IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KIMBERLIE GILLILAND, an individual,	)
	)
Petitioner,	)
	) 22CV-257 JFH-JFJ
vs.	)
	) **Case No.** _____
(1) T. LUKE BARTEAUX,	)
Judge for the District Court of the Cherokee Nation,	)
a federally recognized Indian nation,	)
(2) SARA E. HILL,	)
Cherokee Nation Attorney General,	)
(3) RALPH KEEN II,	)
Cherokee Nation Special Prosecutor,	)
	)
Respondents.	)

PETITION FOR A WRIT OF HABEAS CORPUS UNDER 25 U.S.C.§ 1301

I. INTRODUCTION AND SUMMARY

1. Petitioner Kimberlie Gilliland (referred to herein as "Gilliland") seeks a writ of habeas corpus under the Indian Civil Rights Act of 1968 (25 U.S.C. §§1301-1303) (referred to herein as "ICRA") for relief from her unlawful detention by Respondent Cherokee Nation District Court Judge T. Luke Barteaux (referred to herein as "Judge Barteaux") and her unjustified deprivation of fundamental liberty interests by the Cherokee Nation (referred to herein as the "Nation") without due process of law. Gilliland is not in physically custody; however, Judge Barteaux on October 22, 2019 issued a bench warrant, on March 26, 2021 issued an arrest warrant with the requirements to post a $10,000 cash bond, and on May 17, 2022 struck her case from the Cherokee Nation District Court jury docket until she was arrested or posted bond.

2. Gilliland prays for this Court to find that she is being unconstitutionally and illegally held and detained by bail orders and Bench and Arrest Warrants issued by Judge Barteaux (referred to herein as the "detention orders"),[1] [2] [3]order his detention orders to be set aside, and order the criminal charges filed by the Nation in tribal court be dismissed with prejudice as violating due process.[4]

3. Judge Barteaux's detention orders are infirm on their face because they direct law enforcement to arrest Gilliland outside the territory of the Cherokee Nation and on conditions prohibited by law.

4. Judge Barteaux's dentition orders are unconstitutional because they are based on the Nation's criminal prosecution of Gilliland which violate due process requirements failing to: 1) state an offense, 2) allege specific facts showing criminal intent, 3) clearly state the criminal allegations without vagueness, 4) file charges within the statute of limitation, 5) not exceed the punishment provided by the ICRA[5], and 6) to have a prosecutor without a conflict of interest.

---

[1] The Tribal Court Record in the criminal action the Nation filed against Gilliland on July 28, 2016, filed a nine counts criminal complaint which it titled of "Embezzlement by Officer of a Corporation", in *Cherokee Nation v. Gilliland*, CRM 2016-54 (hereinafter referred to as the "Criminal Case") is referred to in its entirety as "Exhibit A". Individual pleadings within the Tribal Court Record in the Criminal Case are referred to as "Exh. A-1, Exh. A-2, etc.").

[2]Exh. A-23, 2019-08-01 Court Minute Bench Warrant Issued; Exh. A-24, 2019-08-12 Bench Warrant; Exh. A-25, 2019-08-16 Court Minute Order issuing bench warrant; Exh. A-31, 2019-10-22 Order Denying Motion to Reinstate Personal Recognizance Bond; and Exh. A-41, 2021-03-26 Warrant of Arrest.

[3] Exh. A- 46, 2022-05-17 Order Striking the Case from the Jury Docket

[4] Exh. A-1, 2016-07-28 Complaint and Information; Exh. A-10, 2019-03-20 Amended Complaint.

[5] The ICRA, provides as follows:

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

...

2. violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue Warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

...

5. In 2009, Gilliland began work as Executive Director of the Cherokee Nation Foundation ("CNF"), a non-profit organization, then known as Cherokee Nation Education Corporation as a contract employee. In 2011, she became a regular employee. In January 2013, Gilliland resigned from her Executive Director position in good standing but stayed until June 2013 at the request of the CNF Board. Several CNF Board members resigned in 2013 including Robin Flint Ballenger, Casey Ross Petherick, and John Gritts; Jay Calhoun resigned in 2014. The Cherokee Nation Principal Chief appointed new CNF Board leadership afterward.

6. After leaving CNF in 2013, Gilliland heard nothing from the Nation until on or about July 28, 2016, when the Nation filed the nine-count criminal complaint against her alleging she, as Executive Director of the CNF, embezzled funds by paying for CNF business trip travel expenses, taking an online Masters' Degree program for non-profit organization development, purchasing gifts for donors, paying for a parking ticket which she received while using her car for CNF business purposes, and took missing miscellaneous computer equipment without any attempt

---

> 6. deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
> 7. (A) *require excessive bail, impose excessive fines, or inflict cruel and unusual punishments*; (emphasis added)
>
> . . .
>
> (D) impose on a person in a criminal proceeding a total penalty or punishment *greater than imprisonment for a term of 9 years*;
> 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....

25 U.S.C. § 1302(a).
The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe. 25 U.S.C. § 1303.

to inventory said equipment until months after she resigned (hereinafter referred to as the "Complaint").[6]

7. On August 12, 2016, Gilliland surrendered herself to the Cherokee Nation District Court, was arraigned on the Complaint, and was released on a personal recognizance without any conditions. The Nation knew she lived outside of boundaries of the Cherokee Nation in Tulsa, Oklahoma.

8. In August 2018, Gilliland moved to Poland with her husband, a Polish citizen, and their two children because of the stigma of the Nation's criminal charges (she was terminated from her job as the Bacone College Foundation Director in 2016 and could not obtain meaningful employment afterward) and for her husband's health care (he suffered from blood cancer and could get affordable health care in Poland as a Polish native).

9. On March 20, 2019, thirty-two months later, the Nation amended the Complaint, adding six counts which included providing scholarships to Cherokee students and paying for travel of volunteer instructors who had expertise in Native American high school graduates applying for college scholarships (hereinafter the "Amended Complaint").[7]

10. On August 1, 2019, Judge Barteaux revoked Gilliland's personal recognizance bond because she did not appear for arraignment on the Amended Complaint although she had no notice of the hearing. On August 16, 2019, Judge Barteaux ordered Gilliland to deposit $10,000 cash with the District Court by November 20, 2019 or else she would be arrested and jailed until her trial. Gilliland did not post the $10,000 bond and remains in Poland.

---

[6] Exh. A-1, 2016-07-28 Complaint and Information.
[7] Exh. A-10, 2019-03-20 Amended Complaint.

11. On October 18, 2019, without objection by the Nation and permission of Judge Barteaux, Gilliland appeared by phone at the arraignment on the Amended Complaint. Although Gilliland appeared, entered her not guilty plea, and was arraigned, the Nation moved Judge Barteaux to deny her personal recognizance bond which he granted on October 22, 2019 and required her to post a $10,000 bond. Judge Barteaux set a trial date for April 26, 2021, thus the requirement for a $10,000 bond restricted her freedom to come and go unlike other citizens of the Cherokee Nation and the United States. On March 26, 2021, Judger Barteaux issued an Arrest Warrant for Gilliland.[8]

12. The criminal charges underlying Judge Barteaux's Bench and Arrest Warrants are prosecuted under the authority of the Cherokee Nation Attorney General, Sara E. Hill ("Hill") by Special Prosecutor Ralph Keen II ("Keen") who was appointed for the sole purpose to prosecute Gilliland. The Amended Complaint violates Cherokee Nation and federal requirements for due process to 1) state an offense, 2) allege facts showing criminal intent, 3) clearly state the criminal allegations without vagueness, 4) file charges within the statute of limitation, 5) not exceed the punishment provided by the ICRA, and 6) to have a prosecutor without a conflict of interest.[9]

[8] Exh. A-41, 2021-03-26 Warrant of Arrest.
[9] Exh. A-1, 2016-07-28 Complaint; Exh. A-10, 2019-03-20 Amended Complaint.

13. In ruling on Gilliland's motions to dismiss on the aforementioned grounds,[10] Judge Barteaux held, "*The law is sufficient to provide a defendant the knowledge to not commit embezzlement.*"[11]

14. Gilliland then brought a Writ of Habeas Corpus in the Cherokee Nation Supreme Court challenging the Nation's violations of due process and the $10,000 bond required by Judge Barteaux.[12] In denying that writ, however, the Nation's Supreme Court ignored the law that Gilliland need not actually be physically incarcerated to be detained for purpose of the Nation's denial of her individual freedom violations, holding, "*The fact of the matter is that Gilliland is neither incarcerated nor detained by the Cherokee Nation.*" The Court also failed to address the underlying violations of due process and denied Gilliland's appeal.[13] In *Hensley v. Municipal Court,* 411 U.S. 345, 351 (1973), the United States Supreme Court held a person is in custody of the government for purposes of a Writ of Habeas Corpus even when released on his own recognizance.

15. Gilliland alleges that the Nation by and through Judge Barteaux has restricted her freedom and detained her based on unconstitutional criminal charges which deny her due process

---

[10] Exh. A-6, 2019-02-14 Defendant's Demurrer to Complaint; Exh. A-12, 2019-04-03 Defendant's Motion to Strike Amended Complaint; Exh. A-8, 2019-02-15 Motion to Disqualify Keen; Exh. A-11, 2019-03-25 Defendant's Supplemental Motion to Disqualify Keen; Exh. A-13, 2019-04-03 Defendant's Second Demurrer and Motion to Dismiss Amended Complaint; Exh. A-13, 2019-04-03, Defendant's Motion to Strike Amended Complaint: Exh. A-14, 2019-04-26 Defendant's Reply Brief to Disqualify Keen; Exh. A-16, 2019-05-03 Supplement to Demurrer; Exh. A-17, 2019-05-14 Additional Briefing on Void by Vagueness; Exh. A-18, 2019-05-24 Defendant's Response to Nation Additional Briefing

[11] Exh. A-19, 2019-07-02 Order on Demurrer to Complaint.

[12] Exh. A-32, 2019-11-05 SC-19-15 Petition for Writ; Exh. A-35, 2019-11-07 Opening Brief Habeas Corpus; Exh. A-33, 2019-11-07 Exhibits to Habeas Brief; Exh. A-37, 2019-11-19 Defendant's Objection to Nation's Motion to Dismiss Habeas Corpus; Exh. A-39, 2019-12-05 Defendant's Response to Nation's Motion to Dismiss Habeas Corpus.

[13] Exh. A-40, 2020-11-04 SC-19-15 Opinion.

as guaranteed under the United States Constitution, Cherokee Nation law, the Cherokee Nation Constitution,[14] and the ICRA.

16. Gilliland exhausted her tribal court remedies by moving to dismiss charges before Judge Barteaux, which he denied and seeking a writ of habeas corpus before the Cherokee Nation Supreme Court which was denied on November 4, 2020.[15]

II. PARTIES

17. Gilliland is a Cherokee Nation citizen, but at the times relevant herein, she resided in Tulsa, Tulsa County, OK within the territorial boundaries of the Muscogee (Creek) Nation at 1417 E. 46th Street, Tulsa, OK 74105. At times relevant herein, Gilliland was employed as the Executive Director of the CNF, an Internal Revenue Code 501(c)(3) non-profit organization whose headquarters was in Tahlequah, Ok, within the territorial boundaries of the Cherokee Nation.

18. Judge Barteaux is a Judge of the Nation's District Court.

19. The Nation is a federally recognized Indian nation. The Nation's territorial boundaries include all or part of fourteen northeastern Oklahoma counties including Tulsa, Adair, Cherokee, Craig, Delaware, Mayes, McIntosh, Muskogee, Nowata, Ottawa, Rogers, Sequoyah, Washington, and Wagoner Counties.

---

[14] Constitution of the Cherokee Nation 1999
Article III. Bill of Rights, Section 2, "In all criminal proceedings, the accused shall have the right to: counsel; confront all adverse witnesses; have compulsory process for obtaining witnesses in favor of the accused; and, to a speedy public trial by an impartial jury . . . *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.*" (Emphasis added).
Section 3, "The right of trial by jury shall remain inviolate, and the Cherokee Nation shall not deprive any person of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

[15] Exh. A-40, 2020-11-04 SC-19-15 Opinion.

20. Hill is the Cherokee Nation Attorney General and supervises the prosecution of the Nation's criminal case against Gilliland.

21. Keen is the Special Prosecutor appointed to lead the prosecution of the Nation's criminal case against Gilliland.

III. JURISDICTION AND VENUE

22. Federal question jurisdiction is conferred by the ICRA, specifically 25 U.S.C. §1303, which provides that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian Tribe." The ICRA prohibits Judge Barteaux from exercising the Nation's authority to deprive Gilliland of a fundamental liberty interest without due process of law.

23. Venue is properly laid in this judicial district pursuant to 28 U.S.C. §1391(b) because the Nation is within this judicial district and Gilliland at relevant times herein lived within the judicial district.

24. This Court has jurisdiction pursuant to 28 U.S.C. §1331, because this action arises under the Constitution, laws, or treaties of the United States, raising the federal question of Judge Barteaux's unlawful detention of Gilliland and the Nation's unconstitutional actions against Gilliland denying her due process.

IV. CUSTODIAL STATUS OF PETITIONER

25. Gilliland is not in physically custody of the Nation. Gilliland is detained by Judge Barteaux's detention orders including his October 22, 2019 Order issuing a bench warrant and March 26, 2021 Arrest Warrant and imposing a $10,000 cash bond on each.

V. EXHAUSTION

26. On November 4, 2020, Gilliland exhausted tribal court remedies when the Cherokee Nation Supreme Court denied her Writ of Habeas Corpus holding contrary to law, that she was not in custody.[16]

VI. RELIEF REQUESTED

27. A Petition for Habeas Corpus is a proper method to challenge the legality of orders issued by Judge Barteaux. Gilliland requests this Court find the Cherokee Nation criminal charges against her violation due process and order the Cherokee Nation District Court to dismiss them with prejudice.

VII. PROCEDURAL HISTORY OF THE NATION'S CASE AGAINST GILLILAND IN TRIBAL COURT.

A. Background of Controversy

28. Gilliland was the Director of CNF from the end of 2009 to 2011 by contract, and then was employed from 2011 until the end of June 2013 as a regular employee. She had resigned in January 2013 but was asked by CNF's Board to stay until the end of June 2013. She negotiated a termination agreement with Robin Flint Ballenger, then the Chairwoman of the CNF Board, and experienced non-profit board member and former Chairperson of Flintco Construction. The

[16] Exh. A-40, 2020-11-04 SC-19-15 Opinion.

termination agreement was approved by the CNF Board.[17] Gilliland was succeeded by Jason Denny. Several board members, including Chairwoman Ballenger, left their positions prior to 2016.

29. At all times relevant herein, CNF had periodic Finance Committee meetings of Board members, annual accounting audits without any findings of fraud or wrongdoing,[18] and quarterly reviews before the Cherokee Nation Tribal Council.

30. On July 28, 2016, Special Prosecutor Hammons ("Hammons") filed the criminal Complaint in *Cherokee Nation v. Gilliland*, CRM 2016-54 against Gilliland *without referral, investigation, or consultation* with any law enforcement agency, including the Cherokee Nation Marshal Service ("Marshal"), Bureau of Indian Affairs Police, or the Federal Bureau of Investigation. *No law enforcement agency investigated this case.* The Complaint was verified by Hammons who was appointed by Todd Hembree ("Hembree"), the Cherokee Nation Attorney General at that time. Hammons withdrew as attorney of record in April 2019.

31. The standard protocol to investigate the allegations of a criminal offense occurring within the Nation would be, at a minimum, for the Marshal to interview witnesses, gather evidence, request the suspect to provide a statement, prepare an investigation report, make a recommendation

---

[17] Robin Flint Ballenger, an enrolled member of the Cherokee Nation, is the first female chair of The Flintco Companies, Inc. Flintco is the largest American Indian owned Construction Company in the world and is ranked as one of the largest contractors in the nation. . She is currently a board member of the Philbrook Museum of Art, Tulsa City-County Library Trust, Saint Simeon's Foundation, Oklahoma Housing Trust Fund Committee, and a member of the Smithsonian National Museum of the American Indian. She is past president of the Cherokee Nation Education Corporation and Clarehouse board of directors and has served on the boards of the Cherokee National Historical Society, Hillcrest Medical Center and Planned Parenthood Eastern Oklahoma. https://www.tulsahistory.org/halloffame/robin-flint-ballenger/

[18] Exh. A-35, 2019-11-07 Opening Brief Habeas Corpus at p. 24, footnotes 28-33.

to the Attorney General whether to prosecute, if so, what charges should be considered, and verify the Complaint filed as true and correct. *None of that was done.*

32. If funds were suspected as embezzled from the Nation, the standard criminal prosecution protocol would be for the Marshal to refer the case to the Bureau of Indian Affairs Police, or Federal Bureau of Investigation for investigation and review by the U.S. Attorney, especially in the amount the Nation alleges. If the Nation's assets were embezzled, it would have been an even greater reason for the U.S. Attorney to review prosecution by pursuant to 18 U.S.C. § 1163. The Nation did not refer the case to the Marshall, BIA, FBI or Oklahoma State authorities. Not one law enforcement officer investigated this case or is endorsed as a witness.

33. Rather than conduct a regular law enforcement investigation, the Nation hired Sherri Combs, a private contractor, to conduct a forensic audit of CNF's bookkeeping which was concluded before 2014. The Nation has refused to provide Gilliland with a copy of the audit report.[19] That report was not reviewed by law enforcement.

34. Hammons, Hembree, Hill and Keen violated all well-established process, procedure, and protocol to prosecute a criminal case by excluding any law enforcement involvement or investigation including federal resources for investigating white-collar crimes.

B. Tribal Court Chronology

35. July 27, 2016: Keen, representing CNF, filed a civil case, *Cherokee Nation Foundation v. Gilliland*, No. CV-2016-397, (hereinafter referred to as the "Civil Case") based on the same allegations as the Criminal Case. On September 6, 2016, Keen, on behalf of CNF, stated to the Cherokee Nation District Court that, "Admittedly, eight counts in the civil petition involve

[19] Exh. A-4, 2016-09-08 Defendant's Motion to Compel Discovery (Gilliland's Motion to Compel the Nation to produce a copy of the audit filed September 8, 2016.)

the same transaction or occurrence as in the criminal information."[20] In the Civil Case, on CNF's behalf, Keen sought a breathtaking $1,160,000 in damages from Gilliland of which $928,000 were punitive damages.

36. July 28, 2016: The Nation filed the nine count Complaint against Gilliland in the Criminal Case alleging that as CNF's Director, Gilliland embezzled CNF property when she was traveling and promoting the work of the CNF by taking family members with her, attending an online master's degree class for non-profit development, and by failing to account for certain office equipment.[21]

37. August 12, 2016: District Court Judge Fite acknowledged that Gilliland surrendered to the Court in the Criminal Case and entered his order releasing Gilliland on her own recognizance without restriction.[22] The Nation knew at the time of filing the Complaint that Gilliland resided outside the Cherokee Nation in Tulsa, Oklahoma within the territorial boundaries of the Muscogee (Creek) Nation.

38. August 2018: Gilliland moved to Poland.

39. November 11, 2018: Keen entered an appearance in the criminal case against Gilliland and became the lead prosecutor. As a result, Keen became both CNF's attorney in the Civil Case against Gilliland and the lead prosecutor in the Criminal Case against Gilliland.[23]

---

[20] Exh. A-3, 2016-09-06 Civil case- Plaintiff's Response and Combining Brief in Opposition to Defendant's Motion to Stay at page 3, *CNF v. Gilliland*, CV-16-397 (*Cherokee Nation Foundation v. Gilliland*. No. CV 2016-397).
[21] Exh. A-1, 2016-07-28 Complaint.
[22] Exh. A-2, 2016-08-12 Order of Arraignment and Personal Recognizance Bond.
[23] Exh. A-5, 2018-11-01 Entry of Appearance Keen.

40. February 14, 2019: Gilliland filed (1) her Demurrer to Criminal Complaint on grounds that no crime was alleged, and (2) a Motion to Dismiss because the embezzlement statute denied Gilliland due process.[24]

41. March 6, 2019: Judge Barteaux issued a Criminal Trial Notice and Scheduling Order providing that Pretrial Motions were due July 19, 2019, and a jury trial was set for October 21, 2019.[25]

42. March 7, 2019: Gilliland filed a Motion to Disqualify Keen because of his conflict of interest becoming the lead Prosecutor in the criminal case while he represented CNF seeking damages against Gilliland in the companion civil case.[26]

43. March 20, 2019: The Nation filed an Amended Complaint with six additional counts alleging that Gilliland embezzled funds from CNF by giving scholarships to Cherokee students. However, the Amended Complaint made no allegations that Gilliland received any funds or benefited in any fashion from the award of the scholarships. The Amended Complaint also alleged that she paid the expenses of a Cherokee Nation Council member who voluntarily presented a program on the scholarships available to Cherokee students but cited no basis as to why it was improper much less criminal.[27]

---

[24] Exh. A-6, 2019-02-14 Defendant's Demurrer to Complaint; Exh. A-7, 2019-02-14 Defendant's Motion to Dismiss

[25] Exh. A-9, 2019-03-06 Criminal Trial Notice and Scheduling Order

[26] Exh. A-8, 2019-03-07 Motion to Disqualify Keen; Exh. A-11, 2019-03-25 Defendant's Supp. Motion to Disqualify Keen.

[27] Exh. A-10, 2019-03-20 Amended Complaint.

44. April 3, 2019: Gilliland filed her Motion to Strike Amended Complaint on the grounds the statute of limitations had expired for additional Counts Charged, and Demurrer to Amended Complaint.[28]

45. July 2, 2019: The District Court issued orders denying Gilliland's Demurrer, Motion to Strike Amended Complaint, and Motion to Disqualify Keen, and issued its Order Re-Setting Arraignment on the Amended Complaint for July 19, 2019.[29] The Court Clerk did not mail or email the Order Re-setting Arraignment to Gilliland who was on her own personal recognizance bond. The Court Clerk did not mail the Order Re-Setting Arraignment to Gilliland's attorney, Chadwick Smith ("Smith"). Smith did not know of these Orders until September 25, 2019, when he discovered the Orders had been emailed to him but had been blocked by his email server as suspicious as possibly having a virus.[30]

46. July 19, 2019: Having no notice of the hearing, Smith and Gilliland did not appear on July 19, 2019, for Gilliland's arraignment on the Amended Complaint. Neither Keen nor the Court extended the professional courtesy of notice to Smith that that Gilliland and Smith missed the arraignment.

---

[28] Exh. A-12, 2019-04-03 Defendant's Motion to Strike Amended Complaint; Exh. A-13, 2019-04-03 Defendant's Second Demurrer and Motion to Dismiss Amended Complaint.
[29] Exh. A-19, 2019-07-02 Order on Demurrer to Complaint; Exh. A-20, 2019-07-02 Order on Motion to Disqualify; Exh. A-21, 2019-07-02 Order on Motion to Strike Amended Compliant; Exh. A-22, 2019-07-02 Order Re-Setting Arraignment.
[30] Exh. A-26, 2019-9-30 Motion to Withdraw Bench Warrant.

47. August 1, 2019: Judge Barteaux entered a Minute Order issuing a Bench Warrant for Gilliland for failure to appear.[31]

48. August 8, 2019: Judge Barteaux entered a Minute Order and, on motion of the Nation, issued a Bench Warrant for Gilliland's failure to appear at the July 19, 2019 arraignment. The Bench Warrant provided that it was to be served "Day or Night" on Gilliland and listed Gilliland's address to be 1417 E. 46th Street, Tulsa, OK 74105, a location outside the Cherokee Nation. *No notice* was given to Smith or Gilliland of the issuance of the bench warrant by the Court or Keen [32]

49. September 30, 2019: Gilliland filed a motion to withdraw the bench warrant.[33]

50. October 1, 2019: Judge Barteaux withdrew the bench warrant on the condition Gilliland appear for an October 18, 2019 arraignment on the Amended Complaint.

51. October 9, 2019: Gilliland filed a Motion to Appear Telephonically for her second arraignment. The Nation did not object and the Court permitted Gilliland's telephonic appearance.[34]

52. October 9, 2019: Gilliland moved Judge Barteaux to certify for appeal the District Court's Order Denying Motion to Strike Amended Complaint on Grounds the Statute of Limitations Expired for Additional Counts Charged, and Demurrer to Amended Complaint, which Judge Barteaux denied.[35]

---

[31] Exh. A-23. 2019-08-01 Court Minute Bench Warrant Issued.
[32] Exh. A-24. 2019-08-12 Bench Warrant.
[33] Exh. A-26. 2019-09-30 Motion to Withdraw bench warrant.
[34] Exh. A-27. 2019-10-09 Agreed Motion & Order Allowing Gilliland to appear by phone.
[35] Exh. A-28. 2019-10-09 Motion to Certify Orders for Interlocutory Appeal.

53. October 16, 2019: The Nation objected to reinstating Gilliland' personal recognizance bond.[36]

54. October 18, 2019: Gilliland appeared telephonically for her arraignment, acknowledged receipt of the Amended Complaint, and entered a second plea of not guilty.

55. October 22, 2019: Judge Barteaux denied Gilliland's Motion to reinstate her Personal Recognizance bond and ordered her to deposit $10,000 cash with the court as bail before November 20, 2019, or else a Bench Warrant would be issued.[37]

56. October 22, 2019: The District Court denied Gilliland's Motion for Certification for Interlocutory Appeal.[38]

57. October 31, 2019: Gilliland filed her Writ of Habeas Corpus in the Cherokee Nation Supreme Court.[39]

58. November 15, 2019: Keen filed the Cherokee Nation's Motion to Dismiss Petition for Writ of Habeas Corpus.[40]

59. November 19, 2019: Gilliland Objection to Cherokee Nation's Motion to Dismiss Petition for Writ of Habeas Corpus.[41]

---

[36] Exh. A-29, 2019-10-16 Nation's Objection to Defendant's Motion to Reinstate Personal Recognizance Bond.
[37] Exh. A-31, 2019-10-22 Order Denying Motion to Reinstating Person Recognizance Bond.
[38] Exh. A-30, 2019-10-22 Order Denying Certification for Interlocutory Appeal.
[39] Exh. A-32, 2019-11-05 Habeas Petition; Exh. A-35, 2019-11-07 Opening Habeas Brief; Exh. A-33, 2019-11-07 Exhibits to Habeas Brief; Exh. A-34 Table of Contents of Habeas Corpus Brief
[40] Exh. A-36, 2019-11-15 Cherokee Nation's Motion to Dismiss Petition for Writ of Habeas Corpus
[41] Exh. A-37, 2019-11-19 Objection to Cherokee Nation Motion to Dismiss Petition for Writ of Habeas Corpus

60. December 4, 2019: Keen filed the Nation Reply to Defendant's Objection to Cherokee Nation's Motion to Dismiss Petition for Writ of Habeas Corpus.[42]

61. November 4, 2020: The Cherokee Nation Supreme Court denied Gilliland's Writ of Habeas Corpus.[43]

62. March 26, 2021: Judge Barteaux issued an Arrest Warrant for Gilliland without any restriction to "Any Law Enforcement Officer" and ordered a $10,000 bond be posted for her release.[44]

63. August 27, 2021: Keen filed a "Motion in Opposition to Trial in Absentia and to Strike Trial Setting Until Defendant is in Physical Custody."[45] Keen filed this motion to avoid filing a motion for continuance of the October 25, 2021 jury trial.

64. August 30, 2021: Keen moved for continuance of the jury trial set for October 25, 2021 so as Captain of an eight-person competitive billiards team in the Ozark Mount APA League who won the 2021 Northwest Arkansas Eightball Championship, he could take advantage of an all-expense paid trip to Las Vegas to compete in the APA World Eightball championships.[46]

65. September 8, 2021: Judge Barteaux granted CNF's Motion for Continuance and set the case for April 5, 2022 for pre-trial docket and April 25, 2022 for jury trial.

---

[42] Exh. A-38, 2019-12-04 Keen filed the Nation Reply to Defendant's Objection to Cherokee Nation's Motion to Dismiss Petition for Writ of Habeas Corpus

[43] Exh. A-40, 2020-11-04 Cherokee Nation Supreme Court Opinion.

[44] Exh. A-41, 2021-03-26 Warrant of Arrest.

[45] Exh. A-43, 2021-08-27 Nation's Motion in Opposition to Trial in Absentia, Exh. A-45 2021-09-09 Motion to Strike Absentia Motion

[46] Exh. A-44, 2021-08-30 Motion for Continuance

66. May 17, 2022: Judge Barteaux issued an Order Striking the Case from the Jury Docket holding, "The Court hereby strike this matter from the jury docket until such time as the Defendant settles the warrant issue against her."[47]

67. May 19, 2022: as of date, Keen has not tendered a Pretrial Order requested by Gilliland and required by Cherokee Nation District Court Rule 120.

VIII. ARGUMENT AND AUTHORITY

A. This Court has authority to review Gilliland's Petition for Habeas Corpus

68. Gilliland is entitled to have this Court review her Writ of Habeas Corpus because the Amended Complaint in this case fails to conform with the fundamental requirements of due process, and her freedom is wrongfully restricted by the Nation because of Judge Barteaux's detention orders.

69. In *Fay v. Noia*, 372 U.S. 391, 401-02, (1963), the United States Supreme Court stated,

> Its root principle is that, in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus, there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office.

70. For purposes of a Writ of Habeas Corpus, Gilliland's being on a personal recognizance bond or required to post a $10,000 cash bond is deemed being detained because the Nation restricts her liberty to come and go like other citizens. In *Hensley v. Municipal Court,* 411 U.S. 345. 351 (1973), the United States Supreme Court held a person is in custody of the government for purposes of a Writ of Habeas Corpus even when released on his own recognizance.

[47] Exh. A-46, 2022-05-17, Order Striking the Case from the Jury Docket

71. The ICRA mandates that the Nation provide Gilliland due process and the equivalent of the U.S. Constitution Bill of Rights.[48] In *Randall, v. Yakima Nation Tribal Court*, 841 F.2d 897, (9th Cir. 1988), the Ninth Circuit held, "Where the rights are the same under either legal system, federal constitutional standards are employed in determining whether the challenged procedure violates the Act (ICRA)." Therefore, federal case law is applicable to the due process rights provided Gilliland by the ICRA.

72. In *Jones v. Cunningham*, 371 U.S. 236. 239 (1963), the U.S. Supreme Court interpreting 28 U.S.C. § 2241, held, "Similarly, in the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody". In *Settler v. Yakima Tribal Court*, 419 F.2d 486, 490 (9th Cir. 1969), the Ninth Circuit held that 28 U.S.C. § 2241 habeas corpus relief was available to a party who was fined by a tribal court and posted bond. The Ninth Circuit stated the law:

> The second point pressed by appellee is that this case should be dismissed even if the district court has jurisdiction since habeas corpus is not available to a petitioner who is not "in custody" within the meaning of 28 U.S.C. § 2241. We believe, however, that the writ of habeas corpus is available to one who, like appellant, has been fined by an Indian Tribal Court and has posted a bond pending procedural review by an Indian appellate court. . . . Appellee cites no case directly supporting its position. In fact, in the most recent case cited, *Jones v. Cunningham,* 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963), the Supreme Court held that a prisoner placed on parole is "in custody" within the meaning of 28 U.S.C. § 2241 so as to give him sufficient standing to request habeas corpus. The Court noted in its analysis that "history, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not

---

[48] No Indian tribe in exercising powers of self-government shall—

> 6. deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
>
> 7. (A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

25 U.S.C.§ 1302 (a). The Sixth Amendment to the U.S. Constitution also provides that "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation."

> shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Id.* at 240, 83 S.Ct. at 376; *see, e. g., Brownell v. We Shung*, 352 U.S. 180, 183, 77 S.Ct. 252, 1 L.Ed.2d 225 (1953) (habeas corpus available to an alien seeking entry into the United States even though he is free to go anywhere else in the world); *Ex parte Fabiani*, 105 F.Supp. 139 (E.D.Pa.1952) (habeas corpus appropriate procedural vehicle for testing legality of induction into the military); *Ford v. Ford*, 371 U.S. 187, 83 S.Ct. 273, 9 L.Ed.2d 240 (1962) (habeas corpus available to parents disputing proper custody of child)."

73. Custody and detention are not limited to actual physical detention in a jail or prison. Rather, the petitioner must show that he is "subject to restraints 'not shared by the public generally'" S*ee Payer v. Turtle Mt. Tribal Council*, 2003 WL 22339181 at 5 (D.N.D. Oct. 1, 2003).

74. For purposes of habeas corpus, Judge Barteaux's detention orders constitute unconstitutional restraint that may be reviewed by this Court.

B. Judge Barteaux had no authority to issue a Bench or Arrest Warrant outside of the Nation.

75. On August 12, 2016, Cherokee Nation District Court Judge Fite, with the Nation's agreement, allowed Gilliland to surrender herself to the Court and be on a personal recognizance bond without restriction for appearance at trial; she was arraigned on the Complaint at that time. The Nation knew at the time of filing the Complaint that Gilliland resided outside the Cherokee Nation in the Muscogee (Creek) Nation, Tulsa, Oklahoma. There were no travel conditions in the District Court's Order; there was no prohibition on Gilliland's leaving the boundaries of the Nation or State; and there were no conditions requiring her to report her residence and whereabouts or to request permission to move.

76. Whenever Gilliland received notice, actual or legal, she appeared as directed by the District Court. On October 18, 2019, she appeared telephonically for arraignment on the Amended Complaint. However, on October 22, 2019, the Keen objected to Gilliland's Motion to Remain

on her Personal Recognizance Bond and the District Court denied Gilliland's motion. Instead, Judge Barteaux ordered her to deposit $10,000 cash with the Court Clerk as bail to avoid being jailed until her trial set for April 20, 2021 which is not set for April 25, 2022.

77. On October 18, 2019, the time of the arraignment on the Amended Complaint, Gilliland was in Poland where her husband Andrew Sikora, who is a native of that country, was seeking treatment for blood cancer.

78. The Nation wholly failed to notify Gilliland as required by the ICRA of her right to bring this Writ of Habeas Corpus to challenge her detention.[49]

79. The Marshal illegally attempted to serve the Bench Warrant on Gilliland after August 18, 2019. 22 CNCA § 455, Bench Warrant, provides that the District Court may "issue a Bench Warrant for any part of Cherokee Nation," which limits the District Court's authority to *within* the boundaries of the Cherokee Nation.[50] The Marshal knowingly attempted to serve the Bench Warrant *outside* of the Cherokee Nation. If Gilliland had been at her home in Tulsa, the Marshal would have *illegally* arrested Gilliland as provided by the Bench Warrant - an action requested by Keen and authorized by Judge Barteaux.

---

[49] 25 U.S.C.§ 1304 (e), Petitions to Stay Detention, provides:

1. In general.—A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 203 [25 USC §1303] may petition that court to stay further detention of that person by the participating tribe.
2. Grant of stay.—A court shall grant a stay described in paragraph (1) if the court—

(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and
(B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

3. Notice.—An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 203 [25 USC §1303].

[50] 22 CNCA §455: "The Clerk, on the application of the Prosecuting Attorney, may, accordingly, at any time after the order, whether the Court be sitting or not, issue a Bench Warrant for any part of Cherokee Nation."

80. The Bench Warrant was invalid on its face because it specifies Gilliland's residence located outside of the Cherokee Nation as a place she could be arrested.

81. Judge Barteaux ordered Gilliland to be arrested "day or night." However, if served at night at Gilliland's house in Tulsa, the Bench Warrant would have also violated Oklahoma law for serving a misdemeanor warrant at night.[51] The Complaint sought punishment to one year for each count, therefore, the Bench Warrant must be considered as a Misdemeanor Warrant, which is prohibited from being served at night outside the Nation.

82. Judge Barteaux's detention orders are a constant threat to Gilliland's liberty interests in violation of Cherokee Nation law and due process required by the ICRA.

C. The Amended Complaint *does not state a crime* under the embezzlement statute.

83. The Nation's law provides that only those actions which are precisely described and enacted by legislative action as crimes are punishable.[52] Any question as to what the statute identifies as a crime and punishment must be construed against the Nation. A review of the pertinent statutes show that Gilliland committed no crime as alleged by the Nation because the logical reading of *Nation's criminal law provides that embezzlement over $50 value is not punishable by law.*

84. The Nation's criminal embezzlement law is convoluted and confusing. To unravel the charges against Gilliland, one must start with the fact that the Nation charged Gilliland with

---

[51] 22 O.S. §189:"If the offense charged is a felony, the arrest may be made on any day, and at any time of the day or night. . If it is a misdemeanor, the arrest may be made only during the hours of six o'clock a.m. to ten o'clock p.m., inclusive, except as otherwise may be directed by the magistrate endorsed upon the warrant. Provided, an arrest on a warrant which charges a misdemeanor offense may be made at any time of the day or night if the defendant is in a public place or on a public roadway."

[52] 21 CNCA § 2: Criminal acts are only those prescribed—"This code" defined No act or omission shall be deemed criminal or punishable except as prescribed or authorized by this code.

criminal embezzlement pursuant to 21 CNCA §1452.[53] Although 21 CNCA §1452 deems embezzlement a crime and provides some elements, a different statute, 21 CNCA §1462, provides for additional elements and the specific criminal punishment for embezzlement.[54]

85. The Nation further alleges in the Amended Complaint that the charges against Gilliland are punishable as prescribed by a general punishment provision - 21 CNCA §10.[55] However, 21 CNCA §11 provides an exception that where a different punishment is prescribed by law that provision controls.[56] 21 CNCA §1462 prescribes a specific punishment which supersedes the general punishment provision.

86. 21 CNCA §10 also declares all offenses under the Cherokee Nation Criminal Code are a crime without the distinction between a felony and misdemeanor; the ICRA limited

---

[53] 21 CNCA §1452: Embezzlement by officer, etc., of corporation, etc. If any person, being an officer, director, trustee, clerk, servant or agent of any association, society or corporation, public or private, fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose he is guilty of embezzlement.

[54] 21 CNCA §1462: Punishment for embezzlement. Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled, except that every person convicted of embezzlement of any item valued at less than Fifty Dollars ($50.00) shall be punished for a crime. And where the property embezzled is an evidence of debt or right in action, the sum due upon it, or secured to be paid by it, shall be taken as its value.

[55] 21 CNCA §10: Punishment of crimes.
Except in cases where a different punishment is prescribed by this title or by some existing provisions of law, every offense declared to be a crime is punishable by the maximum punishment provided for by the Indian Civil Rights Act, 25 U.S.C. §1302(a)(7). The Court may not impose for conviction of any one (1) offense any penalty or punishment greater than imprisonment for a term of one (1) year or a fine of Five Thousand Dollars ($5,000.00) or both:

[56] 21 CNCA §11: Specific statutes in other titles as governing—Acts punishable in different ways—Acts not otherwise punishable by imprisonment. A. If there be in any other titles of the laws of this Nation a provision making any specific act or omission criminal and providing the punishment therefor, and there be in this penal code any provision or section making the same act or omission a criminal offense or prescribing the punishment therefor, that offense and the punishment thereof, shall be governed by the special provisions made in relation thereto, and not by the provisions of this penal code.

punishment to one year incarceration per offense which is a misdemeanor. In essence, a crime under the then applicable Cherokee Nation law was a misdemeanor. [57]

87. So, 21 CNCA §1462 is controlling; it provides only those acts of embezzlement where the property or asset *is less* than $50 is a crime. 21 CNCA §1462 provides:

> Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled, *except that every person convicted of embezzlement of any item valued at less than Fifty Dollars ($50.00) shall be punished for a crime*. (Emphasis added.)

88. The "except" provision of 21 CNCA §1462 is the operative and controlling language of the section; its meaning is that only those embezzlement offenses where the property is less than $50 are punishable.

89. The Nation had no crime of "feloniously stealing property" or any crimes denominated as a "felony" at the times relevant herein.[58]

---

[57] Cherokee Nation Codification Act of 2016 LA-02-16, 2/18/2016
Section 5. Substantive Provision of Law; Repeals; Additions; and Amendments. All laws included in the Cherokee Nation Code Annotated (2014), and laws appended thereto, are hereby affirmed as the positive law of the Cherokee Nation. All laws and parts of laws not included in the Cherokee Nation Code Annotated (2014) publication are repealed. The repeal shall not revive any law previously repealed, nor shall it affect any right already existing or accrued or any action or proceeding already taken, unless otherwise provided in the Cherokee Nation Code Annotated (2014).

[58] The Cherokee Nation did not have a felony before December 14, 2020. The Nation amended its penal code to create a class of offenses to be denominated as felony on December 14, 2021. TITLE 21 - CRIMINAL CODE MODERNIZATION AMENDMENT OF 2020" LA 28-20, 12/14/2020 provides:
§ 2. Criminal acts are only those prescribed-"This code" defined. No act or omission shall be deemed criminal or punishable except as prescribed or authorized by this code. The words "this code" as used in the "penal code" shall be construed to mean Cherokee Nation Code Annotated."
§ 4. Crimes classified
All crimes or offenses are ~~classified as "crimes."~~divided into:
1. Felonies;
2. Misdemeanors.
§ 5. Felony defined
A felony is a crime which is, or may be, punishable by imprisonment for more than one year.
§ 6. Misdemeanor defined

90. 21 CNCA §1462 does not reference 21 CNCA §§1703-1706 which provide for degrees of larceny - grand and petit.[59]

91. 21 CNCA §1462 prescribes only one degree of property value to be punished- less than $50. In other words, 21 CNCA §1462, taken as a whole, means embezzlement is punished based on the degree of the property value and the only degree prescribed for punishment is less than $50.

92. 21 CNCA §1462 provides for *no other* "prescribed or authorized" crime or punishment; it only provides for embezzlement property valued at less than fifty dollars ($50.00).

93. There is no crime specified in the Nation's criminal code for embezzlement of property valued over $50. In other words, if the property or asset is valued over $50.00, the allegation of embezzlement is not punishable under the Nation's laws. It should be noted the property or asset value of each count of the Amended Complaint exceeds $50.

94. The Nation has the sovereign right to define the elements of a crime. In this

---

Every other crime that is not a felony is a misdemeanor.
§ 21. Prohibited act a ~~crime, when~~ misdemeanor, unless stated otherwise
Where the performance of an act is prohibited by any statute, and no penalty for the violation of such statute is imposed in any statute, the doing of such act is a ~~crime~~ misdemeanor, unless the defendant is a person accused of a criminal offense who (a) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or (b) is being prosecuted for an offense comparable to an offense that would be punishable by more than one (1) year of imprisonment if prosecuted by the United States or any of the states. (Red line and underline in original.)

[59] 21 CNCA §§1703-1706 provide for degrees of larceny - grand and petit. The punishment for each degree is based on the value of the property. Grand larceny requires property value of over $500 and Petit Larceny requires property value of less than $500. . The punishment is different for Grand and Petit Larceny. The Nation's statutes provide no degree of punishment for embezzlement other than 21 CNCA §1462.

If larceny were substituted for "feloniously stealing property" then the nonsensical result would be Gilliland would face the maximum of one year in jail and a $5,000 fine for property valued over $500 and under $50. For property valued between $50 and $500, she would face six months in jail and a $10 to $500 fine. See 21 CNCA § 1706. This strained interpretation would also render the embezzlement statute void by vagueness because it is uncertain, ambiguous, and irreconcilable.

instance, it is consistent with a policy of judicial economy for the Nation to prosecute minor offenses of embezzlement in the Nation's court and defer prosecution of allegations of embezzlement of greater value of property or assets to the federal government pursuant to 18 U.S.C. §§ 1152, 1153.

95. Other than construing 21 CNCA §1462 as providing that embezzlement is punishable for offenses only where the value of the property or assets is less than $50, there is no common sense or logical interpretation of the statute to apprise Gilliland of the elements, nature, and punishment of embezzlement as prohibited by Cherokee Nation law.

96. The Amended Complaint alleges offenses committed by Gilliland which are not crimes under the Nation's laws, and the case should be dismissed.

D. The Amended Complaint alleges no facts showing criminal intent.

97. The Amended Complaint violates due process because it failed to specify factual allegations for the elements of embezzlement committed by Gilliland: 1) fraudulently, 2) did not use CNF property in the due and lawful execution of her trust, or 3) appropriated the property for her own use or purpose as required by 21 CNCA §1452.

98. The U.S. Constitution Sixth Amendment provides that, "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation." The ICRA required the Nation to provide Gilliland with the same due process notice.

99. The Amended Complaint must allege facts that show Gilliland's intent to deceive the CNF. An example of an indictment that failed this test is provided by *United States v. Nance*, 533 F.2d 699 (D.C. Cir. 1976). The indictment in *Nance* charged a false pretense violation pursuant to the District of Columbia Code. It listed the name of each victim, the date of the false representation, the amount each victim lost, and the date the sum was paid to the defendants but

was fatally defective because its failure to specify the false representation which induced the victims to pay the money to the defendants. *See also United States v. Brown*, 995 F.2d 1493, 1504-05 (10th Cir.) (indictment charging controlling premises and making them available for storing and distributing cocaine base insufficient because failed to state how control was exercised), *cert. denied*, 114 S.Ct. 353 (1993).

100. A criminal complaint must sufficiently inform the defendant of the offense and punishment and courts require the Complaint to have a commonsense construction.[60]

101. On March 6, 2019, Judge Barteaux's Order on Motion to File Amended Complaint and Objection Thereto, provided, "The Court authorizes the Nation to amend its complaint one time on or before March 29, 2019."

102. On March 19, 2019, Judge Barteaux deferred ruling on Gilliland's Demurrer to Complaint and Motion to Dismiss until after the Nation had the opportunity to file an Amended Complaint. The Nation's Amended Complaint filed March 20, 2019 is identical to its original Complaint except for the addition of Counts X-XV. But in spite of the fact that the Nation had the benefit of the arguments of Gilliland's Demurrer filed on February 14, 2019, it elected to charge Gilliland in its Amended Complaint pursuant to 21 CNCA §1462 and *not to* provide any specific allegations regarding Gilliland's *intent* and what constituted *fraudulent* appropriation as required by due process.

103. The Nation had notice it failed to provide specific facts as to Gilliland's intent in its Complaint necessary to afford Gilliland due process, but wholly failed to allege any specific

[60] *United States v. Drew*, 722 F.2d 551, 552-53 (9th Cir. 1983). . . The specificity requirement ensures that Gilliland has only to answer charges alleged with specific facts in the Amended Complaint in order for her to prepare her defense, and that she is protected against double jeopardy. *See United States v. Haas*, 583 F.2d 216 (5th Cir.), *reh'g denied*, 588 F.2d 829, *cert. denied*, 440 U.S. 981 (1978).

facts in its Amended Complaint.

104. Judge Barteaux cavalierly held in his July 2, 2019 Order on Demurrer to the [Amended] Complaint, "*The law is sufficient to provide a defendant the knowledge to not commit embezzlement.* The information is sufficient to provide the defendant with full due process and knowledge of the complaint against her."[61] (Emphasis added.) That does not meet the legal standard for sufficiency of notice for a criminal complaint.

105. In many of the Amended Complaint counts, the Nation merely alleges Gilliland went on a business trip paid for by CNF. It is common for an organization's staff to go on business trips paid by the organization and often take family or associates with them particularly when they are part of the business program or presentation. Those actions only become criminal if the facts show that Gilliland fraudulently used CNF's funds by *deceit*, for her use *without the consent of the Board*, or beyond her authorization to spend CNF funds and failed to reimburse CNF, if requested. Board members reviewed the costs and expenses at quarterly meetings, if there were issues, the Board knew or should have known several months after the funds were spent.

106. For example, the Amended Complaint Count XV alleges that Gilliland misappropriated funds by paying for a February 8, 2013 out-of-state CNF trip to Phoenix, Arizona for Cara Cowan Watts, a Cherokee Nation tribal councilmember who provided *free* seminars on science and math scholarships for Cherokee students. However, the Amended Complaint fails to allege why the act was criminal especially because the Nation committed to reimburse CNF for Councilmember Cowan's expenses. The Amended Complaint fails to allege that this trip was not for the purpose or benefit of CNF, beyond Gilliland's spending authority, or it was disapproved

[61] Exh. A-19, 2019-07-02 Order on Demurrer to Complaint.

by the CNF Board. The Amended Complaint failed to allege the cost of the trip was unreasonable. CNF paid for Watt's airfare on Southwest Airlines to present free seminars to Cherokee students and their families on how to apply for college which was a mission of CNF. The Nation refused to acknowledge that the Board gave Gilliland $5,000 spending authority without pre-approval and the Phoenix was only several hundred dollars.

107. To demonstrate the insufficiency of the Amended Complaint, during the trip that the Nation charges in Count I as criminal embezzlement, Gilliland made three presentations on behalf of CNF on February 11 and 12, 2012 to Cherokee communities in Southern California.[62] The Cherokee Nation sent a brochure to all Cherokee citizens in the southern California area inviting them to attend a presentation on scholarship opportunities made by Gilliland as Executive Director of CNF.[63]

108. In part, the Amended Complaint Count I incredibility charged that Gilliland paying the usual and customary expenses for a routine and common business trip such as airport parking, car rental, hotel costs, gasoline for the rental car and meals constituted embezzlement. Count I wholly failed to allege facts that show these common, ordinary, and necessary expenses connected with an *advertised* business trip for CNF were criminally appropriated, without the consent of the Board or outside Gilliland's spending authority. In fact, Count I failed to *allege this trip* was not approved, authorized, or ratified by the CNF Board.

109. Another example of the Amended Complaint's complete failure to allege any criminal acts is Count XIII which alleges Gilliland "unilaterally awarded" four Cherokee student

---

[62] California has 22,124 Cherokee citizens. https://www.cherokeephoenix.org/news/map-shows-cn-citizen-population-for-each-state/article_066ff0b8-0df3-536e-ab04-dead9dd33925.html

[63] Exh. A-6, 2019-02-14 Defendant's Demurrer to Complaint at Exhibit B "Brochure for 2012 Presentations

scholarships. Unilaterally awarding scholarships is not a crime; it may be failure to comply with policy, but there is no allegation that Gilliland criminally received funds from or benefited from the students receiving scholarships.

110. The Nation must afford Gilliland not only an Amended Complaint that contains all of the elements of the offense (whether or not such elements appear in the statute), but one that is sufficiently descriptive to permit the defendant to prepare a defense including facts showing deceit.[64]

E. The embezzlement statue is *void for vagueness.*

111. The Amended Complaint is *void by vagueness* because it causes Gilliland to "speculate as to the meaning of penal statutes." The Nation charging Gilliland with the convoluted language of 21 CNCA § 1462 and without any specificity of criminal intent renders the Amended Complaint void by vagueness.

112. In *United States v. Carl*, 105 U.S. 611 (1881), the United Supreme Court held that "in an indictment... it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." Vague wording, even if taken directly from a statute, does not suffice to provide due process.

113. In *United States v. Batchelder*, 442 U.S. 114 (1979), the U.S. Supreme Court stated:

> It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). A criminal statute is therefore invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954). See *Connally*

[64] *Hamling v. United States*, 418 U.S. 87, 117, *reh'g denied*, 419 U.S. 885 (1974); *Russell v. United States*, 369 U.S. 749, 763-72 (1962); *United States v. Hernandez*, 891 F.2d 521, 525 (5th Cir. 1989), *cert. denied*, 495 U.S. 909 (1990).

> *v. General Construction Co.*, 269 U.S. 385, 391-393, 46 S.Ct. 126, 127-128, 70 L.Ed. 322 (1926); *Papachristou v. Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972); *Dunn v. United States,* 442 U.S., at 112-113, 99 S.Ct., at 2197. So too, vague sentencing provisions may post constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute. See *United States v. Evans,* 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1948); *United States v. Brown*, 333 U.S. 18, 68 S.Ct. 376, 92 L.Ed. 442 (1948); *cf. Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

114. In *Apprendi v New Jersey*, 530 U.S. 466, 480 (2000), the U.S. Supreme Court held that any fact that increases the maximum penalty for a crime must be charged in an indictment submitted to a jury and proven beyond a reasonable doubt."(see also *United States v. Cook,* 84 U.S. (17 Wall.) 168, 174 (1872) (If an offense cannot be accurately and clearly described without an allegation that the accused is not within an exception contained in the statutes, an indictment that does not contain such allegation is defective.)

115. The Cherokee Nation statute on criminal procedure, 22 CNCA § 409, also states for a criminal information to be sufficient, it must describe the offense "clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."

116. Judge Barteaux's July 2, 2019 District Court Order held, "*The law is sufficient to provide a defendant the knowledge to not commit embezzlement.*" However, that is not the issue or the legal standard.[65] The issue is whether the words of the embezzlement statute and the Amended Complaint "fully, directly, and expressly, without any uncertainty or ambiguity" set forth all the elements necessary for Gilliland to defend herself and not face double jeopardy. The Amended Complaint charging her with embezzlement lacks the specificity as to criminal intent, and therefore denies Gilliland constitutional due process.

[65] Exh. A-19, 2019-07-02 Order on Demur to Complaint.

117. The Cherokee Nation Council apparently recognized that 21 CNCA §§ 1452 and 1462 were legally infirm and vague because the language of the statute did not fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. On February 22, 2021, the Council amended 21 CNCA § 1451 and repealed §§ 1452 through 1457 by enactment LA 07-21. (An Act Amending Title 21 of the Cherokee Nation Code Annotated and Declaring an Emergency) in an effort to provide a cogent criminal statute.[66] Of course, that statute cannot be applied to Gilliland because the

[66] The Tribal Council Amended 21 CNCA § 1451 and repealed §§1452 through 1457 by enactment LA 07-21 on 2/22/2021. (An Act Amending Title 21 of the Cherokee Nation Code Annotated and Declaring an Emergency).

21 CNCA § 1451. "Embezzlement" defined

A. "Embezzlement" is the fraudulent appropriation of property of any person or legal entity, legally obtained, to any use or purpose not intended or authorized by its owner, or the secretion of the property with the fraudulent intent to appropriate it to such use or purpose, under any of the following circumstances:

1. Where the property was obtained by being entrusted. to that person for a specific purpose, use, or disposition and shall include, but not be limited to, any funds "held in trust" for any purpose;
2. Where the property was obtained by virtue of a power of attorney being granted for the sale or transfer of the property;
3. Where the property is possessed or controlled for the use of another person;
4. Where the property is to be used for a public or benevolent purpose;
5. Where any person diverts any money appropriated by law from the purpose and object of the appropriation;
6. Where any person fails or refuses to pay over to the Nation, or appropriate authority, any tax or other monies collected in accordance with relevant law, and who appropriates the tax or monies to the use of that person, or to the use of any other person not entitled to the tax or monies;
7. Where the property is possessed for the purpose of transportation, without regard to whether packages containing the property have been broken;
8. Where any person removes crops from any leased or rented premises with the intent to deprive the owner or landlord interested in the land of any of the rent due from that land, or who fraudulently appropriates the rent to that person or any other person; or
9. Where the property is possessed or controlled by virtue of a lease or rental agreement, and the property is willfully or intentionally not returned within ten (10) days after the expiration of the agreement.

Embezzlement does not require a distinct act of taking. but only a fraudulent appropriation, conversion or use of property.

Cherokee Nation Constitution prohibits the Nation's Council from enacting law retroactively. *See* Cherokee Nation Constitution (2003) Article VI, Section 8.

F. The Amended Complaint Counts X-XV were filed after the statute of limitations had run.

118. The Amended Complaint, which included six new counts, Counts X-XV, was filed on March 20, 2019, well outside the five-year statute of limitations proscribed by 22 CNCA §152

B. Except as provided in subsection C of this section, embezzlement shall be punished as follows:
1. If the value of the property embezzled is less than Five Hundred Dollars ($500.00), any person convicted shall be punished by a fine not exceeding One Thousand Dollars ($1,000.00), or by imprisonment for a term not to exceed one (1) year, or by both such fine and imprisonment;
2. If the value of the property embezzled is Five Hundred Dollars ($500.00), or more but less than One Thousand Dollars ($1,000.00), any person convicted shall be guilty of a misdemeanor and shall be punished by imprisonment for a term not to exceed one (1) year or by imposition of a fine not exceeding Five Thousand Dollars ($5,000.00) or by both such fine and imprisonment, and ordered to pay restitution to the victim as provided under the laws of this Nation;
3. If the value of the property embezzled is One Thousand Dollars ($1,000.00) or more but less than Twenty-five Thousand Dollars ($25,000.00), any person convicted shall be guilty of a felony and shall be punished by imprisonment for a term not to exceed three (3) years, or by imposition of a fine not exceeding Five Thousand Dollars ($5,000.00), or by both such fine and imprisonment, and ordered to pay restitution to the victim as provided under the laws of this Nation; or
4. If the value of the property embezzled is Twenty-five Thousand Dollars ($25,000.00) or more, any person convicted shall be guilty of a felony and shall be punished by imprisonment for a term not to exceed three (3) years, or by imposition of a fine not exceeding Ten Thousand Dollars ($10,000.00), or by both such fine and imprisonment, and ordered to pay restitution to the victim as provided under the laws of this Nation.
For purposes of this subsection, a series of offenses may be aggregated into one offense when they are the result of the formulation of a plan or scheme or the setting up of a mechanism which, when put into operation, results in the taking or diversion of money or property on a recurring basis. When all acts result from a continuing course of conduct, they may be aggregated into one crime. Acts forming an integral part of the first taking which facilitate subsequent takings, or acts taken in preparation of several takings which facilitate subsequent takings, are relevant to determine the party's intent to commit a continuing crime.
C. Any Cherokee Nation officer, deputy or employee of such officer, who shall divert any money appropriated by law from the purpose and object of the appropriation, shall, upon conviction, be guilty of a felony punishable by imprisonment for a term not to exceed three (3) years, and a fine equal to triple the amount of money so embezzled and ordered to pay restitution to the victim as provided under the laws of this Nation.
https://cherokee.legistar.com/LegislationDetail.aspx?ID=4751512&GUID=1DEC5513-5B3D-42EF-B1E2-A2CC99A6FB2E&Options=ID%7cText%7c&Search=criminal

(A)[67] for alleged offenses occurring in 2012 (Court XIII) and 2013 (Counts X, XI, XII, XIV, XV)' and wholly fail to plead why the statute of limitation should be tolled by the "Delayed Discovery Rule." The Nation's charging Gilliland with an offense outside the statute of limitations violates due process as illegal, arbitrary and capricious government action.

119. 22 CNCA § 152 (A) is identical to Oklahoma Statute 22 O.S. § 152 (A) and Oklahoma courts' decisions are highly persuasive in interpreting the statute.

120. In *Lovelace v. Keohane, 831 P.2d 624*, 630 (Okla.1992), the Oklahoma Supreme Court explained how the Delayed Discovery Rule applied to Oklahoma's criminal statute of limitation (22 O.S. § 152 A), "The discovery rule tolls the statute of limitations until an injured party knows of, or in the exercise of reasonable diligence, should have known of or discovered the injury, and resulting cause of action. The rule does not apply when "(a) plaintiff is chargeable with knowledge of facts which he ought to have discovered in the exercise of reasonable diligence."

121. Because the Nation failed to allege facts in its Amended Complaint regarding the reasons for the delayed discovery of alleged offenses and the Amended Complaint Counts X-XV must be dismissed. *In Hip Hop Beverage Corp. v. Michaux* (9th Cir., 2018) D.C. No. 2:16-cv-

---

[67] 22 CNCA § 152. Limitations in general
A. Prosecutions for the crimes of bribery, embezzlement of public money, bonds, securities, assets or property of the Cherokee Nation or other subdivision thereof, or of any misappropriation of public money, bonds, securities, assets or property of the Cherokee Nation or other subdivision thereof, falsification of public records of the Cherokee Nation or other subdivision thereof, and conspiracy to defraud the Cherokee Nation or other subdivision thereof in any manner or for any purpose shall be commenced within seven (7) years after the discovery of the crime; provided, however, prosecutions for the crimes of embezzlement or misappropriation of public money, bonds, securities, assets or property of any school district, including those relating to student activity funds, or the crime of falsification of public records of any independent school district, the crime of lewd or indecent proposals or acts against children, pursuant to 21 CNCA § 1123, the crimes of involving minors in pornography, pursuant to 21 CNCA § 1021.2 and 21 CNCA § 1021.3, the crime of sodomy, the crime of criminal conspiracy, or the crime of embezzlement, pursuant to 21 CNCA §§ 1451 through 1462, shall be commenced within five (5) years after the discovery of the crime

03275-MWF-AGR, (Not for Publication), the Ninth Circuit held, "HHBC did not plead facts about its discovery of Michaux's alleged embezzlement with the specificity necessary to invoke the delayed discovery rule. Therefore, its claim is time-barred...." Because HHBC failed to allege specific facts regarding how it "became aware" of the records that revealed Michaux's wrongdoing, the delayed discovery rule is unavailable here. *Fox*, " 110 P.3d at 920-21 (*Fox v. Ethicon Endo-Surgery, Inc.*, 110 P.3d 914, 920-21 (Cal. 2005))]. The lack of specificity makes it impossible to ascertain whether HHBC could have made its discovery earlier. *See id.* Therefore, HHBC has failed to carry its burden of establishing diligence." *See August v. Los Angeles Community College Dist. Bd. of Trustees*, 848 F.2d 1242 (9th Cir. 1988); *see also Saliter v. Pierce Brothers Mortuaries, 81 Cal.App.3d 292, 297 (Cal. App. 1978)* (However, in order to invoke this "special defense" to the limitations period, the plaintiff "must specifically plead facts which show (1) the time and manner of discovery, and (2) the inability to have made earlier discovery despite reasonable diligence."; *Trustmark Ins. Co. v. ESLU, Inc., 299 F.3d 1265,* 1271 (11th Cir. 2002) (The delayed discovery rule prevents a cause of action from accruing until the plaintiff either knows or reasonably should know of the act giving rise to the cause of action."); *Bedtow Grp. II, LLC v. Ungerleider*, D.C. Docket No. 9:15-cv-80255-KLR (Not for Publication) (11th Cir., 2017) (Because Bedtow "should have . . . discovered with the exercise of due diligence " the alleged misrepresentations before it purchased the policies, Florida's delayed discovery rule does not act to postpone the accrual of Bedtow's causes of action.); *Cmi Roadbuilding, Inc. v. Iowa Parts, Inc.*, 920 F.3d 560 (8th Cir. 2019) (The delayed discovery rule prevents a cause of action from accruing until the plaintiff either knows or reasonably should know of the act giving rise to the cause of action).

122. In *Horn v. State*, 2009 OK CR 7, 204 P.3d 777 (Okla. Crim. App., 2009), the Oklahoma Court of Criminal Appeals held that it is burden of the state to plead why it not discover the alleged offense before the statute of limitations quoting *State v. Day,* 1994 OK CR 67, ¶ __, 882 P.2d 1096,

> The statute of limitations begins to run and the offense has been 'discovered' for purposes of Sections 152(A) and (C) when any person (including the victim) other than the wrongdoer or someone in pari delicto with the wrongdoer has knowledge of both (i) the act and (ii) its criminal nature ... [T]he crime has not been discovered during any period that the crime is concealed because of fear induced by threats made by the wrongdoer, or anyone acting in pari delicto with the wrongdoer. The application of this statute of limitation is a legal determination to be determined by a judge as a threshold issue. The statute of limitations is a jurisdictional issue and, once asserted, the presumption is that the statute has run and the State has the obligation to overcome this presumption.

123. For example, in the Amended Complaint, filed March 20, 2019, Count XII alleges Gilliland gave students scholarships in 2011. Certainly, CNF was chargeable with knowledge of scholarships awarded in its name that were announced in 2011 to the CNF Board and Cherokee Nation Council. The Nation waited *eight* years to file on some allegations - three years after the statute of limitations expired. Due process requires the Nation to plead and prove why it did not know or should not have had knowledge about these scholarships and other allegations prior to the expiration of the five-year statute of limitations.

124. Without any pleading or assertions of fact indicating deception or hiding the alleged offenses. Judge Barteaux's July 2, 2019 Order on Motion to Strike Amended Compliant (*sic*) stated. "Because of the alleged deception on the part of the defendant the clock does not start running on embezzlement cases until the discovery of the alleged wrongdoing. Defendants do not get to hide behind their own alleged wrongdoing as a defense to a crime being committed."[68] It

[68] Exh. A-21. 2019-07-02 Order on Motion to Strike Amended Compliant (sic).

appears Judge Barteaux adopted the delayed discovery rule; *however, the Nation wholly failed to allege how Gilliland hid behind her own alleged wrongdoing.*

125. By statute 12 CNCA §11, the Delayed Discovery Rule exists for Cherokee Nation in *civil* actions: "Statute of limitations shall begin to run from the date when the plaintiff knew, through the exercise of reasonable diligence, . . ."[69]

126. Due process requires that the Delayed Discovery Rule apply to the statute of limitations for criminal allegations (22 CNCA §152 (A)), which would mean the date of occurrence is presumed to be the date of discovery unless Nation overcomes that presumption by showing the alleged criminal action was fraudulently concealed by the defendant. In other words, the statute of limitations begins to run on date of occurrence unless the Nation pleads and can show Gilliland concealed the occurrence. Otherwise, the statute of limitations can be indefinite or manipulated by the Nation and then it becomes arbitrary and capricious.

127. As a non-profit board, CNF Board members executed its fiduciary duty to read the financial and program reports put before it by Gilliland and outside accountants and asked questions. The CNF board was responsible for the fiscal affairs of the foundation and for using due diligence to execute its responsibilities.

128. There are no factual allegations that Gilliland concealed any financial records from the Board; fiscal transactions reports were prepared by an outside accountant and submitted to the Board monthly. There are no allegations that Gilliland hid financial or program information from CNF at its monthly finance committee meetings held the third Friday of every month. which

---

[69] Comprehensive Access to Justice Act of 2016 (7/13/2016) LA-16-16.12 CNCA §11. Limitations of Actions
D. Statute of limitations shall begin to run from the date when the plaintiff knew, through the exercise of reasonable diligence. of all the elements of the particular cause of action.

Gilliland started in 2011.

129. The annual CNF 2013 Audit report did not say anything or report any activities different than what were regularly presented to the Board. The CNF board supervising Gilliland and two CPAs did not find any wrongdoing; the Amended Complaint does not give any facts that the actions Gilliland took, with oversight of the Board, constituted criminal concealment.[70]

130. The Delayed Discovery Rule required by due process would charge the Board "with knowledge of both (1) the act and (2) its criminal nature" every time it did or should have reviewed financial statements, signed checks, reviewed invoices, reviewed credit card statements, inspected outside accountants' posted QuickBooks entries, issued 1099s and W-2s, signed and certified tax returns, conducted monthly finance committee meetings, heard operational and program reports, and certified reports to funding agencies and donors.

131. When Gilliland resigned in January 2013, the CNF board requested she stay until June 2013. When she left, CNF Board Members signed her severance check, issued her W-2 for the year, and completed the non-profit corporation tax returns which, with the exercise of minimal diligence, would have alerted them to any offense, if any had existed. CNF was required to reported expenses on its IRS 990 tax returns.

132. The proper date of discovery is during or before 2013 when the Board was given program and scholarship reports, credit card statements, and spreadsheets prepared by outside

---

[70] Exh. A-15, 2019-04-30 Nation's Response in Opposition to Defendant's Motion to Strike Amended Complaint on Grounds that the State of Limitations Expired for Additional Counts Charged, at Exhibit A thereto, " 2013 CNF Audit Report "Schedule of Findings and Questioned Cost," pages 11-14.

The Nation offered into the record the 2013 CNF audit report by Robert St. Pierre. CPA ("St. Pierre" Nothing in St. Pierre's 2013 CNF audit report indicates any fraud. CNF's 2012 audit report shows no fraud. Jim Rush, CPA, who prepared the 2012 CNF Independent Auditor's Report released June 7, 2013, was under the same obligation to report fraud according to the federal Audit Standards and CPA standards as was St. Pierre. He found none.

accountants, at their monthly finance committee meetings and quarterly board meetings.

133. The Nation's position is the statute of limitations started when it finally got around to looking at their books and reports which is arbitrary and capricious and denies Gilliland due process of notice.

G. The Amended Complaint violates the ICRA limitation on punishment.

134. The Nation's July 28, 2016 Complaint charged nine counts of embezzlement, each seeking one year in jail and a $5,000 fine, which would result in nine years of imprisonment.[71] The Nation's March 20, 2019 Amended Complaint added six *new* counts of embezzlement seeking one year in jail and a $5,000 fine for each count which would result in an additional six years of imprisonment. The Amended Complaint thus seeks a total of fifteen years of imprisonment. The ICRA limits the total punishment in a criminal proceeding to be no greater than imprisonment for a term of nine years. *See* 25 U.S.C. §1302(7)(D).

135. The Amended Complaint violates the ICRA for seeking to impose punishment greater than nine years.

H. Prosecutor Keen's conflicts of interest denies Gilliland due process.

136. Gilliland has a due process right be free from prosecutorial conflicts of interest. As Special Prosecutor for the Nation, Keen may not serve two masters - CNF and the Nation. The interests of those two masters are not the same. It is simple. Keen's first duty is to zealously advocate and recover $1,160,000 from Gilliland for his private third-party client - CNF. The

[71] The Complaint and Amended Complaint provide, "ALL OF SAID CRIMES being subject to punishment as defined at 21 CNCA §10, to wit: a term of imprisonment for not more than one (1) year or a fine of five thousand ($5,000.00) or both and any civil remedies as provided by 21 CNCA §1760(B) for each separate crime." The Nation also failed to allege any specifics as to restitution or civil penalties.

Nation's interest is or should not be financial recovery for a third party; it is the fair administration of justice.

137. On November 1, 2018, several years after filing the companion civil case, Keen entered his appearance in this case as a "Special Prosecutor" and has since served as the lead Prosecutor with the power to coerce Gilliland into a civil settlement.

138. In *Berger v. United States*, 295 U.S. 78, 88 (1935), the United States Supreme Court declared:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.

139. According to American Bar Association Model Rules of Professional Conduct Rule 3.8, Keen has obligations as a prosecutor different from a lawyer for civil client. The comments to Rule 3.8 provide, [1] "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." [72]

140. In *Young v. U.S. Ex Rel. Vuitton Et Fils S. A.*, " 481 U.S. 787, 805 (1987) the U.S. Supreme Court addressed the case of where a federal court appointed the law firm representing a party in a civil case to criminally prosecute for contempt the same opposing party in the same underlying civil case. The Court held,

> Private attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated. As we said in Gompers, criminal contempt proceedings arising out of civil litigation "are between the public and the defendant, and are not a part of the original cause." 221 U.S., at 445, 31 S.Ct., at 499. The prosecutor is appointed

[72] Ethical Consideration (EC) 7-13 of Canon 7 of the American Bar Association (ABA) Model Code of Professional Responsibility (1982) provides "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."

> solely to pursue the public interest in vindication of the court's authority. A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution.

136. In *Young*, the U.S. Supreme Court was so adamant that the conflict was impermissible, it noted, "If a Justice Department attorney pursued a contempt prosecution for violation of an injunction benefiting any client of that attorney involved in the underlying civil litigation, that attorney would be open to a charge of committing a felony under 208(a)." 481 U.S. 806. If Keen found himself in federal court under similar circumstances as this case, he might be facing a felony.

137. Keen having the power to criminally prosecute Gilliland while at the same time seeking to have her pay $1,160,000 to his private client for the same alleged conduct is a conflict-of-interest depriving Gilliland of due process requiring for disinterested prosecutor.

138. At Gilliland's October 18, 2019 arraignment on the Amended Complaint, Keen advised the District Court that the Marshal attempted to serve the Bench Warrant issued on August 1 and 8, 2019 and arrest Gilliland at her home in Tulsa but found her tenants who thought she had moved to Colorado. Gilliland's address listed on the Bench Warrant was outside of the Cherokee Nation in Tulsa, Oklahoma and in the Muscogee (Creek) Nation, Tulsa, Oklahoma.

139. Keen sought the arrest of Gilliland on a Bench Warrant that its execution was in violation of law. Keen's request to require a $10,000 cash deposit illustrates his conflict of interest and abuse of power. Keen used the power of the Attorney General's Office to gain advantage by punishing Gilliland in the criminal case by imposing a $10,000 cash deposit in a case where Gilliland had consistently appeared whenever given notice.

140. Keen moving the District Court to issue an invalid Bench Warrant and require Gilliland to deposit $10,000 cash or hold her in jail is certainly unfair leverage to force an unjust settlement in the civil case.

141. Keen's conflict of interested was also demonstrated on July 21, 2021 when he filed a motion in the Cherokee Nation District Court objecting to the Court's issuance of a subpoena for a deposition of Sherri Combs, a forensics auditor, employee of the Cherokee Nation Attorney General Office, and CNF's key witness. Although Keen did not represent Combs, he filed to a motion to strike the subpoena issued by the Cherokee Nation Court to prevent her from testifying. Keen cannot represent Nation and its key witness especially in attempt to prevent her from being deposed.[73]

142. Also at the same time, in an attempt to deny Gilliland counsel of her choice, Keen moved the Cherokee Nation District Court to strike Gilliland's Attorney, Chad Smith, from representing her alleging he was "willfully engaging in the unauthorized practice of law" because the Court's records showed Smith did not pay his last year Cherokee Nation Bar Association dues. The Cherokee Nation District Court denied Keen's motion upon finding the Court Clerk made an error in recording payment of Attorney Smith's Cherokee Nation bar dues in the amount of $50.00.

143. Keen's conflict of interest is most recently seen on August 27, 2021 when Keen filed a "Motion in Opposition to Trial in Absentia and to Strike Trial Setting Until Defendant is in Physical Custody." Keen sought an order from Judge Barteaux to strike Gilliland's case from the jury docket until she was apprehended and to deny her right to waive her appearance at a misdemeanor jury trial. There was no legal event precipitating this motion except for Keen's

[73] Exh. A-42, 2021-07-21 Nation's Motion to Set Aside and Quash Subpoena Duces Tecum and to Strike Attorney Chadwick Smith as Counsel of Record of the Defendant.

desire to go to Las Vegas to play billiards which occurred on Gilliland's jury trial date. Keen subsequently filed a Motion for Continuance of the jury trial which was granted.

144. Gilliland was denied due process because Keen has demonstrated that he cannot be "minister of justice and not simply that of an advocate" due to his conflicts of interest. As of May 19, 2022, Keen has failed to tender to Gilliland a Pre-trial Order required by Cherokee Nation District Court Rule 120 which includes listing synopsis of witness, legal issues to be litigated, contested and uncontested facts and exhibits to be offered at trial.

145. Any one or a combination of these due process violations warrant dismissal of the criminal case against Gilliland.

IX. FIRST CAUSE OF ACTION
EXTRATERRITORIAL AND EXCESSIVE DETENTION ORDERS.

146. For her first Cause of Action, Gilliland realleges and incorporates by reference all prior paragraphs of this Petition.

147. Judge Barteaux has unconstitutionally and illegally restrained Gilliland's liberty because his detention orders require her to appear at times and places thus restricting her ability to come and go as she pleases and subjecting her to restraints not imposed on the general public.

148. Judge Barteaux 's detention orders violate the Nation's law and due process require by the ICRA.

149. Gilliland complied with her personal recognizance bond, so imposition of a $10,000 cash bond and Arrest Warrant was excessive and punitive.

150. Judge Barteaux had no authority to issue a bench or arrest warrant for service outside the Nation.

X. SECOND CAUSE OF ACTION
CRIMINAL PROSECUTION DENIES DUE PROCESS.

151. For her Second Cause of Action, Gilliland realleges and incorporates by reference all prior paragraphs of this Petition. Judge Barteaux's orders for detention are unconstitutional because they are predicated on the underlying criminal prosecution which fundamentally denies Gilliland due process.

152. Judge Barteaux had no authority to restrain Gilliland's liberty because the Amended Complaint violates federal and tribal due process requirements to: 1) state an offense, 2) allege facts showing criminal intent, 3) clearly state the criminal allegations without vagueness, 4) file charges within the statute of limitation, 5) not exceed the punishment provided by the ICRA, and 6) to provide a prosecutor without a conflict of interest.

XI. CONCLUSION

153. The Amended Complaint filed in the Nation's criminal case against Gilliland is nothing more than a list of CNF expenditures by its Executive Director. By seeking fifteen (15) years in prison and a $15,000 fine, the Nation is criminally prosecuting Gilliland on charges that deny her due process requirements to 1) state an offense, 2) allege specific facts showing criminal intent, 3) clearly state the criminal allegations without vagueness, 4) file charges within the statute of limitation, 5) not exceed the punishment provided by the Indian Civil Rights Act and 6) to provide a disinterested prosecutor without conflicts of interest. Judge Barteaux's detention orders based on this criminal prosecution are constitutionally infirm.

154. The gnawing question is *why is the Cherokee Nation proceeding with this prosecution*? The answer may be found in the email of former CNF Chair of the Board Robin Ballenger who after meeting with Principal Chief Bill John Baker and advisor Kalyn Free on

December 4, 2012 learned that they wanted Gilliland removed as CNF Executive Director because "He (Baker) sees her (Gilliland) as a political rival."[74] Attorney General Hembree was appointed to office by Baker, and Hembree and Keen were political affiliates of Baker and contributors to his campaign.

XII. PRAYER FOR RELIEF

155. Gilliland respectfully requests that the Court declare that Judge Barteaux's detention orders represent a sufficiently severe actual restraint on her liberty interests as to warrant habeas corpus review.

156. Gilliland respectfully requests that the Court order Judge Barteaux to withdraw his detention orders including the October 22, 2019 Order issuing a bench warrant imposing a $10,000 cash bond and March 26, 2021 Arrest Warrant.

157. Gilliland respectfully requests that the Court find that the Amended Complaint, in *Cherokee Nation v. Gilliland*, CRM 2016-54 is unconstitutional and illegal and to order that it be dismissed with prejudice.

158. Gilliland respectfully requests this Court award attorneys' fees and costs incurred by Gilliland in bringing this action.

159. Gilliland respectfully requests this Court grant such other and further relief as this Court may deem proper and just.

WHEREFORE, this Court should issue a Writ of Habeas Corpus, order the Nation's criminal charges against Gilliland be dismissed and that Judge Barteaux's detention orders be withdrawn.

DATED June 15, 2022.

---

[74] Exh. B, Robin Ballenger email December 19, 2012 to CNF Board.

Chadwick Smith, OBA # 8312
P.O. Box 11324
Palm Desert, CA 92255
918 453 1707
chad@chadsmith.com
FAX 918 550 8208

5283259.1:411365.01951

EXHIBIT A-1

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
Plaintiff,	)	
	)	
v.	)	**CRM-2016-** 54
	)	
	)	
KIMBERLIE A. GILLILAND,	)	
D.O.B. 08/13/1969,	)	
Defendant.	)	

COMPLAINT AND INFORMATION

IN THE NAME AND BY THE AUTHORITY OF THE CHEROKEE NATION, comes now, A. Diane Hammons, specially appointed prosecutor acting by the power of the Attorney General for the Cherokee Nation, Todd Hembree, and upon her oath gives this Court reason to know and be informed that **KIMBERLIE A. GILLILAND** did, within the territorial boundaries of the Cherokee Nation including within Indian Country as defined by 18 U.S.C. § 1151, and the laws of the Cherokee Nation , commit the hereinafter described crimes. At all times pertinent hereto, Defendant Kimberlie A. Gilliland was serving as Executive Director of the Cherokee Nation Education Corporation a/k/a Cherokee Nation Foundation ("CNF"), a non-profit corporation organized under the laws of the Cherokee Nation, whose officers are appointed by the Principal Chief and approved by the Tribal Council, and whose principal place of business is in Tahlequah, Oklahoma, and which, at all times pertinent hereto received partial funding from the Cherokee Nation government and Cherokee Nation Businesses, both entities being located on Indian Country within the boundaries of the Cherokee Nation.

COUNT I: Embezzlement by Officer of Corporation; 21 CNCA § 1452

From a period from January 24, 2012, through February 14, 2012, Kimberlie A. Gilliland, did willfully and knowingly convert, misappropriate, and embezzle funds of CNF for her own and her family's use, to wit: By using CNF funds to pay for a family trip to California for herself, her husband, Andrew Sikora, and their two minor children, S.S. and S.S; said trip taking place from February 9, 2012, through February 13, 2012. Said conversion included the following transactions.

- On approximately January 24, 2012, the Defendant purchased American Airlines tickets for herself, her husband, Andrew Sikora, and her two minor children, S.S. and S.S. from Tulsa, Oklahoma, to Los Angeles, California, in the approximate amount of $329.20 per ticket plus $56.00 in airline fees, for a travel date of February 9, 2012, all paid out of CNEC funds with the use of a CNEC business credit card, and;
- From February 9, through February 13, 2012, the Defendant paid $70.54 to Fine Airport Parking out of CNEC funds with the use of a CNEC business credit card, and;
- From February 9, through February 13, 2012, the Defendant paid $157.95 to Enterprise Rent a Car at the Los Angeles International Airport, Los Angeles out of CNEC funds with the use of a CNEC business credit card, and;
- From February 9, through February 10, 2012, the Defendant paid $414.05 to Marriott Hotels and Resorts, Anaheim, California, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 11, 2012, the Defendant paid $47.93 for gasoline purchased at OSD Enterprises Inc, in Anaheim, California, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 11,2012, the Defendant paid $25.86 to a restaurant, Bangkok Bay, in Solana Beach, California, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 11,2012, the Defendant paid $46.94 to Oggis Pizza & Brewing Co. in Garden Gove, California, for four (4) guests, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 12, 2012, the Defendant paid $21.30 to Starbucks, in Carlsbad, California, out of CNEC funds with the use of a CNEC business credit card, and;
- From February 12 through February 13, 2012, the Defendant paid $314.53 to the Renaissance Montura, Los Angeles, CA, out of CNEC funds with the use of a CNEC business credit card, and;

- On February 12, 2012, the Defendant paid $1,408.40 to Continental Airlines for tickets and ticket fees for travel to begin on 2/13/12 for herself, her husband Andrew Sikora, and their minor children, S.S. and S.S., out of CNEC funds with the use of a CNEC business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used CNF funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT II: Embezzlement by Officer of Corporation; 21 CNCA § 1452

During a period from May 17, 2012, through May 19, 2012, Kimberlie A. Gilliland, did willfully and knowingly convert and embezzle funds of CNEC for her own use, to wit: By paying for "American Girl" hotel rooms (containing American Girl doll beds, pink balloons, and cookies) for the benefit of her daughter, and an employee's daughter, in the total amount of $291.54 to the Residence Inn Marriott, Addison, Texas, out of CNEC funds with the use of a CNEC business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used CNF funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT III: Embezzlement by Officer of Corporation; 21 CNCA § 1452

During a period from July 16, 2012, through August 13, 2012, Kimberlie A. Gilliland, did willfully and knowingly convert and embezzle funds of CNF for her own and her family's use, to wit: By using CNF funds to pay for a trip to California for herself and her husband, Andrew Sikora; said trip taking place from August 9, 2012, through August 13, 2012. Said conversion included the following transactions:

- On approximately July 16, 2012, the Defendant purchased Southwest Airlines tickets for herself and her husband, Andrew Sikora, to Burbank, California, in the approximate amount of $257.60 per ticket for a travel date of August 9, 2012, all paid out of CNF funds with the use of a CNF business credit card, and;
- From August 9, 2012 –August 13, 2012 the Defendant paid $194.45 to Fine Airport Parking in Tulsa, Oklahoma (including a $125 car wash charge) all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 9, 2012, the Defendant paid $51.84 to the Jose Roux Taco Bar at the Sky Harbor International Airport, Phoenix, Arizona, all paid out of CNF funds with the use of a CNF business

credit card, and;

- From August 9, 2012-August 10, 2012 the Defendant paid $398.82 to the Queen Mary Ship, in Long Beach, California, for two nights lodging in one of their rooms known for "paranormalistic activity," all paid out of CNF funds with the use of a CNF business credit card, and;
- From August 9, 2012-August 13, 2012 the Defendant paid $347.33 to Hertz Rental Car in Oakland, California, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 10, 2012, the Defendant purchased on the Queen Mary Ship in Long Beach, California, a toothbrush and deodorant for $6.74, two bottles of water for $4.78, and $38.80 paid to the Queen Mary Promenade Café for two guest breakfasts, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant purchased on the Queen Mary Ship in Long Beach, California, a "Bellhop Bear" for $21.99, a "Stack Logo Keyring" for $5.99, and a video entitled "Ghost Encounters" for $29.99, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $24.82 on the Queen Mary Ship in Long Beach, California, for food and beverage for two persons all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $56.59 to Shell Oil in Long Beach, California, paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $12.11 to Denny's in Kettleman City, California, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $92.40 to the Best Western Inn and Suites, Kettleman, California, paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 12, 2012, the Defendant paid $49.40 to Exxonmobil, in Kettleman, California and $10.45 to "Yellow Card Services," paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 12, 2012, the Defendant paid $133.02 to the Courtyard by Marriott, in Oakland, California, paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 13, 2012, the Defendant paid $5.35 to La Casita, in the Denver, Colorado, airport, paid out of CNF funds with the use of a CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an

office of trust in CNF, used said funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT IV: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about July 16, 2012, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own and her family's use, to wit: purchasing a Southwest Airlines ticket for her husband, Andrew Sikora, in the amount of $367.60 for an August 18, 2012 trip from Portland, Oregon to Tulsa, Oklahoma, paid out of CNF funds with the use of a CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT V: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about August 17, 2012, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own use, to wit: purchasing a "Buckle Bag" for $74.99 and two towels for $46.00 ($23.00 each) from the Pendleton Woolen Mills Employee Sales Room in Portland, Oregon, paid out of CNF funds with the use of her CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit, and not in the due and lawful execution of her trust.

COUNT VI: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about November 15, 2012, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own use, to wit: paying for a parking ticket from the City of Tulsa that was issued to her 2007 Toyota Camry, tag number ****C5, paid out of CNF funds with a CNF check, signed by defendant, for the amount of $40.00 ($30.00 fine and $10.00 late fee);

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit, and not in the due and lawful execution of her trust.

COUNT VII: Embezzlement by Officer of Corporation; 21 CNCA § 1452

From a period of time from January, 2011, through April, 2013, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own use, to wit:

paying for courses in an online master's degree program for herself from North Park University, in Chicago, Illinois, in the total amount of $21,100.36 paid out of CNF funds with CNF checks signed by the defendant, and with the use of a CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit, and not in the due and lawful execution of her trust.

COUNT VIII: Embezzlement by Officer of Corporation; 21 CNCA § 1452

In June of 2013, defendant unilaterally removed a large Hewlett-Packard Designjet Z3200PS 44" Photo Printer and software disks from the Foundation corporate offices to an unknown location. Said equipment was fully functional and valued in excess of $5,000.00.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said property for her personal benefit, and not in the due and lawful execution of her trust.

COUNT IX: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about June 10, and July 1, 2013, defendant used Foundation funds to purchase and take possession of over $10,000.00 of computer equipment from the Apple Store in Tulsa, Oklahoma.

A substantial portion of said computer equipment purchased with Foundation funds never appeared for use in Foundation's corporate offices, and the whereabouts of the equipment is unknown. The missing items include an AppleTV item, Serial No. F02KGAD4FF54, purchased for $99.00; an Apple laptop computer, Serial No. C02KP36SFFT0, purchased for $2199.00; a MacBook Pro service agreement, No. 970000020608672, purchased for $349.00; two Lightning AV digital adaptors, purchased for $49.00 each; an Apple Thunderbolt to Firewire adaptor, purchased for $29.00; a Thunderbolt Gigabit Ethernet adaptor purchased for $29.00; a light gray iPad Smart Case, purchased for $49.00; and a red iPad Smart Case, also purchased for $49.00.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said property for her personal benefit, and not in the due and lawful execution of her trust.

ALL OF SAID CRIMES being subject to punishment as defined at 21 CNCA § 10, to wit: a term of imprisonment for not more than one (1) year or a fine of five thousand ($5,000.00) or both

and any civil remedies as provided by 21 CNCA § 1760(B) for each separate crime.

FURTHER, that the Defendant is an "Indian" as defined in 25 U.S.C. § 450b(d), being a Citizen of the Cherokee Nation, and that the defendant did, within and without the Cherokee Nation including within Indian Country, commit the above crimes, contrary to the Cherokee Nation statutes cited above, and against the peace and dignity of the Cherokee Nation.

A. Diane Hammons, CNBA 0035
Special Prosecutor
Cherokee Nation Office of the Attorney General
P. O. Box 141
Tahlequah, OK 74465
adianehammons@gmail.com

CHEROKEE NATION) **ss.**

The undersigned, of lawful age, and being first duly sworn states that she has read the above and foregoing Complaint, and that the statements contained therein are true and correct to the best of her information and belief.

Special Prosecutor

Subscribed and sworn to before me this 28th day of July, 2016.

NOTARY PUBLIC

My Commission Expires: 8/20/18

STATE OF OKLAHOMA NOTARY PUBLIC # 14007424 EXP. 08/20/18

Witnesses: Heather Sourjohn, former CNF employee, Tahlequah, OK
Jennifer Sandoval, CNF, 800 S. Muskogee Ave., Tahlequah, OK
Marisa Hambleton, CNF, 800 S. Muskogee Ave., Tahlequah, OK

Robert St. Pierre, CPA, North 2nd St., Stilwell, OK
J.D. Carey, CPA, Tahlequah, OK
Sherri Combs, forensic auditor, Tahlequah, OK
Shelley Butler-Allen, former CNF Board member, Tahlequah, OK
Robin Ballenger, former CNF Board member, Tulsa, OK
Susan Chapman-Plumb, CNF Board member, Tahlequah, OK
Tonya Rozell, CNF Board member, Tahlequah, OK
Casey Ross-Petherick, former CNF Board member, Oklahoma City, OK
Jay Calhoun, former CNF Board member, Cherokee Nation Businesses, Tulsa, OK
John Gritts, former CNF Board member, Colorado
Jackson Crain, Apple Store, Woodland Hills Mall, Tulsa, OK

EXHIBIT A-2

FILED

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION
2016 AUG 12 AM 10: 58

CHEROKEE NATION,

Plaintiff,

Vs.

KIMBERLIE A. GILLILAND,

Defendant.

CM 2016-54

ORDER OF ARRAIGNMENT, SURRENDER AND RELEASE OF CUSTODY ON PERSONAL RECOGNIZANCE

On this 12 of August, 2016, the Court acknowledges the surrender of the Defendant, Kimberlie A. Gilliland and the Cherokee Nation does not object to releasing her on her personal recognizance. The Court arraigns Defendant upon her waiving the reading of the charges the Cherokee Nation brings against her in the above-styled and numbered case and being advised of her constitutional and statutory rights. Defendant reserves further time to file motions and enters a plea of not guilty subject to motions she may file.

Defendant demands a jury trial.

THEREFORE IT IS ORDERED BY THE COURT, Defendant is released on her own recognizance, no bond is required and this case is set for jury trial

Ordered this 12 day of August, 2016.

Judge Fite

Approved:

Chadwick Smith
Attorney for Defendant

Diane Hammons
Attorney for Cherokee Nation

EXHIBIT A-3

IN THE DISTRICT COURT OF THE CHEROKEE NATION

CHEROKEE NATION EDUCATION CORPORATION, d/b/a CHEROKEE NATION FOUNDATION, Plaintiff, vs. KIMBERLIE GILLILAND, Defendant.	Case No. CV-2016-397

PLAINTIFF'S RESPONSE AND COMBINED BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO STAY

COMES NOW the plaintiff, Cherokee Nation Education Corporation, d/b/a Cherokee Nation Foundation (Foundation) by and through its legal counsel, Ralph F Keen II, who responds in opposition to the Defendant's Motion to Stay as follows:

I. DEFENDANT SEEKS AN EXTRAORDINARY REMEDY

First and foremost, the relief defendant seeks - a complete stay of these civil proceedings pending the outcome of criminal proceedings - is an extraordinary remedy. *"[T]he granting of a stay of civil proceedings due to pending criminal investigation is an extraordinary remedy, not to be granted lightly."*[1] As a matter of constitutional law, a defendant has absolutely no right or entitlement to such extraordinary relief.

> There is no general federal constitutional, statutory, or common law rule barring the simultaneous prosecution of separate civil and criminal actions by different federal agencies against the same defendant involving the same transactions. Parallel civil and criminal proceedings instituted by different federal agencies are not uncommon occurrences because of the overlapping nature of federal civil and penal laws. The simultaneous prosecution of civil and criminal actions is generally unobjectionable because the federal government is entitled to vindicate the different interests promoted by different regulatory provisions even though it attempts to vindicate several interests simultaneously in different forums.[2]

[1] United States v. Simcho, No. 08-10733 (5th. Cir. 2009); Trustee of Plumbers Pen. Fund. v. Transworld Mech., 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995); In re Par Pharmaceutical, 133 F.R.D. 12, 13 (S.D.N.Y. 1990).
[2] Simcho, at 2.

The 10th Circuit has so recognized and affirmed that the federal constitution does not generally require a stay of civil proceedings pending the outcome of criminal proceedings, absent a clear showing of *"substantial prejudice"* to a party's rights.[3]

II. DEFENDANT'S BURDEN

Because the defendant seeks extraordinary relief, the defendant carries a heavy burden of proof.[4] In affirming the trial court's denial of a stay the Tenth Circuit has found: *"When applying for a stay, a party must show `a clear case of hardship or inequity' if `even a fair possibility' exists that the stay would damage another party."*[5] Similarly, the Northern District of Oklahoma has held that the district court is not generally required to stay a civil proceeding pending the outcome of a parallel criminal proceeding absent *"substantial prejudice"* to a party's rights.[6] The defendant's arguments fall woefully short of showing a clear case of hardship or inequity, or any substantial prejudice her rights would suffer to justify a complete stay of these proceedings.

While not adopted in the Tenth Circuit, defendant relies heavily on a six-part analysis utilized in other federal jurisdictions. Courts of the Cherokee Nation are in no manner bound by defendant's cited precedent.[7] Nonetheless, to the extend the Court finds the test helpful, and for the sake of comparative analysis, the Foundation would respond as follows:

1. The Extent To Which The Issues In The Civil And Criminal Cases Overlap

The gravamen of defendant's argument is that the extent of overlap between the criminal and civil counts is the *"most important factor"* for the court to consider and protect her right against self-incrimination.[8] Defendant asks the Court place her individual rights above Foundation's: *"in order to avoid placing Gilliland in the position of having to choose between*

---

[3] Creative Consumer Concepts, Inc. v. Kreisler, 563 F.3d 1070, 1080 (10th Cir. 2009) *citing* Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (9th Cir. 1995); SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C.Cir.1980).

[4] Microfinancial, Inc. v. Premier Holidays Intern., 385 F.3d 72, 77 (1st Cir. 2004) (finding the decision whether or not to stay civil litigation in deference to parallel criminal proceedings is purely discretionary, and the movant carries a heavy burden to prevail in such an endeavor).

[5] Creative Consumer Concepts at 1080; Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 987 (10th Cir. 2000); Span-Eng Assocs. v. Weidner, 771 F.2d 464, 468 (10th Cir. 1985); *accord* Austin v. Unarco Indus., Inc., 705 F.2d 1, 5 (1st Cir.1983).

[6] SEC v. Gordon, 2009 WL 2252119 (N.D. Okla. Jul. 28, 2009) *citing* SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C.Cir.1980).

[7] The Comprehensive Access to Justice Act of 2016, L.A. 16-16, § 3 provides: *"No state, or federal law, including any state or federal regulations, shall be binding upon the courts unless specifically incorporated into statute by the Tribal Council or adopted as common law by a decision of the court."*

[8] *See* Brief in Support of Defendant's Motion to Stay, p. 4.

risking a loss in the civil action by invoking her constitutional right against self-incrimination or risking conviction in the criminal case by waiving that right and testifying in the civil proceedings."[9] To the contrary, in deciding whether to testify or invoke their fifth amendment right against self incrimination, the overwhelming authority is that a defendant must make a choice. *"A defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his fifth amendment privilege."*[10] This premise was first established by the United States Supreme Court in U.S. v. Kordel, finding that criminal convictions based on evidence obtained by the government in a civil proceeding are not constitutionally infirm.[11] A plethora of subsequent decisions have made even clearer that it does not violate due process to force a litigant to choose between invoking the fifth amendment in a civil case, thus risking a loss there, or answering the questions in the civil context, thus risking subsequent criminal prosecution.[12]

Admittedly, eight counts in the civil petition involve the same transaction or occurrence as in the criminal information. Yet conversely, in considering the *overall extent of overlap*, the civil complaint contains a total of twenty-two counts, leaving fourteen counts that involve transactions or occurrences separate and distinct from the eight criminal counts. These fourteen counts can be summarized as follows:

Civil Count 1 involves embezzlement and breach of defendant's employment contract vis-à-vis unauthorized pay increases in the amount of $64,676.35. Count 3 involves embezzlement for monies paid to her and her husband's privately owned business, Cherokee Media, in the amount of $6,488.00. Civil Counts 4 through 7 involve the improper payment of scholarship funds in the amount of $22,657.54 to students who did not meet the scholarship criteria.[13] Count 8 relates to embezzlement of funds for a Colorado family trip for four in the amount of $1,300.00. Civil Count 13 relates to embezzlement for hotel, meals and travel expense for herself and former Tribal Council member Cara Cowan Watts in the amount of

---

[9] *Id.*

[10] Creative Consumer Concepts, Inc. v. Kreisler, 563 F.3d 1070, 1080 (10th Cir. 2009).

[11] United States v. Kordel, 397 U.S. 1 (1970).

[12] *See, e.g.*, Baxter v. Palmigiano, 425 U.S. 308, 318–19, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976); United States v. White, 589 F.2d 1283, 1286–87 (5th Cir.1979); Arthurs v. Stern, 560 F.2d 477, 478–79 (1st Cir.1977), *cert. denied,* 434 U.S. 1034, 98 S.Ct. 768, 54 L.Ed.2d 782 (1978); United States v. Rubinson, 543 F.2d 951, 961 (2d Cir.), *cert. denied,* 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976).

[13] At least one of these improper scholarships appears to have involved an act of political patronage in favor of former Principal Chief Chadwick Smith.

$1,200.00. Civil Count 14 relates to embezzlement for purchasing unauthorized airline tickets to Phoenix, Arizona for herself and Cara Cowan Watts in the amount of $1,000.00. Civil Count 15 relates to conversion of Foundation assets and resources for Cara Cowen Watts Community Workshops in the amount of $1,600.00. Civil Count 17 relates to conversion of Foundation assets by payment of unauthorized severance package to Lisa Reed Smith in the amount of $9,597.60. Civil Count 19 relates to the embezzlement for the payment of personal/family insurance coverage in the amount of $3,288.20. Civil Count 20 involves miscellaneous infractions exhibiting a pattern of practice by the defendant of using Foundation monies for the purchase of elaborate meals, alcoholic beverages for herself and others, and other infractions in the amount of $3,000.00. Civil Count 21 relates to rescission, cancellation and breach of contract of the defendant's written severance agreement with the Foundation, and seeking monetary recovery in the amount of $74,500.00. Finally, Civil Count 22 relates to punitive damages in the amount of $928,000.00 both as punishment and as a future deterrent to others.

From a recovery prospective, the overlapping counts account for $38,615.00; equating to 3.3 % of the total civil recovery sought - $1,160,000.00. The defendant should not be permitted to stymie the Foundation's ability to recover on the whole lion's share of its claims, particularly when less intrusive alternatives to a general stay exist.

2. The Status Of The Case, Including Whether Defendant Has Been Indicted

Criminal charges are pending in Cherokee District Court. But again, a district court is not generally required to stay a civil proceeding pending the outcome of a parallel criminal proceeding absent *"substantial prejudice"* to a party's rights.[14] The defendant has made no showing of a substantial prejudice.

3. The Interests Of The Plaintiff In Proceeding Expeditiously Versus The Prejudice To The Plaintiff Resulting From The Delay

Defendant admits that Foundation has a legitimate interest in the expeditious resolution of this action.[15] Foundation asserts that it would be greatly prejudiced if this matter were to be indefinitely stayed. Criminal proceedings at the district court level will undoubtedly require at least a year to go to trial.[16] In addition, should convictions occur, the defendant has the right to

[14] *Supra* note 3.
[15] Defendant's Brief, p 6.
[16] The Cherokee District Court only has two regular criminal dockets, one in the Spring and one in the Fall. Presumptively, the criminal case will not be ready to go to trial by the Spring docket.

appeal, which could take months to years to reach final resolution. Many of the earliest acts of embezzlement date back to unauthorized pay increases in 2009 and proceed forward in time. As the Court can appreciate, witnesses depart, witnesses relocate and memories fade over time. The defendant successfully concealed her wrongful acts while employed only to be discovered after her departure through an independent audit. Justice delayed is justice denied, particularly here where the defendant would reap even more benefit from her skillful deceit and concealment of her bad acts by seeing her civil accountability protracted indefinitely.

In addition, a stay would severely prejudice Foundation's ability to successfully collect a judgment. The defendant presently owns two homes, one of which would presently not be exempt from civil execution. If this matter is stayed for a period of months to years, she will no doubt liquefy or encumber those assets and apply those resources to a vigorous criminal defense. The limiting of Foundation's ability to successfully collect a monetary judgment would cause it substantial prejudice, which more than justifies the Court denying defendant's request for a stay of these proceedings.

4. The Interests Of, And Burden On, The Defendant

Foundation asserts that the defendant will suffer no undue burden by simultaneously defending the criminal charges and the civil claims. Defendant is obviously not without resources. As stated, defendant presently owns two homes and also has a successful business in addition to her ongoing career with Bacone College. The defendant clearly has resources enough to engage a prominent Tulsa law firm in these civil proceedings, as well as experienced local counsel in the criminal proceedings. The defendant attempts to curry sympathy and compassion from the Court in her motion.[17] Yet, her public statements offer an unfiltered insight to her true feelings toward this Honorable Court and the Cherokee judiciary:

> I can only assume that because these actions were filed in tribal court that the FBI and federal investigators have rejected these claims for what they are, which is a frivolous attack on a private citizen who has done nothing wrong.[18]

---

[17] *See* Defendant's Brief, p 7: *"[T]he simultaneous defense of both the this action and the Criminal Case will place a severe financial burden upon Gilliland, a lone individual."*

[18] Harrison Grimwood, Woman accused of embezzlement says charges are political retaliation, 2016 Jul 30, Muskogee Phoenix, http://www.muskogeephoenix.com/news/woman-accused-of-embezzlement-says-charges-are-political-retaliation/article_0f92a23c-7914-5fc0-9582-b58147b40c27.html.

In a single public statement defendant successfully managed to insult the entire Cherokee judiciary by suggesting that because these actions were brought in the Cherokee Courts rather than a federal forum, they must be frivolous. The defendant attempts to convince this Court that she has limited resources, yet she went on in the same public statement to promise to file a "*vigorous countersuit*" against the Cherokee Nation for slandering her.

5. The Interests Of The Court

The defendant admits that this Court has a "*strong interest in keeping litigation moving to conclusion without unnecessary delay.*"[19] The interest of the Court would be best served by denying a stay and seeing justice proceed by holding a person entrusted with assets intended to fund Cherokee students accountable for violating that trust and embezzling and converting those assets to her own use and to the use of other insiders.

6. The Public's Interest.

Foundation asserts that the public's interest will be deeply and adversely impacted should this civil matter be indefinitely stayed. A criminal conviction requires proof beyond a reasonable doubt. Civil liability is established by the lesser preponderance of the evidence standard. Criminal law can provide incarceration and restitution of money, but only civil law can provide the additional financial deterrent of punitive damages. The public's interest would be best served by sending a message that embezzlement of Cherokee resources away from those in need cannot and will not be tolerated in the Cherokee Nation.

III. LESS INTRUSIVE ALTERNATIVES

Defendant boldly seeks a compete stay of these proceedings, apparently without considering that lesser intrusive alternatives clearly exist. For example, when the criminal prosecution parallels a civil action, the Fifth Circuit, using a balancing approach, has determined the appropriate remedy is a limited stay of any discovery that might expose the party to a risk of self-incrimination.[20] Some courts have stayed only oral depositions of the defendant,[21] while others have allowed depositions to proceed, but restricted them from public view and ordered the

---

[19] Defendant's Brief, p 7.
[20] Wehling v. Columbia Broadcasting System, 608 F.2d 1084 (5th Cir.1979), *reh'g denied*, 611 F.2d 1026, 1027 (5th Cir.1980).
[21] Dienstag v. Bronsen, 49 F.R.D. 327 (1970).

transcripts sealed until the criminal prosecutions were complete.[22] When these measures prove inadequate, there is still the option of staying all discovery of the defendant by way of a protective order, as the Supreme Court suggested in Kordel,[23] or staying discovery of only the overlapping counts which pose the highest risk of self-incrimination.

CONCLUSION

The stay the defendant seeks is an extraordinary remedy. One that she has no right or entitlement to under the Cherokee constitution. The defendant has not met her burden of showing a clear case of hardship or inequity, or demonstrating that she will suffer substantial prejudice if a stay is not granted. In deciding whether to testify or invoke their fifth amendment right against self incrimination, the overwhelming authority is that a defendant must make a choice. The Foundation has a legitimate interest in the expeditious resolution of this action and the Court has a strong interest in keeping litigations moving to conclusion without unnecessary delay. The degree of overlap between the civil action as a whole and the criminal proceedings is minimal. Defendant's claims of undue burden and financial hardship are illusory, and the public's interest would be best served by sending a message that embezzlement of Cherokee resources away from those in need cannot and will not be tolerated.

WHEREFORE, premises and precedents considered, Foundation prays the Court deny defendant's motion in its entirety, award it it's fees and costs for defending the same, and for such other relief it deems just and equitable.

Respectfully submitted,

Ralph F Keen II, OBA #17077, CNBA #0094
Keen Law Office, P.C.
205 W. Division
Stilwell, OK 74960
Telephone (918) 696-3355
Facsimile (918) 696-3576
keenlaw@windstream.net
Attorney for Foundation

[22] D'Ippolito v. American Oil Co., 272 F.Supp. 310, 312 (S.D.N.Y. 1967).
[23] United States v. Kordel, 397 U.S. 1, 8-9 (1970)(finding where there is a real and appreciable risk of self-incrimination, an appropriate remedy would be a protective order postponing civil discovery until termination of the criminal action).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Plaintiff's Response and Combined Brief in Opposition to Defendant's Motion to Stay* was emailed and/or mailed, postage pre-paid, this 6th day of September, 2016, to the following:

James J. Proszek
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 200
Tulsa, OK 74103
Attorney for Defendant

Ralph Keen

EXHIBIT A-4

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	**CM 2016-54**
	)	
KIMBERLIE A. GILLILAND,	)	
	)	**Judge Fite**
Defendant.	)	

DEFENDANT'S MOTION TO COMPEL DISCOVERY AND STAY PRODUCTION OF DISCOVERY REQUESTED BY THE CHEROKEE NATION

COMES NOW the Defendant in the above-styled case, by and through her attorney of record, and moves this Court to compel the Cherokee Nation ("Nation") to produce a "investigative report provided to the office of the Cherokee Nation Attorney General in preparation for this action." The Cherokee Nation denied production of the subject investigative report. The Nation in is response to Production of Documents stated:

> 19. EXPERT RECORDS: Any and all examination reports prepared by any Cherokee Nation agency including all forensic accounting and/or audits.
>
> > Those audits will be provided in the hard copies of discovery being prepared for defense counsel. The only "audit" or report that will not be provided is that investigative report provided to the office of the Cherokee Nation Attorney General in preparation for this action.

The Defendant is entitled to the "investigative report provided to the office of the Cherokee Nation Attorney General in preparation for this action."

Further, Defendant moves the Court to issue a stay of the Nation's Motion for Discovery and Production of Records until it completes its response to the Defendant's Motion for Discovery and Production of Records.

Submitted this 8 TH day of September, 2016.

Chadwick Smith
CNBA # 08
22902 S494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 8th day of September, 2016, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

Diane Hammons
Cherokee Nation
Office of Attorney General
P.O. Box 141
Tahlequah OK 74465
adianehammons@gmail.com

Chadwick Smith

EXHIBIT A-5

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION, Plaintiff, vs. KIMBERLIE GILLILAND, Defendant.	Case No. CRM-2016-54

ENTRY OF APPEARANCE

COMES NOW Ralph F Keen II, attorney at law, who enters his appearance as additional Special Prosecutor for Cherokee Nation in the above-styled case pursuant to the attached Order of Appointment.

Ralph F Keen II, CNBA 0094
Special Prosecutor
205 West Division
Stilwell, OK 74960
(918) 696 - 3355
(918) 696 - 3576 Fax
KeenLawOK@gmail.com
For Cherokee Nation,
Office of the Attorney General
PO Box 948
Tahlequah, OK 74465

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing *Entry of Appearance* was mailed the 1st day of November, 2018, by depositing it in the U.S. Mail, postage prepaid, or otherwise personally delivered to:

Chadwick Smith, Esq.
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com

Megan Lucas

APPOINTMENT OF SPECIAL PROSECUTOR

I, Todd Hembree, the duly sworn Attorney General of the Cherokee Nation, do hereby appoint Ralph F. Keen II, to act as a Special Prosecutor for my office in the matter of the Cherokee Nation versus Kimberlie A. Gilliland. Mr. Keen has all the power and authority of a duly appointed Assistant Attorney General in conjunction with the prosecution of this case, and will act under the authority of my office.

Dated this 26th day of October, 2018.

Todd Hembree, Attorney General

EXHIBIT A-6

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CM 2016-54**
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

DEMURRER TO CRIMINAL COMPLAINT ON GROUNDS NO CRIME IS ALLEGED AND MOTION TO DISMISS BECAUSE THE EMBEZZLEMENT STATUTE DENIES DEFENDANT DUE PROCESS

Comes now Defendant Kimberlie A. Gilliland, ("Gilliland") and demurs to the criminal complaint filed herein on July 28, 2016, and moves the Court to dismiss the above styled and numbered case. Gilliland committed no crime because the Nation's criminal law provides that an embezzlement over $50 value is not punishable by law. The Complaint is defective because it makes no factual allegations to prove Gilliland's fraudulent intent and appropriation. See Exhibit "A", Complaint. The Complaint fails to apprise Gilliland without any uncertainty or ambiguity of the punishment she faces if convicted in violation of the U.S. Constitution Fifth and Sixth Amendments and the Cherokee Nation Constitution Article III, Section 3. For these reasons, the Court should dismiss this case.

The Nation charged Gilliland with criminal embezzlement pursuant to 21 CNCA §1452.[1] The specific punishment for embezzlement is found at 21 CNCA § 1462.[2] Although 21 CNCA §1452 deems embezzlement a crime and provides some elements, 21 CNCA § 1462 provides for

[1] 21 CNCA § 1452. Embezzlement by officer, etc., of corporation, etc.
If any person, being an officer, director, trustee, clerk, servant or agent of any association, society or corporation, public or private, fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose he is guilty of embezzlement.

EXHIBIT A-7

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CM 2016-54**
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

DEMURRER TO CRIMINAL COMPLAINT ON GROUNDS NO CRIME IS ALLEGED AND MOTION TO DISMISS BECAUSE THE EMBEZZLEMENT STATUTE DENIES DEFENDANT DUE PROCESS

Comes now Defendant Kimberlie A. Gilliland, ("Gilliland") and demurs to the criminal complaint filed herein on July 28, 2016, and moves the Court to dismiss the above styled and numbered case. Gilliland committed no crime because the Nation's criminal law provides that an embezzlement over $50 value is not punishable by law. The Complaint is defective because it makes no factual allegations to prove Gilliland's fraudulent intent and appropriation. See Exhibit "A", Complaint. The Complaint fails to apprise Gilliland without any uncertainty or ambiguity of the punishment she faces if convicted in violation of the U.S. Constitution Fifth and Sixth Amendments and the Cherokee Nation Constitution Article III, Section 3. For these reasons, the Court should dismiss this case.

The Nation charged Gilliland with criminal embezzlement pursuant to 21 CNCA §1452.[1] The specific punishment for embezzlement is found at 21 CNCA § 1462.[2] Although 21 CNCA §1452 deems embezzlement a crime and provides some elements, 21 CNCA § 1462 provides for

[1] 21 CNCA § 1452. Embezzlement by officer, etc., of corporation, etc.
If any person, being an officer, director, trustee, clerk, servant or agent of any association, society or corporation, public or private, fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose he is guilty of embezzlement.

additional elements and the criminal punishment for embezzlement.[3] The Nation alleges the Complaint's offenses are punishable as prescribed by 21 CNCA §10; however, special statutory punishment provisions supersede general punishment provisions, which in this case is 21 CNCA § 1462.[4]

It is fundamental only those actions which are precisely described and enacted as crime are punishable.[5] Any question as to what the statute alleges as a crime and punishment must be construed against the Nation.

I. ARGUMENT

Proposition One: The Nation's allegations of embezzlement over $50 per offense are not punishable.

21 CNCA § 1462 provides only those acts of embezzlement where the property or asset *is less* than $50 is a crime. 21 CNCA § 1462 provides:

> Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled, *except that every person convicted of embezzlement of any item valued at less than Fifty Dollars ($50.00) shall be punished for a crime*. (Emphasis added.)

---

[2] 21 CNCA § 1462. Punishment for embezzlement
Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled, except that every person convicted of embezzlement of any item valued at less than Fifty Dollars ($50.00) shall be punished for a crime. And where the property embezzled is an evidence of debt or right in action, the sum due upon it, or secured to be paid by it, shall be taken as its value.

[3] Cherokee Nation Codification Act of 2016 LA-02-16 2/18/2016
Section 5. Substantive Provision of Law; Repeals; Additions; and Amendments. All laws included in the Cherokee Nation Code Annotated (2014), and laws appended thereto, are hereby affirmed as the positive law of the Cherokee Nation. All laws and parts of laws not included in the Cherokee Nation Code Annotated (2014) publication are repealed. The repeal shall not revive any law previously repealed, nor shall it affect any right already existing or accrued or any action or proceeding already taken, unless otherwise provided in the Cherokee Nation Code Annotated (2014).

[4] 21 CNCA § 11. Specific statutes in other titles as governing – Acts punishable in different ways – Acts not otherwise punishable by imprisonment
A. If there be in any other titles of the laws of this Nation a provision making any specific act or omission criminal and providing the punishment therefor, and there be in this penal code any provision or section making the same act or omission a criminal offense or prescribing the punishment therefor, that offense and the punishment thereof, shall be governed by the special provisions made in relation thereto, and not by the provisions of this penal code.

[5] 21 CNCA § 2. Criminal acts are only those prescribed – "This code" defined No act or omission shall be deemed criminal or punishable except as prescribed or authorized by this code.

The "exception" provision of 21 CNCA § 1462 is the operative and controlling language of the section, so its meaning is that only those embezzlement offenses where the property is less than $50 is punishable.

First, the Nation has no crime of "feloniously stealing property."

Second, even if the Nation had enacted a crime of "feloniously stealing property," under 21 CNCA § 1462 punishment would be administered in the same "manner," contemplated in first part of 21 CNCA § 1462. This means the process of administering punishment not the substantive punishment.

Third, 21 CNCA § 1462 provides an exception that controls the entire first section, i.e. *"every person convicted of embezzlement of any item valued at less than Fifty Dollars ($50.00) shall be punished for a crime."* 21 CNCA § 1462 provides no other "prescribed or authorized" crimes or punishment. *See* 21 CNCA § 2. 21 CNCA § 1462 clearly provides that an allegation of embezzlement is only punishable as a crime if the property or asset is *valued under $50.00*; there is no crime specified for property valued over $50. In other words, if the property or asset is valued over $50.00, the allegation of embezzlement is not punishable under the Nation's laws.

The Nation has the sovereign right to define the terms of a crime and in this instance, it is consistent with a policy of judicial economy for the Nation to prosecute minor offenses of embezzlement in the Nation's court and defer prosecutor of allegations of embezzlement of greater value of property or assets to the State of Oklahoma pursuant to 21 OK Stat § 21-1451 (2014) or the federal government pursuant to18 U.S. Code § 1163. It should be noted the Nation alleges for each Count of the Complaint that property or asset value exceeds $50 for that Count.

Therefore, the Complaint herein fails to state a punishable crime against Gilliland and the

case should be dismissed.

Proposition Two: The Complaint against Gilliland is defective and the Court should dismiss the criminal prosecution pursuant to Fed. Rules Crim. Pro. 12 (b) (3) (B) (iii) and (v).

The Federal Rules of Criminal Procedure provides that a defect in the Complaint may be raised by Motion.[6]

1. The Complaint does not specify the facts for each element for the crime of embezzlement.

The first defect in the Complaint is that it does not specify for each Count the elements of how Gilliland: 1) fraudulently, 2) did not use CNEC property in the due and lawful execution of her trust, and 3) appropriated the property for her use or purpose. In many of the Counts, the Nation merely alleges Gilliland went on a trip paid for by CNEC. There is no allegation that CNEC disapproved of the travel, that she hid the expenses from CNEC or that the trip was solely for her benefit and not the benefit of CNEC. Staffs with most organizations go on business trips paid by the organization and often take family or associates with them. Those actions only become criminal when the facts that show that Gilliland fraudulently used CNEC's credit card by deceit and for her use without the consent of the Board.

For example, the Nation wholly failed to allege any facts for the Counts involving travel expenses that Gilliland deceived the Board, the Board did not consent, and they were not for the benefit and purpose of CNEC. There is no allegation the Board ever denied the authorization of

---

[6] Rule 12. Pleadings and Pretrial Motions

(a) PLEADINGS. The pleadings in a criminal proceeding are the indictment, the information, and the (b) PRETRIAL MOTIONS.

(3) *Motions That Must Be Made Before Trial.* The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits.

(B) a defect in the indictment or information, including:

(iii) lack of specificity;

. . .

(v) failure to state an offense

the travel expenses or use of its credit card, or asked Gilliland for reimbursement. Without clear and specific facts alleged showing that she traveled at CNEC's expense without its consent and by deceit, there is no crime and the case must be dismissed.

For example, Count I alleges Gilliland defrauded CNEC by taking a trip to California from February 9 to 12, 2012. The Complaint fails to allege that this trip was not for the purpose or benefit of CNEC or it was disapproved by the CNEC Board. The Complaint fails to alleged she was not authorized to use CNEC's credit card for the expenses or that she was not allowed to reimburse CNEC for personal expenses on its credit card. The Complaint characterizes the trip as a "family trip" but wholly fails to allege the trip was not a business trip authorized by the Board or within Gilliland's authority as Executive Director to decide to go on, or that Gilliland deceived the Board from authorizing, ratifying, or approving the expenditures.

To demonstrate the insufficiency of the Complaint, Gilliland made three presentations in behalf of CNEC on February 11, 2012, and February 12, 2012 during the trip that the Nation charges in Count I as criminal embezzlement. A brochure mailed by the Cherokee Nation was sent to all Cherokee citizens in the southern California area inviting them to attend a presentation by Gilliland, as Executive Director of CNEC, on scholarship opportunities. *See* Exhibit "B" Brochure. In Count I, the Nation charges that the usual and customary expenses for a routine and common business trip such as airport parking, car rental, hotel costs, gasoline for the rental car and meals were embezzled funds. Count I wholly fails to allege facts that show these common, ordinary and necessary expenses connected with a business trip for CNEC were criminally appropriated and without the consent of the Board. In fact, Count I fails to *allege this trip* was not approved, authorized or ratified by the CNEC Board even for Gilliland, its Executive Director.

The Complaint must contain sufficiently detail to adequately apprise Gilliland of the nature of the charges against her. Did CNEC not approve her travel to promote its scholarship efforts in its behalf? Did CNEC not approve her husband's and childrens' air fare? Did CNEC deny Gilliland authority as Executive Director to pay for reasonable and customary travel expenses for the trip promoting CNEC and providing its services? Did CNEC not benefit from the presentations? Where these expense not reviewed and ratified by the Board? Did CNEC not allow Gilliland to use its credit for personal expenses and then be reimbursed?

What makes these expenditures criminal?

Without the Nation pleading the facts constituting deceit by Gilliland and the lack of CNEC's consent to use its credit card for alleged expenses, there is no crime. Even if CNEC did not consent, there is no crime without facts showing Gilliland deceived CNEC. The allegations of the Complaint without showing of deceit and lack of CNEC's consent would be the subject for a civil action which CNEC *has filed* contemporaneously with this criminal case for the same allegations. The Nation must plead facts which show Gilliland's intent to deprive wrongfully the owner or the person who entrusted the property.

The Nation must afford Gilliland not only a document that contains all of the elements of the offense (whether or not such elements appear in the statute), but one that is sufficiently descriptive to permit the defendant to prepare a defense. *Hamling v. United States*, 418 U.S. 87, 117, *reh'd denied*, 419 U.S. 885 (1974); *Russell v. United States*, 369 U.S. 749, 763-72 (1962); *United States v. Hernandez*, 891 F.2d 521, 525 (5th Cir. 1989), *cert. denied*, 495 U.S. 909 (1990).

What is required in the Complaint are factual allegations rather than a mere recitation of the acts or practices proscribed by the offense allegedly committed. *See, e.g., United States v.*

Nance, 533 F.2d 699, 701 (D.C. Cir. 1976) (an indictment charging theft of money by false pretenses which listed name of victim, date of false representation, loss to victim and date money was paid to defendant was fatally defective, because it did not specify the false representation that induced victims to pay money). In reviewing the sufficiency of an indictment, the courts have construed the Complaint as a whole to ascertain whether these requirements have been met. *United States v. Hand*, 497 F.2d 929, 934-35 (5th Cir. 1974), *cert. denied*, 424 U.S. 953 (1976

An example of an indictment that failed this test is provided by *United States v. Nance*, 533 F.2d 699 (D.C. Cir. 1976). The indictment in *Nance* charged a false pretense violation pursuant to the D.C. Code. It listed the name of each victim, the date of the false representation, the amount each victim lost, and the date the sum was paid to the defendants, but was fatally defective as a consequence of its failure to specify the false representation which induced the victims to pay the money to the defendants. *See also United States v. Brown*, 995 F.2d 1493, 1504-05 (10th Cir.)(indictment charging controlling premises and making them available for storing and distributing cocaine base insufficient because failed to state how control was exercised), *cert. denied*, 114 S.Ct. 353 (1993).

Because the Nation's Complaint fails to allege specify facts showing Gilliland's intent to deceive CNEC and take its funds and credit cards for her use and without consent of the Board, the Complaint is defective and the case must be dismissed.

2. The Complaint fails to apprise Gilliland of the punishment she faces if convicted.

The United States Constitution Sixth Amendment provides that "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation."

The United States Constitution Fifth Amendment and the Cherokee Nation Constitution Article III, Section 3 provisions for due process requires that a criminal statute may be constitutionally void for vagueness.

In *United States v. Batchelder*, 442 U.S. 114, the U.S. Supreme Court stated:

> It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). A criminal statute is therefore invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954). See *Connally v. General Construction Co.*, 269 U.S. 385, 391-393, 46 S.Ct. 126, 127-128, 70 L.Ed. 322 (1926); *Papachristou v. Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972); *Dunn v. United States*, 442 U.S., at 112-113, 99 S.Ct., at 2197. So too, vague sentencing provisions may post constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute. See *United States v. Evans*, 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1948); *United States v. Brown*, 333 U.S. 18, 68 S.Ct. 376, 92 L.Ed. 442 (1948); *cf. Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

In determining whether a Complaint sufficiently informs the defendant of the offense and punishment, courts require the Complaint to have a common sense construction. *United States v. Drew*, 722 F.2d 551, 552-53 (9th Cir. 1983). The Nation must apprise Gilliland of what she must be prepared to meet includes the Sixth Amendment's specificity requirement. The specificity requirement ensures that Gilliland only has to answer to charges alleged with specific facts in the Complaint in order to permit preparation of her defense, and that she is protected against double jeopardy. *See United States v. Haas*, 583 F.2d 216 (5th Cir.), *reh'g denied*, 588 F.2d 829, *cert. denied*, 440 U.S. 981 (1978).

In *United States v. Carl*, 105 U.S. 611 (1881), the United Supreme Court held that "in an indictment... it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set

forth all the elements necessary to constitute the offense intended to be punished." Vague wording, even if taken directly from a statute, does not suffice.

In *Apprendi v New Jersey*, 530 U.S. 466, (2000), the U.S. Supreme Court held that any fact that increases the maximum penalty for a crime must be charged in an indictment submitted to a jury, and proven beyond a reasonable doubt." Also see *United States v. Cook*, 84 U.S. (17 Wall.) 168, 174 (1872), (If an offense cannot be accurately and clearly described without an allegation that the accused is not within an exception contained in the statutes, an indictment that does not contain such allegation is defective.)

Although the Court may allow the Nation to amend the Complaint to provide specificity as to some elements, there is no way for the Nation to change the punishment provisions of 21 CNCA § 1462. 21 CNCA § 2 provides, that "No act or omission shall be deemed criminal or punishable except as prescribed or authorized by this code." Under the Nation's law, embezzlement over $50 value for property is not a crime. Other than construing 21 CNCA § 1462 as providing that embezzlement is punishable for offences where the value of the property or assets are less than $50, there is no common sense or logical interpretation to apprise Gilliland of the nature and punishment of embezzlement.

21 CNCA § 1462 is the specific punishment provision for embezzlement- not 21 CNCA § 10, the general punishment provision. 21 CNCA § 1462 refers to a non-existing crime (feloniously stealing property) for the manner of punishment then provides an exception only where the property is valued at less than $50 is punishable. 21 CNCA § 1462 is incongruent and cannot "fully, directly, and expressly, without any uncertainty or ambiguity" inform Gilliland as to the property value element and punishment for embezzlement.

Without 21 CNCA § 1462 being clear and understandable on its face, it violates the U.S. Constitution Fifth and Sixth Amendment and Cherokee Nation Constitution Article III, Section 3 due process requirement of adequate notice.

II. CONCLUSION

Because the Complaint is defective as to providing facts as to the Fifth and Sixth Amendment specificity requirement of how Gilliland deceitfully appropriated CNEC's assets to her use including lack of consent by the Board, the Court should dismiss this case. There are no factual allegations that the Board did not authorize, approve (explicitly or implicit) or ratify the expenditure of subject funds or that Gilliland deceived the Board.

Incurable by amendment of the Complaint as charged, Gilliland committed no crime because each Count alleges embezzled property was valued in excess of $50, but pursuant to 21 CNCA § 1462, to constitute a punishable offense, the embezzled property value must be less than $50.

Fatal to the Nation's prosecution is that 21 CNCA § 1462 is unconstitutionally vague and incomprehensible as to the punishment imposed. "Unless those words of (21 CNCA § 1462) themselves fully, directly, and expressly, without any uncertainty or ambiguity" provide notice of the property value element and punishment, then Complaint is unconstitutionally void for vagueness and must be dismissed.

If the Court must pause and scratch its head trying to figure out what 21 CNCA § 1462 means then it is constitutional void by vagueness.

Submitted this 14th day of February, 2019.

/ss/
Chadwick Smith
CNBA # 08
22902 S 494 Road

Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 14th of February, 2019, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

/ss/
Chadwick Smith

Diane Hammons
Special Prosecutor
Cherokee Nation
Office of Attorney General
P.O. Box 141
Tahlequah OK 74465
adianehammons@gmail.com

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

EXHIBIT "A"

FILED

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

2016 JUL 28 AM 8:15

CHEROKEE NATION,
Plaintiff,

v.

KIMBERLIE A. GILLILAND,
D.O.B. 08/13/1969,
Defendant.

CRM-2016- 54

COMPLAINT AND INFORMATION

IN THE NAME AND BY THE AUTHORITY OF THE CHEROKEE NATION, comes now, A. Diane Hammons, specially appointed prosecutor acting by the power of the Attorney General for the Cherokee Nation, Todd Hembree, and upon her oath gives this Court reason to know and be informed that **KIMBERLIE A. GILLILAND** did, within the territorial boundaries of the Cherokee Nation including within Indian Country as defined by 18 U.S.C. § 1151, and the laws of the Cherokee Nation , commit the hereinafter described crimes. At all times pertinent hereto, Defendant Kimberlie A. Gilliland was serving as Executive Director of the Cherokee Nation Education Corporation a/k/a Cherokee Nation Foundation ("CNF"), a non-profit corporation organized under the laws of the Cherokee Nation, whose officers are appointed by the Principal Chief and approved by the Tribal Council, and whose principal place of business is in Tahlequah, Oklahoma, and which, at all times pertinent hereto received partial funding from the Cherokee Nation government and Cherokee Nation Businesses, both entities being located on Indian Country within the boundaries of the Cherokee Nation.

COUNT I: Embezzlement by Officer of Corporation; 21 CNCA § 1452

From a period from January 24, 2012, through February 14, 2012, Kimberlie A. Gilliland, did willfully and knowingly convert, misappropriate, and embezzle funds of CNF for her own and her family's use, to wit: By using CNF funds to pay for a family trip to California for herself, her husband, Andrew Sikora, and their two minor children, S.S. and S.S; said trip taking place from February 9, 2012, through February 13, 2012. Said conversion included the following transactions.

- On approximately January 24, 2012, the Defendant purchased American Airlines tickets for herself, her husband, Andrew Sikora, and her two minor children, S.S. and S.S. from Tulsa, Oklahoma, to Los Angeles, California, in the approximate amount of $329.20 per ticket plus $56.00 in airline fees, for a travel date of February 9, 2012, all paid out of CNEC funds with the use of a CNEC business credit card, and;
- From February 9, through February 13, 2012, the Defendant paid $70.54 to Fine Airport Parking out of CNEC funds with the use of a CNEC business credit card, and;
- From February 9, through February 13, 2012, the Defendant paid $157.95 to Enterprise Rent a Car at the Los Angeles International Airport, Los Angeles out of CNEC funds with the use of a CNEC business credit card, and;
- From February 9, through February 10, 2012, the Defendant paid $414.05 to Marriott Hotels and Resorts, Anaheim, California, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 11, 2012, the Defendant paid $47.93 for gasoline purchased at OSD Enterprises Inc, in Anaheim, California, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 11,2012, the Defendant paid $25.86 to a restaurant, Bangkok Bay, in Solana Beach, California, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 11,2012, the Defendant paid $46.94 to Oggis Pizza & Brewing Co. in Garden Gove, California, for four (4) guests, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 12, 2012, the Defendant paid $21.30 to Starbucks, in Carlsbad, California, out of CNEC funds with the use of a CNEC business credit card, and;
- From February 12 through February 13, 2012, the Defendant paid $314.53 to the Renaissance Montura, Los Angeles, CA, out of CNEC funds with the use of a CNEC business credit card, and;

- On February 12, 2012, the Defendant paid $1,408.40 to Continental Airlines for tickets and ticket fees for travel to begin on 2/13/12 for herself, her husband Andrew Sikora, and their minor children, S.S. and S.S., out of CNEC funds with the use of a CNEC business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used CNF funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT II: Embezzlement by Officer of Corporation; 21 CNCA § 1452

During a period from May 17, 2012, through May 19, 2012, Kimberlie A. Gilliland, did willfully and knowingly convert and embezzle funds of CNEC for her own use, to wit: By paying for "American Girl" hotel rooms (containing American Girl doll beds, pink balloons, and cookies) for the benefit of her daughter, and an employee's daughter, in the total amount of $291.54 to the Residence Inn Marriott, Addison, Texas, out of CNEC funds with the use of a CNEC business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used CNF funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT III: Embezzlement by Officer of Corporation; 21 CNCA § 1452

During a period from July 16, 2012, through August 13, 2012, Kimberlie A. Gilliland, did willfully and knowingly convert and embezzle funds of CNF for her own and her family's use, to wit: By using CNF funds to pay for a trip to California for herself and her husband, Andrew Sikora; said trip taking place from August 9, 2012, through August 13, 2012. Said conversion included the following transactions:

- On approximately July 16, 2012, the Defendant purchased Southwest Airlines tickets for herself and her husband, Andrew Sikora, to Burbank, California, in the approximate amount of $257.60 per ticket for a travel date of August 9, 2012, all paid out of CNF funds with the use of a CNF business credit card, and;
- From August 9, 2012 –August 13, 2012 the Defendant paid $194.45 to Fine Airport Parking in Tulsa, Oklahoma (including a $125 car wash charge) all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 9, 2012, the Defendant paid $51.84 to the Jose Roux Taco Bar at the Sky Harbor International Airport, Phoenix, Arizona, all paid out of CNF funds with the use of a CNF business

credit card, and;

- From August 9, 2012-August 10, 2012 the Defendant paid $398.82 to the Queen Mary Ship, in Long Beach, California, for two nights lodging in one of their rooms known for "paranormalistic activity," all paid out of CNF funds with the use of a CNF business credit card, and;
- From August 9, 2012-August 13, 2012 the Defendant paid $347.33 to Hertz Rental Car in Oakland, California, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 10, 2012, the Defendant purchased on the Queen Mary Ship in Long Beach, California, a toothbrush and deodorant for $6.74, two bottles of water for $4.78, and $38.80 paid to the Queen Mary Promenade Café for two guest breakfasts, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant purchased on the Queen Mary Ship in Long Beach, California, a "Bellhop Bear" for $21.99, a "Stack Logo Keyring" for $5.99, and a video entitled "Ghost Encounters" for $29.99, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $24.82 on the Queen Mary Ship in Long Beach, California, for food and beverage for two persons all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $56.59 to Shell Oil in Long Beach, California, paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $12.11 to Denny's in Kettleman City, California, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $92.40 to the Best Western Inn and Suites, Kettleman, California, paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 12, 2012, the Defendant paid $49.40 to Exxonmobil, in Kettleman, California and $10.45 to "Yellow Card Services," paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 12, 2012, the Defendant paid $133.02 to the Courtyard by Marriott, in Oakland, California, paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 13, 2012, the Defendant paid $5.35 to La Casita, in the Denver, Colorado, airport, paid out of CNF funds with the use of a CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an

office of trust in CNF, used said funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT IV: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about July 16, 2012, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own and her family's use, to wit: purchasing a Southwest Airlines ticket for her husband, Andrew Sikora, in the amount of $367.60 for an August 18, 2012 trip from Portland, Oregon to Tulsa, Oklahoma, paid out of CNF funds with the use of a CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT V: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about August 17, 2012, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own use, to wit: purchasing a "Buckle Bag" for $74.99 and two towels for $46.00 ($23.00 each) from the Pendleton Woolen Mills Employee Sales Room in Portland, Oregon, paid out of CNF funds with the use of her CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit, and not in the due and lawful execution of her trust.

COUNT VI: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about November 15, 2012, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own use, to wit: paying for a parking ticket from the City of Tulsa that was issued to her 2007 Toyota Camry, tag number ****C5, paid out of CNF funds with a CNF check, signed by defendant, for the amount of $40.00 ($30.00 fine and $10.00 late fee);

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit, and not in the due and lawful execution of her trust.

COUNT VII: Embezzlement by Officer of Corporation; 21 CNCA § 1452

From a period of time from January, 2011, through April, 2013, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own use, to wit:

paying for courses in an online master's degree program for herself from North Park University, in Chicago, Illinois, in the total amount of $21,100.36 paid out of CNF funds with CNF checks signed by the defendant, and with the use of a CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit, and not in the due and lawful execution of her trust.

COUNT VIII: Embezzlement by Officer of Corporation; 21 CNCA § 1452

In June of 2013, defendant unilaterally removed a large Hewlett-Packard Designjet Z3200PS 44" Photo Printer and software disks from the Foundation corporate offices to an unknown location. Said equipment was fully functional and valued in excess of $5,000.00.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said property for her personal benefit, and not in the due and lawful execution of her trust.

COUNT IX: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about June 10, and July 1, 2013, defendant used Foundation funds to purchase and take possession of over $10,000.00 of computer equipment from the Apple Store in Tulsa, Oklahoma.

A substantial portion of said computer equipment purchased with Foundation funds never appeared for use in Foundation's corporate offices, and the whereabouts of the equipment is unknown. The missing items include an AppleTV item, Serial No. F02KGAD4FF54, purchased for $99.00; an Apple laptop computer, Serial No. C02KP36SFFT0, purchased for $2199.00; a MacBook Pro service agreement, No. 970000020608672, purchased for $349.00; two Lightning AV digital adaptors, purchased for $49.00 each; an Apple Thunderbolt to Firewire adaptor, purchased for $29.00; a Thunderbolt Gigabit Ethernet adaptor purchased for $29.00; a light gray iPad Smart Case, purchased for $49.00; and a red iPad Smart Case, also purchased for $49.00.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said property for her personal benefit, and not in the due and lawful execution of her trust.

ALL OF SAID CRIMES being subject to punishment as defined at 21 CNCA § 10, to wit: a term of imprisonment for not more than one (1) year or a fine of five thousand ($5,000.00) or both

and any civil remedies as provided by 21 CNCA § 1760(B) for each separate crime.

FURTHER, that the Defendant is an "Indian" as defined in 25 U.S.C. § 450b(d), being a Citizen of the Cherokee Nation, and that the defendant did, within and without the Cherokee Nation including within Indian Country, commit the above crimes, contrary to the Cherokee Nation statutes cited above, and against the peace and dignity of the Cherokee Nation.

A. Diane Hammons, CNBA 0035
Special Prosecutor
Cherokee Nation Office of the Attorney General
P. O. Box 141
Tahlequah, OK 74465
adianehammons@gmail.com

CHEROKEE NATION) **ss.**

The undersigned, of lawful age, and being first duly sworn states that she has read the above and foregoing Complaint, and that the statements contained therein are true and correct to the best of her information and belief.

Special Prosecutor

Subscribed and sworn to before me this 27th day of July, 2016.

NOTARY PUBLIC

My Commission Expires: 8/20/18

NOTARY PUBLIC # 14007424 EXP. 08/20/18 STATE OF OKLAHOMA

Witnesses: Heather Sourjohn, former CNF employee, Tahlequah, OK
Jennifer Sandoval, CNF, 800 S. Muskogee Ave., Tahlequah, OK
Marisa Hambleton, CNF, 800 S. Muskogee Ave., Tahlequah, OK

Robert St. Pierre, CPA, North 2nd St., Stilwell, OK
J.D. Carey, CPA, Tahlequah, OK
Sherri Combs, forensic auditor, Tahlequah, OK
Shelley Butler-Allen, former CNF Board member, Tahlequah, OK
Robin Ballenger, former CNF Board member, Tulsa, OK
Susan Chapman-Plumb, CNF Board member, Tahlequah, OK
Tonya Rozell, CNF Board member, Tahlequah, OK
Casey Ross-Petherick, former CNF Board member, Oklahoma City, OK
Jay Calhoun, former CNF Board member, Cherokee Nation Businesses, Tulsa, OK
John Gritts, former CNF Board member, Colorado
Jackson Crain, Apple Store, Woodland Hills Mall, Tulsa, OK

EXHIBIT "B"

ᏣᎳᎩ ᏧᎾᏕ
CHEROKEE NATION®

www.cherokee.org

Ken Edwards Community Center Indoor Meeting Room 1527 Fourth Street Santa Monica, CA 90401 **Contact:** **Stephanie Bragg** **(310)200-7769** **http://losangeles.cherokee.org** **Potluck Assignments:** **(Please bring a dish according to the first letter of your last name)** **A-G Main Dish** **H-R Side Dish & Bread** **S-Z Desserts**	**5:00pm – 8:00pm** **Native American United Methodist Church 800 South Lemon St. Anaheim, CA 92805** **For more information:** **Janet Cook** **(714)414-5453** **acherokee@juno.com** **Potluck Assignments:** **Please bring a dish according to the 1st letter of your last name** A-D Salads / N-P Desserts E-H Entrées / Q-S Breads I-M Side Dishes / T-Z Beverages	**12:00pm - 4:00pm** **Centro Cultural de la Raza 2004 Park Blvd. San Diego, CA** **Contact:** **Phil Powers** **(858)705-0816** info@sandiegocherokeecommunity.com Plenty of free parking across the street at Veteran Memorial **Potluck Assignments:** **(Please bring a dish according to the first letter of your last name)** **A-G Main Dish** **H-R Side Dish & Bread** **S-Z Desserts**

CHEROKEE NATION
ᏣᎳᎩ ᎠᏰᎵ
P.O. BOX 948
Tahlequah, OK 74465-0948
(918) 453-5000
www.cherokee.org

Please plan to attend the event nearest you!!

You're invited to attend a Cherokee Nation Foundation presentation featuring:

Kim Gilliland

Kimberlie is the Executive Director of the CNF. She received her Bachelor of Science Degree in Biology and Chemistry from UC Berkeley, a Bachelor of Arts Degree from the Art Institute in Graphic & Multimedia Design and is currently studying Nonprofit Finance at North Park University.

She has helped establish a $1M dollar endowment for Cherokee students at Oklahoma State University, establish the Junior Achievement Program, and soon the Cherokee College Preparatory Institute.

The Cherokee Nation Foundation is a tax-exempt 501©3 organization. Their mission is to "*provide higher educational assistance to the Cherokee people and to help revitalize the Cherokee language*". They are the first non-profit to be incorporated by the tribe.

Tsa-La-Gi LA	**Cherokees of Orange County**	**San Diego Cherokee Community**
Saturday, Feb. 11th, 2012	**Saturday, Feb. 11th, 2012**	**Sunday, February 12th, 2012**
10:00 am – 2:00 pm		

ᏣᎳᎩ ᎠᏰᎵ
CHEROKEE NATION
P.O. BOX 948
Tahlequah, OK 74465-0948

Return Service Requested

PRESORT STD
U.S. POSTAGE
PAID
TAHLEQUAH, OK
PERMIT NO. 305

EXHIBIT A-8

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	**CM 2016-54**
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

MOTION TO DISQUALIFY RALPH KEEN II AS SPECIAL PROSECUTOR

Comes now Defendant Kimberlie A. Gilliland, ("Gilliland") and moves to disqualify Ralph Keen II ("Keen") in the above style case from representing the Cherokee Nation ("Nation") because he has a conflict of interest that denies Gilliland due process of law.

On July 27, 2016, Mr. Keen, representing the Cherokee Nation Education Corporation ("CNEC"), filed a companion civil case based on the same allegations of the instant criminal case. *See* Case No. CV 2016-397. On September 6, 2016, Mr. Keen in behalf of CNEC stated to the Court in its "Plaintiff's Response and Combing Brief in Opposition to Defendant's Motion to Stay" (at page 4) that "Admittedly, eight counts in the civil petition involve the same transaction or occurrence as in the criminal information" and in the civil case he sought from Gilliland a breath taking $1,160,000 in damages.

On November 1, 2018, several years after filing the companion civil case, Keen entered his appearance in this case as a "Special Prosecutor."

I. ARGUMENT

Proposition One: Mr. Keen has a conflict of interest

A. Mr. Keen's first duty is to collect money for CNEC.

Mr. Keen may not serve two masters- CNEC and the Nation. The interests of those two masters are not the same. As Mr. Keen advised the civil court, CNEC's interest is obtaining a judgement of $1,160,000. The Oklahoma Code of Professional Responsibility ("Rules") requires Mr. Keen to zealously assert the client's position,[1] and be a zealous advocate on behalf of a client.[2] Rule 1.3. Diligence [1] requires:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

It is simple; Mr. Keen first duty is to zealously recover $1,160,000 from Gilliland for his client CNEC.

B. Mr. Keen's second duty as a Special Prosecutor is to "seek justice, not to merely convict."

The Nation's interest is or should not be financial recovery; it is the fair administration of justice. Ethical Consideration (EC) 7-13 of Canon 7 of the American Bar Association (ABA) Model Code of Professional Responsibility (1982) provides "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."

It very clear, Mr. Keen has different obligations as a prosecutor according to Rule 3.8. The comments to Rule 3.8 provide, [1] "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." As a government employee of the Nation and a prosecutor, his duty is the fair administration of justice not the collection of $1,160,000.

---

[1] As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. Title 5. OS Chapter 1 - Oklahoma Rules of Professional Conduct Preamble: A Lawyer's Responsibilities Appendix 3-A (2)

[2] Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done Title 5. OS Chapter 1 - Oklahoma Rules of Professional Conduct Preamble: A Lawyer's Responsibilities Appendix 3-A (2) (8)

In *Berger v. United States*, 295 U.S. 78, 88 (1935), the United States Supreme Court declared:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer."

By representing CNEC, Mr. Keen's first duty is to collect $1,160,000 and his simultaneously second duty is to represent the Nation to administer justice, he has a conflict of interest. Mr. Keen's conflict is vividly seen where he has the authority to invoke the Nation's power to criminally prosecute Gilliland (and make all decisions attendant to including plea offers, trial strategy, pleading) to create an advantage or leverage for this civil client.

Proposition Two: Mr. Keen's conflict of interest denies Gilliland due process of law.

Rule 1.11. Comments (3) state, "Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d)."

Mr. Keen's conflict of interest is not waivable by the Nation because it violates Gilliland's due process. In *Young v. U.S. Ex Rel. Vuitton Et Fils S. A.*, 780 F.2d 179 (1987), the U.S. Supreme Court addressed the case of where a federal court appointed the law firm representing party in a civil case to criminally prosecute for contempt the same opposing party in the same underlying civil case. The Court held that, "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." The holding of the Court applies in this case where the Nation's Attorney General appointed Mr. Keen to criminally prosecute the adverse party in a civil case that he sued for the same allegation. The synopsis in the *Young* case describes the conflict:

> Counsel for a party that is the beneficiary of a court order may not be appointed to undertake criminal contempt prosecutions for alleged violations of that order. A private attorney appointed to prosecute a criminal contempt should be as disinterested as a public prosecutor, since the attorney is appointed solely to pursue the public interest in vindication of the court's authority. In a case where a prosecutor also represents an interested party, however, the legal profession's ethical rules may require that the prosecutor take into account an interest other than the Government's. This creates an intolerable danger that the public interest will be compromised and produces at least the appearance of impropriety.[3] *See* pages 802-809.

By criminally prosecuting Gilliland at the same time seeking $1,160,000 from her for his private civil client on the same alleged offenses is a conflict of interest depriving Gilliland from due process of a disinterested prosecutor.

In *Young*, the U.S. Supreme Court was so adamant that the conflict was impermissible, it noted, "If a Justice Department attorney pursued a contempt prosecution for violation of an injunction benefiting any client of that attorney involved in the underlying civil litigation, that attorney would be open to a charge of committing a felony under 208(a)."

This Court should disqualify Mr. Keen in this case.

Submitted this ___ day of February, 2019.

_____/ss/_____
Chadwick Smith
CNBA # 08
22902 S494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the of February, 2019, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

_____/ss/_____
Chadwick Smith

[3] https://caselaw.findlaw.com/us-supreme-court/481/787.html

Diane Hammons
Special Prosecutor
Cherokee Nation
Office of Attorney General
P.O. Box 141
Tahlequah OK 74465
adianehammons@gmail.com

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

EXHIBIT A-9

In The District Court of Cherokee Nation

Cherokee Nation,
Plaintiff,

v.

Kimberlie A Gilliland,
Defendant.

CM 2016-54

Criminal Trial Notice and Scheduling Order

This order is intended to eliminate unnecessary discovery motions and to expedite the presentation of evidence and the examination of witnesses. To the extent it is in conflict with any administrative order or rule of the Court, this Order shall govern.

YOU WILL RECEIVE NO FURTHER NOTICE OF THESE DATES	
Amended Complaint due:	March 29, 2019
Arraignment *(if Amended Complaint is filed)*	**April 18, 2019 at 11:30AM**
Initial Discovery/Disclosures complete by:	July 5, 2019
Pretrial Motions (except motions in limine) due:	July 19, 2019
Responses to Pretrial Motions due:	August 5, 2019
Replies due:	August 16, 2019
Pretrial Motion(s) Hearing date:	**August 23, 2019 at 1:00PM**
Motions in Limine due:	September 20, 2019
Final Pretrial Conference/Plea Cutoff date:	**September 20, 2019 at 1:00PM**
Witness Lists, Proposed Jury Instructions and Proposed Verdict Form (submitted directly to chambers) due:	October 11, 2019
Trial Date and Time: *First Up*	**October 21, 2019[1] at 9:00AM, and each day thereafter until finished**

[1] Parties have until May 31, 2019 to file any objection to the trial date.

Attorney Conference and Disclosure

Within ten days of the date of arraignment, government and defense counsel shall meet and confer for the purpose of resolving or minimizing the issues in controversy.

Upon the request of defense counsel, government counsel shall:

A. Provide defense counsel with the information described such as in Federal Rule of Criminal Procedure 16(a)(1); and

B. Permit defense counsel to inspect and copy or photograph any exculpatory/impeachment evidence within the meaning of *Brady v Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976), and *Giglio v. United States*, 405 U.S. 150 (1972).

A list of such evidence shall be prepared and signed by all counsel. Copies of the items which have been disclosed shall be initialed or otherwise marked.

Nothing in this Order shall be construed to require the disclosure of *Jencks* Act (18 U.S.C. § 3500) material prior to the time that its disclosure is required by law. Nevertheless, the Court urges the government to disclose *Jencks* Act materials well in advance of trial. In the event that some materials are not disclosed sufficiently in advance of a government witness' testimony, the Court will allow a reasonable amount of additional time during trial for the defense to prepare before proceeding.

Disclosure Declined

If, in the judgment of government counsel, it would be detrimental to the government's interests to make any of the disclosures set forth in the paragraph above, the government shall file a motion within the ten-day period seeking relief from this Order and setting forth the specific reasons therefore.

Continuing Duty

The duty to disclose is continuing, even throughout trial.

Discovery by the Government

Nothing in these procedures is designed to preclude discovery by the government such as under the Federal Rules of Criminal Procedure, nor to alter the Defendant's obligation, if any, such as under Rule 16(b).

Pre-Trial Motions

Motions must contain a table of contents, an index of authorities, and an index of exhibits attached to the brief. Additionally, concurrence must be sought before filing a motion.

Exhibits

1. Marking of Exhibits: **All exhibits must be marked in advance of trial using consecutive numbers (for the government) and letters (for the defendant).**

2. List of Exhibits: A list of proposed exhibits shall be submitted directly to chambers by each of the parties no later than one week before the Final Pretrial Conference, each party shall make available for inspection all exhibits which that party will introduce at trial. This provision shall not extend the time for disclosure and inspection of material previously ordered herein.

3. Foundation Issues and Motions in Limine: Motions in limine and any notices of intent to contest foundation, chain-of-custody, or scientific analysis shall be filed by the deadline for motions in limine. Any notice of intent to contest foundation, chain-of-custody, or scientific analysis shall set forth a good faith basis for the objection for each item or exhibit.

   When defense counsel has inspected an exhibit which the government intends to introduce into evidence, the foundation for its receipt into evidence will be deemed established unless defense counsel files a notice with the Court at or before the Final Pretrial Conference that the foundation for admission into evidence of the exhibit will be contested.

4. Objections to Exhibits: This Order shall not affect the right of a party to object at the time of trial to the introduction of an exhibit other than on the basis of authentication and foundation.

5. Custody and Record of Admitted Exhibits: Counsel are required to maintain a record of all admitted exhibits during trial. Counsel for each party must keep custody of that party's admitted exhibits during trial. A party who objects to this provision must file a written objection prior to jury selection.

6. Publication of Exhibits During Trial: The Court encourages parties to use electronic projection to publish exhibits during trial in a manner that allows the jury, court, attorneys, and parties to view the exhibit simultaneously. Parties are responsible for providing equipment for such purpose and should contact the Court to obtain permission to bring such equipment into the courthouse. The parties have the Court's permission to use the courthouse equipment but the Court is not responsible for any malfunctions. If a party is planning on publishing through electronic means the Court suggests also having backup hard copies. If photographs and documentary exhibits are not published electronically, then the party must prepare exhibit books for the Court and each juror. Whether or not exhibits are published electronically, a separate exhibit book should be prepared and made available to a witness who is to be questioned about an exhibit.

7. Preparing Exhibits For Jury Deliberation: Counsel must confer and purge from one set of binders or files all exhibits not admitted during the course of trial. Originals of all exhibits admitted at trial should be ready to be turned over to the jury foreperson prior to closing jury instructions so that jury deliberations are not delayed.

8. Filing Exhibits: It is the responsibility of the parties to ensure that the record is complete. All trial exhibits, briefs, and proposed jury instructions are to be filed in the record at the close of trial and any omissions or incorrect additions must be brought to the Court's attention within five business days of the verdict.

9. Full Disclosure: Computer generated visual or animated evidence, together with underlying data, must be disclosed to opposing counsel at least one week before the start of trial.

10. Penalty: A party who does not abide by these provisions may be subject to sanctions, including preclusion of the introduction of exhibits at trial by the offending party.

Scientific Analysis

When a defendant has been made aware of the existence of scientific analysis of an exhibit (which analysis has been determined by an expert in the relevant field of science), the results of the scientific analysis of the exhibit and the opinion of the scientist will be admitted into evidence unless the defendant files a notice with the Court prior to the Final Pretrial Conference, indicating that the scientific analysis of the exhibit will be contested. Such notice shall state whether the expert is desired as a witness.

Witness List

By the deadline established in the scheduling order, and to enable the Court to better estimate the length of trial, each party shall submit directly to chambers a list of witnesses by name and agency (if appropriate), whom the party reasonably anticipates it will call to testify at trial, noting the approximate amount of time it anticipates will be needed for examination of each such witness. This list should NOT to be electronically filed or otherwise submitted to the Clerk's Office. All witnesses, including law enforcement personnel, are to testify in plain clothes.

Jury Instructions

The parties must meet and confer prior to trial to discuss jury instructions. By the deadline established in this Order, the parties must submit directly to chambers a single set of proposed, stipulated jury instructions.

The Court has its own standard introductory and concluding instructions. Each party is responsible for submitting all instructions related to the specific charges or defenses, and special instructions relating to evidence.

All proposed instructions are to be submitted in typewritten form (double spaced) and on computer disk compatible with Microsoft Word. Each instruction shall contain references to authority (e.g., "Devitt and Blackmar, Section 11.08"), and shall be on a separate page. In addition, each party must submit separately to chambers all additional proposed instructions (in the same form) to which any other party objects. Nevertheless, the parties must make a concerted, good faith effort to narrow the areas of dispute and to discuss each instruction with a view to reaching agreement as to an acceptable form. The Court will resolve disputes at a hearing on the record.

The jury is charged before final argument.

Jury Selection

The Court uses a "struck jury" system for jury selection. In most cases, the government is allowed three peremptory challenges and the defendant is allowed three peremptory challenges. The Court will select six regular and two alternate jurors. Alternate jurors are not told they are alternates; they are dismissed by random draw at the conclusion of the proofs.

Voir dire will be conducted by the Court and Counsel. The Court shall conduct voir dire, then Counsel for the Nation, and then Counsel for the Defendant. Counsel may submit proposed voir dire questions in writing for the Court to conduct by the deadline set forth in the scheduling order.

Note-Taking & Juror Involvement

Jurors will be allowed to take notes. The Court specifically instructs the jury in advance on this issue. Jurors who choose to take notes will be instructed that such notes are not themselves evidence, but are merely aids to the juror's memory of the evidence presented at trial. The Court will consider, on a case by case basis, whether jurors will be permitted to question witnesses, generally through submission of questions to be asked by the Court.

Multi-Defendant or Mega Trials

The Court does not have a general procedure for handling multi-defendant criminal "mega trials." For multi-defendant criminal trials the Court encourages attorneys to work out procedures for peremptory challenges among themselves. In such trials, if counsel cannot agree among themselves, the Court will allocate peremptory challenges depending on the circumstances of the case.

Continuances

Continuances of trial dates or continuances during trial will not be granted because of unavailability of witnesses. Please notify the Court if Court intervention is necessary to secure witness attendance. Otherwise, witnesses will be expected to be available when called.

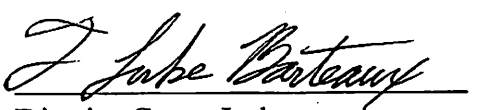
Bench Trials

Proposed findings of fact and conclusion of law must be submitted to chambers one week before the commencement of trial.

Final Pre-Trial Conference

At the Final Pre-Trial Conference, counsel must be prepared to discuss all matters that will promote a fair and expeditious trial, including but not limited to: (1) a potential summary of charges to be read to the jury; (2) anticipated evidentiary issues; (3) length of trial; (4) stipulations that may obviate the need for foundation witnesses; (5) stipulations that may obviate the need to prove facts that are uncontested; (6) stipulations that may obviate the need for certain exhibits; (7) peremptory challenges; and (8) special arrangements for the presentation of witnesses and other evidence (e.g., need for interpreters, A/V needs, etc.). The defendant(s) must be present at the conference.

It is so ordered.



District Court Judge

Certificate of Mailing

I, the undersigned, do hereby certify that on the date file stamped above, that I emailed, faxed, hand delivered, and or mailed a true and correct file stamped copy of the foregoing document to the following person(s):

Chadwick Smith, chad@chadsmith.com

Diane Hammons, adianehammons@gmail.com

Ralph Keen II, keenlawok@gmail.com

Todd Hembree, todd-hembree@cherokee.org

Chrissi Nimmo, chrissi-nimmo@cherokee.org

John Young, john-young@cherokee.org

Courtney Jordan, courtney-jordan@cherokee.org

District Court Clerk

EXHIBIT A-10

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION, Plaintiff,	)	
v.	)	CRM-2016-54
KIMBERLIE A. GILLILAND, D.O.B. 08/13/1969, Defendant.	)	

AMENDED
COMPLAINT AND INFORMATION

IN THE NAME AND BY THE AUTHORITY OF THE CHEROKEE NATION, comes now, A. Diane Hammons, specially appointed prosecutor acting by the power of the Attorney General for the Cherokee Nation, Todd Hembree, and upon her oath gives this Court reason to know and be informed that **KIMBERLIE A. GILLILAND** did, within the territorial boundaries of the Cherokee Nation including within Indian Country as defined by 18 U.S.C. § 1151, and the laws of the Cherokee Nation , commit the hereinafter described crimes. At all times pertinent hereto, Defendant Kimberlie A. Gilliland was serving as Executive Director of the Cherokee Nation Education Corporation a/k/a Cherokee Nation Foundation ("CNF"), a non-profit corporation organized under the laws of the Cherokee Nation, whose officers are appointed by the Principal Chief and approved by the Tribal Council, and whose principal place of business is in Tahlequah, Oklahoma, and which, at all times pertinent hereto received partial funding from the Cherokee Nation government and Cherokee Nation Businesses, both entities being located on Indian Country within the boundaries of the Cherokee Nation.

COUNT I: Embezzlement by Officer of Corporation; 21 CNCA § 1452

From a period from January 24, 2012, through February 14, 2012, Kimberlie A. Gilliland, did willfully and knowingly convert, misappropriate, and embezzle funds of CNF for her own and her family's use, to wit: By using CNF funds to pay for a family trip to California for herself, her

husband, Andrew Sikora, and their two minor children, S.S. and S.S; said trip taking place from February 9, 2012, through February 13, 2012. Said conversion included the following transactions.

- On approximately January 24, 2012, the Defendant purchased American Airlines tickets for herself, her husband, Andrew Sikora, and her two minor children, S.S. and S.S. from Tulsa, Oklahoma, to Los Angeles, California, in the approximate amount of $329.20 per ticket plus $56.00 in airline fees, for a travel date of February 9, 2012, all paid out of CNEC funds with the use of a CNEC business credit card, and;
- From February 9, through February 13, 2012, the Defendant paid $70.54 to Fine Airport Parking out of CNEC funds with the use of a CNEC business credit card, and;
- From February 9, through February 13, 2012, the Defendant paid $157.95 to Enterprise Rent a Car at the Los Angeles International Airport, Los Angeles out of CNEC funds with the use of a CNEC business credit card, and;
- From February 9, through February 10, 2012, the Defendant paid $414.05 to Marriott Hotels and Resorts, Anaheim, California, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 11, 2012, the Defendant paid $47.93 for gasoline purchased at OSD Enterprises Inc, in Anaheim, California, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 11,2012, the Defendant paid $25.86 to a restaurant, Bangkok Bay, in Solana Beach, California, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 11,2012, the Defendant paid $46.94 to Oggis Pizza & Brewing Co. in Garden Gove, California, for four (4) guests, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 12, 2012, the Defendant paid $21.30 to Starbucks, in Carlsbad, California, out of CNEC funds with the use of a CNEC business credit card, and;
- From February 12 through February 13, 2012, the Defendant paid $314.53 to the Renaissance Montura, Los Angeles, CA, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 12, 2012, the Defendant paid $1,408.40 to Continental Airlines for tickets and ticket fees for travel to begin on 2/13/12 for herself, her husband Andrew Sikora, and their minor children, S.S. and S.S., out of CNEC funds with the use of a CNEC business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used CNF funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT II: Embezzlement by Officer of Corporation; 21 CNCA § 1452

During a period from May 17, 2012, through May 19, 2012, Kimberlie A. Gilliland, did willfully and knowingly convert and embezzle funds of CNEC for her own use, to wit: By paying for "American Girl" hotel rooms (containing American Girl doll beds, pink balloons, and cookies) for the benefit of her daughter, and an employee's daughter, in the total amount of $291.54 to the Residence Inn Marriott, Addison, Texas, out of CNEC funds with the use of a CNEC business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used CNF funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT III: Embezzlement by Officer of Corporation; 21 CNCA § 1452

During a period from July 16, 2012, through August 13, 2012, Kimberlie A. Gilliland, did willfully and knowingly convert and embezzle funds of CNF for her own and her family's use, to wit: By using CNF funds to pay for a trip to California for herself and her husband, Andrew Sikora; said trip taking place from August 9, 2012, through August 13, 2012. Said conversion included the following transactions:

- On approximately July 16, 2012, the Defendant purchased Southwest Airlines tickets for herself and her husband, Andrew Sikora, to Burbank, California, in the approximate amount of $257.60 per ticket for a travel date of August 9, 2012, all paid out of CNF funds with the use of a CNF business credit card, and;
- From August 9, 2012 –August 13, 2012 the Defendant paid $194.45 to Fine Airport Parking in Tulsa, Oklahoma (including a $125 car wash charge) all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 9, 2012, the Defendant paid $51.84 to the Jose Roux Taco Bar at the Sky Harbor International Airport, Phoenix, Arizona, all paid out of CNF funds with the use of a CNF business credit card, and;
- From August 9, 2012-August 10, 2012 the Defendant paid $398.82 to the Queen Mary Ship, in Long Beach, California, for two nights lodging in one of their rooms known for "paranormalistic activity, " all paid out of CNF funds with the use of a CNF business credit card, and;
- From August 9, 2012-August 13, 2012 the Defendant paid $347.33 to Hertz Rental Car in Oakland, California, all paid out of CNF funds with the use of a CNF business credit card, and;

- On approximately August 10, 2012, the Defendant purchased on the Queen Mary Ship in Long Beach, California, a toothbrush and deodorant for $6.74, two bottles of water for $4.78, and $38.80 paid to the Queen Mary Promenade Café for two guest breakfasts, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant purchased on the Queen Mary Ship in Long Beach, California, a "Bellhop Bear" for $21.99, a Stack Logo Keyring for $5.99, and a video entitled "Ghost Encounters" for $29.99, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $24.82 on the Queen Mary Ship in Long Beach, California, for food and beverage for two persons all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $56.59 to Shell Oil in Long Beach, California, paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $12.11 to Denny's in Kettleman City, California, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $92.40 to the Best Western Inn and Suites, Kettleman, California, paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 12, 2012, the Defendant paid $49.40 to Exxonmobil, in Kettleman, California and $10.45 to "Yellow Card Services", paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 12, 2012, the Defendant paid $133.02 to the Courtyard by Marriott, in Oakland, California, paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 13, 2012, the Defendant paid $5.35 to La Casita, in the Denver, Colorado, airport, paid out of CNF funds with the use of a CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT IV: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about July 16, 2012, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own and her family's use, to wit: purchasing a Southwest

Airlines ticket for her husband, Andrew Sikora, in the amount of $367.60 for an August 18, 2012 trip from Portland, Oregon to Tulsa, Oklahoma, paid out of CNF funds with the use of a CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT V: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about August 17, 2012, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own use, to wit: purchasing a "Buckle Bag" for $74.99 and two towels for $46.00 ($23.00 each) from the Pendleton Woolen Mills Employee Sales Room in Portland, Oregon, paid out of CNF funds with the use of her CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit, and not in the due and lawful execution of her trust.

COUNT VI: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about November 15, 2012, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own use, to wit: paying for a parking ticket from the City of Tulsa that was issued to her 2007 Toyota Camry, tag number ****C5, paid out of CNF funds with a CNF check, signed by defendant, for the amount of $40.00 ($30.00 fine and $10.00 late fee);

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit, and not in the due and lawful execution of her trust.

COUNT VII: Embezzlement by Officer of Corporation; 21 CNCA § 1452

From a period of time from January, 2011, through April, 2013, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own use, to wit: paying for courses in an online master's degree program for herself from North Park University, in Chicago, Illinois, in the total amount of $21,100.36 paid out of CNF funds with CNF checks signed by the defendant, and with the use of a CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit, and not in the due and lawful execution of her trust.

COUNT VIII: Embezzlement by Officer of Corporation; 21 CNCA § 1452

In June of 2013, defendant unilaterally removed a large Hewlett-Packard Designjet Z3200PS 44" Photo Printer and software disks from the Foundation corporate offices to an unknown location. Said equipment was fully functional and valued in excess of $5,000.00.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said property for her personal benefit, and not in the due and lawful execution of her trust.

COUNT IX: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about June 10, and July 1, 2013, defendant used Foundation funds to purchase and take possession of, over $10,000.00 of computer equipment from the Apple Store in Tulsa, Oklahoma.

A substantial portion of said computer equipment purchased with Foundation funds never appeared for use in Foundation's corporate offices, and the whereabouts of the equipment is unknown. The missing items include an AppleTV item, Serial No. F02KGAD4FF54, purchased for $99.00; an Apple laptop computer, Serial No. C02KP36SFFT0, purchased for $2199.00; a MacBook Pro service agreement, No. 970000020608672, purchased for $349.00; two Lightning AV digital adaptors, purchased for $49.00 each; an Apple Thunderbolt to Firewire adaptor, purchased for $29.00; a Thunderbolt Gigabit Ethernet adaptor purchased for $29.00; a light gray iPad Smart Case, purchased for $49.00; and, a red iPad Smart Case, also purchased for $49.00.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said property for her personal benefit, and not in the due and lawful execution of her trust.

COUNT X: Embezzlement by Officer of Corporation; 21 CNCA § 1452

From January 2011 through July 2013, defendant misappropriated Foundation funds by giving herself pay raises that had not been authorized by the CNF Board.

- The, March 2010 contract with the defendant authorized her compensation as

an independent contractor in an amount not to exceed $72,000.00, or $6,000.00 per month.

- In 2011, Defendant unilaterally changed her position in payroll to that of a payroll employee, with the Foundation paying all taxes and benefits, while also giving herself a substantial pay raise, amounting to approximately $10,900, for the calendar year, 2011.
- Defendant caused herself to be paid approximately $89,161.64 for the calendar year 2012, which was $17,161.64 over the approved contract executed by the CNF Board.
- On January 28, 2013, Foundation and defendant entered into a Severance Agreement which provided that defendant would receive $74,500.00, less taxes and other withholdings. This amount was intended to reflect one-year's salary for defendant at that time. The agreement further allowed defendant to remain on Foundation's payroll at her *"base salary"* until her final day of employment on July 12, 2013, at 5:00 p.m. Per the Severance Agreement, defendant received $74,500.00 less social security, Medicare, federal, and state withholdings on January 31, 2013.
- On or about January 31, 2013, Defendant wrongfully increased her monthly rate from $7,908.18 to $8,072.26.
- From February 2013 to June 2013 Defendant received $40,361.30; said amount being $10,361.30 over her approved 2010 contract rate. As a result of defendant's unauthorized pay increase, she wrongfully paid herself $10,361.30 in excess of her approved 2010 contact rate.
- Defendant's last day per the Severance Agreement was Friday, July 12, 2013, at 5:00 p.m. Due to the pay cycle ending on July 10 defendant should have received two days additional pay on her last paycheck, which under the approved 2010 contract rate, should have been $600.00. However, defendant wrongfully paid herself $8,072.26, a full month's salary at her unauthorized rate for July; said amount being $4,472.26 over her approved 2010 contract rate. As a result of defendant's unauthorized pay increase, she wrongfully paid herself $4,472.26 in excess of her approved 2010 contact rate.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said property for her personal benefit, and not in the due and lawful execution of her trust.

COUNT XI: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about June 12, 2013,, defendant misappropriated Foundation funds by paying $988.00 of Foundation funds to Cherokee Media, a business in which she was involved with her husband, Andrew Sikora.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an

office of trust in CNF, used said property for her personal benefit, and not in the due and lawful execution of her trust.

COUNT XII: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about, defendant misappropriated Foundation funds by giving unauthorized scholarships to three different students who did not meet the criteria for the scholarships, and in one instance, did not even apply for a scholarship.

- Defendant unilaterally awarded a total of $4,500.00 in Foundation Gammon Scholarship funds to "Student A," for academic years 2011-2013, with the final $1,500.00 payment being made on January 28, 2013, the same day defendant executed her severance agreement with the Foundation,
- Student A never made an application for the scholarship, did not go through the competitive scholarship selection process, and was not qualified under the restrictive terms of the Gammon scholarship for an award of those funds.
- Defendant unilaterally awarded a total of $10,000.00 in Foundation Cherokee Nation Businesses scholarship funds to "Student B" for academic years 2011-2013.
- Student B" neither made an application, nor went through the competitive scholarship selection process to be awarded any scholarship funds for the 2011-2012 academic year, yet was unilaterally awarded $5,000.00 by defendant; and"Student B" did not satisfy the academic requirements for the Cherokee Nation Business scholarship for the 2012-2013 academic year, yet was unilaterally awarded $5,000.00 by defendant.
- Defendant unilaterally awarded "Student C" a total of $5,606.73 in Foundation Gammon Scholarship funds for the academic years 2011-2013.
- "Student C" did not submit a timely scholarship application, nor did she go through the competitive scholarship selection process to be awarded said funds and "Student C" did not meet the restrictive terms of the Gammon scholarship for an award of those funds.
- On or about January 3, 2011, defendant unilaterally awarded $1,500.00 in Foundation Gammon Scholarship funds to "Student D," and further extended to her a zero-interest student loan in the amount of $2,050.81.
- "Student D" neither made an application, nor went through the competitive scholarship selection process to be awarded or loaned said funds.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said property for her personal benefit, and not in the due and lawful execution of her trust.

COUNT XIII: Embezzlement by Officer of Corporation; 21 CNCA § 1452

During a period from January 24, 2012, through January 29, 2012, defendant wrongfully expended Foundation funds for her own personal use and benefit, and for the use and benefit of her husband, Andrew Sikora, and for use and benefit of her two minor children, S.S. and S.S., by purchasing meals, hotel lodging, toll road usage, fuel, utilizing a Foundation vehicle and other travel expenses for a family trip to Golden, Colorado occurring on January 24 - 29, 2012.

Said conversion included the following transactions:

- 1/24/12: $28.69 gasoline charged to CNEC Quiktrip (4510 south Peoria, Tulsa, Ok at 6:05 am) gas card ending in 2952.
- 1/24/12: $.95 and $1.90, 2007 Honda CRV Pike Pass charges for Cimarron Turnpike at 6:45 a.m. and 7:13 a.m, respectiely.
- 1/24/12: $23.33 gasoline charged to CNEC Quiktrip (Wichita, KS) gas card ending in 2952.
- 1/24/12: $40.79 gasoline charged to CNEC visa credit card ending in 8611 (assigned to Kimberlie Gilliland) in Colby, KS
- 1/24/12: $25.02 gasoline charged to CNEC Phillips66 Conoco credit card #634 in Limon, Colorado
- 1/24/12: $153.73 Towneplace Suites, Golden, Colorado, arrival-1/24/12 charged to CNEC credit card 8611
- 1/26/12: $41.05 gasoline charged to CNEC Phillips 66 Conoco credit card in Denver, Colorado
- 1/26/12: $117.30 Table Mountain Inn, dining room charged to CNEC visa credit card ending in 8611
- 1/28/12: $32.72 gasoline charged to CNEC Phillips66 Conoco gas card in Denver, Colorado
- 1/29/12: $712.30 departed Residence Inn Marriott –four (4) guests, one room. (handwritten notation on receipt says "fundraiser")
- 1/29/12: $29.97 gasoline charged to CNEC Phillips66 Conoco gas card in Colby, KS
- 1/29/12: $40.57 gasoline charged to CNEC Phillips66 Conoco credit card in Wellington, KS
- 1/29/12: $37.93 Golden Corral charged to CNEC credit card 8611 for party of four (4). The receipt lists kids 4-6 $3.99; child buffet 10-12 yrs $5.99; two (2) Sunday buffets for $20.98 and (2) soft drinks for $3.96. Handwritten notation on receipt states "fundraiser".
- 1/29/12: $1.90 and $.95 CNEC Pike Pass charges for CNEC 2007 Honda CRV.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used CNF funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT XIV: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about April 26, 2013 through April 28, 2013, defendant misappropriated Foundation funds by paying for the out-of-state travel funds of a sitting tribal Council member, Cara Cowan Watts, during a purported Foundation business trip to Dallas, Texas, and by taking Defendant's family on said trip and paying for the lodging and meals of her family.

Said conversion included the following transactions:

- $839.02 spent on lodging for Defendant, Defendant's family, a CNF employee and Councilor Watts on April 26 and April 27, 2013 at the Residence Inn, Dallas, Texas, including a $100 pet charge to Defendant's room.
- $292.76-Volos Taverna Restaurant, Dallas, Texas for meals for Defendant, Defendant's family, the CNF staff member, their family members and Councilor Cara Cowan Watts. The purchase included five carafes of mojitos (alcoholic beverage).
- $461.72-Mi Piaci Ristorane Italiano, Dallas, Texas, on or about April 27, 2013 for food and drink (including $76.00 for wine), for Defendant, Defendant's family, and others.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used CNF funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT XV: Embezzlement by Officer of Corporation; 21 CNCA § 1452

During a period from February 28, 2013, through June 3, 2013, defendant misappropriated Foundation funds by paying for the planned out-of-state travel for both defendant and a sitting tribal Council member, Cara Cowan Watts, by purchasing unauthorized airlines tickets to Phoenix, Arizona.

Said conversion included the following transactions:

- Airline tickets for defendant and Cara Cowan Watts purchased from Southwest Airlines on or about February 28, 2013, in the amount of $343.80 each, plus an additional $25.00 each for upgrades, for a total of $737.60.
- Airline change fees for approximately $140.00 on or about June 3, 2013, to

change the above Southwest Airlines tickets for dates in October, 2013

Said airline tickets were originally purchased for travel on June 8, 2013, but were changed at defendant's direction on May 31, 2013, for travel to occur on October 25, 2103, three months after defendant's final date of employment under the Severance Agreement, resulting in additional charges being assessed, and that said trip never occurred.

ALL OF SAID CRIMES being subject to punishment as defined at 21 CNCA § 10, to wit: a term of imprisonment for not more than one (1) year or a fine of five thousand ($5,000.00) or both and any civil remedies as provided by 21 CNCA § 1760(B) for each separate crime.

FURTHER, that the Defendant is an "Indian" as defined in 25 U.S.C. § 450b(d), being a Citizen of the Cherokee Nation, and that the defendant did, within and without the Cherokee Nation including within Indian Country, commit the above crimes, contrary to the Cherokee Nation statutes cited above, and against the peace and dignity of the Cherokee Nation.

A. Diane Hammons
Special Prosecutor
Cherokee Nation Office of the Attorney General

CHEROKEE NATION) **ss.**

The undersigned, of lawful age, and being first duly sworn states that she has read the above and foregoing Amended Complaint, and that the statements contained therein are true and correct to the best of his information and belief.

Special Prosecutor

Subscribed and sworn to before me this 7th day of March, 2019.

NOTARY PUBLIC

My Commission Expires: 6/27/19

Witnesses:

(The numerous witnesses are listed on a separate notice provided to defense counsel).

EXHIBIT A-11

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	**CM 2016-54**
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

SUPPLEMENT TO MOTION TO DISQUALIFY
RALPH KEEN II AS SPECIAL PROSECUTOR

Comes now Defendant Kimberlie A. Gilliland, ("Gilliland") and submits this supplement to her Motion to Disqualify Ralph Keen II ("Keen") from representing the Cherokee Nation ("Nation") in the above style case because he is disqualified by law.

Mr. Keen filed for and was certified as a candidate for Council District 8 in the 2019 Cherokee Nation elections.[1]

According to Attorney General Opinion 2017-CNAG-01 (Jan. 10, 2017), contracted attorneys of the Nation are employees of the Nation.[2] Mr. Keen as a Special Prosecutor employed by the Attorney General Office is an employee of the Nation.

Mr. Keen was required by the Cherokee Nation Election code, 26 CNCA § 31, to resign his employment from the Cherokee Nation *prior* to filing for office.[3] The last day to withdraw

[1] https://cherokeephoenix.org/Article/Index/62939
[2] Attorney General Opinion 2017-CNAG-01 (Jan. 10, 2017), footnote 1 states, "The Chief's independent legal counsel is an independent contractor and not typically considered an "employee" for legal purposes; however, this Constitutional provision includes "any person employed in any capacity" by the Nation or its entities. For the purpose of the Constitutional analysis regarding conflict of interest, an independent contractor of the Nation is considered an employee."
[3] 26 CNCA § 31 B. Prerequisites for Filing. In addition to the general eligibility qualifications set forth in subsection A herein, a candidate must not be in violation of any of the following at the time of filing:
1. The candidate shall not be an employee of the Cherokee Nation, including any corporation, agency or other entity which is at least fifty-one percent owned by the Cherokee Nation, as of the date of filing or at any time

from candidacy was ten (10) days after the deadline for filing for office (which was on or about February 4, 2019). Mr. Keen has not withdrawn his candidacy and it is now too late.[4] By filing for office and not timely withdrawing, Mr. Keen constructively resigned from Special Prosecutor, is prohibited by law from being employed by the Nation, and may not represent the Nation in this case as Special Prosecutor.

Therefore, the Court should disqualify Mr. Keen as Special Prosecutor because he is prohibited from employment with the Cherokee Nation after he filed for Council office pursuant to 26 CNCA § 31.

Submitted this 25nd day of March, 2019.

/ss/
Chadwick Smith
CNBA # 08
22902 S494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 25nd day of March, 2019, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed
below:

/ss/
Chadwick Smith

Diane Hammons
Special Prosecutor
Cherokee Nation
Office of Attorney General
P.O. Box 141

thereafter if elected provided, that an incumbent serving in an elective office shall not be deemed to be an employee for purposes of this Section.

[4] 26 CNCA § 36. Filing of Candidacy; Withdrawal of Candidacy. D. Withdrawal of Candidacy. Any candidate who wishes to withdraw from the election shall have the opportunity to do so by providing a formal written notice to the Election Commission ten (10) working days after the deadline for filing.

Tahlequah OK 74465
adianehammons@gmail.com

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

EXHIBIT A-12

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	CM 2016-54
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

MOTION TO STRIKE AMENDED COMPLAINT ON GROUNDS THE STATUTE OF LIMITATIONS EXPIRED FOR ADDITIONAL COUNTS CHARGED

Comes now Defendant Kimberlie A. Gilliland, ("Gilliland") and moves to dismiss the Amended Complaint with five new counts or charges (Count X through Count XV) filed on March 20, 2019 by the Cherokee Nation ("Nation"). Because the statute of limitations expired before it filed its Amended Complaint in this case, this Court has no subject matter jurisdiction.

In all counts of the Complaint, the Nation alleges that Gilliland defrauded the Cherokee Nation Education Foundation ("CNEC") pursuant to 21 CNCA 1452.

For the offense of criminal embezzlement (21 CNCA 1452), the Nation's statute of limitation depends on whether the subject assets or property belong to either the Cherokee Nation and its subdivisions, *or to others who are not the Nation or instrumentalities*. According to 22 CNCA § 152 A, the Nation must commence its prosecution within seven (7) years if at issue are "the assets or property of the Cherokee Nation or other subdivision thereof." Otherwise, the last line of 22 CNCA § 152 A applies, i.e. "or the crime of embezzlement, pursuant to 21 CNCA §§ 1451 through 1462, shall be commenced within five (5) years after the discovery of the crime."[1] Therefore, the determination of whether the statute of limitations for

[1] 22 CNCA § 152. Limitations in general

the additional Counts of the proposed Amended Complaint expires in seven (7) or five (5) years turns on whether CNEC is a subdivision of the Cherokee Nation.

The Amended Complaint alleges offense dates as follows: Count X (July 12, 2013), Count XI (June 12, 2013), Count XII (January 28, 2013), Count XIII (January 29, 2012), Count XIV (April 28, 2013), and Count XV (June 3, 2013). The new offenses charged in the Amended Complaint are all separate offenses from those charged in the Complaint and Information filed on July 28, 2016 and *occurred longer than five years ago from filing date of the Amended Complaint.* In other words, the five (5) year statute of limitations for the Amended Complaint allegations expired before July 12, 2018. The five (5) year statute of limitations applies in this case because CNEC is not a subdivision of the Nation.

The Nation's highest court, the Judicial Appeal Tribunal ("JAT") in *In Re: Legislative Acts 2-96, 11-96 and 17-96-* JAT 02-09 (2005) answered the question of whether or not CNEC was "an independent corporation separate from the Cherokee Nation" or was a "defacto an instrumentality of the Cherokee Nation." *See Opinion* at page 1. The pivotal issue in the case was whether the "Cherokee Nation Non-Profit Corporations Act" and its amendments ("Act") were constitutional because it provided that the funds raised by CNEC were not funds of the Nation and were not subject to the restriction of the Cherokee Nation Constitution Article X, Section 7 prohibiting "any donation by gift or otherwise, to any individual firm, company, corporation or association without the approval of the Tribal Council." *Opinion* at page 2.

A. Prosecutions for the crimes of bribery, embezzlement of public money, bonds, securities, assets or property of the Cherokee Nation or other subdivision thereof, or of any misappropriation of public money, bonds, securities, assets or property of the Cherokee Nation or other subdivision thereof, falsification of public records of the Cherokee Nation or other subdivision thereof, and conspiracy to defraud the Cherokee Nation or other subdivision thereof in any manner or for any purpose shall be commenced within seven (7) years after the discovery of the crime;. . .
or the crime of embezzlement, pursuant to 21 CNCA §§ 1451 through 1462, shall be commenced within five (5) years after the discovery of the crime.

The JAT held the "funds raised (by CNEC) are the funds of the Corporation (CNEC) and not subject to the Council's approval for receipt or disbursement." The JAT further held it was a conflict of interest for the Principal Chief and Councilmembers to sit on CNEC's board. In other words, the JAT ruled that CNEC was "an independent corporation separate from the Cherokee Nation" and was not a *defacto* "instrumentality of the Nation." Because CNEC is an independent corporation separate from the Nation, it is not a subdivision of the Nation.

So that there is *no question* about the JAT's decision that CNEC was an independent and separate entity, the Petitioner Councilmembers[2] framed their appeal as:

> 1. The first issue in this case to be decided is whether the Cherokee Nation has any control of the Cherokee Nation Education Corporation (CNEC) or whether the CNEC is an entity separate from the Cherokee Nation that may operate independent and without any control from the Cherokee Nation. *In Re: Legislative Acts 2-96, Petitioners' Trial Brief,* (April 8, 2004), paragraph 1, page 1.

The Respondent Nation[3] replied:

> 9. The record requires the conclusion that the Council authorized the operation of the administration of CNEC as an independent entity. *Respondent's Trial Brief* (May 23, 2003), paragraph 9, page 8.

Squarely before the JAT was the question of whether or not the CNEC was independent and separate from the Nation and the JAT ruled that it was.

Because CNEC is independent and separate from the Nation, it is not a subdivision of the Nation. Therefore, the applicable statute of limitation pursuant to 22 CNCA § 152 A in this case is five (5) years of the alleged offense.

---

[2] Petitioners were seven Cherokee Nation Councilmembers represented by Todd Hembree as attorney for the Council and who is now the Nation's Attorney General who appointed A. Diane Hammons and Ralph Keen as Special Prosecutors for his office in this case.

[3] The Nation was represented by Julian K. Fite, Cherokee Nation General Counsel, and A. Diane Hammons, Director Cherokee Nation Justice Department who submitted the Trial Brief.

On March 20, 2019, the Nation through its attorney Defendant's attorney filed an Amended Complaint adding five counts of "Embezzlement by Officer of Corporation, 21 CNCA 1452 to the original Complaint and Information. Each of those additional counts alleged an offense date before July 28, 2013.

The statute of limitations expired for new alleged offenses (Count X-XV) in the Nation's Amended Complaint and Information before it filed it. Because the prosecution was not commenced within the time required by 22 CNCA § 152 A, the Court has no subject matter jurisdiction and must strike its Amended Complaint.

Submitted this 3rd day of April, 2019.

_____/ss/_____
Chadwick Smith
CNBA # 08
22902 S494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 3rd of April, 2019, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

_____/ss/_____
Chadwick Smith

Diane Hammons
Special Prosecutor
Cherokee Nation
Office of Attorney General
P.O. Box 141
Tahlequah OK 74465
adianehammons@gmail.com

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

EXHIBIT A-13

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CM 2016-54**
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

SECOND DEMURRER TO COMPLAINT AND AMENDED COMPLAINT ON GROUNDS NO CRIME IS ALLEGED AND MOTION TO DISMISS BECAUSE THE EMBEZZLEMENT STATUTE DENIES DEFENDANT DUE PROCESS

Comes now Defendant Kimberlie A. Gilliland, ("Gilliland") and demurs to the criminal Complaint filed herein on July 28, 2016 and the Amended Complaint filed on March 20, 2019; and moves the Court to dismiss the above styled and numbered case.

On March 19, 2019, this Court deferred ruling on Defendant's Demurrer to Complaint and Motion to Dismiss until after the Nation had the opportunity to file an Amended Complaint. The Nation's Amended Complaint filed March 20, 2019 is identical to the Complaint with the exception of the addition of additional Counts X-XV. Therefore, the Nation has had the benefit of the arguments of Gilliland's demur filed on February 14, 2019 but has continued to elect charging Defendant pursuant to 21 CNCA §1452 and *not to* provide any specific allegations regarding Gilliland's intent and appropriation required by due process. It is abundantly clear the Nation had notice that it failed to provide specific facts in its Complaint necessary to afford Gilliland due process but wholly failed to do so with the filing of its Amended Complaint.

Gilliland committed no crime as alleged by the Nation because the Nation's criminal law provides that embezzlement over $50 value *is not* punishable by law. The Complaint is defective because it makes no factual allegations to prove Gilliland's fraudulent intent and appropriation.

Without any uncertainty or ambiguity, the Complaint fails to apprise Gilliland of the punishment she faces if convicted in violation of the U.S. Constitution Fifth and Sixth Amendments and the Cherokee Nation Constitution Article III, Section 3. For these reasons, the Court should dismiss this case.

The Nation charged Gilliland with criminal embezzlement pursuant to 21 CNCA §1452.[1] The specific punishment for embezzlement is found at 21 CNCA § 1462.[2] Although 21 CNCA §1452 deems embezzlement a crime and provides some elements, 21 CNCA § 1462 provides for additional elements and the criminal punishment for embezzlement.[3] The Nation alleges the Complaint's offenses are punishable as prescribed by 21 CNCA §10; however, special statutory punishment provisions supersede general punishment provisions, which in this case is 21 CNCA § 1462.[4]

---

[1] 21 CNCA § 1452. Embezzlement by officer, etc., of corporation, etc.
If any person, being an officer, director, trustee, clerk, servant or agent of any association, society or corporation, public or private, fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose he is guilty of embezzlement.

[2] 21 CNCA § 1462. Punishment for embezzlement
Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled, except that every person convicted of embezzlement of any item valued at less than Fifty Dollars ($50.00) shall be punished for a crime. And where the property embezzled is an evidence of debt or right in action, the sum due upon it, or secured to be paid by it, shall be taken as its value.

[3] Cherokee Nation Codification Act of 2016 LA-02-16 2/18/2016
Section 5. Substantive Provision of Law: Repeals: Additions: and Amendments. All laws included in the Cherokee Nation Code Annotated (2014), and laws appended thereto, are hereby affirmed as the positive law of the Cherokee Nation. All laws and parts of laws not included in the Cherokee Nation Code Annotated (2014) publication are repealed. The repeal shall not revive any law previously repealed, nor shall it affect any right already existing or accrued or any action or proceeding already taken, unless otherwise provided in the Cherokee Nation Code Annotated (2014).

[4] 21 CNCA § 11. Specific statutes in other titles as governing—Acts punishable in different ways—Acts not otherwise punishable by imprisonment
A. If there be in any other titles of the laws of this Nation a provision making any specific act or omission criminal and providing the punishment therefor, and there be in this penal code any provision or section making the same act or omission a criminal offense or prescribing the punishment therefor, that offense and the punishment thereof, shall be governed by the special provisions made in relation thereto, and not by the provisions of this penal code.

It is fundamental only those actions which are precisely described and enacted as crime are punishable.[5] Any question as to what the statute identifies as a crime and punishment must be construed against the Nation.

I. ARGUMENT

Proposition One: The Nation's allegations of embezzlement over $50 per offense are not punishable.

21 CNCA § 1462 provides only those acts of embezzlement where the property or asset *is less* than $50 is a crime. 21 CNCA § 1462 provides:

> Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled, *except that every person convicted of embezzlement of any item valued at less than Fifty Dollars ($50.00) shall be punished for a crime*. (Emphasis added.)

The "exception" provision of 21 CNCA § 1462 is the operative and controlling language of the section, therefore its meaning is that only those embezzlement offenses where the property is less than $50 is punishable.

Why? First, the Nation has no crime of "feloniously stealing property."

Second, even if the Nation had enacted a crime of "feloniously stealing property," under 21 CNCA § 1462 punishment would be administered in the same "manner," contemplated in first part of 21 CNCA § 1462. This means the process of administering punishment not the substantive term of punishment.

Third, 21 CNCA § 1462 provides an exception that controls the entire first section, i.e. *"every person convicted of embezzlement of any item valued at less than Fifty Dollars ($50.00) shall be punished for a crime."* 21 CNCA § 1462 provides for no other "prescribed or

[5] 21 CNCA § 2. Criminal acts are only those prescribed—"This code" defined No act or omission shall be deemed criminal or punishable except as prescribed or authorized by this code.

authorized" crimes or punishment. *See* 21 CNCA § 2. 21 CNCA § 1462 clearly provides that an allegation of embezzlement is only punishable as a crime if the property or asset is *valued under $50.00*; there is no crime specified in the Nation's criminal code for embezzlement of property valued over $50. In other words, if the property or asset is valued over $50.00, the allegation of embezzlement is not punishable under the Nation's laws.

The Nation has the sovereign right to define the terms of a crime and in this instance, it is consistent with a policy of judicial economy for the Nation to prosecute minor offenses of embezzlement in the Nation's court and defer prosecutor of allegations of embezzlement of greater value of property or assets to the State of Oklahoma pursuant to 21 OK Stat § 21-1451 (2014) or the federal government pursuant to 18 U.S. Code § 1163. The victim alleged in this case is a non-Indian and not an instrumentality of the Nation. It should be noted the Nation alleges for each Count of the Complaint that property or asset value exceeds $50 for that Count.

Therefore, the Complaint herein fails to state a punishable crime against Gilliland and the case should be dismissed.

Proposition Two: The Complaint against Gilliland is defective and the Court should dismiss the criminal prosecution pursuant to Fed. Rules Crim. Pro. 12 (b) (3) (B) (iii) and (v).

The Federal Rules of Criminal Procedure provides that a defect in the Complaint may be raised by Motion.[6]

---

[6] Rule 12. Pleadings and Pretrial Motions
(a) PLEADINGS. The pleadings in a criminal proceeding are the indictment. the information. and the (b) PRETRIAL MOTIONS.

(3) *Motions That Must Be Made Before Trial.* The following defenses. objections. and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits :

(B) a defect in the indictment or information. including:

(iii) lack of specificity:

. . .

(v) failure to state an offense

1. The Complaint does not specify the facts for each element for the crime of embezzlement.

The first defect in the Complaint is that it does not specify for each Count the elements of how Gilliland: 1) fraudulently, 2) did not use CNEC property in the due and lawful execution of her trust, and 3) appropriated the property for her use or purpose. In many of the Counts, the Nation merely alleges Gilliland went on a trip paid for by CNEC. There is no allegation that CNEC officials disapproved of the travel, that she hid the expenses from CNEC or that the trip was solely for her benefit and not the benefit of CNEC. It is common for organizations' staff to go on business trips paid by the organization and often take family or associates with them. Those actions only become criminal when the facts that show that Gilliland fraudulently used CNEC's credit card by deceit and for her use *without the consent of the Board* and failed to reimburse the Board when requested.

For example, the Nation wholly failed to allege any facts for the Counts involving travel expenses that Gilliland deceived the Board, the Board did not consent, and they were not for the benefit and purpose of CNEC. There is no allegation the Board ever denied the authorization of the travel expenses or use of its credit card, or asked Gilliland for reimbursement. Without clear and specific facts alleged showing that she traveled at CNEC's expense *without its consent* and by deceit, there is no crime and the case must be dismissed.

For example, Count 1 alleges Gilliland defrauded CNEC by taking a trip to California from February 9 to 12, 2012. The Complaint fails to allege that this trip was not for the purpose or benefit of CNEC or it was disapproved by the CNEC Board. The Complaint fails to allege she was not authorized to use CNEC's credit card for the expenses or that she was not allowed to reimburse CNEC for personal expenses on its credit card. The Complaint characterizes the trip as a "family trip" but wholly fails to allege the trip was not a business trip authorized by the Board

or within Gilliland's authority as Executive Director to decide to go on that trip, or that Gilliland deceived the Board from authorizing, ratifying, or approving the expenditures.

To demonstrate the insufficiency of the Complaint, Gilliland made three presentations in behalf of CNEC on February 11, 2012, and February 12, 2012 during the trip that the Nation charges in Count I as criminal embezzlement. A brochure mailed by the Cherokee Nation was sent to all Cherokee citizens in the southern California area inviting them to attend a presentation by Gilliland, as Executive Director of CNEC, on scholarship opportunities. *See* Exhibit "B" Brochure to February 14, 2019 Demurrer. In Count I, the Nation charges that the usual and customary expenses for a routine and common business trip such as airport parking, car rental, hotel costs, gasoline for the rental car and meals were paid from embezzled funds. Count I wholly fails to allege facts that show these common, ordinary and necessary expenses connected with a business trip for CNEC were criminally appropriated and without the consent of the Board. In fact, Count I fails to *allege this trip* was not approved, authorized or ratified by the CNEC Board even for Gilliland, its Executive Director.

The Complaint must contain sufficiently detail alleged facts to adequately apprise Gilliland of the nature of the charges against her. Did CNEC not approve her travel to promote its scholarship efforts in its behalf? Did CNEC not approve her husband's and children's air fare? Did Gilliland's husband and children contributed to the program authorized by CNEC? Did CNEC deny Gilliland authority as Executive Director to pay for reasonable and customary travel expenses for the trip promoting CNEC and providing its services? Did CNEC not benefit from the presentations? Where these expenses not reviewed and ratified by the Board? Did CNEC not allow Gilliland to use its credit for personal expenses and then be reimbursed?

What makes these expenditures criminal?

Without the Nation pleading the facts constituting deceit by Gilliland and the lack of CNEC's consent to use its credit card for alleged expenses, there is no crime. Even if CNEC did not consent, there is no crime without facts showing Gilliland deceived CNEC. The allegations of the Complaint without showing of deceit and lack of CNEC's consent would be the subject for a civil action which CNEC *has filed* contemporaneously with this criminal case for the same allegations. The Nation must plead facts in this case which show Gilliland's intent to deprive wrongfully the owner or the person who entrusted the property or else the Complaint if defective and must be dismissed.

The Nation must afford Gilliland not only a Complaint that contains all of the elements of the offense (whether or not such elements appear in the statute), but one that is sufficiently descriptive to permit the defendant to prepare a defense. *Hamling v. United States*, 418 U.S. 87, 117, *reh'd denied*, 419 U.S. 885 (1974); *Russell v. United States*, 369 U.S. 749, 763-72 (1962); *United States v. Hernandez*, 891 F.2d 521, 525 (5th Cir. 1989), *cert. denied*, 495 U.S. 909 (1990).

What is required in the Complaint are factual allegations rather than a mere recitation of the acts or practices proscribed by the offense allegedly committed. An example of an indictment that failed this test is provided by *United States v. Nance*, 533 F.2d 699 (D.C. Cir. 1976). The indictment in *Nance* charged a false pretense violation pursuant to the D.C. Code. It listed the name of each victim, the date of the false representation, the amount each victim lost, and the date the sum was paid to the defendants, but was fatally defective as a consequence of its failure to specify the false representation which induced the victims to pay the money to the defendants. *See also United States v. Brown*, 995 F.2d 1493, 1504-05 (10th Cir.)(indictment charging controlling premises and making them available for storing and distributing cocaine

base insufficient because failed to state how control was exercised), *cert. denied*, 114 S.Ct. 353 (1993).

Because the Nation's Complaint fails to allege specify facts showing Gilliland's intent to deceive CNEC and take its funds and credit cards for her use and without consent of the Board, the Complaint is defective and the case must be dismissed.

2. The Complaint fails to apprise Gilliland of the punishment she faces if convicted.

The United States Constitution Sixth Amendment provides that "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation."

The United States Constitution Fifth Amendment and the Cherokee Nation Constitution Article III, Section 3 provisions for due process requires that a criminal statute may be constitutionally void for vagueness.

In *United States v. Batchelder*, 442 U.S. 114, the U.S. Supreme Court stated:

> It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). A criminal statute is therefore invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954). See *Connally v. General Construction Co.*, 269 U.S. 385, 391-393, 46 S.Ct. 126, 127-128, 70 L.Ed. 322 (1926); *Papachristou v. Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972); *Dunn v. United States,* 442 U.S., at 112-113, 99 S.Ct., at 2197. So too, vague sentencing provisions may post constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute. See *United States v. Evans,* 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1948); *United States v. Brown*, 333 U.S. 18, 68 S.Ct. 376, 92 L.Ed. 442 (1948); *cf. Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

In determining whether a Complaint sufficiently informs the defendant of the offense and punishment, courts require the Complaint to have a common sense construction. *United States v. Drew*, 722 F.2d 551, 552-53 (9th Cir. 1983). The Nation must apprise Gilliland of what she

must be prepared to meet includes the Sixth Amendment's specificity requirement. The specificity requirement ensures that Gilliland only has to answer to charges alleged with specific facts in the Complaint in order to permit preparation of her defense, and that she is protected against double jeopardy. *See United States v. Haas*, 583 F.2d 216 (5th Cir.), *reh'g denied*, 588 F.2d 829, *cert. denied*, 440 U.S. 981 (1978).

In *United States v. Carl*, 105 U.S. 611 (1881), the United Supreme Court held that "in an indictment... it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." Vague wording, even if taken directly from a statute, does not suffice.

In *Apprendi v New Jersey*, 530 U.S. 466, (2000), the U.S. Supreme Court held that any fact that increases the maximum penalty for a crime must be charged in an indictment submitted to a jury, and proven beyond a reasonable doubt." Also see *United States v. Cook,* 84 U.S. (17 Wall.) 168, 174 (1872), (If an offense cannot be accurately and clearly described without an allegation that the accused is not within an exception contained in the statutes, an indictment that does not contain such allegation is defective.)

Although the Court may allow the Nation to amend the Complaint to provide specificity as to some elements *which the Nation has elected not to do*, there is no way for the Nation to change the punishment provisions of 21 CNCA § 1462. 21 CNCA § 2 provides, that "No act or omission shall be deemed criminal or punishable except as prescribed or authorized by this code." Under the Nation's law, embezzlement over $50 value for property is not a crime. Other than construing 21 CNCA § 1462 as providing that embezzlement is punishable for offences

where the value of the property or assets are less than $50, there is no common sense or logical interpretation to apprise Gilliland of the nature and punishment of embezzlement.

21 CNCA § 1462 is the specific punishment provision for embezzlement- not 21 CNCA § 10, the general punishment provision. 21 CNCA § 1462 refers to a non-existing crime (feloniously stealing property) for the manner of punishment then provides only where the property is valued at less than $50 is punishable. Other than interpreting that 21 CNCA § 1462 punished embezzlement only for property under $50.00, it is incongruent, void for vagueness, and cannot "fully, directly, and expressly, without any uncertainty or ambiguity" inform Gilliland as to the property value element and punishment for embezzlement.

Because 21 CNCA § 1462 is not clear and understandable on its face, it violates the U.S. Constitution Fifth and Sixth Amendment and Cherokee Nation Constitution Article III, Section 3 due process requirements for adequate notice.

II. CONCLUSION

Because the Complaint and Amended Complaint are defective as to providing facts as to the Fifth and Sixth Amendment specificity requirement of how Gilliland deceitfully appropriated CNEC's assets to her use including lack of consent by the Board, the Court should dismiss this case. In the Complaint or the Amended Complaint, there are no factual allegations that the Board did not authorize, approve (explicitly or implicit) or ratify the expenditure of the subject funds or that Gilliland deceived the Board. The Court gave the Nation the opportunity to correct this defect by operation of its February 14, 2019 ruling and it chose not to provide any specificity as to intent or grounds for misappropriation. In spite of the Nation have notice of the infirmities of its Amended Complaint, it did not change one word except to add Counts X- XV.

Incurable by amendment of the Complaint as charged, Gilliland committed no crime because each Count alleges embezzled property was valued in excess of $50, but pursuant to 21 CNCA § 1462, to constitute a punishable offense, the embezzled property value must be less than $50.

The Court must dismiss this case because the Nation alleges offenses not a crime pursuant to 21 CNCA § 1462 and 21 CNCA § 1462 is unconstitutionally vague and incomprehensible as to the punishment imposed. Unless those words of (21 CNCA § 1462) themselves fully, directly, and expressly, without any uncertainty or ambiguity provide notice of the property value element and punishment, then Complaint is unconstitutionally void for vagueness and must be dismissed.

If the Court must pause and scratch its head trying to figure out what 21 CNCA § 1462 means then it is constitutional void by vagueness.

This Court should sustain Gilliland's Demurrer and dismiss this case.

Submitted this 3th day of April, 2019.

_____/ss/_____
Chadwick Smith
CNBA # 08
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 3nd of April, 2019, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

_____/ss/_____
Chadwick Smith

Diane Hammons

Special Prosecutor
Cherokee Nation
Office of Attorney General
P.O. Box 141
Tahlequah OK 74465
adianehammons@gmail.com

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

EXHIBIT A-14

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CM 2016-54**
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY BRIEF TO MOTION TO DISQUALIFY
RALPH KEEN II AS SPECIAL PROSECUTOR

Comes now Defendant Kimberlie A. Gilliland, ("Gilliland") and submits this Reply Brief in support of her Motion to Disqualify Ralph Keen II ("Keen") from representing the Cherokee Nation ("Nation") in the above style case because he is disqualified by law.

Proposition One: Keen prosecuting the companion civil case subsequent to criminal case increases his conflict of interest.

Predictably, Keen argues he can see no conflict of interest and because Gilliland's civil and criminal cases are not being tried simultaneously, there is no conflict. However, trying the criminal case first increases his conflict. His duty in the civil case is to recover over 1 million dollars in damages, including $928,000 in punitive damages.

By having the authority of the Special Prosecutor, Keen can weld the weight and power of the Cherokee Nation to drive Gilliland to an unjustified trial seeking a verdict which can be used against her in the civil case. Keen's duty to seek justice in the criminal case is conflicted by his duty in the civil case to get $928,000 in punitive damages. The demand for such an amount for punitive damages in the civil case is ludicrous considering the charges including allegations CNEC awarded scholarships to students unrelated to her and Gilliland paid for gas for a rental car on a business trip.

Keen is in the position to abandon a common sense of justice in the criminal case for leverage in the civil case. Keen cannot serve two masters- one to pursue justice and fairness for the Nation and the other to seek $928,000 in punitive damages for CNEC.

It appears the criminal case, with the threat of incarceration, was filed to gain unfair leverage in the civil case. On November 2, 2018, Special Prosecutor Diane Hammons emailed Gilliland's attorney stating, "Attached is a Motion to Amend the criminal complaint (and draft complaint) in Gilliland; we've added in some of the things that were mentioned in the civil action." Evidence of the criminal case being improperly used to gain advantage in the civil case is the sobering fact that the criminal case has NEVER been investigated by any law enforcement agency. This is an unheard-of breach of well-established criminal prosecution protocol and procedure. This criminal case was not referred to the Federal Bureau of Investigation or even the Cherokee Nation Marshal's Office. Note that not one law enforcement officer is endorsed as a witness in this case. The criminal case is nothing but an accommodation for CNEC; all the Special Prosecutor did was take the civil petition, insert alleged violations of Cherokee law and file it. There was no investigation or due diligence interviewing witnesses. The Nation didn't start any witness interviews until 30 months after it filed the case.

Even U.S. Special Prosecutor Mueller in his investigation of Russian collusion, had the FBI performing investigations.

This criminal case has not been prosecuted as a criminal case, i.e., referral to law enforcement for investigation, including interviewing witnesses, gathering and assembling of evidence, and a recommendation for prosecution of a crime. This criminal case has proceeded as an extension of the civil case, i.e., the addition of an occasional witness, continuing discovery, and amendment of the criminal complaint to reflect the civil action.

The Nation has not responded to dispositive motions in this case which require independent judgement; not by the judgment of counsel motivated by recovering $1 million in civil punitive damages. Those motions include:

1. Motion to Strike Amended Complaint on Grounds the Statute of Limitations Expired for Additional Counts Charged, filed April 2, 2019.

2. Second Demurrer to Complaint and Amended Complaint on Grounds No Crime is Alleged and Motion to Dismiss because the Embezzlement Statute Denies Defendant Due Process, filed April 2, 2019.

Keen's conflict is real and serious.

Proposition Two: Gilliland's due process rights are not protected by a stay in the civil case.

Keen argues somehow his conflict goes away because there is a stay in the civil case pending resolution of the criminal case. It does not. His conflict is the present conflict of his duty in the criminal case, conflicting with his duty in the civil case. In his Response Brief at footnote 1, Keen gives an example that after O.J. Simpson was acquitted of criminal charges, his family brought a civil action. In the Simpson case, the prosecutors were not the attorneys in the civil case and the cases were not brought simultaneously.

In *Young v. U.S. Ex Rel. Vuitton Et Fils S. A.*, 780 F.2d 179 (1987), the U.S. Supreme Court addressed the case of where a federal court appointed the law firm representing a party in a civil case to criminally prosecute the same opposing party for contempt in the same underlying civil case. The Court held, "In a case where a prosecutor also represents an interested party; however, the legal profession's ethical rules may require that the prosecutor take into account an interest other than the Government's. This creates an intolerable danger that the public interest will be compromised and produces at least the appearance of impropriety.[1] *See* pages 802-809.

[1] https://caselaw.findlaw.com/us-supreme-court/481/787.html

Keen's conflict is greater in this case because the Attorney General appointed him to criminally prosecute Gilliland not this Court.

Keen's effort to distinguish *Young* is misplaced. The subject matter of Gilliland's criminal and civil case is identical just as was the case in *Young* case. Keen cannot see the appearance of impropriety created when private civil counsel is invested with prosecutorial authority of the Cherokee Nation to punish an adverse civil party in the same legal matter. This Court should. Keen's myopia about this conflict is evidence of his conflict. It should be the highest duty and concern of the Office of Attorney General to avoid the appearance of conflict; however Keen does not even consider his conflict should be reviewed.

Proposition Three: Keen is an employee of the Nation and has a constitutional conflict.

Keen thumbs his nose at the legal opinion of the Attorney General which carries the weight of law until reversed by a court;[2] this is the same Attorney General who appointed him as Special Counsel. According to Attorney General Opinion 2017-CNAG-01, contracted attorneys of the Nation are employees of the Nation.[3] As a Special Prosecutor employed by the Attorney General's Office, Keen is an employee of the Nation. Urging this Court to ignore his boss's Opinion in this case demonstrates Keen's conflict of interest by placing his interest to stay in this case above following the law pronounced by his boss. Keen seems to be arguing the law does not apply to him; that is an abandonment of the public interest and his duty to the Attorney General's Office. Is Keen arguing that his boss's Opinion is wrong, or the constitution does not

[2] 26 § 105. B (4). To give an official opinion upon all questions of law submitted to the Attorney General by any Member of the Tribal Council, the Principal Chief, the Deputy Principal Chief, or by the Group Leader or equivalent of any Cherokee Nation board, commission or executive branch department, and only upon matters in which the requesting party is officially interested. Said opinions shall have the force of law in Cherokee Nation until a differing opinion or order is entered by a Cherokee Nation Court;

[3] Attorney General Opinion 2017-CNAG-01 (Jan. 10, 2017), footnote 1 states, "The Chief's independent legal counsel is an independent contractor and not typically considered an "employee" for legal purposes; however, this Constitutional provision includes "any person employed in any capacity" by the Nation or its entities. For the purpose of the Constitutional analysis regarding conflict of interest, an independent contractor of the Nation is

apply to him?

Keen tries to explain away Attorney General Opinion 2017-CNAG-01 because the spouse of an employee can do business with the Nation; however, that does not change the fact that Keen is in the same circumstance as Kalyn Free, i.e., a contract employee of the Executive Branch. *See* attached Attorney General Opinion 2017-CNAG-01.

Contrary to Keen's unfounded assertion that his status as an employee of the Cherokee Nation "hinges his analysis on footnote No. 1 of the Opinion," Attorney General Hembree stated in the body of his Opinion:

> In 2012, Cherokee Nation Tribal Council passed the "Cherokee Nation Ethics Act of 2012." That Act repealed all previous ethics acts and amendments and is the statute under which we analyze the question before us. Because this Act does not include a separate definition of "employee" and is a continuation of limits contained in Article X. 10 of the Constitution, it is correct to include "any person employed in any capacity" as an employee under this Act" Therefore, the Chief's independent legal counsel is an employee for the purpose of this Act.

In reliance on the Cherokee Nation Constitution, the Attorney General opined that for conflicts of interest purposes, contracted attorneys of Executive Branch are employees of the Nation.

Keen tries to explain away his conflict by arguing the Election Commission determines his eligibility to run for office. The question as to whether Keen disclosed to the Election Commission that he was employed by the Nation and the Attorney General had opined he was an employee of the Nation under the Constitution for purposes of identifying conflicts is not before this Court. Regardless of the issue of Keen's candor with the Election Commission, Gilliland *is not* requesting this Court to disqualify him from his candidacy for office; she is moving to disqualify him from representing the Nation in this case.

Mr. Keen was required by the Cherokee Nation Election code, 26 CNCA § 31, to resign

---

considered an employee."

his employment from the Cherokee Nation *prior* to filing for office.[4] He did not.

Keen further grasps at straws arguing that the Employees Administrative Procedures Act, 52 CNCA Section 4 (L.A. 03-10) excludes employees who are considered independent contractors. However, that definition is for the sole purpose of the Employees Appeal Board extending a quasi-judicial termination hearing for Cherokee Nation employees. That act was repealed by the Employee Access to Justice Act of 2017, ("EAJA") LA 30-17, (11/21/2017).[5] For purposes of the EAJA limited-term contract employees are excluded from having their termination cause heard under its expedited provisions. The EAJA does not apply to Keen because he is not being terminated by the Cherokee Nation. As a contract employee, Keen must bring his termination action as a breach of contract in the District Court. The EAJA does not change Keen's constitutional status as an employee of the Cherokee Nation; all it does is change his remedy for termination.

CONCLUSION

The legal principle that when anyone is vested with the power of the government, especially to incarcerate someone, the standard for conflict of interest and appearance of impropriety is greater, applies to the the Special Prosecutor. The role of the Court is to protect

---

[4] 26 CNCA § 31 B. Prerequisites for Filing. In addition to the general eligibility qualifications set forth in subsection A herein, a candidate must not be in violation of any of the following at the time of filing:
1. The candidate shall not be an employee of the Cherokee Nation, including any corporation, agency or other entity which is at least fifty-one percent owned by the Cherokee Nation, as of the date of filing or at any time thereafter if elected provided, that an incumbent serving in an elective office shall not be deemed to be an employee for purposes of this Section.

[5] § 1002. Purpose
The purpose of this act is to expedite the judicial review of employment terminations and involuntary demotions by employees of the Cherokee Nation and included entities as defined herein while providing due process and for cause removal protections guaranteed by the Cherokee Nation Constitution.
§ 1003. Definition
As used in the Employee Access to Justice Act:
F. "Employee" shall mean a person who has been directly employed by the Cherokee Nation or included entities on a regular, permanent, full-time basis for at least one (1) continuous year immediately prior to termination or involuntary demotion. This term shall not include part-time, seasonal, temporary, or limited-term contract employees, regardless of the length of the contract.

people from the overreach of the government including the Cherokee Nation.

The Court should disqualify Keen as Special Prosecutor because he is prohibited from employment with the Cherokee Nation after he filed for Council office pursuant to 26 CNCA § 31, and he presents an appearance of impropriety, if not an actual conflict, by representing the Nation in the criminal action and CNEC in the civil action on the same factual basis.

Submitted this 26th day of April 2019.

_____/ss/_____
Chadwick Smith
CNBA # 08
22902 S494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 26th day April 2019, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

_____/ss/_____
Chadwick Smith

Diane Hammons
Special Prosecutor
Cherokee Nation
Office of Attorney General
P.O. Box 141
Tahlequah OK 74465
adianehammons@gmail.com

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

Kristi Moncooyea

From: Chad Smith <chad@chadsmith.com>
Sent: Friday, April 26, 2019 10:02 AM
To: Kristi Moncooyea; Keen Law OK; Diane Hammons
Subject: <EXTERNAL> Gilliland CN 2016-54
Attachments: Exhibit to Gilliland Reply Brief 2017-CNAG-01-Conflict of Interest-Legal Counsel for Principal Chief.pdf; 2019-04-26 Reply Brief to Disqualify Keen.pdf

Please find attached for filing, a Reply Brief in the above case. Thanks Chad

--
Chad Smith,
OBA # 8312, CNCA #08
22902 S. 494 Road
Tahlequah, OK 74464
cell 918.453.1707
chadsmith.com

EXHIBIT A-15

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION, Plaintiff, vs. KIMBERLIE GILLILAND, Defendant.	Case No. CRM-2016-54

NATION'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO STRIKE AMENDED COMPLAINT ON GROUNDS THAT THE STATUTE OF LIMITATIONS EXPIRED FOR ADDITIONAL COUNTS CHARGED

COMES NOW Ralph F Keen II, the duly-appointed Special Prosecutor for Cherokee Nation, who responds in opposition to the Defendant's Motion to Strike Amended Complaint on Grounds the Statute of Limitations Expired for Additional Counts Charged, and in support thereof, would show the Court as follows:

Without debating whether Foundation is a governmental subdivision or not, the Defendant was in fact charged with amended counts X through XV within five years after the discovery of the crime as required by 22 CNCA § 152, thus making counsel's seven-year arguments a moot point.

The Defendant, Kimberlie Gilliland, first assumed the responsibilities as Foundation's Executive Director on October 5, 2009. She continued in that position until her final departure from employment on July 12, 2013. Her multiple acts of embezzlement as charged in the Amended Complaint and Information occurred during her tenure as Executive Director, but were concealed and went undiscovered until after her departure and completion of an independent third-party audit, which was released on April 24, 2014 (attached hereto as Exhibit "A"). This was specifically pled in paragraph no. 13 of the civil petition:

> On April 24, 2014, an independent audit of the Foundation was released. The audit report included a schedule of findings and questioned costs. The findings noted the defendant *"exercised substantial control over all phases of the organization and was able to circumvent board authority on a number of issues."* The report indicated that Foundation computers, data files and a printer had been removed from the corporate offices. The report further questioned travel expenses paid for non-employees and checks issued to *"Cherokee Media,"* a business owned and operated by defendant.[1]

Only then did the Foundation Board and Cherokee officials discover her criminal acts of embezzlement as an officer of the corporation. The Cherokee statute of limitations regarding criminal acts of embezzlement is found in 22 CNCA § 152, and is unambiguous:

> **Limitation in general**
>
> A. Prosecutions for the crimes of bribery, embezzlement of public money, bonds, securities, assets or property of the Cherokee Nation or other subdivision thereof, or of any misappropriation of public money, bonds, securities, assets or property of the Cherokee Nation or other subdivision thereof, falsification of public records of the Cherokee Nation or other subdivision thereof, and conspiracy to defraud the Cherokee Nation or other subdivision thereof in any manner or for any purpose shall be commenced within seven (7) years after the discovery of the crime; provided, however, prosecutions for the crimes of embezzlement or misappropriation of public money, bonds, securities, assets, or property of any school district, including those relating to student activity funds, or the crime of falsification of public records of any independent school district, the crime of lewd or indecent proposals or acts against children, pursuant to 21 CNCA § 1123, the crimes of involving minors in pornography, pursuant to 21 CNCA § 1021.2 and 21 CNCA § 1021.3, the crime of sodomy, the crime of criminal conspiracy, or the crime of embezzlement, pursuant to 21 CNCA §§ 1451 through 1462 of Title 21 shall be commenced within five (5) years after the discovery of the crime.[2]

Debating whether Foundation is a Nation subdivision or not is superfluous because the Defendant has been charged within five years of discovery of the crimes. The independent audit

---

[1] Cherokee Nation District Court, CV-16-397, Cherokee Nation Foundation v. Gilliland; *Petition* file marked July 27, 2016.

[2] 22 CNCA § 152 (A). Source, LA 10-90, eff. November 13, 1990. Amended, LA 24-02, eff. August 21, 2002.

was released on April 24, 2014, commencing the five year statute of limitations which would have theoretically expired on April 24, 2019. The Nation's motion to amend its original complaint and information was filed on November 2, 2018, and upon the Court granting leave to amend, the Amended Complaint and Information was filed on March 20, 2019, well within the five-year period allowed under the statute.

In his motion, Mr. Smith erroneously argues that the date of occurrence triggers the five-year statute, completely disregarding the discovery rule specifically sanctioned in the statute. The discovery rule in white collar crimes such as embezzlement is well founded in public policy. Without such a rule, astute criminals could affectively avoid criminal prosecution simply by concealing their bad acts (as the Defendant was successful in doing up until the release of the attached audit) until the statute expires. Counsel Smith is just simply wrong to suggest the charges must be filed within five years of the date of occurrence. The proper trigger date was upon discovery of the crime, which is this case was April 24, 2014. As a result, all amended charges are timely filed within five years of discovery of the crimes, and the Defendant's motion should be denied in its entirety.

The Nation recognizes that the statute of limitations for criminal acts is distinct from the statute for civil actions; however, both statutes are comparable in that they each provide for five-years from the date of discovery.[3] When the two-year statute of limitation was raised as a defense in the civil action, Foundation successfully persuaded the civil Court, the Honorable Bart Fite (deceased) presiding, that the five-year statute applied, and that the 2013 audit release date

[3] Comprehensive Access to Justice Act of 2016, Legislative Act 16-16, eff. August 12, 2016, § 11(D) states: "*Statute of limitations shall begin to run from the date when the plaintiff knew, through the exercise of reasonable diligence, of all the elements of the particular cause of action. Whether a plaintiff knew of a particular element is a fact question to be determined by a jury.*"

was the date of discovery for all claims related to the unauthorized pay increases.[4] Judge Fite found: "*that the five (5) year statute of limitations applies to all of the causes of action contained in Plaintiff's Petition, and therefore, Defendant's Motion to Dismiss is denied.*"[5] The Defendant attempted to bring an interlocutory appeal of this decision before the Cherokee Supreme Court, but by unanimous decision, the Court declined to hear it.[6] The criminal counts arise out of the same transactions and occurrences as the civil case. Thus, the District Court has already adopted the audit release date of April 24, 2014 as the date of discovery in the civil proceedings, and in the sound discretion of *stare decisis*, this Court should likewise find in these criminal proceedings.

WHEREFORE, Plaintiff prays this Court deny Defendant's Motion to Strike Amended Complaint on Grounds the Statute of Limitations Expired for Additional Counts Charged in its entirety.

Respectfully Submitted,

Ralph F Keen II, CNBA 0094
Special Prosecutor
205 West Division
Stilwell, OK 74960
(918) 696 - 3355
(918) 696 - 3576 Fax
KeenLawOK@gmail.com
For Cherokee Nation,
Office of the Attorney General
PO Box 948
Tahlequah, OK 74465

[4] Cherokee Nation District Court, CV-16-397, Cherokee Nation Foundation v. Gilliland; beginning at the last sentence of page 1of *Plaintiff's Response and Combined Brief in Opposition to Defendant's Motion to Dismiss* file marked September 6, 2016, "*The breach of her employment agreement went undiscovered until the release of the 2013 independent audit, and her severance agreement was executed in 2013, thus, both of these claims have been timely brought within a five-year period.*"

[5] *Id. Order Denying Defendant's Motion to Dismiss and Motion to Stay* file marked December 9, 2016.

[6] *See* Cherokee Nation Supreme Court, SC-16-25, Cherokee Nation Education Corporation vs. Gilliland.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing *Nation's Response in Opposition to Defendant's Motion to Strike Amended Complaint on Grounds the Statute of Limitations Expired for Additional Counts Charged* was mailed the 30th day of April, 2019, by depositing it in the U.S. Mail, postage prepaid, or otherwise personally delivered to:

Chadwick Smith, Esq.
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com

Megan Lucas

Megan Lucas

CHEROKEE NATION EDUCATION CORPORATION

TAHLEQUAH, OKLAHOMA

AUDITED FINANCIAL STATEMENTS AND NOTES
For Year Ended December 31, 2013

Audited By:
Robert St. Pierre, C.P.A., P.C.
Certified Public Accountant
1113 N. Second Street
Stilwell, Oklahoma 74960

TABLE OF CONTENTS

INDEPENDENT AUDITOR'S REPORTS

ROBERT ST. PIERRE, C.P.A., P.C.

Certified Public Accountant

1113 N. Second Street
Stilwell, Oklahoma 74960
Phone: (918) 696-4983
Fax: (918) 696-4867

INDEPENDENT AUDITOR'S REPORT

To the Board of Directors
Cherokee Nation Education Corporation
Tahlequah, Oklahoma

Report on the Financial Statements

We have audited the accompanying financial statements of Cherokee Nation Education Corporation. (a non-profit organization), which comprise the statement of financial position as of December 31, 2013, and the related statement of activities, and cash flows for the year then ended, and the related notes to the financial statements.

Managements Responsibility for the Financial Statements

Management is responsible for the preparation and fair presentation of these financial statements in accordance with accounting principles generally accepted in the United States of America; this includes design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of financial statements that are free of material misstatement, whether due to fraud or error.

Auditor's Responsibility

Our responsibility is to express an opinion on these financial statements based on our audit. We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for purpose of expressing an opinion on the effectiveness of the entity's internal control. Accordingly we express no such opinion. An audit also includes evaluation the appropriateness of accounting policies used and the reasonableness of significant accounting estimates made by management, as well as evaluating the overall presentation of the financial statements.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

Basis for Qualified Opinion

No Accounting Controls are exercised over restricted funds and the disbursements of those funds. We were unable to obtain sufficient appropriate Audit evidence about the amounts recorded as restricted funds. Consequently, we were unable to determine whether any adjustments to those amounts were necessary.

Accounting controls over the disbursement of funds for the payment of expenditures and payroll were not sufficient and a great deal of those expenditures did not have appropriate supporting documentation. Consequently, we were unable to determine whether any adjustments to those amounts were necessary.

Opinion

In our opinion, except for the possible effects of the matters described in the Basis for Opinion paragraph, the financial statements referred to above present fairly, in all material respects, the financial position of Cherokee Nation Education Corporation as of December 31, 2013, and the changes in its net assets and its cash flows for the year then ended in accordance with accounting principles generally accepted in the United States of America.

Robert St. Pierre, C.P.A., P.C.
April 28, 2014

FINANCIAL

SECTION

CHEROKEE NATION EDUCATION CORPORATION
STATEMENT OF FINANCIAL POSITION
December 31, 2013

ASSETS

	2013
CURRENT ASSETS	
Checking/ Savings (Note B)	$ 55,255
Restricted Cash	3,850
Schwab Investment Account	684,962
Accounts Receivable (Note D)	101,424
TOTAL CURRENT ASSETS	845,491
FIXED ASSETS	
Equipment	5,147
Vehicles	18,000
Accumulated Depreciation	(13,575)
TOTAL FIXED ASSETS	9,572
TOTAL ASSETS	855,063

LIABILITIES AND NET ASSETS

CURRENT LIABILITES	
Payroll Taxes Payable	1,286
Accrued Expenses	8,400
TOTAL CURRENT LIABILITIES	9,686
NET ASSETS	
Restricted Net Assets	456,743
Unrestricted Net Assets	388,634
TOTAL NET ASSETS	845,377
TOTAL LIABILITIES AND NET ASSETS	$ 855,063

CHEROKEE NATION EDUCATION CORPORATION
STATEMENT OF ACTIVITIES
For the Period Ended December 31, 2013

	2013
REVENUE & SUPPORT	
Contribution - Cherokee Nation Business	478,185
Contribution - Other	85,894
Unrealized Gain on Investments	114,053
Investments Earnings	35
TOTAL REVENUE & SUPPORT	678,167
PROGRAM SERVICES	
Higher Education	187,017
ACT Preparation	75,284
Other Projects	97,661
Cherokee Nation Business Projects	79,258
TOTAL PROGRAM SERVICES	439,220
MANAGEMENT AND GENERAL	
Salaries & Benefits	46,602
Board & Personnel Expense	153,371
Rent and Maintenance	576
Supplies	116,388
Occupancy	21,059
Depreciation	4,501
Fundraising	79,555
TOTAL MANAGEMENT & GENERAL	422,052
INCREASE IN NET ASSETS	(183,105)
PRIOR PERIOD ADJUSTMENT	(695,551)
NET ASSETS PRIOR PERIOD	1,724,033
NET ASSETS AT END OF YEAR	845,377

CHEROKEE NATION EDUCATION CORPORATION
STATEMENT OF CASH FLOWS
For the Year Ended December 31, 2013

CASH FLOWS FROM OPERATING ACTIVITIES	
Increase in Net Assets	(183,105)
Adjustments to Reconcile Change in Net Assets to net Cash Provided by Operating Activities	
Depreciation	4,501
(Increase) Decrease Accounts Receivable	(70,553)
Increase (Decrease) Accounts Payable	(333,033)
Increase (Decrease) Payroll Liabilities	(6,440)
Increase (Decrease) Accrued Expenses	4,200
Net Cash Provided (Used) by Operating Activities	(584,430)
CASH FLOWS FROM INVESTING ACTIVITIES	
(Increase) Decrease in Investment Account	157,172
Net Cash Provided (Used) by Investing Activities	157,172
NET CHANGE IN CASH	(427,258)
CASH AT THE BEGINNING OF THE YEAR	486,363
CASH AT THE END OF THE YEAR	59,105
ADDITIONAL CASH FLOW INFORMATION	
Interest Paid	-

FINANCIAL

STATEMENT

NOTES

CHEROKEE NATION EDUCATION CORPORATION
NOTES TO THE FINANCIAL STATEMENTS
DECEMBER 31, 2013

NOTE A: SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

NATURE OF THE ORGANIZATION

The Cherokee Nation Education Corporation was incorporated in 1998, as a nonprofit Corporation under Title 18 of the Cherokee National Code Annotated. In the year 2010, the Corporation started doing business as the Cherokee Nation Foundation.

The Cherokee Nation Foundation is a nonprofit organization serving the Cherokee Nation, a federally recognized tribe of more than 300,000 citizens. Its mission is to provide higher educational assistance to the Cherokee people and help revitalize the Cherokee language. The foundation is committed to financial transparency and operates in accordance with a board of directors and a Cherokee Nation Tribal Council advisory board. The Cherokee Nation Foundation is a nonprofit, tax-exempt charitable organization under Section 501(c) (3) of the Internal Revenue Code.

BASIS OF ACCOUNTING

The financial statements of Cherokee Nation Education Corporation have been prepared on the accrual basis of accounting, and accordingly, reflect all significant receivables, payables, and other liabilities.

BASIS OF PRESENTATION

The Organization reports is financial position and activities in three classes of net assets: (unrestricted net assets, temporarily restricted net assets, and permanently restricted net assets) based upon the existence or absence of donor-imposed restrictions.

The Organizations contributions received are recorded as unrestricted, temporarily restricted, or permanently restricted support, depending on the existence and nature of any donor restrictions. In addition, the Organization has received contributions with donor-imposed restrictions that would result in temporarily or permanently restricted net assets.

CASH AND CASH EQUIVALENTS

For the purpose of the statement of cash flows, cash and cash equivalents include restricted and unrestricted cash in demand deposit accounts, money market accounts and certificates of deposit.

PROPERTY AND EQUIPMENT

There is no set policy to capitalize equipment. Purchased property and equipment are capitalized at cost. Donations of property and equipment are recorded as revenue at their estimated fair value. Such donations are reported as unrestricted contributions unless the donor has restricted the donated asset to a specific purpose. Assets donated with explicit restrictions regarding their use and contributions of cash that must be used to acquire property and equipment are reported as restricted contributions. Absent donor stipulations regarding how long those donated assets must be maintained, the organization reports expirations of donor restrictions when the donated or acquired assets are placed in service as instructed by the donor. The organization reclassifies temporarily restricted net assets to unrestricted net assets at that time. Property and equipment are depreciated using the straight-line method and Usage Allowance over their estimated useful lives as follows:

Buildings	40 Years
Equipment	5 Years
Vehicles	5 Years

ESTIMATES

The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect certain reported amounts and disclosures. Accordingly, actual results could differ from those estimates.

INCOME TAXES

Cherokee Nation Education Corporation is a Non-Profit Corporation of the Cherokee Nation. The Tribe is exempt status is by treaty and implicit in its being a Federally Recognized Indian Tribe. The Tribe does not hold, nor do it's Corporations hold, nor is it required to obtain, a tax exemption letter from the Internal Revenue Service.

EVALUATION OF SUBSEQUENT EVENTS

The Company has evaluated subsequent events through April 28, 2014 the date which the financial statements were available to be issued.

NOTE B: CASH AND EQUIVALENTS

Cash consists of the following:

	2013
Arvest (Operating Account)	14,304
Arvest (Money Market Account)	40,951
Arvest (Temporary Restricted)	3,850
TOTAL UNRESTRICTED CASH	59,105

NOTE C: INVENTORY

Expendable items are reflected as expenditures when purchased. Merchandise on hand at December 31, 2013, is determined as immaterial; therefore no inventories have been reflected in the financial statements.

NOTE D: ACCOUNTS RECEIVABLE

At Fiscal Year-end there were no accounts receivables outstanding. When an account is determined to be uncollectible it is written off and charged to the current year's operations or to allowance for doubtful accounts. Accounts Receivable, net of the estimated allowance at December 31, 2013, consisted of the following:

ACCOUNTS RECEIVABLE	2013
Current Receivables	101,424
30-60 Days Old	-
Over 60 Days Past Due	-
Allowance For Doubtful Accounts	-
TOTAL RECEIVABLES	101,424

NOTE E: COMMITMENTS AND CONTINGENCIES

Cherokee Nation Education Corporation currently participates in a number of private grant and contract programs. These programs are subject to audit by the grantors or their representatives. Such audits could lead to requests for reimbursement to the grantor agency for expenses disallowed under the terms of the grant. Presently, Cherokee Nation Education Corporation has no such requests pending, and in the opinion of management, any such amounts would not be considered material.

NOTE F: INVESTMENTS

Cherokee Nation Education Corporation, currently values investments at market value at the date of financial statements presentation. All accrued gains or losses are reflected in the carrying amount of the investment. At year end the Organization only had one investment account that was held by Charles Schwab.

NOTE G: PRIOR PERIOD ADJUSTMENT

A prior period adjustment is used to correct balances of prior issued financial statements when a material error is found in the current financial statements.

During 2013 it was discovered that endowment funds to OSU and TU were carried on the books of Cherokee Nation Corporation. These funds were given to OSU and TU as endowments for scholarships to be given to Native American students. When Cherokee Nation Corporation gave these funds to OSU and TU, they gave up all rights to the funds and authority over them, therefore they should not be on the books of The Cherokee Nation Corporation, the result of this error was to overstate assets by 666,767 in the prior year.

There was also errors in relation to restricted funds in the prior years the result of this error was that Temporarily Restricted Net Assets was overstated by 28,784.

Both of these errors are corrected on the current financial statements on the Statement of Activities.

SUPPLEMENTARY

INFORMATION

ROBERT ST. PIERRE C.P.A., P.C.

Certified Public Accountant

1113 N. Second St.
Stilwell, Oklahoma 74960
Phone: (918) 696-4983
Fax: (918) 696-4867

INDEPENDENT AUDITOR'S REPORT ON INTERNAL CONTROL OVER FINANCIAL REPORTING AND ON COMPLIANCE AND OTHER MATTERS BASED ON AN AUDIT OF FINANCIAL STATEMENTS PERFORMED IN ACCORDANCE WITH *GOVERNMENT AUDITING STANDARDS*

To the Board of Directors
Cherokee Nation Education Corporation
Tahlequah, Oklahoma

We have audited the financial statements of Cherokee Nation Education Corporation (a non-profit organization), as of and for the year ended December 31, 2013, and have issued our report thereon dated April 28, 2014 which was qualified. We conducted our audit in accordance with auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in *Government Auditing Standards,* issued by the Comptroller General of the United States.

Internal Control Over Financial Reporting

In planning and performing our audit, we considered Cherokee Nation Education Corporation's internal control over financial reporting in order to determine our auditing procedures for the purpose of expressing our opinion on the financial statements but not for the purpose of expressing an opinion of the effectiveness on Cherokee Nation Education Corporation's Internal control over financial reporting. Accordingly, we do not express an opinion on the effectiveness of the organization's internal control over financial reporting.

Our consideration of internal control was for the limited purpose described in the preceding paragraph and was not designed to identify all deficiencies in the Internal control that might be material weaknesses or significant deficiencies and therefore, material weaknesses or significant deficiencies may exist that were not identified. However as described in the accompanying schedule of findings and questioned costs, we identified certain deficiencies in internal control that we consider to be material weaknesses and significant deficiencies.

A *deficiency in internal control* exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent, or detect and correct misstatements on a timely basis. A *material weakness* is a deficiency, or a combination of deficiencies, in internal control such that there is a reasonable possibility that a material misstatement of the entity's financial statements will not be prevented, or detected and corrected on a timely basis. We consider the deficiencies described in the accompanying schedule of findings and questioned costs to be material weaknesses. (2013 – 1)

A *significant deficiency* is a deficiency, or a combination of deficiencies, in internal control that is less severe than a material weakness, yet important enough to merit attention by those charged with governance. We consider the deficiencies described in the accompany schedule of findings and questioned costs to be significant deficiencies. (2013-2, 2013-3, 2013-4, 2013-5)

Compliance and Other Matters

As part of obtaining reasonable assurance about whether Cherokee Nation Education Corporation's financial statements are free from material misstatement, we performed tests of its compliance with certain provisions of laws, regulations, contracts, and grant agreements, noncompliance with which could have a direct and material effect on the determination of financial statement amounts. However, providing an opinion on compliance with those provisions was not an objective of our audit, and accordingly, we do not express such an opinion. The results of our tests disclosed instances of noncompliance or other matters that are required to be reported under *Government Auditing Standards* and which are described in the accompanying schedule of findings and questioned costs as items (2013-6, 2013-7, 2013-8, 2013-9).

Cherokee Nation Education Corporation's Response to Findings

Cherokee Nation Education Corporation's response to the findings identified in our audit is described in the accompanying schedule of findings and questioned costs. Cherokee Nation Education Corporation's response was not subjected to the auditing procedures applied in the audit of the financial statements and, accordingly, we express no opinion on it.

Purpose of this Report

The purpose of this report is solely to describe the scope of our testing of internal control and compliance and the results of that testing, and not to provide an opinion on the effectiveness of the organization's internal control or on compliance. This report is an integral part of an audit performed in accordance with Government Auditing Standards in considering the entity's internal control and compliance. Accordingly, this communication is not suitable for any other purpose.

Robert St. Pierre, C.P.A., P.C.
April 28, 2014

Cherokee Nation Education Corporation
Tahlequah, Oklahoma
SCHEDULE OF FINDINGS & QUESTIONED COST
December 31, 2013

2013 - 1 Substantial Control by Executive Director

During the audit year the auditor became aware that the Executive Director exercised substantial control over all phases of the organization and was able to circumvent board authority on a number of issues.

Response

There is one remaining board member from the prior Executive Director's tenure. The new board has committed to improve oversight of the organization, including the executive director. For instance, the executive director no longer has check signing authority. Also see our response to 2013-2 below.

2013 – 2 Segregation of Duties

The inherent limitation resulting from one employee performing functions that would normally be divided among several employees were a larger number available presents a proper segregation of accounting functions deficiency. A much larger staff would be necessary in order to assure adequate internal accounting controls.

Response

Management plans to start presenting a list of all disbursements to the board at each meeting that details the check number, amount of the check, the vendor name and supporting documentation for the disbursement. This listing will contain the range of check numbers to be approved. The board of directors will also have access to a copy of the bank statement and a copy of the bank reconciliation.

New internal controls have also been implemented to address this recommendation. An outside accountant was hired in December of 2013. We are in the process of writing procedures and policies regarding the receipt of mail, deposits and disbursements of Foundation Funds.

This condition dictates that the board remains actively involved and continue to closely monitor the financial transactions of the organization.

2013 - 3 Board Minutes

In conducting the audit field work it was noted that the board minutes were not very detailed. The minutes did not provide enough detail to allow an outside party to know everything that was discussed at the board meetings. The minutes also did not note how each member voted.

Response:

Management plans to implement procedures to ensure that all board minutes are sufficiently detailed to allow the reader of the minutes to determine what action was taken and how each member voted on the action item. Management will also consider sending a member of management to one of the open meeting open records classes that the Attorney General conducts each year.

2013 – 4 Prior Year Audit

The prior year audit and records reflected endowment funds for both TU and OSU, these funds were reported as assets on the books for CNEC, the amount reported was 666,766. This error caused the prior year audit as well as the current year's assets to be materially overstated.

Response

We agree. Previous staff and auditor evidently did not have the knowledge and or skill to prepare financial statements in accordance with generally accepted accounting principles. As noted earlier, we have hired an outside accountant to prepare our monthly financial statements who is a CPA and has expertise with nonprofit organizations.

2013 – 5 Health Insurance Payments

When the Executive Director reached agreement on a severance package it does not appear that any type of health insurance was a part of the agreement, however CNEC continued to pay the former Executive Directors health insurance for the remainder of the year.

Response

We agree that the health insurance was not part of the severance package. For part of the audit year the organization either had an interim director or did not have a director at all. Because there was an inadequate management transition and several accountant changes, the automatic withdrawals to pay the former executive director's health insurance was not stopped upon her termination.

2013 - 6 New and Surplus Computers

During the year the Executive Director replaced all the computers in the offices. The purchase price of the computers was 8,931.00, this purchase does not appear to have been approved by the board and it does exceed the spending authorization limit that was established by the board for the Executive Director.

The Executive Director also took possession of some of the old computers and also removed data files from the offices, the Executive Director paid CNEC 1,496, there does not appear to be board approval for this transaction and the items were not declared surplus by the board.

There also was a printer purchased in the prior year, possibly with grant funds, that we were made aware of that was purchased with CNEC funds, this printer was not at CNEC offices and we were told it was taken by the former Executive Director and possibly given to another

Cherokee Nation program. There was no board approval of the removal of the printer from CNEC.

Response

We agree. We are developing procedures for controls over assets of the foundation that will include board approval regarding the disposition of foundation assets.

2013 – 7 Donor Restricted Funds

During the course of operations CNEC receives contributions with donor imposed restrictions. The management and board of directors of CNEC is responsible for insuring that these funds are expended according to the donor's wishes. The records available at CNEC offices were not sufficient to determine if the donor intentions were fulfilled. There is good reason to believe that funds were not expended in accordance with terms as set forth at the time of contribution.

Response

We partially agree. The records that are available are not sufficient to determine all donor restrictions. However, we believe that all funds donated for scholarships have been expended to provide scholarships according to donor instructions. As a matter of fact, the foundation has expended more funds for certain scholarships than what the donors actually funded, due to poor tracking of the remaining balances by the foundation. We believe that as of this date, we have reconstructed the correct balances for all donor restricted funds.

All though we have memorandums of understandings(MOU), with several donors, we are working to contact the donors of other funds that we still hold to develop a written MOU for each restricted donation. Up to this point, we have been acting on verbal instructions from some donors.

2013 – 8 Travel Expenses

While traveling for various reasons the Executive Director appeared to have been paying expenses, such as air fare, meals, and lodging for persons not affiliated with CNEC. There were not adequate records to determine if there was a business purpose or reason for the additional traveling companions.

It was also noted that travel receipts were sometimes in the name of Cherokee Media (a company partially owned by former executive director) however they were paid for with a CNEC credit card.

Response

As of December of 2013 our documentation of travel expenses has improved tremendously. An employee's request for travel expenditures includes documentation of the business purpose. Although we do not know the business purpose for the Cherokee Media travel mentioned above, we can foresee the possibility of the foundation paying other entities/persons travel relating to foundation business. We will document the business purposes for those unusual trips.

2013 – 9 Sunshine Ethics Act

Under the Sunshine Ethics Act we believe that employees of Cherokee Nation and CNEC are prohibited from contracting with CNEC unless they enter into an extra duty contract. The former Executive Director was aware of this via email from Chrissy Nimmo dated September 1, 2009, however CNEC did issue at least one check to Cherokee Media for 988.00 of which the Executive Director is a partner.

Response

We agree and will follow the Sunshine Ethics Act.

EXHIBIT A-16

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CM 2016-54**
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

SUPPLEMENT TO SECOND DEMURRER TO COMPLAINT AND AMENDED COMPLAINT N GROUNDS NO CRIME IS ALLEGED AND MOTION TO DISMISS BECAUSE THE EMBEZZLEMENT STATUTE DENIES DEFENDANT DUE PROCESS

Comes now Defendant Kimberlie A. Gilliland, ("Gilliland") and supplements her demur to the criminal Complaint filed herein on July 28, 2016 and the Amended Complaint filed on March 20, 2019; and moves the Court to dismiss the above styled and numbered case.

Gilliland committed no crime as alleged by the Nation because the Complaint is defective; it makes no factual allegations to prove Gilliland's fraudulent intent and appropriation.

The Nation charged Gilliland with criminal embezzlement pursuant to 21 CNCA §1452.[1]

The first defect in the Complaint is that it does not specify for each Count the elements of how Gilliland: 1) fraudulently, 2) did not use CNEC property in the due and lawful execution of her trust, and 3) appropriated the property for her use or purpose.

In fact, the record the Nation submitted shows Gilliland committed no fraud.

In the Nation's Response in Opposition to Defendant's Motion to Strike Amended Complaint on Grounds that the State of Limitations Expired for Additional Counts Charged,

[1] 21 CNCA § 1452. Embezzlement by officer, etc., of corporation, etc.
If any person, being an officer, director, trustee, clerk, servant or agent of any association, society or corporation, public or private, fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose he is guilty of embezzlement.

("Response") filed April 30, 2019, the Nation offered into the record as Exhibit "A" the 2013 CNEC audit report by Robert St. Pierre, CPA. In the audit report, St. Pierre declares, "We conducted our audit in accordance with audit standards generally accepted in the United States of American and the standards applicable to financial audit contained in the Government Auditing Standards, issued by the Comptroller General of the United States ("Audit Standards").[2] See Response, Exhibit "A" page 10. The federal Audit Standards require:

> 9.40 Auditors should report a matter as a finding when they conclude, based on sufficient, appropriate evidence, that fraud either has occurred or is likely to have occurred that is significant to the audit objectives.

Nothing in St. Pierre's 2013 CNEC audit report indicates any fraud. *See* 2013 CNEC audit report "Schedule of Findings and Questioned Cost" pages 11-14. Under a duty of federal Audit Standards, St. Pierre did not report any fraud which shows no crime was committed. He did not report that Gilliland misused CNEC property in the due and lawful execution of her trust, or she appropriated the property for her use or purpose, i.e. the other elements of embezzlement. As a CPA, St. Pierre also had a duty to report fraud as part of his audit report.[3]

In fact, St. Pierre's 2013 audit report indicates Gilliland was within her authority to travel, allow unaffiliated persons travel to be paid by CNEC, and award scholarships. It is telling that the Board in response to CNEC audit report finding 2013-7 regarding whether donor funds were restricted to donor's wishes, responded, "However, we believe that all funds donated for

---

[2] United States Government Accountability Office by the Comptroller General of the United States, July 2018 GOVERNMENT AUDITING STANDARDS, 2018 Revision https://www.gao.gov/assets/700/693136.pdf

[3] AU Section 110 *Responsibilities and Functions of the Independent Auditor*

.02 The auditor has a responsibility to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud.[1] [1] See section 312, *Audit Risk and Materiality in Conducting an Audit*, and section 316, *Consideration of Fraud in a Financial Statement Audit*. The auditor's consideration of illegal acts and responsibility for detecting misstatements resulting from illegal acts is defined in section 317, *Illegal Acts by Clients*. For those illegal acts that are defined in that section as having a direct and material effect on the determination of financial statement amounts, the auditor's responsibility to detect misstatements resulting from such illegal acts is the same as that for error or fraud. [Footnote added, effective for audits of financial statements for periods ending on or after December 15, 1997, by Statement on Auditing Standards No. 82.] https://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00110.pdf

scholarships have been expended to provide scholarships according to donor instructions." Therefore, CNEC's response to finding 2013-7 acknowledging the proper granting of scholarships occurred contradicts the Nation's allegation in Count XII that Gilliland gave, "unauthorized scholarships to three different students who did not meet the criteria for the scholarships."

The Board in responding to finding 2013-8 that the Executive Director appeared to pay travel expenses of persons not affiliated with CNEC, stated, "An employee's request for travel expenditures includes documentation of the business purpose. Although we do not know the business purpose for Cherokee Media travel mentioned above, we can foresee the possibility of the foundation paying other entities/persons travel relating to foundation business." Therefore, CNEC's response to finding 2013-8 acknowledges travel requests were reviewed by the Board without objection and that it was not against Board policy for CNEC to pay for unaffiliated person's travel.

St. Pierre, the expert that the Nation relies on found no fraud. Fraud is the critical element of embezzlement.

In addition, CNEC's 2012 audit report reports no fraud. See Exhibit "A" is the 2012 CNEC Independent Auditor's Report by Jim Rush, CPA released June 7, 2013. Rush was under the same obligation to report fraud according the federal Audit Standards and CPA standards as was St. Pierre. Ne found none.

Therefore, in addition to the many other reasons argued in previous and companion motions, this Court should sustain Gilliland's Demurrer and dismiss this case.

Submitted this 3th day of May, 2019.

_____/ss/_____

Chadwick Smith
CNBA # 08
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 3nd of May, 2019, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

_____/ss/_____
Chadwick Smith

Diane Hammons
Special Prosecutor
Cherokee Nation
Office of Attorney General
P.O. Box 141
Tahlequah OK 74465
adianehammons@gmail.com

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

CHEROKEE NATION FOUNDATION
A NOT-FOR-PROFIT CORPORATION
FINANCIAL STATEMENTS
YEAR ENDED DECEMBER 31, 2012
WITH INDEPENDENT AUDITORS' REPORT

CONTENTS

Member of the American Institute of Certified Public Accountants

Member of the Oklahoma Society of Certified Public Accountants

JIM RUSH
CERTIFIED PUBLIC ACCOUNTANT
9726 East 42nd Street, Suite 230
Tulsa, Oklahoma 74146-3645
Telephone (918) 664-9190

INDEPENDENT AUDITORS' REPORT

To the Board of Directors of
Cherokee Nation Foundation

We have audited the accompanying financial statements of Cherokee Nation Foundation (a nonprofit organization) which comprise the statement of financial position as of December 31, 2012, and the related statements of activities and cash flows for the year then ended, and the related notes to the financial statements.

Management's Responsibility for the Financial Statements

Management is responsible for the preparation and fair presentation of these financial statements in accordance with accounting principles generally accepted in the United States of America; this includes the design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of financial statements that are free from material misstatement, whether due to fraud or error.

Auditor's Responsibility

Our responsibility is to express an opinion on these financial statements based on our audit. We conducted our audits in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. Accordingly, we express no such opinion. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of significant accounting estimates made by management, as well as evaluating the overall presentation of the financial statements.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

Opinion

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of Cherokee Nation Foundation as of December 31, 2012, and the changes in its net assets and its cash flows for the year then ended in accordance with accounting principles generally accepted in the United States of America.

Certified Public Accountant
Tulsa, Oklahoma
June 7, 2013

CHEROKEE NATION FOUNDATION
STATEMENT OF FINANCIAL POSITION
DECEMBER 31, 2012

ASSETS

Current assets:	
Cash and cash equivalents – restricted	$ 142,683
Cash and cash equivalents	343,680
Accounts receivable	30,881
Total current assets	517,244
Investments:	
Unrestricted	344,960
Restricted	525,949
Total investments	870,909
Other assets:	
OSU Endowment – restricted	333,433
TU Endowment – restricted	333,333
	666,766
Fixed assets:	
Furniture and equipment	5,147
Automotive	18,000
	23,147
Less: accumulated depreciation	< 9,074>
	14,073
Total assets	$2,068,992

LIABILITIES AND NET ASSETS

Current liabilities:	
Accounts payable and accruals	$ 344,960
Total current liabilities/total liabilities	344,960
Net assets:	
Unrestricted	388,634
Temporarily restricted	1,335,398
Permanently restricted	--
Total net assets	1,724,032
Total liabilities and net assets	$2,068,992

See notes to financial statements.

CHEROKEE NATION FOUNDATION

STATEMENTS OF ACTIVITIES

FOR THE YEAR ENDED DECEMBER 31, 2012

Income:	
Contribution – Tribal Nation	$ 377,747
Contribution – Other	81,782
Unrealized Gain on Investments	153,708
Investment Earnings	20,834
Total Income	634,071
Program Expenses:	
Salary and Benefits	136,009
Continuing Education	10,845
Higher Education	88,091
ACT Preparation	73,749
Other Projects	17,635
Cherokee Nation Business Projects	90,494
Art Market Awards	74,200
Total Program Expenses	491,023
Management and General Expenses:	
Salaries and Benefits	45,962
Board and Personnel Expenses	10,103
Rent and Maintenance	24,656
Supplies	5,897
Depreciation	7,716
Fundraising	118,435
Total Management and General Expenses	212,769
Total Expenses	703,792
Net Decrease in Net Assets	<69,721>
Net Assets: Beginning of Year	$1,793,753
Net Assets: End of Year	$1,724,032

See notes to financial statements.

CHEROKEE NATION FOUNDATION

STATEMENTS OF CASH FLOWS

DECEMBER 31, 2012

Cash Flows from Operating Activities	
Change in Net Assets	<$ 69,721>
Adjustments to reconcile change in net assets to net cash provided by operating activities:	
Depreciation	7,716
Donated investment included in contributions	--
Interest and dividends on investments	< 20,834>
Net unrealized gain or (loss) on investments	<153,708>
(Increase) decrease in operating assets:	
Accounts Receivable	21,619
Increase (decrease) in operating liabilities:	
Accounts Payable	340,335
Net cash provided by (used by) operating activities:	125,407
Cash Flows from Investing Activities	
Sale of investments	590,000
Addition of endowment	<333,333>
Net cash provided by investing activities	256,667
Net increase or (decrease) in cash	382,074
Beginning cash	104,289
Ending cash	486,363
Supplemental Disclosure	
Interest expense	--

See notes to financial statements.

CHEROKEE NATION FOUNDATION
NOTES TO FINANCIAL STATEMENTS
DECEMBER 31, 2012

Note 1 – Summary of Significant Accounting Policies

Organization and Nature of Activities

Cherokee Nation Education Corporation (the Corporation) was incorporated in 1998, as a nonprofit corporation under Title 18 of the Cherokee National Code Annotated. It has been granted tax-exempt status under Section 501(c)(3) of the Internal Revenue Code. In the year 2010, the corporation started doing business as the Cherokee National Foundation.

The Corporation is organized exclusively for charitable and educational purposes with the meaning of Section 501(c)(3) of the United Sates Internal Revenue Code of 1996, as amended, or the corresponding section of any future federal tax code. In furtherance of such purpose may:

a. Make distributions to corporations that qualify as exempt corporations under Section 501(c)(3) of the Internal Revenue Code, or to individuals, or on behalf of community groups under the provisions of the Cherokee Nation Education Corporation.

b. Encourage and promote educational opportunities which shall include, but not be limited to provision of instruction, educational services, and scholarships to enrolled adult and minor citizens of the Cherokee Nation and any other federally recognized tribe.

c. To promote and preserve the Cherokee language, culture and history of the Cherokee people.

Basis of Accounting

The Corporation's accounting records are kept according to generally accepted accounting principles found in the United States of America.

Financial Statements Presentation

The financial statement presentation follows the recommendations of Financial Accounting Standards Board in its Statement of Financial Accounting Standards (SFAS) No. 117, *Financial Statements of Not-for-Profit Corporations*. Under SFAS No. 117, the Corporation is required to report information regarding its financial position and activities according to three classes of net assets: unrestricted, temporarily restricted, and permanently restricted.

CHEROKEE NATION FOUNDATION
NOTES TO FINANCIAL STATEMENTS
DECEMBER 31, 2012

Note 1 – Summary of Significant Accounting Policies (Continued)

Unrestricted net assets – Net assets that are not subject to donor-imposed stipulations.

Temporarily restricted net assets – Net assets subject to donor-imposed stipulations that will be met either by actions of the Corporation and/or the passage of time.

Permanently restricted net assets – Net assets subject to donor-imposed stipulations that must be maintained permanently by the Corporation. The Corporation has no permanently restricted net assets.

Revenues are reported as increases in unrestricted net assets unless use of the related assets is limited by donor-imposed restrictions. Expenses are reported as decreases in net assets. Gains and losses on assets or liabilities are reported as increases or decreases in unrestricted net assets unless their use is restricted by explicit donor stipulation or by law. Expirations of temporary restrictions on net assets (i.e., the donor-stipulated purpose has been fulfilled and/or the stipulated time period has elapsed) are reported as net assets released from restrictions.

Use of Estimates

The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities, the disclosure of contingent assets and liabilities, and the reported revenues and expenses. Accordingly, actual results could vary from those estimates.

Income Taxes

Cherokee Nation Education Corporation has been granted tax-exempt status under Section 501(c)(3) of the Internal Revenue Code. No income tax is payable by the Corporation at either the Federal or State level unless the income is unrelated to its exempt purpose. The Corporation has no unrelated business income during the year ended December 31, 2012.

Cash and Cash Equivalents

For purposes of preparing the statements of cash flows, cash includes demand deposits, money market accounts and certificates of deposit with an original maturity date of three months or less.

CHEROKEE NATION FOUNDATION
NOTES TO FINANCIAL STATEMENTS
DECEMBER 31, 2012

Note 1 – Summary of Significant Accounting Policies (Continued)

Fixed Assets and Depreciation

Fixed assets are stated at cost. Depreciation of fixed assets is calculated using either the straight-line or an accelerated method over the estimated life of each asset. Maintenance and repairs are charged to income as incurred, and renewals and betterments that extend the life of existing fixed assets are capitalized. All fixed assets are depreciated for three years.

Bad Debts

Management uses the "direct write-off" method in recognizing bad debts. Receivables are charged to expense in the year they are deemed uncollectible.

Contributions, Grants and Promises to Receive

Contributions and grants are recognized when the donor makes a promise to give to the Corporation that is, in substance, unconditional. The Corporation has adopted SFAS No. 116, *Accounting for Contributions Received and Contributions Made*. Contributions received are recorded as unrestricted, temporarily restricted, or permanently restricted support depending on the existence or nature of any donor restrictions. Support that is restricted by the grantor or donor is reported as an increase in unrestricted net assets if the restriction expires in the reporting period in which the support is recognized. All other restricted support is reported as an increase in temporarily or permanently restricted net assets, depending on the nature of the restriction. When a restriction expires (that is, when a stipulated time restriction ends or purpose restriction is accomplished), temporarily restricted net assets are reclassified to unrestricted net assets and reported in the statement of activities as net assets released from restrictions.

Note 2 – Temporarily Restricted

The Board of Directors has designated approximately $1,335,398 of temporarily restricted net assets as funds functioning as endowment. This amount is invested, together with future gifts to the fund, to accumulate income and capital within the fund to provide for future support of programs and services.

CHEROKEE NATION FOUNDATION
NOTES TO FINANCIAL STATEMENTS
DECEMBER 31, 2012

Note 2 – Temporarily Restricted (Continued)

Restricted Applications	
Balance 1-1-12	$1,360,323
Additions:	
Donations	312,390
Income (loss) from investments	153,708
Available	1,826,421
Removals:	
Programs	< 491,023>
Balance 12-31-12	$1,335,398

Note 3 – OSU Endowment

The Cherokee Nation Foundation has donated $333,433 to the Oklahoma State University Foundation to qualify for the Pickens Legacy Scholarship Match. The matching amount will be contributed to the Fund when it is received by the University following administration of Mr. Pickens' estate. The purpose of this endowment is to provide scholarships to the citizens of the Cherokee Nation.

Note 4 – TU Endowment

The Cherokee Nation Foundation has donated $333,333 to the University of Tulsa. The University will match this amount with $666,667 in additional scholarships. The purpose of this endowment is to provide scholarships to the citizens of the Cherokee Nation.

EXHIBIT A-17

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CM 2016-54**
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

ADDITIONAL BRIEFING

Comes now Defendant Kimberlie A. Gilliland, ("Gilliland") and in accordance with the Court's May 6, 2019 Order allowing additional briefing files this brief.

The Amended Complaint is "void by vagueness" because it fails to adequately apprise Gilliland of the elements of the crime and the punishment she faces if convicted in violation of the U.S. Constitution Fifth and Sixth Amendments and the Cherokee Nation Constitution Article III, Section 3. For these reasons, the Court should dismiss this case.

I. STATUTES

21 CNCA § 2 provides, that "No act or omission shall be deemed criminal or punishable except as prescribed or authorized by this code."

21 CNCA §1452 provides: Embezzlement by officer, etc., of corporation, etc.

> If any person, being an officer, director, trustee, clerk, servant or agent of any association, society or corporation, public or private, fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose he is guilty of embezzlement.

21 CNCA § 1462 is the specific punishment provision for embezzlement- not 21 CNCA § 10, the general punishment provision which provides one year in jail and $5,000 fine.

21 CNCA §1452 deems embezzlement a crime and provides some elements, 21 CNCA § 1462 provides for additional elements and the criminal punishment for embezzlement.[1]

21 CNCA § 1462 provides:

> Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled, *except that every person convicted of embezzlement of any item valued at less than Fifty Dollars ($50.00) shall be punished for a crime*. (Emphasis added.)

21 CNCA § 1703, provides:

> Degrees of larceny. Larceny is divided into two degrees; the first of which is termed grand larceny, the second petit larceny.

21 CNCA § 1704, provides:

> Grand and petit larceny defined. Grand larceny is larceny committed in either of the following cases:
> 1. When the property taken is of value exceeding Five Hundred Dollars ($500.00);
> 2. When such property, although not of value exceeding Five Hundred Dollars ($500.00) in value, is taken from the person of another.
> Larceny in other cases is petit larceny.

21 CNCA § 1705, provides:

> Punishment for grand larceny. Grand larceny is punishable as a crime.

21 CNCA § 1706 provides:

> Punishment for petit larceny. Petit larceny shall be punishable by a fine of not less than Ten Dollars ($10.00) or more than Five Hundred Dollars ($500.00), or imprisonment in the penal institution not to exceed six (6) months, or by both such fine and imprisonment, at the discretion of the Court.

ARGUMENT

The Nation charged Gilliland with criminal embezzlement pursuant to 21 CNCA §1452. The Nation argues that the part of 21 CNCA § 1462 which provides, "Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the

[1] Cherokee Nation Codification Act of 2016 LA-02-16 2/18/2016
Section 5. Substantive Provision of Law; Repeals; Additions; and Amendments. All laws included in the Cherokee Nation Code Annotated (2014), and laws appended thereto, are hereby affirmed as the positive law of the Cherokee Nation. All laws and parts of laws not included in the Cherokee Nation Code Annotated (2014) publication are repealed. The repeal shall not revive any law previously repealed, nor shall it affect any right already existing or

value of that embezzled" refers to 21 CNCA § 1703; it provides, "Larceny is divided into two degrees; the first of which is termed grand larceny, the second petit larceny." There is no pleading in the Amended Complaint that refers to 21 CNCA §§ 1703,1704, 1705, 1706.

However, the Nation by referencing 21 CNCA § 1703, 21 CNCA § 1462 becomes more vague as to the elements and punishment of the alleged crimes and leads to an idiotic conclusion that the punishment for embezzling property valued at less than $50 is the same for embezzling property for over $500. The results of 21 CNCA §1462 incorporating 21 CNCA §§1704, 1705, 1706 based on the value of the embezzled property is:

- Less than $50, it is a crime punishable by 1 year and $5000 fine.
- Less than $500, but more than $50, it is Petit larceny punishable by a fine of not less than Ten Dollars ($10.00) or more than Five Hundred Dollars ($500.00), or imprisonment in the penal institution not to exceed six (6) months.
- More than $500, it is Grand Larceny punishable by 1 year in the penal institution and $5,000 fine.

The Nation cannot make a straight face argument that the Council intended the same punishment for embezzlement of property less than $50 and property more than $500, but half as much jail time and fine for property between $50 and $500. 21 CNCA § 1462 is constitutionally void because of its vagueness.

The Nation's Special Prosecutor argued at the March 6, 2019 hearing that the criminal statutes are written for judges and lawyers who must interpret and argue the statutes. That is not

---

accrued or any action or proceeding already taken, unless otherwise provided in the Cherokee Nation Code Annotated (2014).

true. A criminal statute is invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden."[2]

There is no fair notice to defendants that 21 CNCA § 1462 refers to a non-existing crime (feloniously stealing property) for the manner of punishment but the Amended Complaint on its face only provides where the property is valued at less than $50, the offense is punishable. Other than interpreting that 21 CNCA § 1462 punishes embezzlement only for property under $50.00, it is incongruent, void for vagueness, and cannot "fully, directly, and expressly, without any uncertainty or ambiguity" inform Gilliland as to the property value element and punishment for embezzlement. 21 CNCA § 1462 becomes even more confusing and leads to an absurd result by incorporating the larceny statutes, 21 CNCA §§1704, 1705, 1706.

Because 21 CNCA § 1462 is not clear and understandable on its face to a person of ordinary intelligence, it violates the U.S. Constitution Fifth and Sixth Amendment and Cherokee Nation Constitution Article III, Section 3 due process requirements for adequate notice.

This Court should sustain Gilliland's Demurrer and dismiss this case.

Submitted this 14th day of May, 2019.

/ss/

Chadwick Smith
CNBA # 08
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

[2] In *United States v. Batchelder*, 442 U.S. 114, the U.S. Supreme Court stated: A criminal statute is therefore invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954). See *Connally v. General Construction Co.*, 269 U.S. 385, 391-393, 46 S.Ct. 126, 127-128, 70 L.Ed. 322 (1926); *Papachristou v. Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972); *Dunn v. United States*, 442 U.S., at 112-113, 99 S.Ct., at 2197. So too, vague sentencing provisions may post constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute. See *United States v. Evans*, 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1948); *United States v. Brown*, 333 U.S. 18, 68 S.Ct. 376, 92 L.Ed. 442 (1948); *cf. Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 14th of May, 2019, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

_____/ss/_____
Chadwick Smith

Diane Hammons
Special Prosecutor
Cherokee Nation
Office of Attorney General
P.O. Box 141
Tahlequah OK 74465
adianehammons@gmail.com

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

EXHIBIT A-18

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CM 2016-54**
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY TO THE NATION'S RESPONSE IN SUPPORT OF MOTION TO STRIKE AMENDED COMPLAINT ON GROUNDS THE STATUTE OF LIMITATIONS EXPIRED FOR THE AMENDED COMPLAINT

In accordance with the Court's May 6, 2019 Order allowing additional briefing, comes now Defendant Kimberlie A. Gilliland, ("Gilliland") and files this Reply Brief to the Nation's Response to Defendant's "Response In Support Of Motion to Strike Amended Complaint on Grounds the Statute of Limitations Expired for the Amended Complaint" ("Nation's Brief").

Proposition One Response: The Cherokee Nation Judiciary has not rejected the "Delayed Discovery Rule."

Although the Cherokee Nation courts have not adopted the "Delayed Discovery Rule," it is evident they have not rejected the rule as shown by the Nation's the failure to cited any case law supporting its position. Many decisions this court must make are ones of first impression for this jurisdiction. Because the modern Cherokees Nation courts are young (since 1976), there is not the body of case law that its sister jurisdictions have. That is why the Nation and Gilliland cite foreign cases.

However, the bench mark for this case is the Cherokee Nation Constitution Article III, Sections 2 and 3 which require due process. Due process requires a foreseeable and certain statute of limitations. Does an open-ended statute of limitations comply with Cherokee Nation

Constitutional standards for due process? It does not. The United States Constitution Fifth and Sixth Amendments and the Cherokee Nation Constitution Article III, Sections 2 and 3 provisions for due process require that a criminal statute may be unconstitutionally void for vagueness.

As argued in companion briefs, a criminal statute that does not provide the defendant notice of the elements of the crime, including the statute of limitations, that are "fully, directly, and expressly, without any uncertainty or ambiguity" is void for vagueness. See *United States v. Carl*, 105 U.S. 611 (1881).

In *United States v. Batchelder*, 442 U.S. 114, the U.S. Supreme Court stated, "It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." A criminal statute is therefore invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden."

In essence, Special Prosecutor Keen argues that 21 CNCA §1452 has *no statute of limitations* because it does not start until the allege victim subjectively "discovers" the offense. In other words, the Nation is the only one who can say when and how they discover the alleged offense and the defendant must take the Nation's word for it. Pursuant to Keen's argument, the Nation could "discover" offenses twenty years from now when CNEC installs a new board and the Nation finally got around to reading archived audit reports, and then the statute of limitations would be begin thirty years after the date of the alleged offense.

Even under that theory, the Amended Complaint should be dismissed because the Nation was required to plead when and how it discovered the offense after concealment or fraud; it failed to do so, even when it was granted leave to file its Amended Complaint.

As a non-profit board, CNEC has a duty to read the financial and program reports before

it and ask questions. The CNEC Board is a fiduciary board, not an advisory board. The CNEC board was responsible for the fiscal affairs of the foundation and to use due diligence to execute their responsibilities. *It is telling that the Nation has not pled, averred, or argued that the CNEC board did not discharge its due diligence*. If the CNEC board discharged its fiduciary duty and found no wrongdoing, then there is no crime. There are no factual allegations that Gilliland concealed any financial records from the Board; fiscal transactions reports were prepared by an outside accountant and submitted to the Board.

There is no averment in the Amended Complaint of any concealment by Gilliland to justify extending the statute of limitations. Keen argues the 2013 Audit Report alerts the CNEC Board as to alleged embezzlement. However, the Audit findings cited by Keen do not. Keen cites the 2013 audit finding which supposedly charged CNEC with knowledge of embezzlement, i.e. Gilliland "exercised substantial control over all phases of the organization and was able to circumvent board authority on a number of issues."" This language hardly excused the CNEC Board from exercising its duty of diligence to discover any offense for the previous two years when the financial documents were presented to it on a periodic basis. Further, it is a Directors' job to have "substantial control over all phases of the organization" especially a small one like CNEC, and the audit did not say how or what issues she was "able to circumvent board authority." In fact, the audit report Finding 2013-2 states, "A much larger staff would be necessary in order to assure adequate internal accounting controls." The 2013 Audit report did not say anything or report any activities different than what was presented to the Board periodically during the previous two years. The CNEC board supervising Gilliland and two CPAs did not find any wrongdoing; the Amended Complaint does not give any facts that the actions Gilliland took, with oversight of the Board, which constitutes criminal concealment.

In other words, the 2013 Audit report did not discover any embezzlement and it provided no more of an opportunity for the CNEC, by exercising reasonable due diligence, to discover wrongdoing than it had by reviewing the periodic financial and program reports it received the previous two years.

Keen exposes weakness of his case in the Nation's Brief where he states, "Thus, to the extent *Horn* applies, the statute began to run only after offense had been "discovered" by way the 2013 audit, released on April 24, 2014, when the board was charged with knowledge of both (i) the act and (ii) its criminal nature." What acts and what criminal nature are reported in the Audit? *See* Nation's Brief at page 4. The Delayed Discovery Rule would charge the Board "with knowledge of both (i) the act and (ii) its criminal nature" every time it did or should have reviewed financial statements, signed checks, reviewed invoices, reviewed credit card statements, outside accounts posted quick book entries, issued 1099s and w-2s, signed and certified tax returns, and heard operational and program reports. The transcript excerpts in Keen's civil case against Gilliland do not illustrate concealment, they demonstrate that the witnesses did not remember events that took place five (5) years prior to the deposition. No witness testified that Gilliland hid any information from or deceived CNEC board members.

It is telling that Keen argues that "sworn testimony confirms that the Defendant was so thorough in her concealment and deception that the Board of Directors had no idea of her multiple acts of embezzlement until after her departure from employment and the release of the 2013 audit," but none of the statements cited by Keen remotely supports his irresponsible and hollow hyperbole. *See* Nation's Brief page 2. In essence, because a board member did not remember about Gilliland's severance pay five years later is not an excuse for not knowing about it and the rest of the Amended Complaint allegations in 2012. Apparently, the CNEC board

signed Gilliland's severance check, issued her W-2 for the year, and completed the non-profit corporation tax returns which with the exercise of minimal diligence would have alerted them to any offense, if any had existed. If Gilliland actually paid herself the severance that Keen claims, he would have presented the check signed by her. He has not, because it was signed by a Board member. The reality of this case is that the CNEC Board did not discover "multiple acts of embezzlement" because there were none.

The proper date of discovery is identified by Keen in the Exhibits to the Nation's Brief. In Exhibit "C," the partial Deposition of Shelley Butler-Allen, she testified the Board was given spreadsheets prepared by accountants at their quarterly board meetings. *See* page 38. That is the date of discovery unless a specific expenditure was earlier noticed to Board members such as travel requests, contract approvals and payments signed by Board members, oral reports, and other such documents approved by Board members.

Further, if the Nation is confident in 21 CNCA §1452 as written, there is no need for the Nation to pepper the record with excuses of the Board's ignorance of the alleged offenses after five years from the date of occurrence. *See* Nation's Brief pages 3-5. All the Nation had to do is plead the specifics of fraud or concealment by Gilliland. It did not.

Proposition Two Response: Criminal pleading standards must be more strictly construed that the pleadings in civil actions.

Citing *Oklahoma statutes*, Keen argues civil pleading standards do not apply to criminal cases. However, where the Nation is trying to imprison a defendant, the criminal statute must be construed narrowly. Even the Attorney General agrees with this principle of law as illustrated in his opinion, "Because the Election Code section in question may attach criminal penalties to any violation thereof, the statue must be narrowly construed. " Attorney General Opinion 2015-CNAG-04 (March 5. 2015). The same principle applies to 21 CNCA §1452. Therefore, Keen's

argument is without merit.

Proposition Three Response: Judge Fite did not previously find that the 2013 Audit Release Date was the date of discovery for claims relating to the alleged unauthorized pay increases.

The Nation's Brief on this point confirms that Judge Fite *did not find* "that the 2013 audit release date was the date of discovery for certain claims in the civil petition." Keen argues, "*While his order does not specifically address it,* the briefs and oral arguments before the Court confirm that claims relating to the unauthorized pay increases (as did all of acts of embezzlement) went undiscovered until the release of the 2013 audit."

It should go unsaid that *if a Judge's order does not state a finding of fact or law, then the Judge did not make a finding of fact or law*. Most lawyers would be delighted that by the mere filing a brief with an argument means the Court found in the lawyer's favor. If that is how it works, the parties do not need a record or a Judge. Further, this is a separate case; it is not Keen's civil case against Gilliland. The parties are not the same. The rulings in the civil case do not apply in this case, especially where Keen has not plead with specific facts in the Amended Complaint why the 2013 Audit is the date of discovery.

In her "Response in Support of Motion to Strike Amended Complaint on Grounds the Statute of Limitations Expired for the Amended Complaint," filed May 3, 2019, Gilliland provided exhibits of Judge Fite's order showing he *did not make* the finding that Keen alleges.

Proposition Four and Five Responses: CNEC had a duty of reasonable diligence to discover the alleged offense.

Keen argues that the victim has no duty to exercise reasonable diligence to discover offenses and provides transcripts which show *absolutely no concealment*. Gilliland adopts the arguments she made in Proposition One Response of this brief regarding CNEC's duty of due diligence.

It is worth noting that although Mr. Keen makes inflammatory and baseless accusations that "the Board was continuously mislead and deceived by Defendant Gilliland" and "(Gilliland's) skill as being a master manipulator "(Nation's Brief page 6), the Amended Complaint *does not plead one allegation* with facts of concealment. CNEC, the Nation and the Special Prosecutors (as Keen asserts is a team of four including Diane Hammonds and two Assistant Attorney Generals) have had five years since the 2013 Audit Report to investigate and plead concealment. All that Keen has to show for five years of investigation is wild hyperbole and several board members saying they don't remember what happened five years ago.

The Delayed Discovery Rule is the Nation's affirmative defense that the five year statute of limitations beginning with the date of offense does not apply. Even after this Court gave the Nation the opportunity to file an Amended Complaint, the Nation failed to plead with specificity why it did not file the charges within the stature of limitations.

What is lost on the Nation is that *it has the burden of proof and pleading*. It has failed to allege when and how Gilliland concealed any offenses from the CNEC Board to entitle it to file any of the charges outside the five-year statute of limitation.

After the blustering is over, the Nation's argument boils down to that the statute of limitations for 21 CNCA §1452 is five years or whenever we get around to it.

This Court should dismiss this case on grounds of denial of due process.

Submitted this 24th day of May, 2019.

/ss/

Chadwick Smith
CNBA # 08
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 24th of May, 2019, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

_____/ss/_____
Chadwick Smith

Diane Hammons
Special Prosecutor
Cherokee Nation
Office of Attorney General
P.O. Box 141
Tahlequah OK 74465
adianehammons@gmail.com

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

EXHIBIT A-19

In The District Court of Cherokee Nation

Cherokee Nation,
Plaintiff,

v.

Kimberlie A Gilliland,
Defendant.

CM 2016-54

Order on Demur to Complaint

Demur to complaint is overruled. The law is sufficient to provide a defendant the knowledge not to commit embezzlement. The information is sufficient to provide the defendant with full due process and knowledge of the complaint against her. The District Court is the appropriate court for this case to be heard and has full jurisdiction over it and the parties hereto, including but not limited to the authority to declare a provision of law constitutional or unconstitutional subject to appellate review.

It is so ordered.

District Court Judge

Certificate of Mailing

I, the undersigned, do hereby certify that on the date file stamped above, that I emailed, faxed, hand delivered, and or mailed a true and correct file stamped copy of the foregoing document to the following person(s):

Chadwick Smith, chad@chadsmith.com
Diane Hammons, adianehammons@gmail.com
Ralph Keen II, keenlawok@gmail.com
Todd Hembree, todd-hembree@cherokee.org
Chrissi Nimmo, chrissi-nimmo@cherokee.org
John Young, john-young@cherokee.org
Courtney Jordan, courtney-jordan@cherokee.org

District Court Clerk

EXHIBIT A-20

In The District Court of Cherokee Nation

Cherokee Nation,
Plaintiff,

v.

Kimberlie A Gilliland,
Defendant.

CM 2016-54

Order on Motion to Disqualify

Motion to disqualify denied in part and dismissed in part as moot. *Young v. U.S. Ex Rel. Vuitton Et Fils S. A.*, 780 F.2d 179 (1987), is not Cherokee Nation law, but is also distinguishable from the case at hand in that in *Young* counsel within the same case, concurrently, was appointed to prosecute opposing party on a contempt charge within the same exact case. In other words in *Young* the Court gave one party power over the other party in the same case giving the power welding party an unfair advantage. In the cases at hand counsel's goal is similar in the civil and the criminal case, not to push for a different allegation because of legal posturing in an underlying matter. Further, the civil case has been stayed until after the criminal case has been disposed of, and if restitution is awarded in the criminal case it would be unrecoverable in the civil case. Therefore the motion to disqualify is denied. Counsel is not a candidate for office at this time therefore arguments regarding said issue are dismissed as moot.

It is so ordered.

District Court Judge

Certificate of Mailing

I, the undersigned, do hereby certify that on the date file stamped above, that I emailed, faxed, hand delivered, and or mailed a true and correct file stamped copy of the foregoing document to the following person(s):

Chadwick Smith, chad@chadsmith.com
Diane Hammons, adianehammons@gmail.com
Ralph Keen II, keenlawok@gmail.com
Todd Hembree, todd-hembree@cherokee.org
Chrissi Nimmo, chrissi-nimmo@cherokee.org
John Young, john-young@cherokee.org
Courtney Jordan, courtney-jordan@cherokee.org

District Court Clerk

EXHIBIT A-21

FILED

In The District Court of Cherokee Nation

2019 JUL -2 PM 3:30

CHEROKEE NATION
DISTRICT COURT
KRISTI MONCOOYEA
COURT CLERK

Cherokee Nation,
Plaintiff,

v.

Kimberlie A Gilliland,
Defendant.

CM 2016-54

Order on Motion to Strike Amended Compliant

Motion to strike is denied. Amendment was filed within the statute of limitations. Because of the alleged deception on the part of the defendant the clock does not start running on embezzlement cases until the discovery of the alleged wrong doing. Defendants do not get to hide behind their own alleged wrong doing as a defense to a crime being committed.

It is so ordered.

District Court Judge

Certificate of Mailing

I, the undersigned, do hereby certify that on the date file stamped above, that I emailed, faxed, hand delivered, and or mailed a true and correct file stamped copy of the foregoing document to the following person(s):

Chadwick Smith, chad@chadsmith.com
Diane Hammons, adianehammons@gmail.com
Ralph Keen II, keenlawok@gmail.com
Todd Hembree, todd-hembree@cherokee.org
Chrissi Nimmo, chrissi-nimmo@cherokee.org
John Young, john-young@cherokee.org
Courtney Jordan, courtney-jordan@cherokee.org

District Court Clerk

EXHIBIT A-22

In The District Court of Cherokee Nation

Cherokee Nation,
Plaintiff,

v.

Kimberlie A Gilliland,
Defendant.

CM 2016-54

Order Re-Setting Arraignment

Defendant was previously set to be arraigned on May 6, 2019 at 10:00AM. Before the arraignment could take place Defendant filed a motion to strike the complaint and a demur to the complaint.

Pursuant to 22 CNCA §§ 497 and 498, the motion to strike the complaint and the demur to the complaint were heard without the defendant being arraigned. The Court has now denied the motion to strike the complaint and overruled the demur to the complaint, and pursuant to 22 CNCA §§ 503 and 511 the defendant must now plead forthwith. Further, if defendant does not plead, judgment may be pronounced.

The Court hereby Orders Defendant, Kimberlie A Gilliland, to present herself for arraignment on July 19, 2019 at 10:00AM, at the Cherokee Nation Courthouse, located on the second floor of the WW Keeler Tribal Complex at 17675 S Muskogee, Tahlequah, OK 74464.

Any and all other previous orders of the Court, including the *Criminal Trial Notice and Scheduling Order* filed herein on March 6, 2019, shall remain in full force and effect.

It is so ordered.

District Court Judge

Certificate of Mailing

I, the undersigned, do hereby certify that on the date file stamped above, that I emailed, faxed, hand delivered, and or mailed a true and correct file stamped copy of the foregoing document to the following person(s):

Chadwick Smith, chad@chadsmith.com
Diane Hammons, adianehammons@gmail.com
Ralph Keen II, keenlawok@gmail.com
Todd Hembree, todd-hembree@cherokee.org
Chrissi Nimmo, chrissi-nimmo@cherokee.org
John Young, john-young@cherokee.org
Courtney Jordan, courtney-jordan@cherokee.org

District Court Clerk

EXHIBIT A-23

IN THE DISTRICT COURT OF THE CHEROKEE NATION

CRM-2016-54

CHEROKEE NATION v.
KIMBERLIE A. GILLILAND

COURT MINUTE

This matter came on for arraignment on the 19th day of July, 2019. Appearing were John Young and Ralph Keen representing the Cherokee Nation; the defendant fails to appear.

Upon request of the nation, the Court forfeits the or bond and a bench warrant is issued for defendant's failure to appears. The scheduling order entered on March 6, 2019 is set aside.

JUDGE OF THE DISTRICT COURT

EXHIBIT A-24

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION, Plaintiff, vs. KIMBERLIE GILLILAND, Defendant.	Case No. CRM-2016-54

BENCH WARRANT

TO THE CHEROKEE NATION MARSHALS OR SHERIFF OR DEPUTY SHERIFF OR ANY OTHER OFFICER AUTHORIZED BY LAW TO SERVE CRIMINAL PROCESS:

WHEREAS, complaint has been made in writing, and has charged the Defendant, KIMBERLIE GILLILAND, did then and there unlawfully and contrary to the laws of the Cherokee Nation, commit the offenses of:
COUNT I: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT II: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT III: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT IV: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT V: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT VI: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT VII: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT VII: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT IX: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT X: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT XI: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT XII: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT XIII: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT XIV: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT XV: Embezzlement by Officer of Corporation; 21 CNCA § 1452, and FAILED TO APPEAR in the said Court.

YOU ARE THEREFORE COMMANDED forthwith to arrest the said KIMBERLIE GILLILAND and bring her before the Court of the Cherokee Nation, 17675 S. Muskogee Avenue, 2nd Floor, Tahlequah, Oklahoma, or if the Court be adjourned or be not in session that you retain her in your custody in the County Jail in the County in which you arrest her or that you deliver her in to the custody of the Cherokee Nation, subject to the further order of this Court.

IT IS THEREFORE ORDERED that the above-identified Defendant be arrested by and be detained in the custody of the Cherokee Nation Marshal Service or its agents, day or night pending appearance before the Cherokee Nation District Court.

WITNESS my hand and seal of the Cherokee Nation District Court this 8th day of August, 2019.

CASH/SURETY/ NO BOND: $ 10,000 00/100

By _____
JUDGE OF THE DISTRICT COURT

DESCRIPTION:

Name: Kimberlie Gilliland
DL/SSN: 446-66-9476
Address: 1417 E 46th St. Tulsa, OK 74105
DOB: 08/13/1969 Height: 5'8" Weight: 160 lbs Hair: Blonde/Graying Eyes: Grey Blue Race: AI/F

EXHIBIT A-25

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,
Plaintiff,

vs.

KIMBERLIE GILLILAND,
Defendant.

Case No. CRM-2016-54

CHEROKEE NATION DISTRICT COURT
KRISTI MONCOOYEA COURT CLERK
2019 AUG 16 AM 9:08
FILED

COURT MINUTE ORDER
(SUMMARY)

DATE: July 19, 2019 **TIME:** 10:00 A.M.

JUDGE: T. Luke Barteaux **REPORTER:**

Plaintiff's Attorney: Ralph F Keen II

Defendant's Attorney: Chadwick Smith, appearing not

CAUSE COMES ON FOR: Arraignment

RULES/FINDING BY COURT: Defendant failed to appear after receiving notice of said arraignment on July 2, 2019. Nation's motion for the issuance of a bench warrant and revocation of her prior personal recognizance bond is hereby granted. Bench warrant shall issue for failure to appear. Personal recognizance bond is hereby revoked and new cash bond is set at $ 10,000.00. The Court further finds that the previous Scheduling Order entered on March 6, 2019, should be and is hereby set aside.

T. Luke Barteaux
JUDGE OF THE DISTRICT COURT

SPECIAL PROSECUTOR
CHEROKEE NATION

ATTORNEY FOR DEFENDANT

DEFENDANT

EXHIBIT A-26

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CM 2016-54**
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

MOTION TO WITHDRAW BENCH WARRANT

Comes now Defendant Kimberlie A. Gilliland, ("Gilliland") by her attorney, Chadwick Smith and moves the Court to withdraw its bench warrant to arrest Gilliland for failure to appear at an arraignment hearing on July 19, 2019 because Gilliland did not know of her arraignment date.

On July 2, 2019, after this Court denied certain dispositive motions filed by Gilliland, the Court issued its Order Re-Setting Arraignment and the District Court Clerk emailed the attorneys of record in this case the Court's orders, including Gilliland's attorney Chad Smith ("Smith").[1] The certificate of mailing for these Orders reflects that they were emailed to the parties and *not mailed by regular mail. See* Exhibit A, Order Re-setting Arraignment. Smith received no July 2, 2019 Orders in the regular mail.

Smith did not communicate to Gilliland her arraignment date because he did not received the email with the Court's Order for Re-setting Arraignment. It is undisputed that the Court Clerk emailed the Court's Order for Re-setting Arraignment on July 2, 2019 to Smith.

Smith uses as his business email chad@chadsmith.com hosted by a private company on

[1] Order on Motion to Strike Amended Complaint, Order of Demur to Complaint, Order on Motion to Disqualify, and Order for Re-Setting Arraignment.

its computer servers which after receipt, it forwards the emails to Smith's gmail email account which he uses daily and does not check the chad@chadsmith.com server because of the difficulty in accessing it. Smith has had the chad@chadsmith.com email for over eight years and has not had the problem of emails not being forwarded to his gmail account before May 25, 2019.

On September 25, 2019 in anticipation of pre-trial conferences, Smith requested and the District Court Clerk emailed him copies of the docket sheet in each of his cases pending in the District Court, including Gilliland. Upon review of the Gilliland docket sheet, Smith for the first time discovered that on July 2, 2019, the Court entered orders on several motions, set an arraignment date, and subsequently issued a bench warrant for Gilliland on motion of the Cherokee Nation when Smith and Gilliland did not appear on July 19, 2019. The Cherokee Nation did not give notice to Gilliland of its Motion for Bench Warrant. Smith did not receive the August 1, 2019 Court minute or August 16, 2019 Court Minute Order issuing the bench warrant signed by the Court and Ralph Keen until Smith requested the docket sheet.

Smith receives hundreds of emails at chad@chadsmith.com each month and he has discovered on September 26, 2019 approximately thirteen (13) emails not forwarded by the chad@chadsmith.com server to his gmail account since May 25, 2019 including the District Court's and Assistant Attorney General John Young's replies by to Smith's emails to him.[2] Smith also made efforts to discuss the status of his pending cases with the Cherokee Nation prior to reviewing the docket sheets.[3]

Smith takes full responsibility for the failure to notify Gilliland. However, Smith was not

[2] Emails not forward by the chad@chadsmith.com server to Smith primary email include: 9/19/2019 from Sarah Hill. 9/10/2019 from Kristi Moncooyea, 9/09/2019 from Kristi Moncooyea, 9/05/2019 from John Young. 8/19/2019 from John Young, and 7/02/2019 from Kristi Moncooyea.

[3] On July 15, 2019. August 10, 2019 and September 4, 2019. Smith emailed John Young a letter requesting consultation on pending cases and left a phone message for John Young in August, 2019 and for Sarah Hill in September, 2019. Young and Hill did not return the calls. Smith did not received John Young's response emails that he sent August 19, 2019 and September 5, 2019.

aware of the Court's orders because of this email anomaly and he had no reasonable cause to suspect a chad@chadsmith.com server malfunction.

As soon, as Smith discovered the error, he contacted Ralph Keen and John Young, attorneys for the Cherokee Nation.

Therefore, Gilliland through her attorney moves the court to withdraw its bench warrant for the arrest of Gilliland.

Smith contacted Ralph Keen by phone and John Young by phone message and email on September 26, 2019, and John Young again by phone message and email on September 27, 2019 asking if the Cherokee Nation objected to the Court withdrawing the bench warrant. As of submission of this motion, they have not advised Smith of their position.

Submitted this 27th day of September, 2019.

_____/ss/_____
Chadwick Smith
CNBA # 08
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I. Chadwick Smith, do hereby certify that on the 27 th of September, 2019, pursuant to CNDC Rule 7. I emailed a true and complete copy of the foregoing document to the persons listed below:

_____/ss/_____
Chadwick Smith

John C. Young
Assistant Attorney General
Sarah Hill
Attorney General
Cherokee Nation
Office of Attorney General
P.O. Box 141
Tahlequah OK 74465

john.young@cherokee.org
sarah.hill@cherokee.org

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

EXHIBIT A-27

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CM 2016-54**
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

AGREED MOTION TO ALLOW DEFENDANT TO APPEAR TELEPHONICALLY AT SECOND ARRAIGNMENT

Pursuant to CNDC Rule 50, Defendant Kimberlie A. Gilliland, ("Gilliland") by her attorney, Chadwick Smith moves the Court to allow her to present herself and appear telephonically for a second arraignment in the above case set for October 18, 2019 at 11.00 a.m.

The Nation does not object if her attorney appears in person. See Exhibit "A", Email from Ralph Keen. Also, CNDC Rule 43 provides that the parties may telephonically participate with consent of the opposing counsel.

Gilliland affirms that she will be in attendance for the trial of this matter and has a compelling interest to attend trial to seek an acquittal to clear her name so that she may regain meaningful employment.

Submitted this 8th day of October, 2019.

/ss/
Chadwick Smith
CNBA # 08
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

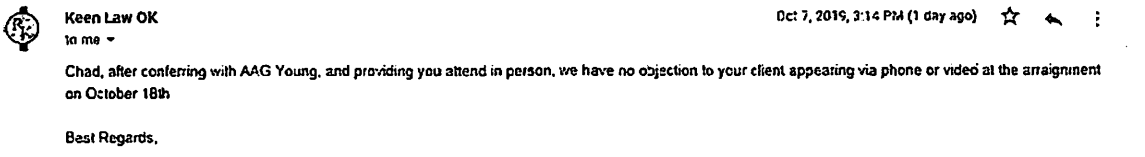
I, Chadwick Smith, do hereby certify that on the 8th of October, 2019, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

_____/ss/_____
Chadwick Smith

John C. Young
Assistant Attorney General
Sarah Hill
Attorney General
Cherokee Nation
Office of Attorney General
P.O. Box 141
Tahlequah OK 74465
john.young@cherokee.org
sarah.hill@cherokee.org

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

Exhibit "A"



Keen Law OK
to me

Oct 7, 2019, 3:14 PM (1 day ago)

Chad, after conferring with AAG Young, and providing you attend in person, we have no objection to your client appearing via phone or video at the arraignment on October 18th

Best Regards,

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CM 2016-54**
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

ORDER ALLOWING DEFENDANT TO APPEAR
TELEPHONICALLY AT SECOND ARRAIGNMENT

Pursuant to CNDC Rule 50, the Court grants Defendant Kimberlie A. Gilliland's motion to present herself and appear telephonically for a second arraignment in the above case set for October 18, 2019 at 11.00 a.m.. The Cherokee Nation does not object if her attorney appears.

THEREFORE, the Court orders Defendant Kimberlie A. Gilliland, to present herself and appear telephonically for a second arraignment in the above case set for October 18, 2019 at 11.00 a.m. by calling the Court Clerk at phone number 918 207-3900 and remain connected by phone until excused by the Court.

Ordered this 9 day of October, 2019.

Judge Barteaux

EXHIBIT A-28

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CM 2016-54**
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

MOTION TO CERTIFY ORDERS FOR INTERLOCUTORY APPEAL

Comes now Defendant Kimberlie A. Gilliland, ("Gilliland") by her attorney, Chadwick Smith and moves the Court to find its interlocutory Order on Motion to Strike Amended Complaint and Order on Demur to Complaint filed in this case on July 2, 2029 are dispositive of the issues in this case and are subject to immediate appeal.

Submitted this 10th day of October, 2019.

_____/ss/_____
Chadwick Smith
CNBA # 08
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 10 th of October, 2019, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

_____/ss/_____
Chadwick Smith

John C. Young
Assistant Attorney General
Sarah Hill
Attorney General
Cherokee Nation

Office of Attorney General
P.O. Box 141
Tahlequah OK 74465
john.young@cherokee.org
sarah.hill@cherokee.org

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

EXHIBIT A-29

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION, Plaintiff, vs. KIMBERLIE GILLILAND, Defendant.	Case No. CRM-2016-54

NATION'S OBJECTION TO DEFENDANT'S MOTION TO REINSTATE PERSONAL RECOGNIZANCE BOND

COMES NOW Ralph F Keen II, the duly-appointed Special Prosecutor for Cherokee Nation, who objects to the Defendant's Motion to Reinstate Personal Recognizance Bond, and in support thereof would show the Court as follows:

Cherokee Nation objects to the Defendant's motion requesting her personal recognizance bond be reinstated. Attempted service of the Bench Warrant on the Defendant at her home in Tulsa revealed that she no longer resides in Tulsa and has apparently rented the home out. By her counsel's own admission, the Defendant has left the United States and is currently residing in Poland. The Defendant neither sought leave of Court nor notified the Nation of her leaving the jurisdiction and traveling outside of the United States. As a result, the Defendant is now a confirmed flight risk who has absconded from the jurisdictional reach of the Cherokee criminal justice system. To reinstate her prior personal recognizance bond under these conditions would be an insult to the Court and offer no assurance that she will return to the United States and stand accountable for the criminal acts she is charged with. The word of her legal counsel, as sincere as it may be, is no guarantee of appearance.

The Court should enforce its current cash bond setting of $10,000.00 to ensure that the Defendant will return from overseas and appear for trial.

WHEREFORE, premises and precedence considered, the Nation prays the Court deny Defendant's Motion to Reinstate Personal Recognizance Bond and enforce the present cash bond setting of $10,000.00 to ensure that the Defendant will return to the United States and appear for trial.

Respectfully Submitted,

Ralph F Keen II, CNBA 0094
Special Prosecutor
205 West Division
Stilwell, OK 74960
(918) 696 - 3355
(918) 696 - 3576 Fax
KeenLawOK@gmail.com
For Cherokee Nation,
Office of the Attorney General
PO Box 948
Tahlequah, OK 74465

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing *Nation's Response to Defendant's Motion to Reinstate Personal Recognizance Bond* was mailed the 16th day of October, 2019, by depositing it in the U.S. Mail, postage prepaid, or otherwise personally delivered to:

Chadwick Smith, Esq.
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
chief.chad.smith@gmail.com

Megan Lucas
Megan Lucas

EXHIBIT A-30

In The District Court of Cherokee Nation

Cherokee Nation,
Plaintiff,

v.

Kimberlie A Gilliland,
Defendant.

CM 2016-54

Order Denying Certification for Interlocutory Appeal

Defendant filed her *Motion to Certify Orders for Interlocutory Appeal* on or about October 9, 2019. Oral arguments were held on October 21, 2019. Defendant's request for certification for interlocutory appeal is denied. It was previously Ordered that this matter shall not be stayed for possible interlocutory appeals unless by motion and good cause is found by the Court. Good cause has not been found. The Defendant has already appealed this matter once based on jurisdiction and the District Court was affirmed. See ***Gilliland v. Cherokee Nation, SC-17-08 (August 13, 2018)***.

Cherokee Nation Supreme Court Rule 70 (B) states that "Any party in a criminal case, may appeal a judgment or sentence." Defendant has not received a judgement and or sentence.

Additional authority for denial of interlocutory appeal certification. See *Takeda Pharmaceuticals USA, Inc. v. Cherokee Nation*, SC-16-02 (November 22, 2016), and ***Cherokee Nation Education Corporation v. Gilliland*, SC-16-25 (March 31, 2017)** the Cherokee Nation Supreme Court does not favor interlocutory appeals as they foster multiple appeals before the record is fully established.

Done and Ordered in Chambers on October 21, 2019.

District Court Judge

Certificate of Mailing

I, the undersigned, do hereby certify that on the 22 day of October, 2019 that I emailed, faxed, hand delivered, and or mailed a true and correct file stamped copy of the foregoing document to the following person(s):

Chadwick Smith
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com

Ralph Keen II, keenlawok@gmail.com

Sara Hill, sara-hill@cherokee.org

Chrissi Nimmo, chrissi-nimmo@cherokee.org

John Young, john-young@cherokee.org

Courtney Jordan, courtney-jordan@cherokee.org

District Court Clerk

EXHIBIT A-31

In The District Court of Cherokee Nation

Cherokee Nation,
Plaintiff,

v.

Kimberlie A Gilliland,
Defendant.

CM 2016-54

Order Denying Motion to Reinstating Personal Recognizance Bond

Defendant filed her *Motion to Reinstate Personal Recognizance Bond* on or about October 9, 2019. Oral arguments were held on October 18, 2019. Said motion is denied. Defendant shall deposit a cash bond of ten thousand dollars ($10,000) with the Cherokee Nation District Court by 4:30pm on November 20, 2019. A bench warrant shall issue if bond is not paid.

Ordered on October 21, 2019.

F Lobe Barteaux
District Court Judge

Certificate of Mailing

I, the undersigned, do hereby certify that on the 22 day of October, 2019 that I emailed, faxed, hand delivered, and or mailed a true and correct file stamped copy of the foregoing document to the following person(s):

Chadwick Smith
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com

Ralph Keen II, keenlawok@gmail.com
Sara Hill, sara-hill@cherokee.org
Chrissi Nimmo, chrissi-nimmo@cherokee.org
John Young, john-young@cherokee.org
Courtney Jordan, courtney-jordan@cherokee.org

Kristi Moncooyea
District Court Clerk

EXHIBIT A-32

IN THE SUPREME COURT OF THE CHEROKEE NATION

KIMBERLIE A. GILLILAND,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. SC - 19-15**
	)	
CHEROKEE NATION,	)	**District Court CM 2016-54**
	)	
and	)	
	)	
LUKE BARTEAUX,	)	
Judge of the District Court,	)	
	)	
Respondents.	)	

PETITION FOR WRIT OF HABEAS CORPUS AND APPEAL FROM INTERLOCUTORY ORDERS

I. TRIAL COURT HISTORY

COURT/ COMMISSION: District Court,

CASE NO.: CM-2016-54

JUDGE/ HEARING OFFICER: Judge Barteaux

NATURE OF CASE: Criminal

NAME OF PARTY(IES) FILING THIS PETITION: Kimberlie Gilliland

THE APPEAL IS BROUGHT FROM: (check one)

Judgment, Decree or Final order of the District Court
Appeal from order granting summary judgment or motion to dismiss
Final Order of Other Tribunal, Commission, or Hearing Board
Interlocutory Order Appealable
X Other

II. TIMELINESS OF APPEAL

1. Date judgment, decree, or order appealed was filed: October 22, 2019

2. Does the judgment or order on appeal dispose of *all* claims by and against *all* parties? Yes X No

3. Were any post-trial motions filed? No.

4. This Petition is filed by:
   Delivery to Clerk, or
   x Mailing to Clerk by U.S. Certified Mail, Return Receipt Requested

III. RELATED OR PRIOR APPEALS

Appeal in this case filed October 10, 2017.

IV. SETTLEMENT CONFERENCE

Is the Petitioner willing to participate in a Settlement Conference? X Yes No

V. RECORD ON APPEAL

A transcript will be ordered
No Transcript will be ordered because no record was made and/or no transcript will be necessary for this appeal
Narrative Statement will be filed
X Audio and video file of District Court proceeds are designated in record.

VI. JUDGMENT, DECREE OR ORDER APPEALED-- EXHIBIT "A"

Attach as Exhibit "A" are copies of the July 2, 2019 Order of Motion to Strike Amended Complaint and July 2, 2019 Order on Demur to Complaint and October 22, 2019 Order Denying Motion to Reinstating Personal Recognizance Bond.

VII. SUMMARY OF CASE -- Exhibit "B"

Attach Exhibit "B" a brief summary of the case.

VIII. ISSUES TO BE RAISED ON APPEAL -- Exhibit "C"

Attach as Exhibit "C" the issues proposed to be raised.

IX. NAME OF COUNSEL OR PARTY, IF PRO SE

ATTORNEY FOR PETITIONER
Name: Chad Smith
CBNA: 08
Firm: Chad Smith
Address: 22902 S 494 Road
City: Tahlequah

State: OK Zip: 74464
Phone: 918 453 1707
Email: chief.chad.smith@gmail.com

ATTORNEYS FOR RESPONDENT
John C. Young
Assistant Attorney General
Sarah Hill
Attorney General
Cherokee Nation
Office of Attorney General
P.O. Box 141
Tahlequah OK 74465
john.young@cherokee.org
sarah.hill@cherokee.org

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

DATE: October 31, 2019

Verified by: _____
(Signature of Attorney or Pro Se Party)

CNBA: 08
Firm: Chad Smith
Address: 22902 S 494 Road
City: Tahlequah
State: OK Zip: 74464
Phone: 918 453 1707
Email: chief.chad.smith@gmail.com

X. CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

I hereby certify that a true and correct copy of the Petition for Habeas Corpus, was mailed or hand-delivered this 31st day of October 2017 to the following:

ATTORNEYS FOR RESPONDENT
John C. Young
Assistant Attorney General
Sarah Hill
Attorney General
Cherokee Nation
Office of Attorney General
P.O. Box 141

Tahlequah OK 74465
john.young@cherokee.org
sarah.hill@cherokee.org

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

I further certify that a copy of the Petition in for Habeas Corpus was mailed to, or filed in, the office of the Court Clerk of the Cherokee Nation Supreme Court on October 31, 2019.

Chad Smith

EXHIBIT "A"

FILED

In The District Court of Cherokee Nation

2019 JUL -2 PM 3:30

CHEROKEE NATION
DISTRICT COURT
KRISTI MONCOOYEA
COURT CLERK

Cherokee Nation,
Plaintiff,

v.

Kimberlie A Gilliland,
Defendant.

CM 2016-54

Order on Demur to Complaint

Demur to complaint is overruled. The law is sufficient to provide a defendant the knowledge not to commit embezzlement. The information is sufficient to provide the defendant with full due process and knowledge of the complaint against her. The District Court is the appropriate court for this case to be heard and has full jurisdiction over it and the parties hereto, including but not limited to the authority to declare a provision of law constitutional or unconstitutional subject to appellate review.

It is so ordered.

J. Luke Bacteaux
District Court Judge

Certificate of Mailing

I, the undersigned, do hereby certify that on the date file stamped above, that I emailed, faxed, hand delivered, and or mailed a true and correct file stamped copy of the foregoing document to the following person(s):

Chadwick Smith, chad@chadsmith.com
Diane Hammons, adianehammons@gmail.com
Ralph Keen II, keenlawok@gmail.com
Todd Hembree, todd-hembree@cherokee.org
Chrissi Nimmo, chrissi-nimmo@cherokee.org
John Young, john-young@cherokee.org
Courtney Jordan, courtney-jordan@cherokee.org

District Court Clerk

FILED

In The District Court of Cherokee Nation

2019 JUL -2 PM 3:30

CHEROKEE NATION
DISTRICT COURT
KRISTI MONCOOYEA
COURT CLERK

Cherokee Nation,
Plaintiff,

v.

Kimberlie A Gilliland,
Defendant.

CM 2016-54

Order on Motion to Strike Amended Compliant

Motion to strike is denied. Amendment was filed within the statute of limitations. Because of the alleged deception on the part of the defendant the clock does not start running on embezzlement cases until the discovery of the alleged wrong doing. Defendants do not get to hide behind their own alleged wrong doing as a defense to a crime being committed.

It is so ordered.

District Court Judge

Certificate of Mailing

I, the undersigned, do hereby certify that on the date file stamped above, that I emailed, faxed, hand delivered, and or mailed a true and correct file stamped copy of the foregoing document to the following person(s):

Chadwick Smith, chad@chadsmith.com
Diane Hammons, adianehammons@gmail.com
Ralph Keen II, keenlawok@gmail.com
Todd Hembree, todd-hembree@cherokee.org
Chrissi Nimmo, chrissi-nimmo@cherokee.org
John Young, john-young@cherokee.org
Courtney Jordan, courtney-jordan@cherokee.org

District Court Clerk

In The District Court of Cherokee Nation

Cherokee Nation,
Plaintiff,

v.

Kimberlie A Gilliland,
Defendant.

CM 2016-54

Order on Motion to Disqualify

Motion to disqualify denied in part and dismissed in part as moot. *Young v. U.S. Ex Rel. Vuitton Et Fils S. A.*, 780 F.2d 179 (1987), is not Cherokee Nation law, but is also distinguishable from the case at hand in that in *Young* counsel within the same case, concurrently, was appointed to prosecute opposing party on a contempt charge within the same exact case. In other words in *Young* the Court gave one party power over the other party in the same case giving the power welding party an unfair advantage. In the cases at hand counsel's goal is similar in the civil and the criminal case, not to push for a different allegation because of legal posturing in an underlying matter. Further, the civil case has been stayed until after the criminal case has been disposed of, and if restitution is awarded in the criminal case it would be unrecoverable in the civil case. Therefore the motion to disqualify is denied. Counsel is not a candidate for office at this time therefore arguments regarding said issue are dismissed as moot.

It is so ordered.

District Court Judge

Certificate of Mailing

I, the undersigned, do hereby certify that on the date file stamped above, that I emailed, faxed, hand delivered, and or mailed a true and correct file stamped copy of the foregoing document to the following person(s):

Chadwick Smith, chad@chadsmith.com
Diane Hammons, adianehammons@gmail.com
Ralph Keen II, keenlawok@gmail.com
Todd Hembree, todd-hembree@cherokee.org
Chrissi Nimmo, chrissi-nimmo@cherokee.org
John Young, john-young@cherokee.org
Courtney Jordan, courtney-jordan@cherokee.org

District Court Clerk

FILED

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

2016 AUG 12 AM 10:58

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	CM 2016-54
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

ORDER OF ARRAIGNMENT, SURRENDER AND
RELEASE OF CUSTODY ON PERSONAL RECOGNIZANCE

On this 12 of August, 2016, the Court acknowledges the surrender of the Defendant, Kimberlie A. Gilliland and the Cherokee Nation does not object to releasing her on her personal recognizance. The Court arraigns Defendant upon her waiving the reading of the charges the Cherokee Nation brings against her in the above-styled and numbered case and being advised of her constitutional and statutory rights. Defendant reserves further time to file motions and enters a plea of not guilty subject to motions she may file.

Defendant demands a jury trial.

THEREFORE IT IS ORDERED BY THE COURT, Defendant is released on her own recognizance, no bond is required and this case is set for jury trial

Ordered this 12 day of August, 2016.

Judge Fite

Approved:

Chadwick Smith
Attorney for Defendant

Diane Hammons
Attorney for Cherokee Nation

Exhibit "B" Statement of Case

On March 20, 2019, the Cherokee Nation filed an Amended Complaint charging Gilliland with accusations of embezzlement from Cherokee Nation Education Foundation. Gilliland filed a Demurrer to the Amended Complaint arguing that it was void due to vagueness and failed to state a crime thus violating the due process right of notice guaranteed by the Cherokee Nation Constitution and the Indian Civil Rights Act. Gilliland further moved to dismiss the prosecution on grounds the various charges of the Amended Complaint were filed after the statute of limitations had run.

The District Court overruled both motions. Gilliland's freedom is impaired by reason that on October 22, 2019 the District Court ordered her to deposit $10,000 cash in the District Court to avoid incarceration pending trial although the Amended Complaint is void and invalid for a number of reasons.

Exhibit "C" Issues Raised on Appeal

The District Court has unconstitutionally restrained Gilliland' liberty because the Court's custody order required petitioner to appear at times and places restricting her to come and go as she pleased and was subject to restraints not shared by the public generally. A Petition for Habeas Corpus is a proper method to challenge the legality of orders issued by the District Court. The District Court had no authority to restraint Gilliland's liberty because the Amended Complaint was void for vagueness, failed to state a crime, was filed outside the statute of limitations, and violated federal law. The issues on appeal include:

A. THE BAIL SET BY THE DISTRICT COURT VIOLATES THE NATION'S LAW.
   1. Gilliland complied with her personal recognizance bond and imposition of a $10,000 cash bond is excessive and punitive.
   2. The District Court had no authority to issue a bench warrant outside the Nation.

B. THE CRIMINAL CHARGES FOR WHICH BAIL IS REQUIRED ARE UNCONSTITUTIONAL OR ILLEGAL.
   1. The District Court erred by not dismissing the case because the Amended Complaint fails to provide Gilliland due process because allegations do not apprise her of the particulars of the crime she is charged.
   2. In its July 2, 2019 Order, the District Court erred because the Amended Complaint violates constitutional and statutory requirements for due process because the charging statute *does not state a crime* as alleged and is *void by vagueness*.
      a. The Amended Complaint *does not state a crime* under the embezzlement statute.
      b. The embezzlement statue is *void for vagueness*.
   3. In its July 2, 2019 Order, the District Court erred because the Amended Complaint fails to apprise Gilliland of the factual allegations of the charges.
      a. There is no specificity as to facts to apprise Gilliland of the alleged criminal conduct.
      b. There are no allegations of criminal intent or action.
   4. In its July 2, 2019 Order, the District Court erred by denying Gilliland's Motion to Strike Amended Complaint because the Amended Complaint was filed after the statute of limitations expired.
      a. The Nation is subject to the "Delayed Discovery Rule" for the embezzlement statute of limitation.
      b. The Nation failed to allege or plead facts to prove it exercised reasonable diligence and that the offence was concealed from the CNF to invoke the Delayed Discovery Rule.
      c. The record offered by the Nation shows no fraud.
   5. The Amended Complaint violates the ICRA limitation on punishment.
   6. The District Court erred by declining to find the Nation's Attorney had a conflict of interest

EXHIBIT A-33

LIST OF EXHIBITS

Exhibit "A", Chronology of the Case

Exhibit "B", Order of Arraignment, Surrender and Release of Custody on Personal Recognizance

Exhibit "C", Subpoena Proof of Service

Exhibit "D", July 2, 2019 Order on Demurrer to Amended Complaint

Exhibit "E", July 2, 2019 Order on Motion to Strike Amended Compliant (sic)

Exhibit "F", Complaint and Information

Exhibit "G", Amended Complaint

Exhibit "H", Order Re-Setting Arraignment.

Exhibit "I", Bench Warrant

Exhibit "A", Chronology of the Case

Exhibit "A" Chronology

July 27, 2016- Keen, representing CNF filed a companion civil case based on the same allegations of the instant criminal case. *See* Case No. CV 2016-397. On September 6, 2016, Keen on behalf of CNF stated to the Court in its "Plaintiff's Response and Combining Brief in Opposition to Defendant's Motion to Stay" (at page 4) that "Admittedly, eight counts in the civil petition involve the same transaction or occurrence as in the criminal information" and in the civil case he sought from Gilliland a breathtaking $1,160,000 in damages of which $928,000 was punitive damages.

July 28, 2016- The Nation filed nine counts of criminal charges against Gilliland alleging that as Director of the Cherokee Nation Foundation, ("CNF"), she embezzled CNF property by traveling on trips with family members promoting the work of the Foundation, attended an online Master degree class, and did not account for certain office equipment. The Complaint was verified by A. Dianne Hammons, Special Prosecutor who was appointed by Todd Hembree, Cherokee Nation Attorney General. No law enforcement officer was endorsed as a witness or did an investigation of the matter. *See* Exhibit "F", Complaint and Information, CRM 2016-54.

August 12, 2016- The District Court acknowledged Gilliland surrendered to the Court, and entered its order releasing Gilliland on her own recognizance without restriction. *See* Exhibit "B", Order of Arraignment, Surrender and Release of Custody on Personal Recognizance. The Nation knew at the time of filing the Complaint that Gilliland resided outside the Cherokee Nation in Tulsa, Oklahoma.

February 14, 2019- Gilliland filed her Demurrer to Criminal Complaint on Grounds No Crime is Alleged and Motion to Dismiss because the Embezzlement Statute Denies Defendant Due Process.

March 7, 2019- Gilliland filed Motion to Disqualify Keen based on conflict of interest.

March 20, 2019- The Nation filed an Amended Complaint with six additional counts alleging that Gilliland embezzled funds from CNF for giving scholarships to Cherokee students without any allegation that she received any funds or benefited in any fashion from the award of the scholarships, and she paid the expenses of a Cherokee Nation Council member to present a program on scholarships to a Cherokee community. *See* Exhibit "G", Amended Complaint.

April 3, 2019- Gilliland filed her Motion to Strike Amended Complaint of Grounds the Statute of Limitations Expired for Additional Counts Charged, Demurrer to Amended Complaint.

July 2, 2019- The District Court issued orders denying Gilliland's Demurrer, Motion to Strike Amended Complaint, and Motion to Disqualify Keen and issued its Order Re-Setting Arraignment for July 19, 2019. No notice by email or regular mail was sent to Gilliland who was on her own personal recognizance bond by email or regular mail. *See* Exhibit "H", Order Re-Setting Arraignment. Smith did not discover these Orders until September 25, 2019 when he discovered the emailed Orders were blocked by his email as suspicious as possibly having a virus.

July 19, 2019- Smith and Gilliland did not appear for Gilliland's arraignment on the Amended Complaint.

August 1, 2019- The District Court filed its Minute Order issuing a Bench Warrant for Gilliland for failure to appear.

August 8, 2019- The District Court filed its Court Minute Order and on motion of the Nation issued a Bench Warrant for failure to appear at the July 19, 2019 arraignment to be served "Day

or Night" and listed Gilliland's address to be 1417 E. 46th Street, Tulsa, OK 74105, a location outside the Cherokee Nation. *See* Exhibit "I", Bench Warrant.

September 25, 2019 - Smith discovered the District Court's July 2, 2019 Order to appear for arraignment on July 19, 2019.

October 9, 2019- On Gilliland's Motion to Appear by Telephone, the Nation did not object to allow Gilliland to appearing for Arraignment on the Amended Complaint by phone and the Court ordered that she be allowed to appear by phone. *See* Agreed Motion to Allow Defendant to Appear Telephonically at Second Arraignment and Order Allowing Defendant to Appear Telephonically at Second Arraignment.

October 16, 2019- Gilliland moved to certify Orders for Appeal, the District Courts Order Denying Motion to Strike Amended Complaint on Grounds the Statute of Limitations Expired for Additional Counts Charged, and Demurrer to Amended Complaint.

October 18, 2019- Gilliland appeared for arraignment by phone and her counsel waived the reading of the Amended Complaint, acknowledged receipt, and entered a plea of non-guilty.

October 22, 2019- The District Court denied Gilliland's Motion to reinstate her Personal Recognizance bond and ordered her to deposit $10.000 cash with the court as bail before November 20, 2019 or else a Bench Warrant would be issued.

October 22, 2019- The District Court denied Gilliland's Motion for Certification for Interlocutory Appeal.

Exhibit "B", Order of Arraignment, Surrender and Release of Custody on Personal Recognizance

FILED

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

2016 AUG 12 AM 10: 58

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	CM 2016-54
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

ORDER OF ARRAIGNMENT, SURRENDER AND RELEASE OF CUSTODY ON PERSONAL RECOGNIZANCE

On this 12 of August, 2016, the Court acknowledges the surrender of the Defendant, Kimberlie A. Gilliland and the Cherokee Nation does not object to releasing her on her personal recognizance. The Court arraigns Defendant upon her waiving the reading of the charges the Cherokee Nation brings against her in the above-styled and numbered case and being advised of her constitutional and statutory rights. Defendant reserves further time to file motions and enters a plea of not guilty subject to motions she may file.

Defendant demands a jury trial.

THEREFORE IT IS ORDERED BY THE COURT, Defendant is released on her own recognizance, no bond is required and this case is set for jury trial

Ordered this 12 day of August, 2016.

Judge Fite

Approved:

Chadwick Smith
Attorney for Defendant

Diane Hammons
Attorney for Cherokee Nation

Exhibit "C", Subpoena Proof of Service

PROOF OF SERVICE

Origin / County _____ State OK Federal CHEROKEE NATION Case No. CV-2016-397

DOCUMENTS SERVED: I, being duly sworn, certify that I received the foregoing, to wit on _____

____ Summons w/ Petition or Complaint	____ Injunction/Victim Protective Order	____ Motion to Modify	____ Interrogatories
____ Amended Petition / Complaint	____ Garnishment/Lis Pendens	____ Motion for Leave/to Vacate/Enter	____ Brief-Plaintiff's/Defendant's
____ Petition / 3rd Party Defendant	____ Subpoena Duces Tecum	____ Motion/Summary Judgement	____ Journal Entry/Answer
____ Small Claims Affidavit / Money Judgement	X Subpoena	____ Motion/Deficiency Judgement	____ Cross/Counter Claim
____ Small Claims Replevin	____ Fees/Subpoena	____ Request for Admissions	____ Writ/Habeas Corpus
____ Hearing on Assets	____ Notice to Take Deposition	____ Request for Production	____ Letter/Notice to Quit
____ Citation for Contempt	____ Notice	____ Replevin Notice/Order	____ Application/Temporary Order
____ Witness Fee / Amount	____ Petition / Guardianship	____ Restraining Order	____ Order for Hearing
____ Other	____ Forcible Entry & Detainer		

METHOD OF SERVICE: Service made pursuant to: Other _____ Other _____

☐ Oklahoma/Title 12 O.S. Section 158.1 ☐ Federal Rule 4 Other _____

(A) That on JANUARY 22 2018 at 11:23 (a.m.) p.m., I served the above indicated document(s) on the within named ANDREW SIKORA at 1417 EAST 46TH STREET TULSA OK

(B) Additionally, on _____ at _____ a.m. p.m., I served the document(s) indicated on the within named _____ at 74105

MANNER OF SERVICE: And served the same according to law in the following manner, to wit:

PERSONAL SERVICE

_____ ☐ by delivering a true copy of said process to the above named and informing such person of their contents.

USUAL PLACE OF RESIDENCE

_____ ☐ by leaving a copy of said process for the above named with _____, a resident/family member, who is fifteen years of age or older, at the above listed address which is the usual place of abode or dwelling house of the above named, and informing such person of their contents.

CORPORATION / PARTNERSHIP / UNINCORPORATED ASSOCIATION / GOVERNMENT ENTITIES, ETC.

_____ ☐ by delivering a copy of said process to _____ he / she being the service agent authorized to accept service, managing agent in charge, and officer, a partner, owner, or the Attorney of Record for the above named entity/individual, and informing such person of their contents.

POSTED SERVICE

A # ☒ by affixing a copy of said process to the premises at the address indicated, which is in the possession of the above named individual.

NO SERVICE

_____ ☐ Said process WAS NOT SERVED on the above named for reason(s) stated: ☐ Evading Service ☐ Not at Home ☐ Bad Address / No Such Address ☐ Service Canceled ☐ Other _____

OTHER INFORMATION A # AFTER 5 ATTEMPTS of AVOIDING SERVICE - ATTY AUTHORIZED SERV.

Subscribed and sworn to before me this 24 day of JANUARY 2018

My Commission Expires AUGUST 01, 2020

COMMISSION # 16007373

NOTARY PUBLIC - STATE OF OKLAHOMA

SUZIE MARKEE

Notary Public Commission Exp.

SEAL

Undersigned declares under penalty of perjury that the foregoing is true and correct.

Name of Server

License # PS 2015-1

STATEMENT OF FEES

PROCESS SERVICE FEE:	$ 50.00	BAD ADDRESS / ENDEAVOR:	$ _____
URGENT / RUSH FEE: 5	$ _____	SKIP / LOCATE / RESEARCH:	$ _____
MILEAGE @ ____ (STRIPS)	$ 50.00	COURIER / COURT FILING:	$ _____
HOURLY (TRAVEL / WAIT):	$ _____	FEES / COST ADVANCED:	$ _____
ADDITIONAL SERVICE:	$ _____	TOTAL DUE:	$ 100.00

"John 3:16"

CELL PHONE
918-680-0001
E-mail
rlgprocessservices@yahoo.com

R.L.G. PROCESS SERVICE

P.O. Box 911 • STILWELL, OK 74960 • HOME PHONE 918-696-7442 Fax 918-696-2514

Exhibit "D", July 2, 2019 Order on Demurrer to Amended Complaint

In The District Court of Cherokee Nation

Cherokee Nation,
Plaintiff,

v.

Kimberlie A Gilliland,
Defendant.

CM 2016-54

Order on Demur to Complaint

Demur to complaint is overruled. The law is sufficient to provide a defendant the knowledge not to commit embezzlement. The information is sufficient to provide the defendant with full due process and knowledge of the complaint against her. The District Court is the appropriate court for this case to be heard and has full jurisdiction over it and the parties hereto, including but not limited to the authority to declare a provision of law constitutional or unconstitutional subject to appellate review.

It is so ordered.

District Court Judge

Certificate of Mailing

I, the undersigned, do hereby certify that on the date file stamped above, that I emailed, faxed, hand delivered, and or mailed a true and correct file stamped copy of the foregoing document to the following person(s):

Chadwick Smith, chad@chadsmith.com
Diane Hammons, adianehammons@gmail.com
Ralph Keen II, keenlawok@gmail.com
Todd Hembree, todd-hembree@cherokee.org
Chrissi Nimmo, chrissi-nimmo@cherokee.org
John Young, john-young@cherokee.org
Courtney Jordan, courtney-jordan@cherokee.org

District Court Clerk

Exhibit "E", July 2, 2019 Order on Motion to Strike Amended Compliant (sic)

In The District Court of Cherokee Nation

Cherokee Nation,
Plaintiff,

v.

Kimberlie A Gilliland,
Defendant.

CM 2016-54

Order on Motion to Strike Amended Compliant

Motion to strike is denied. Amendment was filed within the statute of limitations. Because of the alleged deception on the part of the defendant the clock does not start running on embezzlement cases until the discovery of the alleged wrong doing. Defendants do not get to hide behind their own alleged wrong doing as a defense to a crime being committed.

It is so ordered.

District Court Judge

Certificate of Mailing

I, the undersigned, do hereby certify that on the date file stamped above, that I emailed, faxed, hand delivered, and or mailed a true and correct file stamped copy of the foregoing document to the following person(s):

Chadwick Smith, chad@chadsmith.com
Diane Hammons, adianehammons@gmail.com
Ralph Keen II, keenlawok@gmail.com
Todd Hembree, todd-hembree@cherokee.org
Chrissi Nimmo, chrissi-nimmo@cherokee.org
John Young, john-young@cherokee.org
Courtney Jordan, courtney-jordan@cherokee.org

District Court Clerk

Exhibit "F", Complaint and Information

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
Plaintiff,	)	
	)	
v.	)	**CRM-2016-** 54
	)	
	)	
KIMBERLIE A. GILLILAND,	)	
D.O.B. 08/13/1969,	)	
Defendant.	)	

COMPLAINT AND INFORMATION

IN THE NAME AND BY THE AUTHORITY OF THE CHEROKEE NATION, comes now, A. Diane Hammons, specially appointed prosecutor acting by the power of the Attorney General for the Cherokee Nation, Todd Hembree, and upon her oath gives this Court reason to know and be informed that **KIMBERLIE A. GILLILAND** did, within the territorial boundaries of the Cherokee Nation including within Indian Country as defined by 18 U.S.C. § 1151, and the laws of the Cherokee Nation , commit the hereinafter described crimes. At all times pertinent hereto, Defendant Kimberlie A. Gilliland was serving as Executive Director of the Cherokee Nation Education Corporation a/k/a Cherokee Nation Foundation ("CNF"), a non-profit corporation organized under the laws of the Cherokee Nation, whose officers are appointed by the Principal Chief and approved by the Tribal Council, and whose principal place of business is in Tahlequah, Oklahoma, and which, at all times pertinent hereto received partial funding from the Cherokee Nation government and Cherokee Nation Businesses, both entities being located on Indian Country within the boundaries of the Cherokee Nation.

COUNT I: Embezzlement by Officer of Corporation; 21 CNCA § 1452

From a period from January 24, 2012, through February 14, 2012, Kimberlie A. Gilliland, did willfully and knowingly convert, misappropriate, and embezzle funds of CNF for her own and her family's use, to wit: By using CNF funds to pay for a family trip to California for herself, her husband, Andrew Sikora, and their two minor children, S.S. and S.S; said trip taking place from February 9, 2012, through February 13, 2012. Said conversion included the following transactions.

- On approximately January 24, 2012, the Defendant purchased American Airlines tickets for herself, her husband, Andrew Sikora, and her two minor children, S.S. and S.S. from Tulsa, Oklahoma, to Los Angeles, California, in the approximate amount of $329.20 per ticket plus $56.00 in airline fees, for a travel date of February 9, 2012, all paid out of CNEC funds with the use of a CNEC business credit card, and;
- From February 9, through February 13, 2012, the Defendant paid $70.54 to Fine Airport Parking out of CNEC funds with the use of a CNEC business credit card, and;
- From February 9, through February 13, 2012, the Defendant paid $157.95 to Enterprise Rent a Car at the Los Angeles International Airport, Los Angeles out of CNEC funds with the use of a CNEC business credit card, and;
- From February 9, through February 10, 2012, the Defendant paid $414.05 to Marriott Hotels and Resorts, Anaheim, California, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 11, 2012, the Defendant paid $47.93 for gasoline purchased at OSD Enterprises Inc, in Anaheim, California, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 11,2012, the Defendant paid $25.86 to a restaurant, Bangkok Bay, in Solana Beach, California, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 11,2012, the Defendant paid $46.94 to Oggis Pizza & Brewing Co. in Garden Gove, California, for four (4) guests, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 12, 2012, the Defendant paid $21.30 to Starbucks, in Carlsbad, California, out of CNEC funds with the use of a CNEC business credit card, and;
- From February 12 through February 13, 2012, the Defendant paid $314.53 to the Renaissance Montura, Los Angeles, CA, out of CNEC funds with the use of a CNEC business credit card, and;

- On February 12, 2012, the Defendant paid $1,408.40 to Continental Airlines for tickets and ticket fees for travel to begin on 2/13/12 for herself, her husband Andrew Sikora, and their minor children, S.S. and S.S., out of CNEC funds with the use of a CNEC business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used CNF funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT II: Embezzlement by Officer of Corporation; 21 CNCA § 1452

During a period from May 17, 2012, through May 19, 2012, Kimberlie A. Gilliland, did willfully and knowingly convert and embezzle funds of CNEC for her own use, to wit: By paying for "American Girl" hotel rooms (containing American Girl doll beds, pink balloons, and cookies) for the benefit of her daughter, and an employee's daughter, in the total amount of $291.54 to the Residence Inn Marriott, Addison, Texas, out of CNEC funds with the use of a CNEC business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used CNF funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT III: Embezzlement by Officer of Corporation; 21 CNCA § 1452

During a period from July 16, 2012, through August 13, 2012, Kimberlie A. Gilliland, did willfully and knowingly convert and embezzle funds of CNF for her own and her family's use, to wit: By using CNF funds to pay for a trip to California for herself and her husband, Andrew Sikora; said trip taking place from August 9, 2012, through August 13, 2012. Said conversion included the following transactions:

- On approximately July 16, 2012, the Defendant purchased Southwest Airlines tickets for herself and her husband, Andrew Sikora, to Burbank, California, in the approximate amount of $257.60 per ticket for a travel date of August 9, 2012, all paid out of CNF funds with the use of a CNF business credit card, and;
- From August 9, 2012 –August 13, 2012 the Defendant paid $194.45 to Fine Airport Parking in Tulsa, Oklahoma (including a $125 car wash charge) all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 9, 2012, the Defendant paid $51.84 to the Jose Roux Taco Bar at the Sky Harbor International Airport, Phoenix, Arizona, all paid out of CNF funds with the use of a CNF business

credit card, and;

- From August 9, 2012-August 10, 2012 the Defendant paid $398.82 to the Queen Mary Ship, in Long Beach, California, for two nights lodging in one of their rooms known for "paranormalistic activity," all paid out of CNF funds with the use of a CNF business credit card, and;
- From August 9, 2012-August 13, 2012 the Defendant paid $347.33 to Hertz Rental Car in Oakland, California, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 10, 2012, the Defendant purchased on the Queen Mary Ship in Long Beach, California, a toothbrush and deodorant for $6.74, two bottles of water for $4.78, and $38.80 paid to the Queen Mary Promenade Café for two guest breakfasts, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant purchased on the Queen Mary Ship in Long Beach, California, a "Bellhop Bear" for $21.99, a "Stack Logo Keyring" for $5.99, and a video entitled "Ghost Encounters" for $29.99, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $24.82 on the Queen Mary Ship in Long Beach, California, for food and beverage for two persons all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $56.59 to Shell Oil in Long Beach, California, paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $12.11 to Denny's in Kettleman City, California, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $92.40 to the Best Western Inn and Suites, Kettleman, California, paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 12, 2012, the Defendant paid $49.40 to Exxonmobil, in Kettleman, California and $10.45 to "Yellow Card Services," paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 12, 2012, the Defendant paid $133.02 to the Courtyard by Marriott, in Oakland, California, paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 13, 2012, the Defendant paid $5.35 to La Casita, in the Denver, Colorado, airport, paid out of CNF funds with the use of a CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an

office of trust in CNF, used said funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT IV: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about July 16, 2012, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own and her family's use, to wit: purchasing a Southwest Airlines ticket for her husband, Andrew Sikora, in the amount of $367.60 for an August 18, 2012 trip from Portland, Oregon to Tulsa, Oklahoma, paid out of CNF funds with the use of a CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT V: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about August 17, 2012, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own use, to wit: purchasing a "Buckle Bag" for $74.99 and two towels for $46.00 ($23.00 each) from the Pendleton Woolen Mills Employee Sales Room in Portland, Oregon, paid out of CNF funds with the use of her CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit, and not in the due and lawful execution of her trust.

COUNT VI: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about November 15, 2012, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own use, to wit: paying for a parking ticket from the City of Tulsa that was issued to her 2007 Toyota Camry, tag number ****C5, paid out of CNF funds with a CNF check, signed by defendant, for the amount of $40.00 ($30.00 fine and $10.00 late fee);

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit, and not in the due and lawful execution of her trust.

COUNT VII: Embezzlement by Officer of Corporation; 21 CNCA § 1452

From a period of time from January, 2011, through April, 2013, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own use, to wit:

paying for courses in an online master's degree program for herself from North Park University, in Chicago, Illinois, in the total amount of $21,100.36 paid out of CNF funds with CNF checks signed by the defendant, and with the use of a CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit, and not in the due and lawful execution of her trust.

COUNT VIII: Embezzlement by Officer of Corporation; 21 CNCA § 1452

In June of 2013, defendant unilaterally removed a large Hewlett-Packard Designjet Z3200PS 44" Photo Printer and software disks from the Foundation corporate offices to an unknown location. Said equipment was fully functional and valued in excess of $5,000.00.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said property for her personal benefit, and not in the due and lawful execution of her trust.

COUNT IX: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about June 10, and July 1, 2013, defendant used Foundation funds to purchase and take possession of over $10,000.00 of computer equipment from the Apple Store in Tulsa, Oklahoma.

A substantial portion of said computer equipment purchased with Foundation funds never appeared for use in Foundation's corporate offices, and the whereabouts of the equipment is unknown. The missing items include an AppleTV item, Serial No. F02KGAD4FF54, purchased for $99.00; an Apple laptop computer, Serial No. C02KP36SFFT0, purchased for $2199.00; a MacBook Pro service agreement, No. 970000020608672, purchased for $349.00; two Lightning AV digital adaptors, purchased for $49.00 each; an Apple Thunderbolt to Firewire adaptor, purchased for $29.00; a Thunderbolt Gigabit Ethernet adaptor purchased for $29.00; a light gray iPad Smart Case, purchased for $49.00; and a red iPad Smart Case, also purchased for $49.00.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said property for her personal benefit, and not in the due and lawful execution of her trust.

ALL OF SAID CRIMES being subject to punishment as defined at 21 CNCA § 10, to wit: a term of imprisonment for not more than one (1) year or a fine of five thousand ($5,000.00) or both

and any civil remedies as provided by 21 CNCA § 1760(B) for each separate crime.

FURTHER, that the Defendant is an "Indian" as defined in 25 U.S.C. § 450b(d), being a Citizen of the Cherokee Nation, and that the defendant did, within and without the Cherokee Nation including within Indian Country, commit the above crimes, contrary to the Cherokee Nation statutes cited above, and against the peace and dignity of the Cherokee Nation.

A. Diane Hammons, CNBA 0035
Special Prosecutor
Cherokee Nation Office of the Attorney General
P. O. Box 141
Tahlequah, OK 74465
adianehammons@gmail.com

CHEROKEE NATION) **ss.**

The undersigned, of lawful age, and being first duly sworn states that she has read the above and foregoing Complaint, and that the statements contained therein are true and correct to the best of her information and belief.

Special Prosecutor

Subscribed and sworn to before me this 25th day of July, 2016.

NOTARY PUBLIC

My Commission Expires: 8/20/18

NOTARY PUBLIC # 14007424 EXP. 08/20/18 STATE OF OKLAHOMA

Witnesses: Heather Sourjohn, former CNF employee, Tahlequah, OK
Jennifer Sandoval, CNF, 800 S. Muskogee Ave., Tahlequah, OK
Marisa Hambleton, CNF, 800 S. Muskogee Ave., Tahlequah, OK

Robert St. Pierre, CPA, North 2nd St., Stilwell, OK
J.D. Carey, CPA, Tahlequah, OK
Sherri Combs, forensic auditor, Tahlequah, OK
Shelley Butler-Allen, former CNF Board member, Tahlequah, OK
Robin Ballenger, former CNF Board member, Tulsa, OK
Susan Chapman-Plumb, CNF Board member, Tahlequah, OK
Tonya Rozell, CNF Board member, Tahlequah, OK
Casey Ross-Petherick, former CNF Board member, Oklahoma City, OK
Jay Calhoun, former CNF Board member, Cherokee Nation Businesses, Tulsa, OK
John Gritts, former CNF Board member, Colorado
Jackson Crain, Apple Store, Woodland Hills Mall, Tulsa, OK

Exhibit "G", Amended Complaint

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,
Plaintiff,

v.

KIMBERLIE A. GILLILAND,
D.O.B. 08/13/1969,
Defendant.

CRM-2016-54

AMENDED
COMPLAINT AND INFORMATION

IN THE NAME AND BY THE AUTHORITY OF THE CHEROKEE NATION, comes now, A. Diane Hammons, specially appointed prosecutor acting by the power of the Attorney General for the Cherokee Nation, Todd Hembree, and upon her oath gives this Court reason to know and be informed that **KIMBERLIE A. GILLILAND** did, within the territorial boundaries of the Cherokee Nation including within Indian Country as defined by 18 U.S.C. § 1151, and the laws of the Cherokee Nation , commit the hereinafter described crimes. At all times pertinent hereto, Defendant Kimberlie A. Gilliland was serving as Executive Director of the Cherokee Nation Education Corporation a/k/a Cherokee Nation Foundation ("CNF"), a non-profit corporation organized under the laws of the Cherokee Nation, whose officers are appointed by the Principal Chief and approved by the Tribal Council, and whose principal place of business is in Tahlequah, Oklahoma, and which, at all times pertinent hereto received partial funding from the Cherokee Nation government and Cherokee Nation Businesses, both entities being located on Indian Country within the boundaries of the Cherokee Nation.

COUNT I: Embezzlement by Officer of Corporation; 21 CNCA § 1452

From a period from January 24, 2012, through February 14, 2012, Kimberlie A. Gilliland, did willfully and knowingly convert, misappropriate, and embezzle funds of CNF for her own and her family's use, to wit: By using CNF funds to pay for a family trip to California for herself, her

husband, Andrew Sikora, and their two minor children, S.S. and S.S; said trip taking place from February 9, 2012, through February 13, 2012. Said conversion included the following transactions.

- On approximately January 24, 2012, the Defendant purchased American Airlines tickets for herself, her husband, Andrew Sikora, and her two minor children, S.S. and S.S. from Tulsa, Oklahoma, to Los Angeles, California, in the approximate amount of $329.20 per ticket plus $56.00 in airline fees, for a travel date of February 9, 2012, all paid out of CNEC funds with the use of a CNEC business credit card, and;
- From February 9, through February 13, 2012, the Defendant paid $70.54 to Fine Airport Parking out of CNEC funds with the use of a CNEC business credit card, and;
- From February 9, through February 13, 2012, the Defendant paid $157.95 to Enterprise Rent a Car at the Los Angeles International Airport, Los Angeles out of CNEC funds with the use of a CNEC business credit card, and;
- From February 9, through February 10, 2012, the Defendant paid $414.05 to Marriott Hotels and Resorts, Anaheim, California, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 11, 2012, the Defendant paid $47.93 for gasoline purchased at OSD Enterprises Inc, in Anaheim, California, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 11,2012, the Defendant paid $25.86 to a restaurant, Bangkok Bay, in Solana Beach, California, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 11,2012, the Defendant paid $46.94 to Oggis Pizza & Brewing Co. in Garden Gove, California, for four (4) guests, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 12, 2012, the Defendant paid $21.30 to Starbucks, in Carlsbad, California, out of CNEC funds with the use of a CNEC business credit card, and;
- From February 12 through February 13, 2012, the Defendant paid $314.53 to the Renaissance Montura, Los Angeles, CA, out of CNEC funds with the use of a CNEC business credit card, and;
- On February 12, 2012, the Defendant paid $1,408.40 to Continental Airlines for tickets and ticket fees for travel to begin on 2/13/12 for herself, her husband Andrew Sikora, and their minor children, S.S. and S.S., out of CNEC funds with the use of a CNEC business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used CNF funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT II: Embezzlement by Officer of Corporation; 21 CNCA § 1452

During a period from May 17, 2012, through May 19, 2012, Kimberlie A. Gilliland, did willfully and knowingly convert and embezzle funds of CNEC for her own use, to wit: By paying for "American Girl" hotel rooms (containing American Girl doll beds, pink balloons, and cookies) for the benefit of her daughter, and an employee's daughter, in the total amount of $291.54 to the Residence Inn Marriott, Addison, Texas, out of CNEC funds with the use of a CNEC business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used CNF funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT III: Embezzlement by Officer of Corporation; 21 CNCA § 1452

During a period from July 16, 2012, through August 13, 2012, Kimberlie A. Gilliland, did willfully and knowingly convert and embezzle funds of CNF for her own and her family's use, to wit: By using CNF funds to pay for a trip to California for herself and her husband, Andrew Sikora; said trip taking place from August 9, 2012, through August 13, 2012. Said conversion included the following transactions:

- On approximately July 16, 2012, the Defendant purchased Southwest Airlines tickets for herself and her husband, Andrew Sikora, to Burbank, California, in the approximate amount of $257.60 per ticket for a travel date of August 9, 2012, all paid out of CNF funds with the use of a CNF business credit card, and;
- From August 9, 2012 –August 13, 2012 the Defendant paid $194.45 to Fine Airport Parking in Tulsa, Oklahoma (including a $125 car wash charge) all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 9, 2012, the Defendant paid $51.84 to the Jose Roux Taco Bar at the Sky Harbor International Airport, Phoenix, Arizona, all paid out of CNF funds with the use of a CNF business credit card, and;
- From August 9, 2012-August 10, 2012 the Defendant paid $398.82 to the Queen Mary Ship, in Long Beach, California, for two nights lodging in one of their rooms known for "paranormalistic activity, " all paid out of CNF funds with the use of a CNF business credit card, and;
- From August 9, 2012-August 13, 2012 the Defendant paid $347.33 to Hertz Rental Car in Oakland, California, all paid out of CNF funds with the use of a CNF business credit card, and;

- On approximately August 10, 2012, the Defendant purchased on the Queen Mary Ship in Long Beach, California, a toothbrush and deodorant for $6.74, two bottles of water for $4.78, and $38.80 paid to the Queen Mary Promenade Café for two guest breakfasts, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant purchased on the Queen Mary Ship in Long Beach, California, a "Bellhop Bear" for $21.99, a Stack Logo Keyring for $5.99, and a video entitled "Ghost Encounters" for $29.99, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $24.82 on the Queen Mary Ship in Long Beach, California, for food and beverage for two persons all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $56.59 to Shell Oil in Long Beach, California, paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $12.11 to Denny's in Kettleman City, California, all paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 11, 2012, the Defendant paid $92.40 to the Best Western Inn and Suites, Kettleman, California, paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 12, 2012, the Defendant paid $49.40 to Exxonmobil, in Kettleman, California and $10.45 to "Yellow Card Services", paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 12, 2012, the Defendant paid $133.02 to the Courtyard by Marriott, in Oakland, California, paid out of CNF funds with the use of a CNF business credit card, and;
- On approximately August 13, 2012, the Defendant paid $5.35 to La Casita, in the Denver, Colorado, airport, paid out of CNF funds with the use of a CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT IV: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about July 16, 2012, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own and her family's use, to wit: purchasing a Southwest

Airlines ticket for her husband, Andrew Sikora, in the amount of $367.60 for an August 18, 2012 trip from Portland, Oregon to Tulsa, Oklahoma, paid out of CNF funds with the use of a CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT V: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about August 17, 2012, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own use, to wit: purchasing a "Buckle Bag" for $74.99 and two towels for $46.00 ($23.00 each) from the Pendleton Woolen Mills Employee Sales Room in Portland, Oregon, paid out of CNF funds with the use of her CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit, and not in the due and lawful execution of her trust.

COUNT VI: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about November 15, 2012, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own use, to wit: paying for a parking ticket from the City of Tulsa that was issued to her 2007 Toyota Camry, tag number ****C5, paid out of CNF funds with a CNF check, signed by defendant, for the amount of $40.00 ($30.00 fine and $10.00 late fee);

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit, and not in the due and lawful execution of her trust.

COUNT VII: Embezzlement by Officer of Corporation; 21 CNCA § 1452

From a period of time from January, 2011, through April, 2013, the defendant did willfully and knowingly convert and embezzle funds of CNF for her own use, to wit: paying for courses in an online master's degree program for herself from North Park University, in Chicago, Illinois, in the total amount of $21,100.36 paid out of CNF funds with CNF checks signed by the defendant, and with the use of a CNF business credit card.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said funds for her personal benefit, and not in the due and lawful execution of her trust.

COUNT VIII: Embezzlement by Officer of Corporation; 21 CNCA § 1452

In June of 2013, defendant unilaterally removed a large Hewlett-Packard Designjet Z3200PS 44" Photo Printer and software disks from the Foundation corporate offices to an unknown location. Said equipment was fully functional and valued in excess of $5,000.00.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said property for her personal benefit, and not in the due and lawful execution of her trust.

COUNT IX: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about June 10, and July 1, 2013, defendant used Foundation funds to purchase and take possession of, over $10,000.00 of computer equipment from the Apple Store in Tulsa, Oklahoma.

A substantial portion of said computer equipment purchased with Foundation funds never appeared for use in Foundation's corporate offices, and the whereabouts of the equipment is unknown. The missing items include an AppleTV item, Serial No. F02KGAD4FF54, purchased for $99.00; an Apple laptop computer, Serial No. C02KP36SFFT0, purchased for $2199.00; a MacBook Pro service agreement, No. 970000020608672, purchased for $349.00; two Lightning AV digital adaptors, purchased for $49.00 each; an Apple Thunderbolt to Firewire adaptor, purchased for $29.00; a Thunderbolt Gigabit Ethernet adaptor purchased for $29.00; a light gray iPad Smart Case, purchased for $49.00; and, a red iPad Smart Case, also purchased for $49.00.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said property for her personal benefit, and not in the due and lawful execution of her trust.

COUNT X: Embezzlement by Officer of Corporation; 21 CNCA § 1452

From January 2011 through July 2013, defendant misappropriated Foundation funds by giving herself pay raises that had not been authorized by the CNF Board.

- The, March 2010 contract with the defendant authorized her compensation as

an independent contractor in an amount not to exceed $72,000.00, or $6,000.00 per month.

- In 2011, Defendant unilaterally changed her position in payroll to that of a payroll employee, with the Foundation paying all taxes and benefits, while also giving herself a substantial pay raise, amounting to approximately $10,900, for the calendar year, 2011.
- Defendant caused herself to be paid approximately $89,161.64 for the calendar year 2012, which was $17,161.64 over the approved contract executed by the CNF Board.
- On January 28, 2013, Foundation and defendant entered into a Severance Agreement which provided that defendant would receive $74,500.00, less taxes and other withholdings. This amount was intended to reflect one-year's salary for defendant at that time. The agreement further allowed defendant to remain on Foundation's payroll at her *"base salary"* until her final day of employment on July 12, 2013, at 5:00 p.m. Per the Severance Agreement, defendant received $74,500.00 less social security, Medicare, federal, and state withholdings on January 31, 2013.
- On or about January 31, 2013, Defendant wrongfully increased her monthly rate from $7,908.18 to $8,072.26.
- From February 2013 to June 2013 Defendant received $40,361.30; said amount being $10,361.30 over her approved 2010 contract rate. As a result of defendant's unauthorized pay increase, she wrongfully paid herself $10,361.30 in excess of her approved 2010 contact rate.
- Defendant's last day per the Severance Agreement was Friday, July 12, 2013, at 5:00 p.m. Due to the pay cycle ending on July 10 defendant should have received two days additional pay on her last paycheck, which under the approved 2010 contract rate, should have been $600.00. However, defendant wrongfully paid herself $8,072.26, a full month's salary at her unauthorized rate for July; said amount being $4,472.26 over her approved 2010 contract rate. As a result of defendant's unauthorized pay increase, she wrongfully paid herself $4,472.26 in excess of her approved 2010 contact rate.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said property for her personal benefit, and not in the due and lawful execution of her trust.

COUNT XI: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about June 12, 2013,, defendant misappropriated Foundation funds by paying $988.00 of Foundation funds to Cherokee Media, a business in which she was involved with her husband, Andrew Sikora.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an

office of trust in CNF, used said property for her personal benefit, and not in the due and lawful execution of her trust.

COUNT XII: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about, defendant misappropriated Foundation funds by giving unauthorized scholarships to three different students who did not meet the criteria for the scholarships, and in one instance, did not even apply for a scholarship.

- Defendant unilaterally awarded a total of $4,500.00 in Foundation Gammon Scholarship funds to "Student A," for academic years 2011-2013, with the final $1,500.00 payment being made on January 28, 2013, the same day defendant executed her severance agreement with the Foundation.
- Student A never made an application for the scholarship, did not go through the competitive scholarship selection process, and was not qualified under the restrictive terms of the Gammon scholarship for an award of those funds.
- Defendant unilaterally awarded a total of $10,000.00 in Foundation Cherokee Nation Businesses scholarship funds to "Student B" for academic years 2011-2013.
- Student B" neither made an application, nor went through the competitive scholarship selection process to be awarded any scholarship funds for the 2011-2012 academic year, yet was unilaterally awarded $5,000.00 by defendant; and"Student B" did not satisfy the academic requirements for the Cherokee Nation Business scholarship for the 2012-2013 academic year, yet was unilaterally awarded $5,000.00 by defendant.
- Defendant unilaterally awarded "Student C" a total of $5,606.73 in Foundation Gammon Scholarship funds for the academic years 2011-2013.
- "Student C" did not submit a timely scholarship application, nor did she go through the competitive scholarship selection process to be awarded said funds and "Student C" did not meet the restrictive terms of the Gammon scholarship for an award of those funds.
- On or about January 3, 2011, defendant unilaterally awarded $1,500.00 in Foundation Gammon Scholarship funds to "Student D," and further extended to her a zero-interest student loan in the amount of $2,050.81.
- "Student D" neither made an application, nor went through the competitive scholarship selection process to be awarded or loaned said funds.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used said property for her personal benefit, and not in the due and lawful execution of her trust.

COUNT XIII: Embezzlement by Officer of Corporation; 21 CNCA § 1452

During a period from January 24, 2012, through January 29, 2012, defendant wrongfully expended Foundation funds for her own personal use and benefit, and for the use and benefit of her husband, Andrew Sikora, and for use and benefit of her two minor children, S.S. and S.S., by purchasing meals, hotel lodging, toll road usage, fuel, utilizing a Foundation vehicle and other travel expenses for a family trip to Golden, Colorado occurring on January 24 - 29, 2012.

Said conversion included the following transactions:

- 1/24/12: $28.69 gasoline charged to CNEC Quiktrip (4510 south Peoria, Tulsa, Ok at 6:05 am) gas card ending in 2952.
- 1/24/12: $.95 and $1.90, 2007 Honda CRV Pike Pass charges for Cimarron Turnpike at 6:45 a.m. and 7:13 a.m, respectiely.
- 1/24/12: $23.33 gasoline charged to CNEC Quiktrip (Wichita, KS) gas card ending in 2952.
- 1/24/12: $40.79 gasoline charged to CNEC visa credit card ending in 8611 (assigned to Kimberlie Gilliland) in Colby, KS
- 1/24/12: $25.02 gasoline charged to CNEC Phillips66 Conoco credit card #634 in Limon, Colorado
- 1/24/12: $153.73 Towneplace Suites, Golden, Colorado, arrival-1/24/12 charged to CNEC credit card 8611
- 1/26/12: $41.05 gasoline charged to CNEC Phillips 66 Conoco credit card in Denver, Colorado
- 1/26/12: $117.30 Table Mountain Inn, dining room charged to CNEC visa credit card ending in 8611
- 1/28/12: $32.72 gasoline charged to CNEC Phillips66 Conoco gas card in Denver, Colorado
- 1/29/12: $712.30 departed Residence Inn Marriott –four (4) guests, one room. (handwritten notation on receipt says "fundraiser")
- 1/29/12: $29.97 gasoline charged to CNEC Phillips66 Conoco gas card in Colby, KS
- 1/29/12: $40.57 gasoline charged to CNEC Phillips66 Conoco credit card in Wellington, KS
- 1/29/12: $37.93 Golden Corral charged to CNEC credit card 8611 for party of four (4). The receipt lists kids 4-6 $3.99; child buffet 10-12 yrs $5.99; two (2) Sunday buffets for $20.98 and (2) soft drinks for $3.96. Handwritten notation on receipt states "fundraiser".
- 1/29/12: $1.90 and $.95 CNEC Pike Pass charges for CNEC 2007 Honda CRV.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used CNF funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT XIV: Embezzlement by Officer of Corporation; 21 CNCA § 1452

On or about April 26, 2013 through April 28, 2013, defendant misappropriated Foundation funds by paying for the out-of-state travel funds of a sitting tribal Council member, Cara Cowan Watts, during a purported Foundation business trip to Dallas, Texas, and by taking Defendant's family on said trip and paying for the lodging and meals of her family.

Said conversion included the following transactions:

- $839.02 spent on lodging for Defendant, Defendant's family, a CNF employee and Councilor Watts on April 26 and April 27, 2013 at the Residence Inn, Dallas, Texas, including a $100 pet charge to Defendant's room.
- $292.76-Volos Taverna Restaurant, Dallas, Texas for meals for Defendant, Defendant's family, the CNF staff member, their family members and Councilor Cara Cowan Watts. The purchase included five carafes of mojitos (alcoholic beverage).
- $461.72-Mi Piaci Ristorane Italiano, Dallas, Texas, on or about April 27, 2013 for food and drink (including $76.00 for wine), for Defendant, Defendant's family, and others.

Said acts being a fraudulent appropriation by Kimberlie Gilliland, who while holding an office of trust in CNF, used CNF funds for her personal benefit and her family's benefit, and not in the due and lawful execution of her trust.

COUNT XV: Embezzlement by Officer of Corporation; 21 CNCA § 1452

During a period from February 28, 2013, through June 3, 2013, defendant misappropriated Foundation funds by paying for the planned out-of-state travel for both defendant and a sitting tribal Council member, Cara Cowan Watts, by purchasing unauthorized airlines tickets to Phoenix, Arizona.

Said conversion included the following transactions:

- Airline tickets for defendant and Cara Cowan Watts purchased from Southwest Airlines on or about February 28, 2013, in the amount of $343.80 each, plus an additional $25.00 each for upgrades, for a total of $737.60.
- Airline change fees for approximately $140.00 on or about June 3, 2013, to

change the above Southwest Airlines tickets for dates in October, 2013

Said airline tickets were originally purchased for travel on June 8, 2013, but were changed at defendant's direction on May 31, 2013, for travel to occur on October 25, 2103, three months after defendant's final date of employment under the Severance Agreement, resulting in additional charges being assessed, and that said trip never occurred.

ALL OF SAID CRIMES being subject to punishment as defined at 21 CNCA § 10, to wit: a term of imprisonment for not more than one (1) year or a fine of five thousand ($5,000.00) or both and any civil remedies as provided by 21 CNCA § 1760(B) for each separate crime.

FURTHER, that the Defendant is an "Indian" as defined in 25 U.S.C. § 450b(d), being a Citizen of the Cherokee Nation, and that the defendant did, within and without the Cherokee Nation including within Indian Country, commit the above crimes, contrary to the Cherokee Nation statutes cited above, and against the peace and dignity of the Cherokee Nation.

A. Diane Hammons
Special Prosecutor
Cherokee Nation Office of the Attorney General

CHEROKEE NATION) **ss.**

The undersigned, of lawful age, and being first duly sworn states that she has read the above and foregoing Amended Complaint, and that the statements contained therein are true and correct to the best of his information and belief.

Special Prosecutor

Subscribed and sworn to before me this 28th day of March, 2019.

NOTARY PUBLIC

My Commission Expires: 6/27/19

Witnesses:

(The numerous witnesses are listed on a separate notice provided to defense counsel).

Exhibit "H", Order Re-Setting Arraignment

In The District Court of Cherokee Nation

Cherokee Nation,
Plaintiff,

v.

Kimberlie A Gilliland,
Defendant.

CM 2016-54

Order Re-Setting Arraignment

Defendant was previously set to be arraigned on May 6, 2019 at 10:00AM. Before the arraignment could take place Defendant filed a motion to strike the complaint and a demur to the complaint.

Pursuant to 22 CNCA §§ 497 and 498, the motion to strike the complaint and the demur to the complaint were heard without the defendant being arraigned. The Court has now denied the motion to strike the complaint and overruled the demur to the complaint, and pursuant to 22 CNCA §§ 503 and 511 the defendant must now plead forthwith. Further, if defendant does not plead, judgment may be pronounced.

The Court hereby Orders Defendant, Kimberlie A Gilliland, to present herself for arraignment on July 19, 2019 at 10:00AM, at the Cherokee Nation Courthouse, located on the second floor of the WW Keeler Tribal Complex at 17675 S Muskogee, Tahlequah, OK 74464.

Any and all other previous orders of the Court, including the *Criminal Trial Notice and Scheduling Order* filed herein on March 6, 2019, shall remain in full force and effect.

It is so ordered.

District Court Judge

Certificate of Mailing

I, the undersigned, do hereby certify that on the date file stamped above, that I emailed, faxed, hand delivered, and or mailed a true and correct file stamped copy of the foregoing document to the following person(s):

Chadwick Smith, chad@chadsmith.com
Diane Hammons, adianehammons@gmail.com
Ralph Keen II, keenlawok@gmail.com
Todd Hembree, todd-hembree@cherokee.org
Chrissi Nimmo, chrissi-nimmo@cherokee.org
John Young, john-young@cherokee.org
Courtney Jordan, courtney-jordan@cherokee.org

District Court Clerk

Exhibit "I", Bench Warrant

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION, Plaintiff, vs. KIMBERLIE GILLILAND, Defendant.	Case No. CRM-2016-54

BENCH WARRANT

TO THE CHEROKEE NATION MARSHALS OR SHERIFF OR DEPUTY SHERIFF OR ANY OTHER OFFICER AUTHORIZED BY LAW TO SERVE CRIMINAL PROCESS:

WHEREAS, complaint has been made in writing, and has charged the Defendant, KIMBERLIE GILLILAND, did then and there unlawfully and contrary to the laws of the Cherokee Nation, commit the offenses of:
COUNT I: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT II: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT III: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT IV: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT V: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT VI: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT VII: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT VII: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT IX: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT X: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT XI: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT XII: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT XIII: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT XIV: Embezzlement by Officer of Corporation; 21 CNCA § 1452,
COUNT XV: Embezzlement by Officer of Corporation; 21 CNCA § 1452, and FAILED TO APPEAR in the said Court.

YOU ARE THEREFORE COMMANDED forthwith to arrest the said KIMBERLIE GILLILAND and bring her before the Court of the Cherokee Nation, 17675 S. Muskogee Avenue, 2nd Floor, Tahlequah, Oklahoma, or if the Court be adjourned or be not in session that you retain her in your custody in the County Jail in the County in which you arrest her or that you deliver her in to the custody of the Cherokee Nation, subject to the further order of this Court.

IT IS THEREFORE ORDERED that the above-identified Defendant be arrested by and be detained in the custody of the Cherokee Nation Marshal Service or its agents, day or night pending appearance before the Cherokee Nation District Court.

WITNESS my hand and seal of the Cherokee Nation District Court this 8th day of August, 2019.

CASH/SURETY/ NO BOND: $ 10,000 00/100

By _____
JUDGE OF THE DISTRICT COURT

DESCRIPTION:

Name: Kimberlie Gilliland
DL/SSN: 446-66-9476
Address: 1417 E 46th St. Tulsa, OK 74105
DOB: 08/13/1969 Height: 5'8" Weight: 160 lbs Hair: Blonde/Graying Eyes: Grey Blue Race: AI/F

EXHIBIT A-34

IN THE SUPREME COURT OF THE CHEROKEE NATION

KIMBERLIE A. GILLILAND,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. SC 2019-15**
	)	
CHEROKEE NATION,	)	**District Court CM 2016-54**
	)	
Respondent.	)	

TABLE OF CONTENTS
BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS AND APPEAL

EXHIBIT A-35

IN THE SUPREME COURT OF THE CHEROKEE NATION

KIMBERLIE A. GILLILAND,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. SC -2019-15**
	)	
CHEROKEE NATION,	)	**District Court CM 2016-54**
	)	
and	)	
	)	
LUKE BARTEAUX,	)	
Judge of the District Court,	)	
	)	
Respondents.	)	

BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS AND APPEAL

Petitioner Kimberlie Gilliland, ("Gilliland") submits this Brief in support of her Petition for Writ of Habeas Corpus arguing that the Cherokee Nation ("Nation") by and through District Court Judge Luke Barteaux ("District Court") has restricted her freedom in violation of Cherokee Nation law, the Cherokee Nation Constitution,[1] and the Indian Civil Rights Act, 25 U.S.C.§ 1301 et seq. ("ICRA")[2].

---

[1] CONSTITUTION OF THE CHEROKEE NATION 1999
Article III. Bill of Rights
Section 2.
In all criminal proceedings, the accused shall have the right to: counsel: confront all adverse witnesses: have compulsory process for obtaining witnesses in favor of the accused: and, to a speedy public trial by an impartial jury. . . . Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.
Section 3. The right of trial by jury shall remain inviolate, and the Cherokee Nation shall not deprive any person of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

[2] The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C.§§ 1301-1304 (ICRA), provides as follows:
§ 1302 (a) No Indian tribe in exercising powers of self-government shall—
2. violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue Warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized:

Gilliland prays for this Court to find that she is being unconstitutionally and illegally held by order of the District Court. The District Court ordered $10,000 cash to be deposited with the District Court by November 20, 2019 or else she would be arrested and jailed until her trial set for April 20, 2020, thus restricting her freedom to come and go unlike other citizens of the Cherokee Nation and the United States. The District Court's bail order is punitive, excessive, and violates the Nation's law. The criminal charges, underlying the District Court's bail order, brought by the Special Prosecutor Ralph Keen ("Keen") under the authority of the Cherokee Nation Attorney General Sarah Hill, violate Cherokee Nation and federal requirements for due process and are unconstitutional as void by vagueness, fail to allege a crime, were filed outside the statute of limitations, and imposed a penalty greater than permitted by the ICRA. Gilliland prays for this Court to order the District Court's bail order to be set aside and the criminal charges be dismissed with prejudice.

I. AUTHORITY OF THE COURT TO HEAR A WRIT OF HABEAS CORPUS

The Cherokee Nation Supreme Court has the power to issue, hear and determine writs of habeas corpus.[3] Cherokee Nation law[4] provides that Gilliland is entitled to review of the District

---

6. deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
7. (A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;
(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;
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;
§ 1303. Habeas corpus
The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

[3] CONSTITUTION OF THE CHEROKEE NATION 1999
Article VIII. Judicial
Section 4. In support of its original and appellate jurisdiction, the Supreme Court shall have power to issue, hear and determine writs of habeas corpus, mandamus, quo Warranto, certiorari, prohibition and such other remedial writs as may be provided by law and may exercise such other jurisdiction as may be conferred by statute. The appellate jurisdiction of the Supreme Court shall extend to all cases at law and in equity arising under the laws or Constitution of the Cherokee Nation.

[4] 22 CNCA § 1079. Denial of bail—Review by habeas corpus

Court's order fixing the amount of bail by the Supreme Court. The ICRA is binding on the Nation as substantive federal law and provides that a writ of habeas corpus is a proper vehicle to challenge detention arising from a criminal complaint.

II. STATEMENT OF THE CASE.

Gilliland was the Director of the Cherokee Nation Foundation ("CNF") from 2009 to 2011 by contract, and then was employed from 2011 until the end of June 2013 as a regular employee. She resigned in January 2013 but was asked by CNF to stay until the end of June 2013. She negotiated a termination agreement with Robin Ballenger, the Chairman of the CNF Board which was approved by the Board. Gilliland was succeeded by Jason Denny. During the period of time pertinent herein, CNF had annual audits without any findings of fraud or wrongdoing. *See* footnotes 28-33.

Diane Hammond, appointed Special Prosecutor by Attorney General Todd Hembree ("Hembree") on March 20, 2016, filed the Complaint *without referral, investigation, or consultation* with any law enforcement agency. The fact that no law enforcement agency investigated this case should raise all sorts of red flags. If a criminal offense occurred, the Cherokee Nation Marshall would be requested to investigate the allegations, interview witnesses, gather evidence, request the suspect to provide a statement, and make a recommendation to the Attorney General whether to prosecute or not and, if so, what charges should be considered. None of that was done. *Not one law enforcement officer is endorsed as a witness in this case.* If it were suspected that hundreds of thousands of dollars were embezzled from the Cherokee Nation or to a magnitude that Hammond is requesting fifteen years in jail and $75,000 in fines, the Cherokee Nation Marshall would refer the case to the Federal Bureau of Investigation for

---

If bail on appeal be denied, or the amount fixed be excessive, the defendant shall be entitled to a review of the action of the trial Court and its reasons for refusing bail, by habeas corpus proceedings before the appellate Court, or if the Court be not in session, then by some Judge of said Court.

investigation and review by the U.S. Attorney. Hembree issued a statement to the press in July 2016 contending that the charges were filed "to safeguard the assets of the Cherokee Nation."[5] If the Nation's assess were embezzled, it would have been even a greater reason for prosecution by the U.S. Attorney pursuant to 18 U.S.C. § 1163.[6]

Rather than conduct a regular law enforcement investigation, the Nation hired Sherri Combs, a private contractor, to conduct a forensic audit of CNF which was concluded before 2014. The Nation has refused to provide Gilliland a copy of the audit report.[7] Even that report was not reviewed by law enforcement. Why did Hammond and Hembree violate all well-established process, procedure and protocol to prosecute a criminal case without any law enforcement involvement including federal resources for investigating white-collar crimes?

About the same time Hammond filed this criminal case, Keen was retained by CNF to civilly sue Gilliland for substantially the same allegations as charged in this criminal case.

On November 11, 2018, Keen entered an appearance in this criminal case and became the lead prosecutor. As a result, Keen became CNF's plaintiff's attorney in the civil case against Gilliland and the lead prosecutor against Gilliland in the criminal case.

The chronology of the case is attached as Exhibit "A".

---

[5] "Former Cherokee Nation Foundation director charged with embezzlement" Muskogee Phoenix, July 29, 2016 https://www.muskogeephoenix.com/news/former-cherokee-nation-foundation-director-charged-with-embezzlement/article_2fcb7ca3-4d22-5f51-b587-27a07b431246.html

[6] 53 U.S. Code § 1163. Whoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, goods, assets, or other property belonging to any Indian tribal organization or intrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization; or

Whoever, knowing any such moneys, funds, credits, goods, assets, or other property to have been so embezzled, stolen, converted, misapplied or permitted to be misapplied, receives, conceals, or retains the same with intent to convert it to his use or the use of another—

Shall be fined under this title, or imprisoned not more than five years, or both; but if the value of such property does not exceed the sum of $1,000, he shall be fined under this title, or imprisoned not more than one year, or both.

As used in this section, the term "Indian tribal organization" means any tribe, band, or community of Indians which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group which is organized under any of such laws.

[7] Gilliland's Motion to Compel filed September 8, 2016.

III. ARGUMENT AND AUTHORITY

A. THE BAIL SET BY THE DISTRICT COURT VIOLATES THE NATION'S LAW.

1. Gilliland complied with her personal recognizance bond but the District Court subsequently ordering a $10,000 cash deposit is excessive and punitive.

On August 12, 2016, the Nation agreed, and the District Court allowed Gilliland to surrender herself to the Court, and be on a personal recognizance bond without restriction for appearance at trial; she was arraigned on the Complaint at that time.[8] The Nation knew at the time of filing the Complaint that Gilliland resided outside the Cherokee Nation in the Muskogee Creek Nation, Tulsa, Oklahoma. There were no conditions in the District Court's Order not to leave the boundaries of the Nation or State; there was no condition to report her residence or whereabouts; there was no condition to request permission to move.

Whenever Gilliland received notice, actual or legal, she appeared as directed by the District Court. On October 18, 2019 she appeared by phone for an arraignment on the Amended Complaint. However, on October 22, 2019, the Nation objected to Gilliland's Motion to Remain on her Personal Recognizance Bond and the District Court denied Gilliland's motion. Instead, the District Court ordered her to deposit with the Court Clerk **$10,000 cash** with the Court Clerk as bail to avoid being jailed until her trial set for April 20, 2020.

In its October 16, 2019, objection to Gilliland remaining on her personal recognizance bond, the Nation wrongfully argued in its hyperbole that Gilliland "absconded" from the Cherokee Nation's jurisdiction. On August 8, 2016, the Nation knew that she lived outside the Nation and the District Court released Gilliland on her own recognizance *without* any restriction on leaving the Cherokee Nation or requesting permission of the Court to leave the Cherokee Nation. Keen, Special Prosecutor in this instant criminal case, and plaintiff's attorney in a

[8] See Exhibit "B", Order of Arraignment, Surrender and Release of Custody on Personal Recognizance.

companion civil case against Gilliland clearly knew that Gilliland and her husband Andrew Sikora ("Sikora") lived outside the Cherokee Nation because Keen attempted to enforce a subpoena in the companion civil case for Sikora's deposition at Gilliland's and Sikora's Tulsa address.[9] There has been no material change of circumstances between August 12, 2016 when she was released on her personal recognizance and the District Court's October 22, 2019 order to deposit $10,000 cash with the District Court to avoid being jailed pending trial.

At the time of the second arraignment, Gilliland was in Poland where her husband Sikora, a Polish native, was seeking treatment for blood cancer.

The Nation's request to require a $10,000 cash deposit illustrates Keen's conflict of interest who is suing Gilliland in a civil case based on the same accusations. It shows Keen using the power of the Attorney General's Office to gain advantage by punishing Gilliland in the criminal case by imposing a $10,000 cash deposit in a case where Gilliland has appeared whenever given notice. Therefore, the District Court's October 22, 2019 Order imposing a $10,000 cash bond is punitive and excessive without any material change of circumstance thus violating due process required by Cherokee law and the ICRA.

2. The District Court had no authority to issue a Bench Warrant outside of the Nation.

At Gilliland's October 18, 2019 arraignment on the Amended Complaint, Keen advised the District Court that the Cherokee Nation's Marshall attempted to serve a Bench Warrant issued on August 1, 2019[10] and arrest Gilliland at her home in Tulsa but found out it was rented out and the tenants thought she moved to Colorado. Gilliland's address list on the Bench

[9] On or about Sunday, January 22, 2018, CNF's process server purported to serve Sikora and Cherokee media by posting a copy of the subpoena on the door of Sikora's residence at 1417 east 46th street, Tulsa, Oklahoma 74145. A copy of the proof of service is attached as Exhibit "C". Andrew Sikora's Motion to Quash or Modify Subpoena and Memorandum in Support, file Feb. 5, 2018, *CNF v. Gilliland*, Case No. CV-16-397.

[10] Gilliland and her attorney did not received notice of a July 19, 2019 arraignment and failed to appear. The Bench Warrant was subsequently recalled without objection by the Nation. *See* October 1, 2019 Order withdrawing Bench Warrant.

Warrant was outside of the Cherokee Nation in Tulsa, Oklahoma and in the Muskogee Creek Nation, Tulsa, Oklahoma.

The Cherokee Nation Marshall illegally attempted to serve the Bench Warrant on Gilliland. 22 CNCA § 455, Bench Warrant, provides that the District Court may "issue a Bench Warrant for any part of Cherokee Nation," which limits the District Court's authority to *within* the boundaries of the Cherokee Nation.[11] The Marshall knowingly attempted to serve the Bench Warrant *outside* of the Cherokee Nation. If the Marshall had arrested Gilliland at her home in Tulsa as provided by the Bench Warrant, the Marshall would have *illegally* arrested Gilliland- an action requested by Keen and authorized by the District Court.

The Bench Warrant is invalid on its face because it specifies Gilliland's residence outside of the Cherokee Nation as the place she could be arrested.

Further, the District Court ordered Gilliland to be arrested "day or night." However, if served at night at Gilliland's house in Tulsa, the Bench Warrant would have violated Oklahoma law for serving a misdemeanor warrant at night.[12] The ICRA and the Nation's law limits punishment to one year, therefore, the Bench Warrant must be considered as a misdemeanor Warrant which is prohibited from being served at night.

---

[11] 22 CNCA § 455. Bench Warrant may issue
The Clerk, on the application of the Prosecuting Attorney, may, accordingly, at any time after the order, whether the Court be sitting or not, issue a Bench Warrant for any part of Cherokee Nation.

[12] 22 OK. Stat § 189. Arrest, when made.
If the offense charged is a felony, the arrest may be made on any day, and at any time of the day or night. If it is a misdemeanor, the arrest may be made only during the hours of six o'clock a.m. to ten o'clock p.m., inclusive, except as otherwise may be directed by the magistrate endorsed upon the warrant. Provided, an arrest on a warrant which charges a misdemeanor offense may be made at any time of the day or night if the defendant is in a public place or on a public roadway.

In fact, the Nation's law has *the same prohibition* on serving its arrest warrants *within* the Cherokee Nation at night.[13] By directing the Marshall to serve the Bench Warrant at night within the Cherokee Nation boundaries, the Bench Warrant was illegal on its face.

Therefore, the Bench Warrant directing the Marshall to arrest Gilliland at night or outside of the Cherokee Nation boundaries, and inside the Cherokee Nation boundaries at night was illegal.

Based on the precedent of the August 1, 2019 Bench Warrant, the District Court's October 22, 2019 order to deposit $10,000 cash or a bench warrant would be issued, Gilliland anticipates any bench warrant issued by the District Court and attempted to be enforced by Keen would be illegal outside the boundaries of the Cherokee Nation or if served at night.

B. THE CRIMINAL CHARGES FOR WHICH BAIL IS REQUIRED ARE UNCONSTITUTIONAL OR ILLEGAL.

1. The District Court erred by not dismissing the case because the Amended Complaint fails to apprise her of the particulars of the alleged criminal action.

The Sixth Amendment provides that, "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation." The ICRA required the Nation to provide Gilliland with the same due process notice.

The Sixth Amendment, the Cherokee Nation Constitution Article III, Section 3 and ICRA provisions for due process provides that a criminal statute may be constitutionally void for vagueness.

In *United States v. Batchelder*, 442 U.S. 114, the U.S. Supreme Court stated:

---

[13] 22 CNCA § 189. Arrest, when made
If the offense charged is a crime which under the laws of the State of Oklahoma would be a felony, the arrest may be made on any day, and at any time of the day or night. If it is a crime which under the laws of the State of Oklahoma would be a misdemeanor, the arrest may be made only during the hours of six o'clock a.m. to ten o'clock p.m., inclusive, except as otherwise may be directed by the Magistrate endorsed upon the warrant. Provided, an arrest on a warrant which charges a criminal offense may be made at any time of the day or night if the defendant is in a public place or on a public roadway.

> It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). A criminal statute is therefore invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954). See *Connally v. General Construction Co.*, 269 U.S. 385, 391-393, 46 S.Ct. 126, 127-128, 70 L.Ed. 322 (1926); *Papachristou v. Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972); *Dunn v. United States,* 442 U.S., at 112-113, 99 S.Ct., at 2197. So too, vague sentencing provisions may post constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute. See *United States v. Evans,* 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1948); *United States v. Brown*, 333 U.S. 18, 68 S.Ct. 376, 92 L.Ed. 442 (1948); *cf. Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

In determining whether a Complaint sufficiently informs the defendant of the offense and punishment, courts require the Complaint to have a common sense construction. *United States v. Drew*, 722 F.2d 551, 552-53 (9th Cir. 1983). The specificity requirement ensures that Gilliland only has to answer to charges alleged with specific facts in the Amended Complaint in order for her to prepare her defense, and that she is protected against double jeopardy. *See United States v. Haas*, 583 F.2d 216 (5th Cir.), *reh'g denied*, 588 F.2d 829, *cert. denied*, 440 U.S. 981 (1978).

In *United States v. Carl*, 105 U.S. 611 (1881), the United Supreme Court held that "in an indictment... it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." Vague wording, even if taken directly from a statute, does not suffice.

As discussed below, the Amended Complaint is fatally flawed by failing to provide the required due process notice.

/

/

2. The District Court erred by not sustaining Gilliland's Demurrer because the Amended Complaint *does not state a crime* as alleged and is *void by vagueness*.

a. The Amended Complaint *does not state a crime* under the embezzlement statute.

The Nation's law provides that only those actions which are precisely described and enacted by legislative action as crimes are punishable.[14] Any question as to what the statute identifies as a crime and punishment must be construed against the Nation. A review of the pertinent statutes show that Gilliland committed no crime as alleged by the Nation because the Nation's criminal law provides that embezzlement over $50 value *is not* punishable by law.

The Nation charged Gilliland with criminal embezzlement pursuant to 21 CNCA §1452.[15] The specific punishment for embezzlement is found at 21 CNCA § 1462.[16] Although 21 CNCA §1452 deems embezzlement a crime and provides some elements, 21 CNCA § 1462 provides for additional elements and the criminal punishment for embezzlement.

The Nation alleges the Amended Complaint's offenses are punishable as prescribed by a general punishment provision- 21 CNCA §10;[17] however, a special statutory punishment provision supersedes a general punishment provision, which in this case is 21 CNCA § 1462.[18]

---

[14] 21 CNCA § 2. Criminal acts are only those prescribed—"This code" defined No act or omission shall be deemed criminal or punishable except as prescribed or authorized by this code.

[15] 21 CNCA § 1452. Embezzlement by officer, etc., of corporation, etc. If any person, being an officer, director, trustee, clerk, servant or agent of any association, society or corporation, public or private, fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose he is guilty of embezzlement.

[16] 21 CNCA § 1462. Punishment for embezzlement. Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled, except that every person convicted of embezzlement of any item valued at less than Fifty Dollars ($50.00) shall be punished for a crime. And where the property embezzled is an evidence of debt or right in action, the sum due upon it, or secured to be paid by it, shall be taken as its value.

[17] 21 CNCA § 10. Punishment of crimes
Except in cases where a different punishment is prescribed by this title or by some existing provisions of law, every offense declared to be a crime is punishable by the maximum punishment provided for by the Indian Civil Rights Act, 25 U.S.C. § 1302(a)(7). The Court may not impose for conviction of any one (1) offense any penalty or punishment greater than imprisonment for a term of one (1) year or a fine of Five Thousand Dollars ($5,000.00) or both:

21 CNCA § 1462 provides only those acts of embezzlement where the property or asset *is less* than $50 is a crime. 21 CNCA § 1462 provides:[19]

> Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled, *except that every person convicted of embezzlement of any item valued at less than Fifty Dollars ($50.00) shall be punished for a crime*. (Emphasis added.)

The "exception" provision of 21 CNCA § 1462 is the operative and controlling language of the section; its meaning is that only those embezzlement offenses where the property is less than $50 is punishable. Why?

First, the Nation has no crime of "feloniously stealing property."

Second, even if the Nation had enacted a crime of "feloniously stealing property," under 21 CNCA § 1462 punishment would be administered in the same "manner" contemplated in first part of that provision. Manner means the process of administering punishment-not the substantive term of punishment. The meaning of "Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled" is that punishment may be by degrees based on the value of the property. 21 CNCA § 1462 proscribes only one degree of property value to be punished- less than $50. In other

---

[18] 21 CNCA § 11. Specific statutes in other titles as governing—Acts punishable in different ways—Acts not otherwise punishable by imprisonment. A. If there be in any other titles of the laws of this Nation a provision making any specific act or omission criminal and providing the punishment therefor, and there be in this penal code any provision or section making the same act or omission a criminal offense or prescribing the punishment therefor, that offense and the punishment thereof, shall be governed by the special provisions made in relation thereto, and not by the provisions of this penal code.

[19] Cherokee Nation Codification Act of 2016 LA-02-16 2/18/2016
Section 5. Substantive Provision of Law: Repeals: Additions: and Amendments. All laws included in the Cherokee Nation Code Annotated (2014), and laws appended thereto, are hereby affirmed as the positive law of the Cherokee Nation. All laws and parts of laws not included in the Cherokee Nation Code Annotated (2014) publication are repealed. The repeal shall not revive any law previously repealed, nor shall it affect any right already existing or accrued or any action or proceeding already taken, unless otherwise provided in the Cherokee Nation Code Annotated (2014).

words, 21 CNCA § 1462, taken as a whole, means embezzlement is punished based on the degree of the property value and the only degree proscribed for punishment is less than $50.[20]

Third, 21 CNCA § 1462 provides an exception that controls the entire first section, i.e. *"every person convicted of embezzlement of any item valued at less than Fifty Dollars ($50.00) shall be punished for a crime."* 21 CNCA § 1462 provides *no other* "prescribed or authorized" crime or punishment- only embezzlement for property valued at less than fifty dollars ($50.00).

There is no crime specified in the Nation's criminal code for embezzlement of property valued over $50. In other words, if the property or asset is valued over $50.00, the allegation of embezzlement is not punishable under the Nation's laws. It should be noted the property or asset value of each Count of the Amended Complaint exceeds $50.

The Nation has the sovereign right to define the elements of a crime. In this instance, it is consistent with a policy of judicial economy for the Nation to prosecute minor offenses of embezzlement in the Nation's court and defer prosecution of allegations of embezzlement of greater value of property or assets to the State of Oklahoma pursuant to 21 OK Stat § 21-1451 (2014) or the federal government pursuant to 18 U.S.C. § 1163. The alleged victim in this case is a non-Indian and not an instrumentality of the Nation

The Nation elected not to amend the Complaint to provide specificity when given the opportunity[21] but there is no way for the Nation to change the elements of 21 CNCA § 1462.

---

[20] 21 CNCA §§ 1703-1706 provide for degrees of larceny- grand and petit. The punishment for each degree is based on the value of the property. Grand larceny requires property value of over $500 and Petit Larceny requires property value of less than $500. The punishment is different for Grand and Petit Larceny. The Nation's statutes provide no degree of punishment for embezzlement.

If larceny were substituted for "feloniously stealing property" then the nonsensical result would be Gilliland would face the maximum of one year in jail and a $5,000 fine for property valued over $500 and under $50. For property valued between $50 and $500, she would face six months in jail and a $10 to $500 fine. See 21 CNCA § 1706. This strained interpretation would render the embezzlement statute void by vagueness because it is uncertain, ambiguous, and irreconcilable.

[21] March 6, 2019 District Court Order on Motion to File Amended Complaint and Objection Thereto, provided, "The Court authorizes the Nation to amend its complaint one time or or before March 29, 2019."

Therefore, the Amended Complaint alleging offenses committed by Gilliland are not a crime under the Nation's laws, and the case should be dismissed.

b. The embezzlement statue is *void for vagueness.*

Other than construing 21 CNCA § 1462 as providing that embezzlement is punishable for offenses only where the value of the property or assets are less than $50, there is no common sense or logical interpretation of the statute to apprise Gilliland of the elements, nature and punishment of embezzlement as prohibited by Cherokee Nation law.

The Amended Complaint is *void by vagueness* because it causes Gilliland to "speculate as to the meaning of penal statutes." A criminal statute is invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." See *Batchelder*. As in this case, the Nation's embezzlement statute fails to pass this test of intelligible notice.

The July 2, 2019 District Court Order stated, "The law is sufficient to provide a defendant the knowledge not to commit embezzlement"; however that is not the issue. The issue is whether the words of the embezzlement statute "fully, directly, and expressly, without any uncertainty or ambiguity set forth all the elements necessary to defend herself and not face double jeopardy. It does not.

3. The District Court erred by not dismissing this case because the Amended Complaint fails to apprise Gilliland of the factual allegations of the charges.

The Amended Complaint is defective because it makes no factual allegations to prove Gilliland's fraudulent intent and intended appropriation. The Sixth Amendment provides that "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation." *Also see* the ICRA 25 UCS§ 1302 (a)(6) and Cherokee Nation Constitution Article III, Section 3.

a. There is no specificity as to facts to apprise Gilliland of the alleged criminal conduct.

On March 19, 2019, the District Court deferred ruling on Gilliland's Demurrer to Complaint and Motion to Dismiss until after the Nation had the opportunity to file an Amended Complaint. The Nation's Amended Complaint filed March 20, 2019 is identical to its original Complaint except with the addition of Counts X-XV. Therefore, the Nation had the benefit of the arguments of Gilliland's Demur filed on February 14, 2019, but elected to charge Gilliland pursuant to 21 CNCA §1462 and *not to* provide any specific allegations regarding Gilliland's intent and fraudulent appropriation required by due process. It is abundantly clear that the Nation knew that it failed to provide specific facts in its Complaint necessary to afford Gilliland due process, but wholly failed to provide specific facts in its Amended Complaint.

The July 2, 2019 District Court Order stated, "The information is sufficient to provide the defendant with full due process and knowledge of the complaint against her."[22] That is not the standard for sufficiency of notice for a criminal complaint.

The first defect in the Amended Complaint is that none of the Counts specify factual allegations of how Gilliland: 1) fraudulently, 2) did not use CNF property in the due and lawful execution of her trust, or 3) appropriated the property for her use or purpose. In many of the Counts, the Nation merely alleges Gilliland went on a trip paid for by CNF. It is common for organizations' staff to go on business trips paid by the organization and often take family or associates with them. Those actions only become criminal when the facts show that Gilliland fraudulently used CNF's funds by deceit and for her use *without the consent of the Board* and failed to reimburse the Board, if requested.

[22] *See* Exhibit "D", July 2, 2019 Order on Demurrer to Amended Complaint.

The Amended Complaint wholly failed to allege any facts that Gilliland deceived the Board, the Board did not consent, and the travel was not for the benefit and purpose of CNF for the Counts involving travel expenses. Without clear and specific facts alleging that she traveled at CNF's expense *without its consent* and by deceit, there is no crime and the case must be dismissed.

For example, Amended Complaint Count XV alleges that Gilliland misappropriated funds by paying for the February 8, 2013 out of state CNF trip for Cara Cowan Watts, a tribal councilmember. However, the Amended Complaint fails to allege why the act was criminal because the Nation reimbursed CNF for the Councilmember Cowan's expenses. The Amended Complaint fails to allege that this trip was not for the purpose or benefit of CNF or it was disapproved by the CNF Board. The Amended Complaint fails to allege she was not authorized to use CNF's credit card for the expenses, or that she or Councilmember Watts were not allowed to reimburse CNF for travel expenses on its credit card. The Amended Complaint fails to allege the trip was not a business trip authorized by the Board. The Amended Complaint fails to allege Gilliland exceeded her authority as Executive Director to expend her CNF approved annual budget or to decide which trips furthered the purpose of the CNF. The Amended Complaint fails to allege that Gilliland deceived the Board from authorizing, ratifying, or approving the expenditures. In fact, it is very common for an organization to organize and pay for travel expenses for group and then receive reimbursement.

To further demonstrate the insufficiency of the Amended Complaint, during the trip that the Nation charges in Count I as criminal embezzlement, Gilliland made three presentations in behalf of CNF on February 11 and 12, 2012. The Cherokee Nation sent to all Cherokee citizens in the southern California area a brochure inviting them to attend a presentation by Gilliland, as

Executive Director of CNF, on scholarship opportunities.[23] In Count I, the Nation charges that the usual and customary expenses for a routine and common business trip such as airport parking, car rental, hotel costs, gasoline for the rental car and meals were paid by embezzled funds. Count I wholly fails to allege facts that show these common, ordinary and necessary expenses connected with an *advertised* business trip for CNF were criminally appropriated and without the consent of the Board. In fact, Count I fails to *allege this trip* was not approved, authorized, or ratified by the CNF Board.

The Amended Complaint must contain sufficiently detailed alleged facts to adequately apprise Gilliland of the nature of the charges against her. Did CNF not approve her travel to promote its scholarship efforts in its behalf? Did CNF not approve her husband's and children's airfare? Did Gilliland's husband and children contribute to the program authorized by CNF? Did CNF deny Gilliland authority as Executive Director to pay for reasonable and customary travel expenses for the trip promoting CNF and providing its services? Did CNF not benefit from the presentations? Where these trips and expenses not reviewed and ratified by the Board? Did CNF not allow Gilliland to use its credit card for personal expenses and then be reimbursed? Were not annual audits reviewed and accepted without exception by the Board?

The Nation must allege facts not summary accusations and it has failed to do so.

b. There are no allegations of criminal intent or action.

What makes these expenditures criminal?

Without the Nation pleading the facts constituting deceit by Gilliland and the lack of CNF's consent to use its credit card for alleged expenses, there is no crime. There is no crime absent facts showing Gilliland deceived CNF. The allegations of the Amended Complaint without pleading facts of deceit and lack of CNF's consent would be the subject for a civil

[23] *See* Brochure for 2012 Presentations attached to Gilliland's February 14, 2019 Demurrer as Exhibit "B."

action, which CNF *has filed* contemporaneously with this criminal case for the same allegations.

The Nation must afford Gilliland not only an Amended Complaint that contains all of the elements of the offense (whether or not such elements appear in the statute), but one that is sufficiently descriptive to permit the defendant to prepare a defense. *Hamling v. United States*, 418 U.S. 87, 117, *reh'd denied*, 419 U.S. 885 (1974); *Russell v. United States*, 369 U.S. 749, 763-72 (1962); *United States v. Hernandez*, 891 F.2d 521, 525 (5th Cir. 1989), *cert. denied*, 495 U.S. 909 (1990).

Required in the Amended Complaint are factual allegations, rather than a mere recitation of the acts or practices proscribed by the offense allegedly committed. An example of an indictment that failed this test is provided by *United States v. Nance*, 533 F.2d 699 (D.C. Cir. 1976). In *Nance*, the indictment charged a false pretense violation pursuant to the D.C. Code. It listed the name of each victim, the date of the false representation, the amount each victim lost, and the date the sum was paid to the defendants, but was fatally defective as a consequence of its failure to specify the false representation which induced the victims to pay the money to the defendants. *See also United States v. Brown*, 995 F.2d 1493, 1504-05 (10th Cir.)(indictment charging controlling premises and making them available for storing and distributing cocaine base insufficient because it failed to state how control was exercised), *cert. denied*, 114 S.Ct. 353 (1993).

A good example of the Amended Complaint's complete failure to allege any criminal acts is Count XIII which alleges Gilliland "unilaterally awarded" four Cherokee students scholarships. Unilaterally awarding scholarships is not a crime; it may be failure to comply with policy but there is no allegation that Gilliland received funds from or benefited from the student's scholarships. *See* Exhibit "G", Amended Complaint.

Because the Nation's Amended Complaint fails to specify facts showing Gilliland's intent to deceive CNF and take its funds for her use and without consent of the Board, the Amended Complaint is defective and the case must be dismissed.

4. The District Court erred by denying Gilliland's Motion to Strike Amended Complaint because the Amended Complaint was filed after the statute of limitations expired.

a. The Nation is subject to the "Delayed Discovery Rule" for the embezzlement statute of limitation.

The District Court's July 2, 2019 Order on Motion to Strike Amended Compliant (sic) stated, "Because of the alleged deception on the part of the defendant the clock does not start running on embezzlement cases until the discovery of the alleged wrong doing. Defendants do not get to hide behind their own alleged wrong doing as a defense to a crime being committed."[24] The District Court missed the point. The issue is, "Does the "Delay Discovery Rule" apply to the Cherokee Nation under its own due process requirements or the ICRA.

The Nation argues the statute of limitations does not begin to run until the alleged embezzlement is discovered pursuant to 22 CNCA § 152 A. By statute, the Delayed Discovery Rule exists for Cherokee Nation civil actions- "Statute of limitations shall begin to run from the date when the plaintiff knew, through the exercise of reasonable diligence,"[25] However, the Nation argues and apparently the District Court found the "Delayed Discovery Rule" requiring the Nation to exercise reasonable diligence to discover the offense does not apply to criminal actions. That notion is *non sequitur*. Oklahoma Statute 22 O.S. § 152 A is identical to 22

[24] *See* Exhibit "E", July 2, 2019 Order on Motion to Strike Amended Compliant (sic).
[25] Comprehensive Access to Justice Act of 2016 (7/13/2016) LA-16-16.12 CNCA § 11 . Limitations of Actions D. Statute of limitations shall begin to run from the date when the plaintiff knew, through the exercise of reasonable diligence, of all the elements of the particular cause of action.

CNCA § 152 A; therefore, absent some Cherokee Nation decisions, Oklahoma courts' decisions on this subject are highly persuasive in this matter.

In *Horn v. State*, 2009 OK CR 7, (Okla. Crim. App., 2009), the Oklahoma Court of Criminal Appeals quoting *State v. Day,* 1994 OK CR 67, 882 P.2d 1096, stated:

> The statute of limitations begins to run and the offense has been `discovered' for purposes of Sections 152(A) and (C) when any person (including the victim) other than the wrongdoer or someone in pari delicto with the wrongdoer has knowledge of both (i) the act and (ii) its criminal nature ... [T]he crime has not been discovered during any period that the crime is concealed because of fear induced by threats made by the wrongdoer, or anyone acting in pari delicto with the wrongdoer. . . . The statute of limitations is a jurisdictional issue and, once asserted, the presumption is that the statute has run and the State has the obligation to overcome this presumption.

The Delayed Discovery Rule applies to 22 CNCA § 152 A which means the date of occurrence is presumed to be the date of discovery unless Nation overcomes that presumption by showing the alleged criminal action was fraudulently concealed by the defendant. In other words, the statute of limitations begins to run on date of occurrence unless the Nation pleads and can show Gilliland concealed the occurrence.

In *Lovelace v. Keohane, 831 P.2d 624*, 630 (Okla.1992), the Oklahoma Supreme Court held, "the delayed discovery rule did not extend the statute of limitations 18 years after the allegedly abusive relationship terminated because the victim was "chargeable with knowledge of facts which [she] ought to have discovered in the exercise of reasonable diligence (*c.f. Daugherty v. Farmers Coop. Ass'n, 689 P.2d 947*, 951 (Okla.1984)). In *Lovelace,* the Oklahoma Supreme Court held that, "The discovery rule tolls the statute of limitations until an injured party knows of, or in the exercise of reasonable diligence, should have known of or discovered the injury, and resulting cause of action. The rule does not apply when "(a) plaintiff is chargeable with knowledge of facts which he ought to have discovered in the exercise of reasonable diligence."

The same applies to CNF and the Nation. It is the Nation's burden to pleased abd prove it is not chargeable with knowledge of facts which CNF ought to have discovered in the exercise of reasonable diligence.

The benchmark for this case is the Cherokee Nation Constitution Article III, Sections 2 and 3, and the ICRA which require due process. Due process requires a foreseeable and certain statute of limitations. Does an open-ended or subjective statute of limitations comply with Cherokee Nation Constitutional standards for due process? It does not.

Without a certain and unambiguous starting date for the statute of limitations, there is no statute of limitations.

A criminal statute that does not provide the defendant notice of the elements of the crime, including the statute of limitations, that are "fully, directly, and expressly, without any uncertainty or ambiguity" is void for vagueness. See *Carl. In Batchelder*, 442 U.S. 114, the U.S. Supreme Court stated, "It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."

In essence, Keen argues that 21 CNCA §1452 has *no statute of limitations* because it does not start until the alleged victim *subjectively* "discovers" the offense. In other words, the Nation is the only one who can say when and how they discovered the alleged offense and the defendant must take the Nation's word for it. Pursuant to Keen's argument, the Nation could turn a blind eye and "discover" offenses twenty years from now when CNF installs a new board and the Nation finally got around to reading archived audit reports; then the statute of limitations would begin twenty-five years after the date of the alleged offense.

The Delayed Discovery Rule under Cherokee law applies to both civil and criminal cases.

/

b. The Nation failed to allege or plead facts to prove it exercised reasonable diligence and that the alleged offenses were concealed from the CNF.

The Nation failed to allege facts in its Amended Complaint regarding the reasons for the delay filing of the Amended Complaint and it must be dismissed. *In Hip Hop Beverage Corp. v. Michaux* (9th Cir., 2018) D.C. No. 2:16-cv-03275-MWF-AGR, the Ninth Circuit held,

> HHBC did not plead facts about its discovery of Michaux's alleged embezzlement with the specificity necessary to invoke the delayed discovery rule. Therefore, its claim is time-barred.. . . Because HHBC failed to allege specific facts regarding how it "became aware" of the records that revealed Michaux's wrongdoing, the delayed discovery rule is unavailable here. *Fox*, 110 P.3d at 920-21. The lack of specificity makes it impossible to ascertain whether HHBC could have made its discovery earlier. *See id.* Therefore, HHBC has failed to carry its burden of establishing diligence. *See id.*

Although given the chance to amend its Complaint, the Nation failed to allege specific facts regarding how it "became aware" of the alleged wrongdoing; therefore the delayed discovery rule is unavailable. *Also see August v. Los Angeles Community College Dist. Bd. of Trustees*, 848 F.2d 1242 (9th Cir., 1988), (However, in order to invoke this "special defense" to the limitations period, the plaintiff "must specifically plead facts which show (1) the time and manner of discovery, and (2) the inability to have made earlier discovery despite reasonable diligence." *Saliter*, 81 Cal.App.3d at 297, 146 Cal.Rptr. at 274.); *Jiles v. United Parcel Serv. Inc.* (11th Cir., 2011), (The delayed discovery rule prevents a cause of action from accruing until the plaintiff either knows or reasonably should know of the act giving rise to the cause of action." *Trustmark Ins. Co. v. ESLU, Inc., 299 F.3d 1265*, 1271 (11th Cir. 2002)); *Bedtow Grp. II, LLC v. Ungerleider* (11th Cir., 2017), (Because Bedtow "should have . . . discovered with the exercise of due diligence " the alleged misrepresentations before it purchased the policies, Florida's delayed discovery rule does not act to postpone the accrual of Bedtow's causes of action.); *CMI Roadbuilding, Inc. v. Iowa Parts, Inc.* (N.D. Iowa, 2017), (The delayed discovery

rule prevents a cause of action from accruing until the plaintiff either knows or reasonably should know of the act giving rise to the cause of action." *Trustmark Ins. Co. v. ESLU, Inc., 299 F.3d 1265*, 1271 (11th Cir. 2002)).

The Amended Complaint wholly fails to plead why the statute of limitation should be tolled by the delay discovery rule. For example, the Amended Complaint Count XII alleges Gilliland gave students scholarships in 2013. Certainly, CNF was chargeable with knowledge of scholarships awarded in its name. The Nation waited *seven* years to file Count XII. Did Gilliland conceal the names of scholarship recipients from the Board? The law requires the Nation to plead and prove why it waited so long to file these charges.

As a non-profit board, CNF Board members have a duty to read the financial and program reports before it and ask questions. The CNF Board is a fiduciary board, not an advisory board. The CNF board was responsible for the fiscal affairs of the foundation and to use due diligence to execute its responsibilities. *It is telling that the Nation has not pled, averred, or argued that the CNF board did not discharge its due diligence*. If the CNF board discharged its fiduciary duty and found no wrongdoing, then there is no crime. There are no factual allegations that Gilliland concealed any financial records from the Board; fiscal transactions reports were prepared by an outside accountant and submitted to the Board. There are no allegations that Gilliland hid financial or program information from CNF at its monthly finance committee meetings held the third Friday of every month which Gilliland started in 2011.

There is no averment in the Amended Complaint of any concealment by Gilliland to justify tolling the statute of limitations. Keen argues the CNF 2013 Audit Report alerted the CNF Board as to alleged embezzlement. However, the Audit findings cited by Keen do not.

The 2013 Audit report did not say anything or report any activities different than what

was regularly presented to the Board during the previous two years. The CNF board supervising Gilliland and two CPAs did not find any wrongdoing; the Amended Complaint does not give any facts that the actions Gilliland took, with oversight of the Board, constituting criminal concealment.

In other words, the CNF 2013 Audit report did not discover any embezzlement or concealment. By exercising reasonable due diligence, CNF had the opportunity to discover wrongdoing by reviewing the periodic financial and program reports it received the previous two years.

Keen exposes the weakness of this case in the Nation's Brief where he states, "Thus, to the extent *Horn* applies, the statute began to run only after offense had been "discovered" by way the 2013 audit, released on April 24, 2014, when the board was charged with knowledge of both (i) the act and (ii) its criminal nature."[26] The Delayed Discovery Rule would charge the Board "with knowledge of both (i) the act and (ii) its criminal nature" every time it did or should have reviewed financial statements, signed checks, reviewed invoices, reviewed credit card statements, inspected outside accountants' posted quick book entries, issued 1099s and w-2s, signed and certified tax returns, conducted monthly finance committee meetings, and heard operational and program reports. No witness testified in the related civil case that Gilliland hid any information from or deceived any CNF board members. There is no allegation in the Amended Complaint that Gilliland concealed these records from the Board.

When Gilliland resigned in January 2013, the CNF board requested she stay until June 2013. When she left, CNF signed her severance check, issued her W-2 for the year, and completed the non-profit corporation tax returns which with the exercise of minimal diligence

[26] *See* Nation's Response to Defendant's "Response in Support of Motion to Strike Amended Complaint on Grounds the State of Limitations Expired for the Amended Complaint" filed May 17, 2019 at page 4

would have alerted them to any offense, if any had existed. If Gilliland actually paid herself the severance that Keen claims in his briefs, he would have presented the check signed by her. He has not, because it was signed by Board Chairman Robin Ballenger. The reality of this case is that the CNF Board did not discover "multiple (or any) acts of embezzlement", as Keen argues, because there were none.

The proper date of discovery is when the Board was given program and scholarship reports, credit card statements, and spreadsheets prepared by accountants at their monthly finance committee meetings and quarterly board meetings.

The Nation was required to plead the specifics of fraud or concealment by Gilliland to justify filing the Amended Complaint out of time. It did not and the Amended Complaint should be dismissed for being filed out of time.

c. The record offered by the Nation shows no fraud.

The Nation offered into the record the 2013 CNF audit report by Robert St. Pierre, CPA ("St. Pierre").[27] In the audit report, St. Pierre declares, "We conducted our audit in accordance with audit standards generally accepted in the United States of American and the standards applicable to financial audit contained in the Government Auditing Standards, issued by the Comptroller General of the United States ("Audit Standards").[28] The federal Audit Standards require:

> 9.40 Auditors should report a matter as a finding when they conclude, based on sufficient, appropriate evidence, that fraud either has occurred or is likely to have occurred that is significant to the audit objectives.

[27] Exhibit "A" to the Nation's Response in Opposition to Defendant's Motion to Strike Amended Complaint on Grounds that the State of Limitations Expired for Additional Counts Charged, ("Response") filed April 30, 2019,
[28] United States Government Accountability Office by the Comptroller General of the United States. July 2018 GOVERNMENT AUDITING STANDARDS. 2018 Revision http *See* 2013 CNF audit report "Schedule of Findings and Questioned Cost" pages 11-14.s://www.gao.gov/assets/700/693136.pdf

Nothing in St. Pierre's 2013 CNF audit report indicates any fraud.[29] Under a duty of federal Audit Standards, St. Pierre did not report any fraud. He did not report that Gilliland misused CNF property in the due and lawful execution of her trust, or she appropriated the property for her use or purpose, i.e. elements of embezzlement. Also as a CPA, St. Pierre had a duty to report fraud as part of his audit report.[30]

In fact, St. Pierre's 2013 audit report indicates Gilliland was within her authority to travel, allow third parties' travel to be paid by CNF, and award scholarships. It is telling that in response to CNF audit report finding 2013-7 regarding whether donor funds were restricted to donor's wishes, the Board responded, "However, we believe that all funds donated for scholarships have been expended to provide scholarships according to donor instructions."[31] Therefore, CNF's response to finding 2013-7 acknowledging the proper granting of scholarships occurred contradicts the Nation's allegation in Count XII that Gilliland gave, "unauthorized scholarships to three different students who did not meet the criteria for the scholarships." Just how did Gilliland give unauthorized scholarships if the Board advised the auditor that scholarships were awarded according to donor instructions? The Amended Complaint pleads no facts as to what constituted fraud or embezzlement.

In responding to finding 2013-8 that the Executive Director appeared to pay travel expenses of persons not affiliated with CNF, the Board stated, "An employee's request for travel

---

[29] *See* 2013 CNF audit report "Schedule of Findings and Questioned Cost" pages 11-14.

[30] AU Section 110 *Responsibilities and Functions of the Independent Auditor*
.02 The auditor has a responsibility to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud. 1 1 See section 312, *Audit Risk and Materiality in Conducting an Audit*, and section 316, *Consideration of Fraud in a Financial Statement Audit*. The auditor's consideration of illegal acts and responsibility for detecting misstatements resulting from illegal acts is defined in section 317, *Illegal Acts by Clients*. For those illegal acts that are defined in that section as having a direct and material effect on the determination of financial statement amounts, the auditor's responsibility to detect misstatements resulting from such illegal acts is the same as that for error or fraud. [Footnote added, effective for audits of financial statements for periods ending on or after December 15, 1997, by Statement on Auditing Standards No. 82.] https://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00110.pdf

[31] See Footnote 29.

expenditures includes documentation of the business purpose. Although we do not know the business purpose for Cherokee Media (Andrew Sikora's company) travel mentioned above, we can foresee the possibility of the foundation paying other entities/persons travel relating to foundation business."[32] Therefore, CNF's response to finding 2013-8 acknowledges travel requests were reviewed by the Board and that it was not against Board policy for CNF to pay for third parties' travel relating to foundation business. St. Pierre, the expert that the Nation relies on, found no fraud. Fraud is the critical element of embezzlement and the trigger for the Delayed Discovery Rule.

In addition, CNF's 2012 audit report reports no fraud.[33] Jim Rush, CPA who prepared the 2012 CNF Independent Auditor's Report released June 7, 2013, was under the same obligation to report fraud according the federal Audit Standards and CPA standards as was St. Pierre. He found none. Keen offers no reason for the Nation filing the Amended Complaint out of time.

Therefore, the Amended Complaint should be dismissed because it was filed after the reasonable time to discover any embezzlement and that the Nation failed to plead why it would be entitled to toll the statute of limitations due to the Delayed Discovery Rule.

5. The Amended Complaint violates the ICRA limitation on punishment.

The Nation's July 28, 2016 Complaint charged nine counts of embezzlement, each seeking one year in jail and a $5,000 fine, which results in nine years of imprisonment.[34] The Nation's March 20, 2019 Amended Complaint added six new counts of embezzlement seeking

[32] See Footnote 29.

[33] Exhibit "A" Independent Auditor's Report December 31, 2012 (Jim Rush, CPA) to Gilliland's "Supplement to Second Demurrer to Complaint and Amended Complaint on Grounds No Crime is Alleged and Motion to Dismiss Because the Embezzlement Statute Denies Defendant Due Process" filed May 3, 2019.

[34] The Complaint and Amended Complaint provide, "ALL OF SAID CRIMES being subject to punishment as defined at 21 CNCA § 10, to wit: a term of imprisonment for not more than one (1) year or a fine of five thousand ($5,000.00) or both and any civil remedies as provided by 21 CNCA § 1760(B) for each separate crime."

one year in jail and a $5,000 fine for each count which results in an additional six years of imprisonment. The Amended Complaint seeks a total of fifteen years of imprisonment. The ICRA limits the total punishment in a criminal proceeding to be no greater than imprisonment for a term of nine years. *See* 25 U.S.C. § 1302(7) (D).

Therefore, the Amended Complaint violates the ICRA for imposing punishment greater than nine years and counts X through XV should be dismissed.

6. The District Court erred by not disqualifying Keen.

The ICRA is a federal law binding on the Nation to protect Cherokee citizens' due process rights from oppressive acts by their own government. Because Gilliland's federal substantive due process rights must be enforced by the District Court, the federal court's decisions interpreting due process are binding on the District Court and are not elective. Gilliland has a federal due process right for the prosecution of her case to be free from conflicts of interest.

On July 27, 2016, representing CNF, Keen filed a companion civil case based on the same allegation of the instant criminal case. He stated in that case, "Admittedly, eight counts in the civil petition involve the same transaction or occurrence as in the criminal information"; in that case, he seeks $928,000 in punitive damage and actual damages of $232,000 which includes recouping the full valve of scholarships awarded by CNF to Cherokee students.

On November 1, 2018, several years after filing the companion civil case, Keen entered his appearance in this case as a "Special Prosecutor."

Keen may not serve two masters- CNF and the Nation. The interests of those two masters are not the same. As Keen advised the civil court, CNF's interest is obtaining a judgement of $1,160,000. It is simple; Keen's first duty is to zealously recover $1,160,000 from Gilliland for his private client CNF. Keen's second duty as a Special Prosecutor for the Nation is

to "seek justice, not to merely convict."[35] The Nation's interest should not be financial recovery for a third party; its interest is the fair administration of justice.

As a government employee of the Nation and a prosecutor, Keen's duty is the fair administration of justice not the collection of $1,160,000. In *Berger v. United States*, 295 U.S. 78, 88 (1935), the United States Supreme Court declared:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer."

Keen has an irreconcilable conflict of interest between collecting money and seeking justice.

In *Young v. U.S. Ex Rel. Vuitton Et Fils S. A.*, 780 F.2d 179 (1987), the U.S. Supreme Court addressed the case of where a federal court appointed the law firm opposing the defendant in a civil case to criminally prosecute the same defendant for contempt in the same case. The Court reversed the appointment holding that, "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." The holding of the Court applies in this case where the Nation's Attorney General appointed Keen to criminally prosecute the adverse party in a civil case for the same allegations.

Criminally prosecuting Gilliland at the same time he is seeking from her $1,160,000 on the same alleged offenses for his private client is a conflict of interest depriving Gilliland from due process of a disinterested prosecutor.

[35] Ethical Consideration (EC) 7-13 of Canon 7 of the American Bar Association (ABA) Model Code of Professional Responsibility (1982) provides "The responsibility of a public prosecutor differs from that of the usual advocate: his duty is to seek justice, not merely to convict."

In *Young*, the U.S. Supreme Court was so adamant that the conflict was impermissible, it noted, "If a Justice Department attorney pursued a contempt prosecution for violation of an injunction benefiting any client of that attorney involved in the underlying civil litigation, that attorney would be open to a charge of committing a felony under 208(a)." If Keen found himself in federal court under similar circumstances as this case, he would be facing a felony.

Keen's conflict of interest is manifested by him moving the District Court to impose on Gilliland a cash deposit of $10,000 with the District Court to avoid being jailed pending trial in this criminal case. The Nation requiring Gilliland to deposit $10,00 cash or hold her in jail six months pending trial set for April 20, 2020 is certainly leverage in the civil case to force an unjust settlement.

Therefore, the District Court erred by not disqualifying Keen for his conflict of interest which denies Gilliland the due process right of a fair and impartial prosecution.

IV. CONCLUSION

The District Court restrains Gilliland in constructive custody by its October 22, 2019 Order. To maintain her freedom from being jailed pending trial on an Amended Complaint that violates Cherokee Nation and federal laws, she must deposit $10,000 cash with the court by November 20, 2019. There has been no material change of circumstance to justify changing Gilliland's personal recognizance bond to a deposit of $10,000 cash. This Court should strike her bail as excessive.

Incurable by any further amendment of the Amended Complaint, Gilliland committed no crime because each Count alleges embezzled property that was valued in excess of $50. but pursuant to 21 CNCA § 1462, to constitute a punishable offense, the embezzled property value must be less than $50. The Amended Complaint should be dismissed for failure to state a crime.

21 CNCA § 1462 is unconstitutionally vague and incomprehensible. Unless the words of 21 CNCA § 1462 themselves fully, directly, and expressly, without any uncertainty or ambiguity provide notice of the property value element and punishment, then the Amended Complaint is unconstitutionally void for vagueness and must be dismissed.

If the Court must pause, read the statute twice or more, and scratch its head trying to figure out what 21 CNCA § 1462 means, then it is constitutionally void by vagueness.

Because the Amended Complaint is defective as to pleading specific facts required by the Fifth and Sixth Amendment, ICRA and Cherokee Nation Constitution alleging *how* Gilliland deceitfully appropriated CNF's assets for her use, including lack of consent by the Board, the Court should dismiss this case.

The Amended Complaint contains no factual allegations that the Board did not authorize, approve (explicitly or implicit) or ratify the expenditure of the subject funds, or that Gilliland deceived the Board. The District Court gave the Nation the opportunity to correct these defects by its February 14, 2019 Order allowing the Nation to amend its complaint and the Nation chose not to provide any specificity as to intent or grounds for misappropriation. In spite of the Nation having notice of the infirmities of its Amended Complaint, it did not change one word except to add Counts X- XV. This Court should dismiss this case for failure to provide specificity required by Cherokee Nation due process, the Sixth Amendment and the ICRA.

The Delayed Discover Rule applies to criminal cases and as a result the Amended Complaint was filed out of time and should be dismissed. The Nation wholly failed to allege reasons why it was dilatory in filing charges *seven* years after the alleged offenses to invoke the Delayed Discover Rule; therefore, the Amended Complaint is infirm and should be dismissed.

The Amended Complaint's Counts X-XV violates the ICRA's prohibition of imposing nine years of imprisonment and those counts should be dismissed for this additional reason.

Lastly, Keen's conflict of interest as being the plaintiff's private civil attorney and the Nation's prosecutor of the same allegations denies Gilliland an independent prosecutor.

For all of the above reasons, this Court should set aside the custody and bail order of the District Court and dismiss this case.

Submitted this 7th day of November, 2019.

_____/ss/_____
Chadwick Smith
CNBA # 08
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 7th of November, 2019, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

_____/ss/_____
Chadwick Smith

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

John C. Young
Assistant Attorney General
Sarah Hill
Attorney General
Cherokee Nation
Office of Attorney General
P.O. Box 948
Tahlequah OK 74465
john.young@cherokee.org
sarah.hill@cherokee.org

EXHIBIT A-36

IN THE SUPREME COURT OF THE CHEROKEE NATION

KIMBERLIE GILLILAND, Petitioner, vs. CHEROKEE NATION, And LUKE BARTEAUX, Judge of the District Court, Respondents.	Case No. SC-19-15 District Court Case No. CRM-2016-54

CHEROKEE NATION'S MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS AND APPEAL FROM INTERLOCUTORY ORDERS, AND COMBINED BRIEF IN SUPPORT

COMES NOW the Cherokee Nation, by and through its Special Prosecutor Ralph Keen, who moves under Supreme Court Rule 63(D) to dismiss the petitioner/defendant's Petition for Writ of Habeas Corpus for failure to state a claim upon which relief can be granted, dismiss the unauthorized "Appeal From Interlocutory Orders" for lack of interlocutory certification, and in support thereof would show the Court as follows:

1. **The Petitioner/Defendant Is Not Confined in A Penal Institution and Therefore Cannot Seek Habeas Corpus.**

Habeas Corpus is an extraordinary writ and proceeding employed to bring a prisoner before the court to ensure the person is not being unlawfully deprived of his or her liberty. In this instance, the petitioner/defendant, Kimberlie A. Gilliland, is neither incarcerated nor detained by the Cherokee Nation, but is in truth and fact presently free and residing out of the country in Poland with her husband. Habeas Corpus is not appropriate for appellate review of discretionary decisions

of a lower court.[1] Indeed, the federal statute governing habeas corpus only authorizes such relief to prisoners or detainees in actual physical custody.[2]

Without question, this Court has authority to issue writs of habeas corpus under its constitutional jurisdiction.[3] Yet, while the constitution grants the general authority, it is tribal legislation that sets the scope of the authority. Title 22 CNCA § 1151 deals directly with habeas corpus relief and provides:

> § 1151. Habeas Corpus For Person to Testify or Be Surrendered on Bail
>
> The Supreme Court and District Courts within this Nation, or the Judges thereof in vacation, shall have power to issue writs of habeas corpus, for the purpose of bringing the body of any person **confined in any penal institution before them**, to testify or be surrendered in discharge of bail. [*Emphasis added.*]

Clearly, Cherokee law follows well-settled American jurisprudence that habeas corpus writs are only appropriate for ordering the release of persons incarcerated or detained to be brought before the court to challenge the legality of their detention. As stated above, the defendant has never been incarcerated or detained by the Cherokee Nation and presently enjoys all aspects of her freedom, including the ability to abscond from the Nation's jurisdiction to exile in Poland. Therefore, the petitioner/defendant has failed to state a claim upon which relief can be granted for habeas corpus under S. Ct. Rule 63(D) and the petition should accordingly be dismissed in its entirety.

---

[1] Sheriff, Clark County v. Hatch, 100 Nev. 664, 691 P.2d 449, 450 (Nev. 1984) (*finding: "Habeas corpus is a form of collateral attack — an independent proceeding instituted for the purpose of testing the legality of detention. It is a separate action to determine whether a defendant is being unlawfully deprived of his or her liberty and is not an appropriate proceeding for appeal-like review of discretionary decisions of a lower court.").*

[2] *See* 28 U.S.C. § 2241 et seq.

[3] CN Const. art. VIII, § 4.

2. **Criminal Defendants in The Cherokee System Have No Access To Pre-Judgment Appellate Review Of Lower Court Rulings As A Matter Of Right.**

Without any supporting authority, defense counsel previously sought to have the District Court certify certain adverse rulings for interlocutory appeal. The motion and the Nation's response are attached hereto as Exhibits "1" and "2." After taking the matter under advisement and considering the law and precedents offered by Nation, and this Court's policy disfavoring interlocutory appeals, District Judge Barteaux issued a written ruling denying the defendant's request, attached hereto as Exhibit "3." Now, counsel Smith has chosen to ignore and circumvent that ruling and seeks to do indirectly what he could not accomplish directly by bootstrapping an unauthorized premature appeal to a meritless application for a writ of habeas corpus.

The defendant's premature petition in error is fatally flawed and should be dismissed. The Orders that the defendant attempts to raise on appeal are: 1) Order on Demur to Complaint, 2) Order on Motion to Strike Amended Complaint, 3) Order on Motion to Disqualify and 4) Order Denying Motion to Reinstating Personal Recognizance Bond. None of these Orders qualify as a judgment or sentence, nor do they dispose of all claims by and against all parties to the prosecution. Appeals in criminal matters are governed by Title 22 CNCA § 1051 which provides:

> A. An appeal to the Supreme Court may be taken by the defendant as a matter of right **from any judgment against him, which shall be taken as herein provided; and, upon the appeal, any decision of the Court or intermediate order made in the progress of the case may be reviewed**; provided, all appeals taken from any **conviction** on a plea of guilty shall be taken by petition for writ of certiorari to the Supreme Court, as provided in subsection (B) of this section; provided further, such petition must be filed within ninety (90) days from the date of said **conviction.**
>
> ...
>
> B. The procedure for the filing of an appeal in the Supreme Court shall be as provided in the Rules of Appellate Procedure; and the Supreme Court **shall provide by court rules, which will have the force of statute,** and be in furtherance of this method of appeal: (1) The procedure to be followed by the trial courts in the preparation

> and authentication of transcripts and records in cases appealed under this act; (2) the procedure to be followed for the completion and submission of the appeal taken hereunder; and (3) the procedure to be followed for filing a petition for and the issuance of a writ of certiorari. [*Emphasis added.*]

Section VII of the Supreme Court Rules and Procedures provides the appellate procedures required by the statute. Specifically, Rule 70(B) addresses who may appeal in criminal matters, and provides:

> B. Any party in a criminal case, may appeal a **judgment or sentence.** The prosecution may only appeal a decision to the extent it raises a question of law, rather than a question of fact. [*Emphasis added.*]

The Defendant's Petition in Error confirms on its face that the appeal is not an appeal of a judgment, decree or final order of the District Court nor an appeal from an order granting summary judgment or motion to dismiss nor a final order of other tribunal, commission or hearing board nor an interlocutory order appealable. The type of appeal is marked "*other*" and violates both Cherokee statute and this Court's rules of appellate procedure, and should accordingly be dismissed.

Moreover, counsel's actions are in direct contempt of the lower Court's order denying certification for interlocutory appeal. All the issues on appeal raised by the Defendant will be appealable as a matter of right, if she is tried and convicted of the crimes charged. Then she certainly would have the ability to appeal as a matter of right, however, until a final judgment and sentence is entered all of the issues set forth in the Defendant's Petition in Error are premature to invoke the Court's appellate jurisdiction and this Court should dismiss the appeal on that basis.

3. **Un-detained Criminal Defendants in The Cherokee System are Not Entitled to Pre-Judgment Appellate Review of a Bond Setting.**

In his brief, counsel Smith asserts "*Cherokee Nation law provides that Gilliland is entitled to review of the District Court's order fixing the amount of bail by the Supreme Court.*"[4] As set out below, this assertion is both erroneous and misleading. Counsel cites to 22 CNCA § 1079 for his premise and in so doing highlights just how frivolous his petition is, and how far he is willing to mispresent the law to the Court in violation of Rule 3.3 of the Rules of Professional Conduct,[5] because section 1079 applies only to review of bail in post-conviction appeal proceedings.

Sections 1076 through 1079 of Title 22 of the CNCA addresses bail in post-convection relief proceedings in the Cherokee Nation. Section 1076 requires direct notice to the defendant at sentencing: "*the Court shall at the time of entering judgment and sentence notify the defendant of his right to appeal.*" Sections 1077 and 1078 set forth the scope and limitations of bail allowable, and the amount of bail. Read in context of the three preceding sections, Section 1079 provides for appellate review by habeas corpus only when post-conviction bail is denied, or if the amount fixed is excessive. The statute is clearly limited to post-conviction proceedings and has absolutely no application to pre-trial bonds. Counsel Smith appears to be so desperate to protract a trial on the merits that he is willing to misrepresent Cherokee law in hopes of avoiding the Spring trial docket. The Nation believes this entire petition to be frivolous and filed for the improper purpose of delaying trial.[6] The Court would be wholly justified in either reprimanding or even sanctioning counsel to deter these types of frivolous filings in the future.

---

[4] *See* Petitioner's Brief in Support, pg. 2.

[5] Rule 3.3: Candor Toward The Tribunal:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . ..

[6] Rule 3.1 Meritorious Claims and Contentions:

Finally, in the event this appeal is permitted to proceed, the Nation will fully brief the colorful issue of how the Court derived at setting a $10,000.00 cash bond.[7] However, for the purpose of this motion, the Nation will offer that the defendant has been charged with fifteen separate criminal counts of embezzlement by an officer of a corporation under 21 CNCA § 1452. Each of those fifteen counts carries a potential punishment of one-year imprisonment, a fine of $5,000.00 dollars, or both. Title 22 § 1115.3 grants the District Court discretion to set the amount of bail prior to initial appearance at the amount of fine and costs including any penalty assessments provided for in the Cherokee Nation Code Annotated. Fifteen counts of embezzlement punishable at $5,000.00 each amount to $75,000.00. The Court's bond of $10,000.00 is a little more than 13% of what was permissible under the statute. This, plus considering that the defendant has confirmed herself to be a flight risk by fleeing the country with no guarantee of return, counsel's arguments that the $10,000.00 cash bond is excessive and punitive are simply frivolous.

Respectfully Submitted,

Ralph F Keen II, CNBA 0094
Special Prosecutor
205 West Division
Stilwell, OK 74960

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

[7] When the defendant failed to appear for arraignment on the amended information, the Court revoked her personal recognizance bond, set a $10,000.00 cash bond and issued a bench warrant. Three months later counsel Smith claimed he had email issues and never received the order setting the arraignment and accepted full responsibility for the failure to appear. Considering this, Nation agreed to the see the bench warrant recalled; but after learning that the defendant had absconded to Poland and rented her Tulsa home out, Nation objected to the reinstatement of her P.R. bond. Following oral arguments, the Court held firm to the $10,000.00 cash bond and required it be paid no later than November 20, 2019.

(918) 696 - 3355
(918) 696 - 3576 Fax
KeenLawOK@gmail.com
For Cherokee Nation,
Office of the Attorney General
PO Box 948
Tahlequah, OK 74465

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing *Cherokee Nation's Motion to Dismiss Petition for Writ of Habeas Corpus and Appeal from Interlocutory Orders, and Combined Brief in Support* was mailed the 15th day of November 2019, by depositing it in the U.S. Mail, postage prepaid, or otherwise personally delivered to:

Chadwick Smith, Esq.
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
chief.chad.smith@gmail.com

Megan Lucas

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CM 2016-54**
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

MOTION TO CERTIFY ORDERS FOR INTERLOCUTORY APPEAL

Comes now Defendant Kimberlie A. Gilliland, ("Gilliland") by her attorney, Chadwick Smith and moves the Court to find its interlocutory Order on Motion to Strike Amended Complaint and Order on Demur to Complaint filed in this case on July 2, 2029 are dispositive of the issues in this case and are subject to immediate appeal.

Submitted this 10th day of October, 2019.

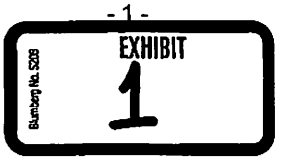
/ss/
Chadwick Smith
CNBA # 08
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 10 th of October, 2019, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

/ss/
Chadwick Smith

John C. Young
Assistant Attorney General
Sarah Hill
Attorney General
Cherokee Nation



Office of Attorney General
P.O. Box 141
Tahlequah OK 74465
john.young@cherokee.org
sarah.hill@cherokee.org

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION, Plaintiff, vs. KIMBERLIE GILLILAND, Defendant.	Case No. CRM-2016-54

NATION'S RESPONSE TO DEFENDANT'S MOTION TO CERTIFY ORDERS FOR INTERLOCUTORY APPEAL

COMES NOW Ralph F Keen II, the duly-appointed Special Prosecutor for Cherokee Nation, who responds in opposition to the Defendant's Motion to Certify Orders for Interlocutory Appeal, and in support thereof, would show the Court as follows:

Without citing a scintilla of legal authority, the Defendant brazenly seeks interlocutory certification of the Court's rulings on two prior orders. By court rule in either Oklahoma or federal court, such an unsupported motion could be summarily denied without a hearing.[1] Cherokee Supreme Court Rule 70 defines who is entitled to access to appellate review, and establishes a separate standard for civil and criminal matters:

> Rule 70. Who May Appeal
> A. Any party significantly and adversely affected by a decision of the District Court of the Cherokee Nation in a civil case may appeal.
> B. Any party in a criminal case, may appeal a **judgment or sentence**. The prosecution may only appeal a decision to the extent it raises a question of law, rather than a question of fact. [*Emphasis Added.*]

The civil standard applies to any party significantly and adversely affected; however, the criminal standard is strictly limited to only appealing a judgment or sentence. This precise language is

[1] *See e.g.*, Oklahoma District Court Rule 4(d); Eastern District LCvR 7.1(b).

dispositive that interlocutory appeals in criminal matters are not sanctioned. This Court has neither rendered a judgement, nor imposed sentence in these proceeding, and until this occurs the Defendant has no entitlement to appellate review.

Even under the broader civil standard, interlocutory appeals are not favored. After two attempted appeals in the parallel civil action to these criminal proceedings, the Supreme Court expressly ruled and created law-of-the-case that: "*This Court does not favor interlocutory appeals as the same foster multiple appeals before the record is fully established below.*"[2] Similarly, in a case decided in April of this year, the Supreme Court unanimously dismissed an appeal brought by Nation because the District Court decision had not disposed of all issues pending before it, thereby recognizing a classic element of the final order doctrine.[3] Moreover, the Cherokee Code of Civil Procedure, LA-16-16 § 19 provides that "*the District Court shall not certify jurisdictional rulings for interlocutory appeal.*" Although civil, it clearly shows intent by the legislative branch to deter and severely limit serial interlocutory appeals in cases before the record is fully established. Even more so, public policy disfavors interlocutory appeals in criminal matters.

This case has now been protracted for over three years and has already seen multiple appeals in the civil proceedings. Now a similar strategy appears to be in play in the criminal prosecution. Fair and speedy justice favors this matter being tried. In the event the Defendant is convicted and sentenced, she will then have the option of appellate review as a matter of right.

---

[2] SC-16-25 Opinion of March 31 2017, remanding case back to District Court, attached hereto as Exhibit "A."

[3] Cherokee Nation v. David Comingdeer, SC-2016-07, Order of April 8, 2019, attached hereto as Exhibit "B."

WHEREFORE, premises and precedence considered, the Nation prays the Court deny certifying its orders for interlocutory appeal.

Respectfully Submitted,

Ralph F Keen II, CNBA 0094
Special Prosecutor
205 West Division
Stilwell, OK 74960
(918) 696 - 3355
(918) 696 - 3576 Fax
KeenLawOK@gmail.com
For Cherokee Nation,
Office of the Attorney General
PO Box 948
Tahlequah, OK 74465

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing *Nation's Response to Defendant's Motion to Certify Orders for Interlocutory Appeal* was mailed the 16th day of October, 2019, by depositing it in the U.S. Mail, postage prepaid, or otherwise personally delivered to:

Chadwick Smith, Esq.
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
chief.chad.smith@gmail.com

Megan Lucas

IN THE SUPREME COURT OF THE CHEROKEE NATION

CHEROKEE NATION EDUCATION CORPORATION d/b/a CHEROKEE NATION FOUNDATION,

Plaintiff/Appellee

vs.

KIMBERLIE GILLILAND,

Defendant/Appellant

Case No.: SC-16-25

OPINION

THIS MATTER comes before the Court on appeal by the Defendant below from an order of the District Court denying Defendant's motion to dismiss and motion to stay. These motions came before the District Court and were denied with a finding of the applicable statute of limitations. The District Court also found that there had not been a sufficient showing of substantial prejudice to warrant a stay of this civil case. Gilliland argues here that this Court should take this case now because without a stay her ability to defend the criminal case will be prejudiced. The Cherokee Nation Education Corporation moves to dismiss the appeal as premature.

This Court does not favor interlocutory appeals as the same foster multiple appeals before the record is fully established below. *Takeda Pharmaceuticals USA, Inc., SC-16-02 (Nov.22, 2016).* It is true that Rule 50A as worded does allow this Court to consider an appeal by any party "significantly and adversely affected" by a decision of the District Court. Notwithstanding, the Rule does not authorize immediate appeal *per se.* Likewise, Gilliland's argument that Rule 51A required her to file an appeal to this

Court within thirty (30) days of the District Court's order on the aforementioned motions is clearly misplaced. Her right to appeal from the District Court contemplates an appeal within thirty (30) days of completion of the action below.

While this Court is not inclined to hear an appeal now, the District Court is cautioned to take appropriate steps to protect the rights of Gilliland in the criminal case pending civil litigation. To that end, a strong case can be made for granting a stay where a party under criminal indictment is required to defend a civil proceeding involving the same matter. *Colene Baldeagle; Shawn Imitates Dog, Personal Representative for the Estate of Teresa Imitates Dog-Martinez; and Audrey Yellowhair, Plaintiffs v. U.S.A., 2017 W.L. 978988.*

This appeal is remanded to the District Court with instruction to monitor the progression of discovery in this civil case to ensure Gilliland's rights are not prejudiced in the criminal case and revisit the stay issue if necessary.

THEREFORE, IT IS ORDERED that this matter be remanded to the District Court for further proceedings.

Dated this 31ST day of March, 2017.

James G. Wilcoxen, Justice

Concurring:

John C. Garrett, Chief Justice

Angela Jones, Justice

Lynn Burris, Justice

Mark L. Dobbins, Justice

Certificate of Mailing

I, Kendall Bird, certify that on the 31st day of March, 2016, I mailed, emailed and/or faxed a true copy of the above and foregoing to the following:

James Proszek, jproszek@hallestill.com
Johnathan Rogers, jrogers@hallestill.com
Ralph Keen, II, keenlaw@windstrem.net
Kristi Moncooyea, via email
Judge C. Bart Fite, via email

Kendall Bird, Court Clerk

IN THE SUPREME COURT OF THE CHEROKEE NATION

CHEROKEE NATION
Appellant,

-vs-

DAVID COMINGDEER,
Appellee.

Case No. SC-2016-07

ORDER

THIS MATTER comes before the Court on Petition in Error filed by the Cherokee Nation effectively seeking interlocutory review of the decision of the District Court denying a motion to reconsider on August 16, 2018. The District Court's decision below disposes of less than all of the issues pending before that court. *Takeda Pharmaceuticals USA, Inc. v. Cherokee Nation, SC-16-02; Dearman v. Smithkline Beecham Corp., SC-2010-02.* Without passing on the merits of the decision below, this Court does not find that there is a need for this interlocutory review and hereby *remands* this matter back to the District Court for further decision on all issues.

THEREFORE, IT IS THE ORDER of this Court that this matter is *remanded* back to the District Court for further proceedings consistent herewith.

Dated this 8th day of April, 2019.

James G. Wilcoxen, Chief Justice

EXHIBIT B

Concurring:

Lee W. Paden, Justice

Lynn Burris, Justice

Mark L. Dobbins, Justice

John C. Garrett, Justice

Certificate of Mailing

I, Kendall Bird, certify that on the 8th day of April, 2019, I mailed, emailed and/or faxed a true copy of the above and foregoing to the following:

Chad Smith, chad@chadsmith.com
John C. Young, john-young@cherokee.org
Paiten Qualls, paiten-qualls@cherokee.org

Kendall Bird, Court Clerk

In The District Court of Cherokee Nation

Cherokee Nation,
Plaintiff,

v.

Kimberlie A Gilliland,
Defendant.

CM 2016-54

Order Denying Certification for Interlocutory Appeal

Defendant filed her *Motion to Certify Orders for Interlocutory Appeal* on or about October 9, 2019. Oral arguments were held on October 21, 2019. Defendant's request for certification for interlocutory appeal is denied. It was previously Ordered that this matter shall not be stayed for possible interlocutory appeals unless by motion and good cause is found by the Court. Good cause has not been found. The Defendant has already appealed this matter once based on jurisdiction and the District Court was affirmed. See ***Gilliland v. Cherokee Nation, SC-17-08 (August 13, 2018)***.

Cherokee Nation Supreme Court Rule 70 (B) states that "Any party in a criminal case, may appeal a judgment or sentence." Defendant has not received a judgement and or sentence.

Additional authority for denial of interlocutory appeal certification. See *Takeda Pharmaceuticals USA, Inc. v. Cherokee Nation*, SC-16-02 (November 22, 2016), and ***Cherokee Nation Education Corporation v. Gilliland*, SC-16-25 (March 31, 2017)** the Cherokee Nation Supreme Court does not favor interlocutory appeals as they foster multiple appeals before the record is fully established.

Done and Ordered in Chambers on October 21, 2019.

District Court Judge

EXHIBIT 3

Certificate of Mailing

I, the undersigned, do hereby certify that on the 22 day of October, 2019 that I emailed, faxed, hand delivered, and or mailed a true and correct file stamped copy of the foregoing document to the following person(s):

Chadwick Smith
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com

Ralph Keen II, keenlawok@gmail.com

Sara Hill, sara-hill@cherokee.org

Chrissi Nimmo, chrissi-nimmo@cherokee.org

John Young, john-young@cherokee.org

Courtney Jordan, courtney-jordan@cherokee.org

District Court Clerk

EXHIBIT A-37

IN THE SUPREME COURT OF THE CHEROKEE NATION

KIMBERLIE A. GILLILAND,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. SC -2019-15**
	)	
CHEROKEE NATION,	)	**District Court CM 2016-54**
	)	
and	)	
	)	
LUKE BARTEAUX,	)	
Judge of the District Court,	)	
	)	
Respondents.	)	

OBJECTION TO CHEROKEE NATION'S MOTION TO DISMISS
PETITION FOR WRIT OF HABEAS CORPUS AND APPEAL

Petitioner Kimberlie Gilliland, ("Gilliland") objects to the Cherokee Nation's ("Nation") Motion to Dismiss Petition for Writ of Habeas Corpus ("Mot. to Dism.") and submits this brief in objection.

The Nation's Motion to Dismiss is wholly without merit.

I. ARGUMENT AND AUTHORITY

Gilliland is entitled to have this Court review her Writ of Habeas Corpus because the Amended Complaint in this case fails to conform with the fundamental requirements of law, and her freedom is wrongfully restricted by the Nation because of the District Court's October 22, 2019 Order for her to deposit $10,000 cash with the District Court or be jailed.[1]

[1] On August 6, 2016, the District Court ordered Gilliland released on her personal recognizance without any conditions. On August 16, 2019, the District Court ordered "(Gilliland's) Personal recognizance bond is hereby revoked and a new cash bond is set at $10,000". On October 1, 2019, without objection by the Nation, the District Court withdrew the bench warrant. On October 18, 2019, Gilliland appeared for her second arraignment by phone without objection by the Nation and with permission of the District Court. On October 22, 2019, the District Court

In *Fay v. Noia* , 372 U.S. 391, 401-02, (1963), the United States Supreme Court stated,

> Its root principle is that, in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus, there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office.

Gilliland being on a personal recognizance or posting cash bond for purposes of a Writ of Habeas Corpus is deemed being in the Nation's custody and being detained because the Nation restricts her liberty to come and go unlike other citizens. In *Hensley v. Municipal Court,* 411 U.S. 345, 351 (1973); the United States Supreme Court held a person is in custody of the government for purposes of a Writ of Habeas Corpus even when released on his own recognizance.

The Nation has violated Gilliland's Cherokee Nation and federal due process rights by filing the Amended Complaint because it is void by vagueness, fails to allege a crime, was filed outside the statute of limitations, imposes a penalty greater than permitted by the ICRA, and is prosecuted by a Special Prosecutor who has an irreconcilable conflict of interest. Where Gilliland's liberty is restricted by the District Court's order to deposit $10,000 to maintain her liberty from being jailed pending trial in April 2020, she may challenge the Nation's unconstitutional and illegal Amended Complaint by a Writ of Habeas Corpus for the "vindication of due process".

1. There is no requirement that Gilliland be a prisoner confined in a penal institution to seek the relief of Habeas Corpus.

a. Gilliland has the right to seek a Writ of Habeas Corpus in accordance with Cherokee Nation law.

---

denied Gilliland's Motion to Reinstate her personal recognizance bond and ordered Gilliland to deposit $10,000 cash with the District Court by November 20, 2019.

The Nation argues that 22 CNCA § 1151 denies Gilliland habeas corpus relief, however a cursory reading of the statue provides, "The Supreme Court . . . shall have power to issue writs of habeas corpus, . . . (to) be surrendered in discharge of bail.[2] It should be noted that 22 CNCA § 1151 is codified in its own Chapter 21 and not Chapter 18 titled "Appeals." The District Court's Order revoking Gilliland's personal recognizance bond and ordering her to deposit $10,000 cash with the District Court by November 20, 2019 is in essence an action to "be surrendered in discharge of bail." 22 CNCA § 1151 does not require Gilliland to be incarcerated to seek a Writ of Habeas Corpus. 22 CNCA § 1151 affirms the Supreme Court's authority in certain circumstances and does not exclude Gilliland from pursuing a Writ of Habeas Corpus.

22 CNCA § 1151 merely supplements the power for the Supreme Court to hear a Writ of Habeas Corpus provided by the Cherokee Nation Constitution and other statutes. The 1999 Cherokee Nation Constitution Article VIII, Judicial Section 4 providing that, "the Supreme Court shall have power to issue, hear and determine writs of habeas corpus" does not require physical custody."[3] *Also see* 20 CNCA § 51.[4]

---

[2] 22 CNCA § 454. Bench warrant to issue, when
If the defendant has been discharged on bail, or have deposited money instead thereof, and does not appear to be arraigned, when his personal attendance is necessary, the Court in addition to the forfeiture of the undertaking of bail or of the money deposited, may direct the Clerk to issue a bench warrant for his arrest.

[3] Constitution of the Cherokee Nation 1999, Article VIII, Judicial Section 4.
In support of its original and appellate jurisdiction, the Supreme Court shall have power to issue, hear and determine writs of habeas corpus, mandamus, quo Warranto, certiorari, prohibition and such other remedial writs as may be provided by law and may exercise such other jurisdiction as may be conferred by statute.

[4] 20 Chapter 4-Supreme Court—Powers and Duties Generally § 51. Jurisdiction of Supreme Court generally
A. The Supreme Court shall have original jurisdiction over all matters set forth in Article VIII.
Section 4 of the Cherokee Constitution . . .
Also see the Judicial Reform and Jurisdiction Act of 2006" codified as Title 20 Chapter 1, et. seq LA-23-07 (6/11/2007) Section 5. Jurisdiction of the Supreme Court: The Supreme Court shall have original and exclusive jurisdiction over:
1. Writs of Habeas Corpus, mandamus, quo warranto, certiorari, prohibition and all other matters set forth under Article VIII of the Cherokee Nation Constitution.

Simply, the Cherokee Nation statutes do not deny its Gilliland the right to seek a Writ of Habeas Corpus when ordered to deposit $10,000 cash with the District Court to avoid being jailed pending trial.

b. Gilliland has the right to seek a writ of habeas corpus in accordance with the Indian Civil Rights Act.

The Indian Civil Rights Act of 1968 ("ICRA") mandates the Cherokee Nation provide Gilliland due process and the equivalent of the U.S. Constitution Bill of Rights.[5] In *Randall, v. Yakima Nation Tribal Court*, 841 F.2d 897, (1988), the Ninth Circuit held, "Where the rights are the same under either legal system, federal constitutional standards are employed in determining whether the challenged procedure violates the Act (ICRA)." Therefore, federal case law is applicable to the due process rights provided Gilliland by the ICRA.

Ralph Keen, Special Prosecutor for the Cherokee Nation ("Keen"), misrepresented federal law apparently in hopes of incarcerating Gilliland pending trial, thus giving him leverage in this case and as the Plaintiff's attorney in the companion civil case.[6] Keen states, "Indeed, the federal statute governing habeas corpus only authorizes such relief to prisoner or detainees in actual physical custody" and he cites in his footnote- "28 U.S.C. 2241 et seq." *See* Mot. to Dism. at p. 2.

Federal law, 28 U.S.C. § 2241, *does not* require detainees be in actual physical custody. In *Jones v. Cunningham*, 371 U.S. 236. 239 (1963), the U.S. Supreme Court interpreting 28 U.S.C. § 2241, held, "Similarly, in the United States the use of habeas corpus has not been

---

[5] ICRA. 25 U.S.C.§ 1302 (a) No Indian tribe in exercising powers of self-government shall—

6. deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

7. (A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments:

Also, the U.S. Constitution Sixth Amendment provides that "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation."

[6] *CNEC v Gilliland*, CV 2016-397.

restricted to situations in which the applicant is in actual, physical custody". In *Settler v. Yakima Tribal Court*, 419 F.2d 486, 490 (9th Cir., 1969), the Ninth Circuit held that 28 U.S.C. § 2241 habeas corpus relief was available to a party who was fined by a tribal court and posted bond. The Ninth Circuit stated the law:

> The second point pressed by appellee is that this case should be dismissed even if the district court has jurisdiction since habeas corpus is not available to a petitioner who is not "in custody" within the meaning of 28 U.S.C. § 2241. We believe, however, that the writ of habeas corpus is available to one who, like appellant, has been fined by an Indian Tribal Court and has posted a bond pending procedural review by an Indian appellate court. (Note that we deal (*infra,* IV.) with the exhaustion of remedies issue.) Appellee cites no case directly supporting its position. In fact, in the most recent case cited, *Jones v. Cunningham,* 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963), the Supreme Court held that a prisoner placed on parole is "in custody" within the meaning of 28 U.S.C. § 2241 so as to give him sufficient standing to request habeas corpus. The Court noted in its analysis that "history, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Id.* at 240, 83 S.Ct. at 376; *see, e. g., Brownell v. We Shung*, 352 U.S. 180, 183, 77 S.Ct. 252, 1 L.Ed.2d 225 (1953) (habeas corpus available to an alien seeking entry into the United States even though he is free to go anywhere else in the world); *Ex parte Fabiani*, 105 F.Supp. 139 (E.D.Pa.1952) (habeas corpus appropriate procedural vehicle for testing legality of induction into the military); *Ford v. Ford*, 371 U.S. 187, 83 S.Ct. 273, 9 L.Ed.2d 240 (1962) (habeas corpus available to parents disputing proper custody of child)."

Custody and detention are not limited to actual physical detention in a jail or prison. Rather, the petitioner must show that he is "subject to restraints 'not shared by the public generally'" *See Jones v. Cunningham* , 371 U.S. 236, 240, 243, (1963)). *Also see*: *Payer v. Turtle Mt. Tribal Council*, A4-03-105, 2003 WL 22339181, at *5 (D.N.D. Oct. 1, 2003), (The following is a non-exhaustive list of cases where courts have held that a person is "in custody" for habeas jurisdictional purposes: (1) when a person is released on his own recognizance pending sentencing, *Hensley v. Municipal Court,* 411 U.S. 345, 351 (1973); (2) when a person is on probation or parole, *United States ex. rel. B. v. Shelly,* 430 F.2d 215, 217–18 n. 3 (2d

Cir.1970); (3) when a person is subject to a suspended sentence carrying a threat of future imprisonment, *Sammons v. Rodgers,* 785 F.2d 1343, 1345 (5th Cir.1986); and (4) when a tribal member is "banished" from a tribe and its reservation, *Poodry,* 85 F.3d 874. The common thread running through all of these cases appears to be a restraint on a person's liberty of movement not shared by the public generally.); *Scudero v. Moran*, 230 F. Supp. 3d 980, 984 (D. Alaska 2017), (The term "detention" is "interpreted similarly to the 'in custody' requirement in other habeas contexts," meaning that a petitioner under § 1303 must demonstrate "a severe actual or potential restraint on liberty."); *Shenandoah v. U.S. Dept. of Int.,* 159 F.3d 708, 714 (2d Cir. 1998), (Habeas relief does address more than actual physical custody, and includes parole, probation, release on one's own recognizance pending sentencing or trial, and permanent banishment. *Poodry,* 85 F.3d at 893–94, 897).

Therefore, Keen's argument that Gilliland must be in physical custody to seek Habeas Corpus relief is wholly without merit and Keen misrepresents the law.[7]

2. Gilliland may collaterally attack the District Court's rulings by a Writ of Habeas Corpus.

The Nation argues that Gilliland must be incarcerated and must be convicted before she can challenge the illegality of her detention; this would lead to the results that Gilliland would have to be in jail since her arraignment in July 2016 until her court date set for April 2020 before she could challenge the Nation's failure to provide her with due process. In a case cited by the Nation, *Sheriff, Clark County v Hatch*, 100 Nev. 664, 691, the Nevada court stated the law,

[7] In his Mot. to Dism. at p. 5, Keen's argument directed to Gilliland's attorney that, "The Court would be wholly justified in either reprimanding or even sanctioning counsel to deter these types of frivolous filing in the future" applies to Keen. First, Keen failed to comply with Federal Rule of Civil Procedure Rule 11 requiring him to give Gilliland's attorney notice to withdraw within twenty-one (21) days any offending pleading or statement. Second, Keen's argument that federal law requires a person to be in "actual physical custody" is a frivolous argument contrary to the well-settled law. Rather than Gilliland urging the Court to sanction Keen for falsely stating the law, Keen should take the opportunity to correct the record and the Court can note his lack of credibility.

"Habeas corpus is a form of collateral attack- an independent proceeding instituted for the purpose of testing the legality of detention." Detention includes the District Court's bail order. That is what this Writ of Habeas Corpus is about.

The Nation concedes, this Court has constitutional and statutory mandates to a hear writ of habeas corpus. *See* Mot. to Dism, p. 2. The Cherokee Nation Constitution's bill of rights, Article III, Section 2[8] prohibits excessive bail. In this case, *any* bail is excessive because the Amended Complaint violates Cherokee Nation and federal requirements for due process.

The Nation erroneously argues that 22 CNCA § 1051 is the only method to seek review of the District Court's detention and denial of due process. The plain language of 22 CNCA § 1051 provides an appeal is permissive and is not the exclusive method of seeking review. The first line of 22 CNCA § 1051 (A) provides that, "An appeal to the Supreme Court *may* be taken by the defendant as a matter of right. . . ; 22 CNCA 1051 grants the defendant the right to appeal and not does restrict any other method of review. Also, the Nation makes the same flawed argument regarding SC Rule 70(b) because it also acknowledges the defendant's right to appeal and does not require review of the legality of detention to be brought exclusively under 22 CNCA § 1051 and SC Rule 70(b).

Gilliland's challenge of the District Court's bail order is not premature because her liberty is being illegally restricted now.

In essence, the Nation argues that Cherokee law provides fewer remedies for violating due process than other jurisdictions and Cherokee citizens should stay in jail years before challenging their illegal detention. However, that is not the Cherokee law.

[8] Article III, Section 2. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Therefore, the Nation's argument that Gilliland's exclusive remedy to challenge the District Court's denial of due process is by appeal is wholly without merit and contrary to the law.

3. By a Writ of Habeas Corpus, Gilliland is entitled to pre-judgment appellate review of a bail setting where the underlying Amended Complaint violates due process.

Keen's attack on opposing Counsel that he is "willing to mispresent the law" is a frail but ballistic argument. *See* Mot. Dismiss at pg. 4. All that Smith stated in his brief was "Cherokee Nation law provides that Gilliland is entitled to review of the District Court's order fixing the amount of bail by the Supreme Court."[9] That is true.

Keen's unprofessional and erroneous attack on Gilliland's attorney is a smoke screen and diversion from his absolute lack of addressing the issues for filing her Petition for Writ of Habeas Corpus:

- Does 22 CNCA § 1051 and SC Rule 70(b) exclude a writ of habeas corpus? *It does not!*
- Does not the constitution prohibit excessive bail and provide for this Court to hear Writs of Habeas Corpus? *It does!*
- Does not the Cherokee Nation Constitution bill of rights Article III. Section 2 and ICRA prohibit denial of due process including the Amended Complaint being void by vagueness, failing to allege a crime, being filed outside the statute of limitations, imposing a penalty greater than permitted by the ICRA, and prosecution by a Special Prosecutor who has an irreconcilable conflict of interest? *It does!*

These questions go to the core of the Petitioner for Writ of Habeas Corpus.

---

[9] Smith argued at Petitioner's Brief in Support at p. 2 that, "Cherokee Nation law[(footnote)] provides that Gilliland is entitled to review of the District Court's order fixing the amount of bail by the Supreme Court." The footnote stated: 22 CNCA § 1079. Denial of bail—Review by habeas corpus
If bail on appeal be denied, or the amount fixed be excessive, the defendant shall be entitled to a review of the action of the trial Court and its reasons for refusing bail, by habeas corpus proceedings before the appellate Court, or if the Court be not in session, then by some Judge of said Court.

The Nation argues the District Court's order for Gilliland to post $10,000 with the District Court, rather than go to jail pending trial was justified after the Nation learned that "defendant had absconded to Poland and rented her Tulsa home out". *See* Mot. to Dism. P. 6 at footnote 7.

To abscond, one must *go in a clandestine manner out of the jurisdiction of the courts, or to lie concealed, in order to avoid their process. To hide, conceal, or absent oneself clandestinely, with the intent to avoid legal process.*[10] Gilliland did not abscond; she did not reside in the Cherokee Nation when the Amended Complaint was filed and when she was released on her personal recognizance. She was never required by the District Court to reside in the Cherokee Nation jurisdiction. Gilliland never left the Nation's jurisdiction. How could she abscond from the Nation's territorial jurisdiction if she did not live there when the Amended Complaint was filed and was never required to be there?

On July 26, 2016, the Cherokee Nation Marshall personally served Gilliland on the front yard at her home in Tulsa outside the Cherokee Nation boundaries and jurisdiction with the Summons and Petition in the companion civil case - *CNEC v Gilliland*, CV 2016-397. The Nation knew that Gilliland lived outside the Nation's jurisdiction but still agreed one month later on August 8, 2016, that the District Court could release Gilliland on her own personal recognizance *without* any conditions .i.e., leaving the Cherokee Nation, reporting her residence, or requesting permission of the Court to leave the Nation's jurisdiction. Gilliland did not hide, conceal, or absent herself clandestinely with the intent to avoid legal process; the Nation knew she lived outside the Nation. Gilliland did not go to Poland to avoid legal process; she was there for her husband's medical treatment. The Nation knew Gilliland was in Poland on October 3, 2019

[10] https://legal-dictionary.thefreedictionary.com/abscond

because her attorney emailed Keen[11] that Gilliland was in Poland with her husband who was undergoing medical treatment.

The Nation's feigned fear of Gilliland absconding was belied on September 30, 2019, when the Nation had no objection to withdrawing the August 16, 2019 bench warrant and on October 7, 2019 when it agreed to allow Gilliland to appear by phone from Poland on October 18, 2019, for the second arraignment.

Contrary to the Nation's cry that she absconded, she was not required to physically relocate to the Nation's territory or be under the supervision of the District Court. Gilliland has honored her personal recognizance bond and has appeared before the District Court whenever she had notice. The Nation's effort to justify a $10,000 deposit to not be jailed is *irrelevant* because Gilliland is detained by the District Court even on a personal recognizance bond. *See Hensley.*

Keen's argument that "un-detained criminal defendants in the Cherokee system are not entitled to pre-judgment appellate review of a bond setting" is misleading. The law is that Gilliland is entitled to a Writ of Habeas Corpus to challenge the District Court's bail order restricting her liberty and the Amended Complaint's unconstitutional and illegal due process violations.

II. CONCLUSION

The Nation's Motion to Dismiss Gilliland's Writ of Habeas Corpus should be denied. Sadly, the Nation argues that Cherokee Nation citizens are not entitled to the same remedies and safeguards from abuse of government power as other American governments. Why in the world would the Nation make such a despotic argument?

[11] Smith email to Ralph Keen, October 3, 2019. "Kimberlie is in Poland with her husband Andrew Skiori who is a native of Poland. He is there seeking medical treatment because they have no health insurance and Kimberlie cannot get a job (in) the United States because of the charges pending."

The Writ of Habeas Corpus is known as the "great and efficacious writ in all manner of illegal confinement. *See* Blackstone Commentaries, p. 131 Am. ed 1832. The "Great Writ" is the only writ explicitly protected by the U.S. Constitution, Art. I, § 9, cl. 2. *See Holland v. Florida*, 130 S. Ct. 2549 (2010). The ICRA authorizes the use of the Great Writ to contest tribal court proceedings. *See Garvais v. United States,* No. 10-35369, D.C. No. 2:03-cv-00290-JLQ (9th Cir., 2011).

The Cherokee Nation Constitution takes wrongful denial of its citizens' liberty as seriously as the constitutions of other American governments do. Under Cherokee Nation and federal law, Gilliland is entitled to bring her Writ of Habeas Corpus to challenge the legality of her liberty restrictions. This Court should deny the Nation's Motion to Dismiss Gilliland's Petition for Writ of Habeas Corpus and permit her to vindicate due process by the "Great Writ".

Submitted this 19th day of November, 2019.

_____/ss/_____
Chadwick Smith
CNBA # 08
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 19th of November, 2019, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

_____/ss/_____
Chadwick Smith

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

John C. Young
Assistant Attorney General
Sarah Hill
Attorney General
Cherokee Nation
Office of Attorney General
P.O. Box 948
Tahlequah OK 74465
john.young@cherokee.org
sarah.hill@cherokee.org

EXHIBIT A-38

IN THE SUPREME COURT OF THE CHEROKEE NATION

KIMBERLIE GILLILAND, Petitioner, vs. CHEROKEE NATION, And LUKE BARTEAUX, Judge of the District Court, Respondents.	Case No. SC-19-15 District Court Case No. CRM-2016-54

NATIONS' REPLY TO DEFENDANT'S "OBJECTION TO CHEROKEE NATION'S MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS AND APPEAL"

Comes now the Cherokee Nation, who replies to arguments raised in the defendant's objection and would suggest that counsel is again employing smoke-and-mirrors tactics in an effort to obtain what is almost universally post-conviction relief (habeas corpus) in a pre-conviction setting and to use it as a platform to circumvent normal appellate procedure for unripe appellate review. When scrutinized counsel's arguments are a proverbial house of cards which advocate for the access to habeas corpus as a matter of right at any time; such as when defense counsel disagrees with lower court rulings on routine motions or bond settings. If allowed, this would make for exceedingly poor judicial policy. Habeas corpus is extraordinary relief strictly limited in scope and purpose to reviewing the constitutionality of a detention, and in all but the most extreme cases, should likewise be limited in scope to post-conviction relief only.

A cursory review of defendant's cited authority supports this sound policy as, contrary to the defendant's stated position, they are literally all **post-conviction relief cases**. The Supreme Court case of Hensley v. Municipal Court, 411 US 385 (1973) (Def. Br., p 2) dealt with a California misdemeanor conviction wherein the petitioner was sentenced to serve one-year in jail and fined

$625.00, but was released on his own recognizance pending execution of his sentence. In Settler v. Yakima Tribal Court, 419 F.2d 486 (9th Cir., 1969) (Def. Br. p 5), the petitioner was convicted by the Yakima Indian Tribal Court for twice violating off-reservation Indian tribal fishing laws. The cited case of United States ex. rel. B. v Shelly, 430 F.2d 215 (2nd Cir., 1970) (Def. Br. p 5), dealt with post-conviction relief of an oral confession given in violation of the Miranda doctrine. In Sammons v. Rodgers, 785 F.2d 1433 (5th Cir., 1986) (Def. Br. p 6), the petitioner was convicted of kidnapping and burglary and challenged the Federal Parole Board's use of prior state convictions to lower his eligibility for early release. Finally, Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2nd Cir., 1996) (Def. Br. p 6) involved a conviction of treason and a sentence of permanent banishment from the Tonawanda Seneca Indian Reservation.

Contrary to counsel's arguments, his cited authority are solid examples of habeas corpus as a form of post-conviction relief. Whether the convicted is detained or incarcerated (which is normally the case), or in those rare cases where they are free on post-conviction bond or personal recognizance, the common denominator is a constitutional challenge of a post-conviction detainment or pending incarceration. In this case the defendant would have this Court reject this sound policy and open the floodgates to endless pre-conviction habeas corpus claims challenging virtually each and every adverse decision of our district courts. The defendant would self-servingly have the Cherokee system mutate this tool of extraordinary relief, designed to be the Court's special guardian against unlawful imprisonment, into a frivolous mechanism for those with unlimited financial means to protract and avoiding criminal culpability in theoretical perpetuity.

To bring the present undisputed facts into focus, the defendant has neither been convicted, nor sentenced, nor spent a single minute incarcerated; and now, as of the date of this filing, has

failed to post the $10,000.00[1] cash bond ordered by the District Court. Thus, in addition to fleeing from the Nation's jurisdictional reach to Poland, she has now graduated to a full-fledged fugitive from Cherokee justice. Through an endless barrage of repetitive motions, appeals and now misplaced attempts at extraordinary relief, the accused has managed to protract both the criminal and the companion civil proceedings out now for over three years without any trial on the merits. Justice delayed is justice denied. It is high time the defendant be brought before the criminal courts of this great Nation and answer for the crimes for which she stands accused.

Respectfully Submitted,

Ralph F Keen II, CNBA 0094
Special Prosecutor
205 West Division
Stilwell, OK 74960
(918) 696 - 3355
(918) 696 - 3576 Fax
KeenLawOK@gmail.com
For Cherokee Nation,
Office of the Attorney General
PO Box 948
Tahlequah, OK 74465

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing *Nation's Reply to Defendant's "Objection to Cherokee Nation's Motion to Dismiss Petition for Writ of Habeas Corpus and Appeal"* was mailed the 4th day of December 2019, by depositing it in the U.S. Mail, postage prepaid, or otherwise personally delivered to:

Chadwick Smith, Esq.
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
chief.chad.smith@gmail.com

Megan Lucas

[1] The $10,000.00 equates to $666.66 for each of the 15 criminal counts of embezzlement the defendant is charged with.

EXHIBIT A-39

IN THE SUPREME COURT OF THE CHEROKEE NATION

KIMBERLIE A. GILLILAND,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. SC -2019-15**
	)	
CHEROKEE NATION,	)	**District Court CM 2016-54**
	)	
and	)	
	)	
LUKE BARTEAUX,	)	
Judge of the District Court,	)	
	)	
Respondents.	)	

RESPONSE TO CHEROKEE NATION'S MOTION TO DISMISS
PETITION FOR WRIT OF HABEAS CORPUS AND APPEAL

Petitioner Kimberlie Gilliland, ("Gilliland") submits this Response to the Cherokee Nation's ("Nation") Reply to Defendant's Objection to Cherokee Nation's Motion to Dismiss Petition for Writ of Habeas Corpus.

The Nation first argued that Gilliland must be in physical custody to seek Habeas Corpus relief, that "Indeed, the federal statute governing habeas corpus only authorizes such relief to prisoner or detainees in actual physical custody," and that the federal habeas corpus act, U.S.C. 2241 et seq. supported that proposition. *See* Mot. to Dism. at p. 2. Gilliland cited case law in her Objection that showed not only was the Nation wrong but Keen misrepresented the law. In her previous brief, Gilliland cited cases for the proposition that a defendant does not have to be in actual physical custody to seek a Writ of Habeas Corpus. In its Reply Brief, the Nation favorably cites the same cases and it appears that the Nation now concedes the proposition that a person does not have to be in actual physical custody to bring a Writ of Habeas Corpus.

The Nation uses the cases cited by Gilliland to argue a Writ of Habeas Corpus can only be used as post-conviction relief. For post-conviction relief, defendants have the right to appeal a District Court Judgment and Sentence; however a Writ of Habeas Corpus is the only review remedy for a person illegally held *before* conviction. The Nation cites no law to support the proposition that a Writ of Habeas Corpus is available only for post-conviction relief. To the contrary, a Writ of Habeas Corpus is available in civil cases where no threat of incarceration exists, such as in child custody cases. See *Wilkerson v. Davila*, S.Ct. Okla. 351 P.2d 311 (1960).

Comically, the Nation argues that Gilliland fled to Poland beyond the Nation's jurisdictional reach; however, Gilliland was living outside the Cherokee Nation's boundaries and the Nation's reach when the District Court released on her own recognizance.

It is silly for the Nation to argue that Gilliland has managed to protract this case for three years when it took *the Nation seven years to file the case*.

It is high time for the Nation to follow the principles of due process and acknowledge Gilliland's constitutional right to seek a Writ of Habeas Corpus.

Submitted this 5th day of December, 2019.

_____/ss/_____
Chadwick Smith
CNBA # 08
22902 S 494 Road
Tahlequah, OK 74464
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 5th of December, 2019, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

_____/ss/_____
Chadwick Smith

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

John C. Young
Assistant Attorney General
Sarah Hill
Attorney General
Cherokee Nation
Office of Attorney General
P.O. Box 948
Tahlequah OK 74465
john.young@cherokee.org
sarah.hill@cherokee.org

EXHIBIT A-40

IN THE SUPREME COURT OF THE CHEROKEE NATION

KIMBERLIE GILLILAND,	)	
	)	
Appellant.	)	
v.	)	**CASE NO.: SC-19-15**
	)	District Court Case No. CRM-2016-54
CHEROKEE NATION, and	)	
	)	
LUKE BARTEAUX,	)	
Judge of the District Court	)	
Appellee.	)	

Appellant:

Chad Smith for Kimberlie A. Gilliland
Attorney at Law
22902 S. 494 Rd
Tahlequah, OK 74464
chief.chad.smith@gmail.com

Appellee:

Sara Hill for Cherokee Nation
John C. Young
Office of the Attorney General
Cherokee Nation
P.O. Box 141
Tahlequah, Ok 74465
sara-hill@cherokee.org
john-young@cherokee.org

Ralph Keen II
Keen Law Office, P.C.
204 W. Division
Stilwell, Ok 74960
KeenLawOK@gmail.com

Before:

James G. Wilcoxen, Chief Justice
Lee W. Paden, Justice
Shawna S. Baker, Justice
Mark L. Dobbins, Justice
John C. Garrett, Justice

OPINION

AFTER review of the briefs submitted herein and this Court's ruling of March 31, 2017 in SC-16-25, this Interlocutory Appeal is hereby dismissed as premature.

Appellant, Kimberlie Gilliland claims that she is being unfairly and unconstitutionally treated by having been ordered to post a $10,000.00 bond following her failure to appear in court. Gilliland alleges that the actions of the Cherokee Nation violate tribal and federal requirements for due process. Gilliland seeks an order granting her a *Writ of Habeas Corpus* even though she has failed to cooperate with the district court below. The fact of the matter is that Gilliland is neither incarcerated nor detained by the Cherokee Nation. *Habeas Corpus* relief would be entirely improper under circumstances where a party has disregarded the district court's orders.

Petitioner's request for this Court to issue a *Writ of Habeas Corpus* is hereby denied. This matter is once again remanded to proceed below.

IT IS SO ORDERED.

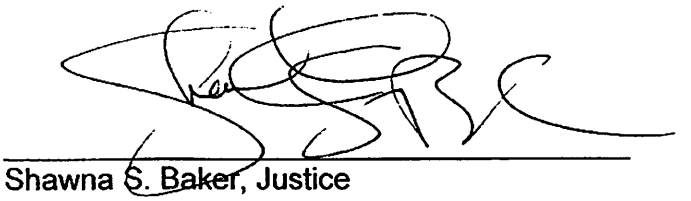
Dated this 14th day of October, 2020.

James G. Wilcoxen, Chief Justice

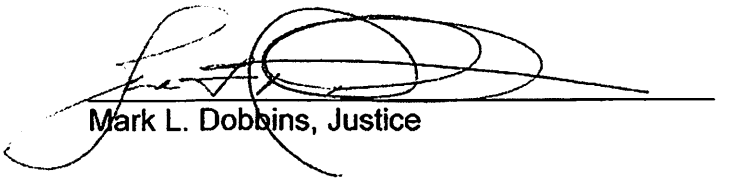
John C. Garrett, Justice

Concurring:

Lee W. Paden, Justice



Shawna S. Baker, Justice

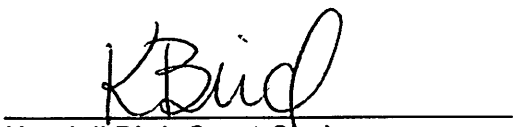


Mark L. Dobbins, Justice

Certificate of Mailing

I, Kendall Bird, certify that on the 4 day of Nov, 2020, I mailed, emailed and/or faxed a true copy of the above and foregoing to the following:

Chad Smith, chief.chad.smith@gmail.com
Sara Hill, sara-hill@cherokee.org
John C. Young, john-young@cherokee.org
Ralph Keen, KeenLawOK@gmail.com



Kendall Bird, Court Clerk

EXHIBIT A-41

Cherokee Nation District Court Warrant of Arrest (Form Rev. 07/19, Page 1)	WARRANT OF ARREST	Case Number: CRM-2016-54

IN THE CHEROKEE NATION DISTRICT COURT

Cherokee Nation v. KIMBERLIE A. GILLILAND, DOB: 08/13/1969, (Female)

TO ANY LAW ENFORCEMENT OFFICER

X Probable cause has been found on a complaint filed in the court against (name or description of person to be arrested) **KIMBERLIE A. GILLILAND, DOB: 08/13/1969, (Female)**, charging the offense of: **failure to timely pay bond after order of reinstatement**, as described in the complaint.

X YOU ARE THEREFORE ORDERED to arrest the person named or described above and bring that person before a judge of the Cherokee Nation District Court to answer the charges against that person and have with you then and have this Warrant of Arrest with your return thereon.

X You may release the accused person without taking the accused person before a judge:

☐ if the accused person enters into a bond in the amount of $_____ with sufficient sureties approved by an authorized officer by depositing cash or negotiable bonds in the amount with the court clerk.

X if the accused person posts a **CASH** appearance bond in the amount of **$10,000.00**.

☐ on his or her personal recognizance.

03/26/2021
Date

T Luke Barteaux
District Court Judge T Luke Barteaux

Cherokee Nation District Court Warrant of Arrest
(Form Rev. 07/19, Page 2)

WARRANT OF ARREST

CERTIFICATE OF EXECUTION

I, the undersigned law enforcement officer, certify that I executed the foregoing WARRANT OF ARREST by arresting the accused person named (or described) therein at _____ o' clock ☐ a.m. ☐ p.m. on the _____ day of _____, _____.
Located at _____.

After arrest, the accused person was:

☐ Released as authorized at _____ o'clock ☐ a.m. ☐ p.m. _____, _____.

☐ Taken before Judge _____ at _____ o' clock ☐ a.m. ☐ p.m., on the _____ day of _____, 20____.

_____ _____
Date Signature/Title/Agency

IDENTIFICATION OF ACCUSED PERSON

Name of Accused (or Alias)	Telephone Number				
Social Security Number	Date of Birth	Age	Race	Sex	Height
Weight	Hair	Eyes	Other		
Address	City	State	Zip Code		
Name of Employer	Employer's Telephone Number				
Address of Employer	City	State	Zip Code		

WITNESSES

Name	Address	Telephone Number

ACKNOWLEDGEMENT BY ACCUSED PERSON

☐ I hereby acknowledge that at the time of my release from custody I was directed to appear in person before the court, as follows:
Place: Cherokee Nation Courthouse, located on the second floor of the WW Keeler Tribal Complex at 17675 S Muskogee, Tahlequah, OK 74464
Date: The _____ day of _____, 20____.
Time: 10:00 o' clock a.m., and to remain there as thereafter needed until discharged by a judge.

☐ I promise to appear as directed before the court, as follows:
Place: Cherokee Nation Courthouse, located on the second floor of the WW Keeler Tribal Complex at 17675 S Muskogee, Tahlequah, OK 74464
Date: The _____ day of _____, 20____.
Time: 10:00 o' clock a.m., and to remain there as thereafter needed until discharged by a judge.

_____ _____
Date Signature of Accused Person

EXHIBIT A-42

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION, Plaintiff, vs. KIMBERLIE GILLILAND, Defendant.	Case No. CRM-2016-54

NATION'S MOTION TO SET ASIDE AND QUASH SUBPOENA DUCES TECUM AND TO STRIKE ATTORNEY CHADWICK SMITH AS COUNSEL OF RECORD FOR THE DEFENDANT

COMES NOW the Cherokee Nation, by and through its Special Appointed Prosecutor, Ralph F Keen II, who moves to set aside and quash the Subpoena Duces Tecum entered on July 7, 2021 (attached as Exhibit "A"); to strike attorney Chadwick Smith as counsel of record for the defendant, and in support thereof would show the Court as follows:

1. **The Subpoena Duces Tecum Was Procured *Ex Parte* In Violation Of Law.**

Neither your Special Prosecutor nor the Cherokee Nation Attorney General's office received any notice of Mr. Smith's motion to issue Subpoena Duces Tecum filed-marked July 7, 2021, in violation of District Court Rule 90 which entitled Nation to 14 days to file a written response prior to any ruling on the merits. Contrary to Mr. Smith's certificate of service, and his recital of attempting to contact counsel on June 30, his emails were in fact directed to a closed email account, and not to counsel's active email account. However, the certificate of service became moot under Rule 90 because an Order was signed and entered one day after the motion

was filed. As a result, the Subpoena Duces Tecum was improperly obtained by Mr. Smith *ex parte* in violation of Cherokee law.[1]

2. The Subpoena Duces Tecum Is Not Supported by Cherokee Law.

As a matter of substantive law, Mr. Smith's motion and the resulting *ex parte* Subpoena Duces Tecum are wrongfully predicated on 22 CNCA § 704 which authorizes a magistrate to issue a **trial** subpoena compelling a witness to appear before the Court for testimony. Section 704 does not authorize issuance of subpoenas or subpoenas duces tecum for the purpose of pre-trial discovery depositions. Moreover, Cherokee criminal procedure provides no mechanism for discovery depositions to be conducted by a defendant in criminal proceedings, and certainly not to interrogate employees of the office prosecuting the case.

3. Attorney Chadwick Smith Is Not A Member In Good Standing Of The Cherokee Bar Association; Is Not Authorized To Practice Law Before The Courts Of The Cherokee Nation And Should Accordingly Be Stricken As Attorney Of Record For The Defendant.

It has come to the attention of your Special Prosecutor through the Clerk of the Cherokee Nation Supreme Court that attorney Chad Smith is no longer an active member of the Cherokee Nation Bar Association and has not been for over two years. Disturbingly, all filings made by Mr. Smith in these criminal proceedings since his loss of membership have been filed in violation of Rule 152 of the Cherokee Nation Supreme Court Rules and Procedures (SC-2019-02) which mandates: *"No person shall practice as an attorney and counselor at law in any Court of the Cherokee Nation unless said person first obtains membership in the Cherokee Nation Bar Association."* Mr. Smith's membership was terminated for failure to pay annual dues in 2018 or

[1] Your Special Prosecutor, Ms. Combs and the AG's office first became aware of the *ex parte* documents on July 20. In Exhibit A-1 Mr. Smith acknowledges that his motion was sent to an obsolete Windstream email account closed for over three years, but not to the correct Gmail account appearing on his certificate of service.

2019. Indeed, his name does not appear on the current Cherokee Nation Listing of Bar Association Members on the Court's website. In addition, Rule 152 further provides: "*Failure to pay the membership fee by October 31st will result in loss of membership. A new application will be necessary for re-admittance. See Cherokee Nation Bar Association By-laws at Appendix (2), Page 29.*" Thus, Mr. Smith must make a new application and be approved for admission before the Cherokee Supreme Court; he cannot simply pay the delinquent dues and claim admission.

As a result of his loss of membership, Mr. Smith is and has been willfully engaging in the unauthorized practice of law. He cannot serve as counsel of record before any court of the Cherokee Nation and should accordingly be stricken as counsel of record for the defendant in this case. Mr. Smith's blatant misrepresentation of the law to the Court, *ex parte* practice, coupled now with his willful unauthorized practice of law amounts to clear attorney misconduct and should be sanctioned or disciplined in an appropriate manner.

4. <u>The Subpoena Duces Tecum Is Flawed On Its Face, And Its Attempted Service Was Fatally Flawed.</u>

The Subpoena Duces Tecum is addressed to *"Sherry Combs, Cherokee Nation Tax Commission."*[2] In truth and fact Ms. Combs is an employee of the Cherokee Nation Attorney General's office, not the Cherokee Nation Tax Commission; a fact Mr. Smith is fully aware of. Moreover, service was attempted via standard certified mail (non-restricted) and addressed to the *"CN Gaming Commission P.O. Box 948 Tahlequah, OK 74964."*[3] All certified mail sent to Nation's general P.O. Box is signed for by mail room staff and routed to the proper office or commission. Therefore, the certified mailing was presumably sent to the Gaming Commission,

[2] *See* Exhibit A-3.
[3] *See* Exhibit A-2.

not the AG's office. Your Special Prosecutor has confirmed with Ms. Combs that she never received service of the Subpoena Duces Tecum, certified or otherwise.

5. **Nation Has No Legal Obligation To Comply With The Ex Parte, Flawed And Unserved Subpoena Duces Tecum.**

With all due respect to orders lawfully issued by this honorable Court, it is Nation's considered position that because the Subpoena Duces Tecum: 1) was obtained *ex parte* without notice or opportunity to be heard by Nation; 2) is contrary to Cherokee law; 3) was procured through the unauthorized practice of law; and 4), its attempted service was fatally flawed, Nation is under no legal obligation to comply with the Subpoena Duces Tecum, or to produce Ms. Combs at the Law office of Hall Estill in Tulsa, Oklahoma on July 26, 2021, at 9:00 a.m.

WHEREFORE, premise and precedents considered, Cherokee Nation prays the Court rescind, set aside and quash the Subpoena Duces Tecum issued on 07/07/21 directed towards Sherry Combs; strike Chadwick Smith as attorney of record for the defendant; sanction Mr. Smith for his misconduct; and for such other relief the Court would deem just and equitable.

Respectfully Submitted,

Ralph F Keen II, CNBA 0094
Special Prosecutor
205 West Division
Stilwell, OK 74960
(918) 696 - 3355
KeenLawOK@gmail.com
For Cherokee Nation,
Office of the Attorney General
PO Box 948
Tahlequah, OK 74465

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing *Nation's Motion to Set Aside and Quash Subpoena Duces Tecum and to Strike Attorney Chadwick Smith As Counsel Of Record For The Defendant* was e-mailed on the 21st day of July 2021 to:

Chadwick Smith
P.O. Box 11324
Palm Desert, CA 92255
chad@chadsmith.com

Megan Lucas

Megan Lucas

Gmail Keen Law OK <keenlawok@gmail.com>

Subpoena Duces Tecum

Chad Smith <Chad@chadsmith.com> Tue, Jul 20, 2021 at 2:49 PM
To: Keen Law OK <keenlawok@gmail.com>
Cc: John Chapman Young <john-young@cherokee.org>

Ralph I used the emails I had on file in this case but I acknowledge that I did not send it to KeenLawOk because I used the emails that came up from search of your name. Did John Young change his email also? Here is the green card and the Motion and Order for Subpoena. Chad

On Tue, Jul 20, 2021 at 12:05 PM Keen Law OK <keenlawok@gmail.com> wrote:

> Chad, neither myself, nor Mr. Young have received any notice of any motion, hearing, order or subpoena being issued by the Court. To my knowledge, the last thing issued by Judge Barteaux was the attached arrest warrant dated 3/26/21 for your client for failing to post the cash bond ordered by the court before absconding to Poland.
>
> My office address and phone number have remained unchanged for 24 years. My office gmail address on my card below has been my primary email for over three years now - a fact I know you are fully aware of because you have used it to communicate with me on multiple occasions. Whatever you are in possession of has apparently been obtained ex parte in violation of law as there is no legal basis for a subpoena duces tecum in criminal proceedings. Kindly cc me your subpoena, order and certified green card and be advised that I will be challenging their validity and means of procurement.
>
> Ralph Keen

RK
205 W. Division Stilwell, OK 74960
Phone: (918) 696-3355
Fax: (918) 696-3576
keenlawok@gmail.com
Licensed in Oklahoma & Arkansas
State/Federal/Tribal
RALPH F KEEN II
Attorney At Law

2 attachments

Combs Subpoena Green Card.pdf
572K

2021-07-06 Order Mtn to Issue Subpoena & Subpoena Duces Tecum.pdf
98K

A-1

CERTIFIED MAIL®

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

SHERRI COMBS
CN GAMING COMMISSION
POBOX 948
TAHLEQUAH OK 74464

9590 9402 6276 0274 7873 63

2. Article Number (Transfer from service label)
7020 1290 0000 3102 1044

SENDER: COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Andrew Plater
☐ Agent
☐ Addressee

B. Received by (Printed Name)
C. Date of Delivery
JUL 13 2021

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Adult Signature
☐ Adult Signature Restricted Delivery
☐ Certified Mail®
☐ Certified Mail Restricted Delivery
☐ Collect on Delivery
☐ Priority Mail Express®
☐ Registered Mail™
☐ Registered Mail Restricted Delivery
☐ Signature Confirmation™
☐ Signature Confirmation Restricted Delivery

(over $500)

PS Form 3811, July 2020 PSN 7530-02-000-9053 Domestic Return Receipt

A-2

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
Plaintiff,	)	
	)	
v.	)	**CRM-2016-54**
	)	
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

SUBPOENA DUCES TECUM

Sherri Combs
Cherokee Nation Tax Commission
P.O. Box 948
Tahlequah, Oklahoma 74464

YOU ARE COMMANDED to appear in the at the time, date, and place set forth below for deposition. When you arrive, you must remain at the hearing room until the Court allows you to leave. You are order to bring with you copies of all documents reviewed in preparing an investigative report for the criminal prosecution in this case and all documents you referenced or reviewed to form your opinion in this case.

Place: Law office of Hall, Estell
320 S Boston Ave #200, Tulsa, OK 74103

Date and Time: July 26, 2021 at 9.00 a.m.

Date: 7/7/2021

Judge of the District Court

A-3

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
Plaintiff,	)	
	)	
v.	)	**CRM-2016-54**
	)	
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

MOTION TO ISSUE SUBPOENA DUCES TECMUM

Defendant moves the Court pursuant to 22 CNCA 704 to issue the attached Subpoena Duces Tecum ordering the Cherokee Nation's endorsed witness Sherri Combs to appear at deposition on July 26, 2021 at 9.00 am at the Office of Hall Estell, 320 S Boston Ave #200, Tulsa, OK 74103

On information and belief, Sherri Combs works for the Cherokee Nation as an Audit Manager in the Cherokee Nation Gaming Commission. Ms. Combs prepared an investigative report which is the basis of this criminal prosecution.

In its October 11, 2017, Discovery Order CRM 2016-54, this Court ordered the Nation:

> D. If not done so already the Cherokee Nation shall provide the underlying documents relied upon to create the "investigative report" to the Defendant so that she can reach her own conclusions.
>
> E. Since Ms. Combs' opinion is intertwined in the "investigative report" and she is expected to also testify. The Cherokee Nation, if it has not already done so by providing other reports prepared by Ms. Combs, if any, shall also provide Defendant with a more detailed statement of Ms. Combs expected testimony than that listed in it's discovery responses in order to provide the defendant with a fair opportunity to test the merit of the expert's testimony through focused cross-examination.

Although, the Cherokee Nation has provided its documents it intends to present at trial, it

A-4

has not provided all the documents Combs reviewed as a basis of her investigative report. Defendant is entitled to discover documents Combs relied on in preparing the investigation report, documents leading to exculpatory evidence, and her testimony intended for trial.

Attorney for Defendant emailed Ralph Keen, the Cherokee Nation's Prosecutor on June 30, 2021 with a request to set up the requested deposition by agreement but has received no response as of date.

Therefore, Defendant moves the Court to issue the attached subpoena duces tecum and order the Cherokee Nation to produce Combs for deposition on July 26, 2021 at 9.00 am at the Office of Hall Estell, 320 S Boston Ave #200, Tulsa, OK 74103

. Submitted this 6 th day of July, 2021.

Chadwick Smith
CNBA # 08
P.O. Box 11324
Palm Desert, CA 92255
chad@chadsmith.com
918 453 1707

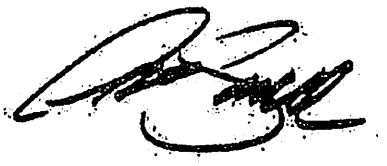
Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 6th day of July, 2021, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

A-5

Ralph Keen



Chadwick Smith

A-6

EXHIBIT A-43

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION, Plaintiff, vs. KIMBERLIE GILLILAND, Defendant.	Case No. CRM-2016-54

NATION'S MOTION IN OPPOSITION TO TRIAL *IN ABSENTIA* AND TO STRIKE TRIAL SETTING UNTIL DEFENDANT IS IN PHYSICAL CUSTODY

COMES NOW the Cherokee Nation, by and through its Special Prosecutor, Ralph F Keen II, who moves in opposition to any trial *in absentia* and to strike current trial setting until the defendant is in physical custody, and in support thereof would show the Court as follows:

BACKGROUND

1. At the outset of these proceedings, the defendant was initially released on her own personal recognizance. That P.R. bond was revoked for failure to appear on 7/19/19 and was replaced with a $10,000.00 cash bond.[1] The Court later established a 30-day deadline (11/20/19) for the bond to be paid, or a bench warrant would issue.[2]

2. Disregarding the Court's order, defense counsel attempted to bring a baseless habeas corpus action in the Supreme Court, arguing, *inter alia*, that although the accused was neither incarcerated nor being detained, the Court's ["*excessive*"] bond represented a "*constructive custody.*"[3] Almost a year later the Supreme Court unanimously denied and dismissed the action stating:

---

[1] *See* Minute Order entered 8/16/19.
[2] *See* Order Denying Motion to Reinstating Personal Recognizance Bond entered 10/22/19.
[3] Defendant's Brief in Support of Petition for Writ of Habeas Corpus and Appeal, pg. 29. Counsel also argued that the FBI and the U.S. Attorney's office were the only authorities to

> Gilliland alleges that the actions of the Cherokee Nation violate tribal and federal requirements for due process. Gilliland seeks an order granting her a Writ of Habeas Corpus even though she has failed to cooperate with the district court below. The fact of the matter is that Gilliland is neither incarcerated nor detained by the Cherokee Nation. Habeas Corpus relief would be entirely improper under circumstances where a party has disregarded the district court's orders.[4]

3. Nation learned the accused had fled the United States and absconded to Poland in an email from defense counsel on 10/3/19. The email represented that the defendant "...*will be at trial on this matter*..." and later reiterated that the defendant "...*will return to the Cherokee Nation for trial*... ".[5]

4. On 3/26/21 both the defendant and defense counsel failed to appear at the Court's jury trial disposition docket. The Court thereafter issued a new arrest warrant issued for failure to post bond or appear as ordered.

5. At the Court's status disposition hearing on 4/5/21, defense counsel announced that the accused "*may be willing to waive her right to attend the trial in person.*" Despite previous assertions that the accused would present herself for trial, now counsel has taken the opposite stance of seeking a trial *in absentia* on behalf of the defendant, even though she has posted no bond and in fact remains a fugitive from justice residing in Poland.

6. In its Minute Order of July 6, 2021, the Court set this matter for jury trial on 10/25/21 at 9:00 a.m. admonishing: "*Default or Dismissal shall be granted if either party fails to appear.*"

---

investigate and prosecute the defendant for the crimes charged (*id.*at 3-4) and that absconding to Poland was no different than living in Tulsa. *Id.* 5, 6 and 29.

[4] SC-19-15 Opinion filed 11/04/20.

[5] Smith/Keen email dated 10/03/19, available upon request.

ARGUMENTS AND AUTHORITIES

As a general matter, criminal trials *in absentia*[6] are generally prohibited under international law and run-afoul of constitutional rights protected by both the United States and the Cherokee Nation constitutions. The defendant cannot be properly tried, convicted or acquitted in this matter until she is arrested (or surrenders herself) on the outstanding arrest warrant and returned to the jurisdictional custody and control of the Cherokee Nation. Her incarceration will thereafter ensure a speedy and just trial be had with her being present for all aspects of the trial process including jury empanelment, testimony, jury deliberation and sentencing if convicted.

1. The Right of the Accused to Appear in Person is Protected by Both the U.S. and Cherokee Constitutions.

For over 130 years, courts in the United States have held that the Constitution protects a criminal defendant's due process right to appear in person at their trial under the Fifth, Sixth and Fourteenth Amendments. In 1884, the United States Supreme Court held:

> It is essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial; that is at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.[7]

The Cherokee Constitution affirms these same rights under Article III, Sections 2 and 3. Congress codified this right by approving Rule 43 of the Federal Rules of Criminal Procedure in 1946 requiring a defendant to be present at every stage of trial, including jury impanelment, verdict and sentencing.

---

[6] "*In the absence of* [the accused]" Black's Law Dictionary 876, (10th ed. 2014).
[7] Hopt v. Utah, 110 U.S. 574 (1884).

Cherokee Code and the Court Rules appear to be silent with respect to trials *in absentia*. However, Federal Rule 43 applies to the Cherokee judiciary by virtue of the 2018 amendments of the Cherokee District Court Rules, SC-AD-19-01, which provides: "*to the extent these Rules modify or expand the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure or Federal Rules of Evidence, these Court Rules shall govern all criminal and civil proceedings in the Tribal Courts.*" Thus, in the absence of specific Cherokee Code or Court Rule, the Federal Rules of Criminal Procedure apply. On this issue FRCP 43 is clear and dispositive.

2. Criminal Trials *In Absentia* Are Prohibited Under FRCP 43:

Rule 43 of the Federal Rules of Criminal Procedure mandates the defendant's presence in criminal proceedings and every trial stage, including jury empanelment and return of the verdict and sentencing:

> **Rule 43. Defendant's Presence**
>
> **(a) When Required.** Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:
>
> (1) the initial appearance, the initial arraignment, and the plea;
>
> (2) every trial stage, including jury impanelment and the return of the verdict; and
>
> (3) sentencing.

Rule 43(a) applies to all felony and multiple count misdemeanor proceedings. In contrast, subpart 43(b)(2) does allow waiver of presence, but only for a simple misdemeanor offense when the crime is punishable "*by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, ...*" In this case the accused is charged with fifteen criminal counts, each potentially carrying a term of one year imprisonment. If sentenced consecutively this would equate to a maximum jail term of fifteen years. Thus, the 43(b)(2) exception is inapplicable, and the defendant has no ability to waive her presence at trial.

Moreover, the defendant has fled the Cherokee Nation to evade prosecution and possible incarceration by absconding to Poland. She has an active warrant for her arrest and meets the definition of a fugitive from justice. As such, she has no right or privilege to seek a trial *in absentia.* So found the United States Supreme Court in the 1993 case of Crosby v. United States, 506 U.S. 255 where the Court unanimously held that Rule 43 does not permit a trial *in absentia* of a defendant who is absent at the beginning of trial.

> This case requires us to decide whether Federal Rule of Criminal Procedure 43 permits the trial in absentia of a defendant who **absconds prior to trial and is absent at its beginning.** We hold that it does not. ...The Rule declares explicitly: "The defendant shall be present . . . at every stage of the trial . . . *except as otherwise provided by this rule*" (emphasis added). The list of situations in which the trial may proceed without the defendant is marked as exclusive not by the *"expression of one"* circumstance, but rather by the express use of a limiting phrase. In that respect the language and structure of the Rule could not be more clear.[8]

The Crobsy Court could not have been more clear: an absconder from justice has no right or privilege to a trial *in absentia* whatsoever.

3. The Defendant Has No Right To Be Absent From Trial.

While some state jurisdictions may allow an accused to waive their constitutional right to attend trial in certain situations, that ability is always discretionary with the Court. Restated - no one has an absolute right to not be present at trial. The Arizona Supreme Court so held in the case of State v. Mumford:

> [T]he appellant now contends that he had an absolute right to be absent. We do not agree. The defendant has a right to be present at every stage of the trial... . He may waive that right... . This does not mean, however, that the trial court must accept his waiver. [9]

[8] Crosby v. United States, 506 U.S. 255 (1993).
[9] State v. Mumford, 666 P.2d 1074, 1075 (Ariz. Ct. App. 1982).

In addition to the Constitutional rights of the accused, the Court must also consider the People's right to require the accused to be present for the purpose of identification by witnesses and for observation and assessment by the jury panel. In a similar case cited by the Mumford court, the New York Superior Court required the defendant's presence as a matter of the orderly administration of justice:

> Section 356 of the Code of Criminal Procedure requires that the defendant must be personally present at the trial. Although he may waive this right to be present in court, ..., nevertheless the People have the right to require his presence for the purpose of identification by its witnesses. A defendant must obtain the permission of the Trial Judge to be absent from a trial. ... . The orderly administration of a trial requires this. The Trial Judge *"must have the power at all times to keep the prisoner within sight of the court, the jury, the counsel, and the witnesses."*[10]

4. The Defendant Remains A Fugitive From Justice.

To summarize the procedural posture of this case, the defendant was granted a cash bond of $10,000.00 and was given a reasonable deadline to pay it. Rather than submit to the authority of the Court, her counsel filed a baseless habeas corpus action while she intentionally fled the jurisdictional reach of the Nation to Poland. After a delay of a year the habeas action was unanimously rejected by the Supreme Court. When she defied and refused to post the cash bond as ordered the Court rightly issued a warrant for her arrest which is still outstanding. Counsel's attempt at securing trial *in absentia* is nothing but the latest chapter in a thinly veiled attempt for the accused to evade justice and criminal culpability. Even if tried and convicted *in absentia*, this Court has absolutely no assurance beyond defense counsel's word that the defendant would return to the Nation for sentencing. Cherokee Nation has no extradition treaty with Poland, so the defendant could (and likely would) simply thumb her nose in mockery of the entire Cherokee

[10] People v. Winship, 309 N.Y. 311, 130 N.E.2d 634 (1955) [*internal citations omitted*].

justice system, while bashing it in the local press as she has done in the past.[11] This honorable Court should neither condone nor enable such antics. Rule 43 prohibits a trial *in absentia* in this matter and, moreover, an absconder from justice has no right or privilege to a trial *in absentia*. To acquiesce in such a request would create a poor precedent at a time when, in the post McGirt landscape, the Nation needs to establish itself as a respected forum for fair justice and sound jurisprudence.

WHEREFORE, premise and precedents considered, Cherokee Nation prays the Court deny setting any trial *in absentia* and to strike the current trial setting until such time the defendant is in physical custody of the Nation; and for such other relief the Court would deem just and equitable.

Respectfully Submitted,

Ralph F Keen II, CNBA 0094
Special Prosecutor
205 West Division
Stilwell, OK 74960
(918) 696 - 3355
KeenLawOK@gmail.com
For Cherokee Nation,
Office of the Attorney General
PO Box 948
Tahlequah, OK 74465

[11] The defendant has previously expressed her distain and disrespect for the Cherokee justice system in the local press: *"I can only assume that because these actions were filed in tribal court that the FBI and federal investigators have rejected these claims for what they are, which is a frivolous attack on a private citizen who has done nothing wrong."* Former director of CN Foundation says fraud allegation 'baseless' Tahlequah Daily Press Jul 30, 2016.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing *Nation's Motion in Opposition to Trial in Absentia and to Strike Trial Until Defendant is in Physical Custody* was mailed by depositing it in the U.S. Mail, postage prepaid, or otherwise personally delivered and/or e-mailed on the 27th day of August 2021 to:

Chadwick Smith
P.O. Box 11324
Palm Desert, CA 92255
chad@chadsmith.com

Megan Lucas

EXHIBIT A-44

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION, Plaintiff, vs. KIMBERLIE GILLILAND, Defendant.	Case No. CRM-2016-54

NATION'S MOTION FOR CONTINUANCE

COMES NOW the Cherokee Nation, by and through its Special Appointed Prosecutor, Ralph F Keen II, who moves to continue the trial date presently set for October 25, 2021 at 9:00 a.m. and offers good cause, to-wit:

Your special prosecutor has an out-of-state personal commitment during the present trial setting. The undersigned captains an eight-person competitive billiards team in the Ozark Mountain APA League in northwest Arkansas. Counsel's team recently won the local and regional playoffs, and now stands as the 2021 Northwest Arkansas Eightball Champions. As such the team has won an all-expense-paid trip to Las Vegas to compete in the APA World Eightball Championship, October 20 through October 29.[1] Normally the World Tournament is held each August but was rescheduled this year due to COVID cancelations last year.

The Nation also has pending its Motion in Opposition to Trial *in absentia* and to Strike Trial Until Defendant is in Physical Custody. If that motion is granted, this motion will be rendered moot.

[1] The World Championships bring in over 600 teams from multiple countries to compete for prize money and the title of World Champions.

WHEREFORE, premise and precedents considered, Cherokee Nation prays the Court continue the trial date presently set for October 25, 2021 at 9:00 a.m.; and for such other relief the Court would deem just and equitable.

Respectfully Submitted,

Ralph F Keen II, CNBA 0094
Special Prosecutor
205 West Division
Stilwell, OK 74960
(918) 696 - 3355
KeenLawOK@gmail.com
For Cherokee Nation,
Office of the Attorney General
PO Box 948
Tahlequah, OK 74465

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing *Nation's Motion for Continuance* was mailed by depositing it in the U.S. Mail, postage prepaid, or otherwise personally delivered and/or e-mailed on the 30th day of August 2021 to:

Chadwick Smith
P.O. Box 11324
Palm Desert, CA 92255
chad@chadsmith.com

Megan Lucas

EXHIBIT A-45

IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CM 2016-54**
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION TO STRIKE
NATION'S MOTION IN OPPOSITION TO TRIAL *IN ABSENTIA* AND TO STRIKE
TRIAL SETTING UNTIL DEFENDANT IS IN PHYSICIAL CUSTODY

Defendant Gilliland moves the strike Special Prosecutor Ralph F Keen II"s ("Keen"), "Motion in Opposition to Any Trial *In Absentia* and to Strike Current Trial Setting Until the Defendant is in Physical Custody" ("Motion").

Why would a Prosecutor object to a Defendant waiving her presence at a jury trial?

Would not his job be easier knowing she would not testify or the jury would not see her face to face and personally and be confronted with putting her in jail for fifteen years as Keen has plead in this Amended Complaint and having sympathy with her and contempt for the Cherokee Nation for filing such scurrilous charges? Why would Keen object? Normally, it is the Prosecutor that argues the Defendant waives her jury trial if she fails to appear and urges the court to proceed without her. Putting the evidence on would be like shooting fish in a barrel. So why does Keen object to Gilliland waiving her appearance at trial?

The accused in a criminal case has the right *under the Cherokee Nation Constitution* to "have the right to: counsel", "confront all adverse witnesses", "a speedy public trial by an impartial

jury" and right" against self-incrimination". The Constitution provides, "The right of trial by jury shall remain inviolate . . . "[1]

The right to a jury trial under the Cherokee Nation Constitution is the accused's right- not the Prosecutor or the Judge. It should be without question that an accused can waive counsel and represent herself, waive the right to "confront all adverse witnesses" and stipulated to evidence, waive the right to call witnesses in her behalf, waive a jury trial and have a bench trial, and waive her right against self-incrimination and testify at trial. If the accused can waive all these Cherokee Nation Constitutional rights, why can she not waive her right to "confront all adverse witnesses" in person at a misdemeanor trial? Does Keen also believe Gilliland may not waiver her constitutional rights of counsel, call witnesses, jury trial, self-incrimination, confront adverse witnesses through counsel?

Keen has filed this motion stating, "In its Minute Order of July 6, 2021, the Court set this matter for jury trial on 10/25/21 at 9:00 a.m. admonishing: "Default or Dismissal shall be granted if either party fails to appear."" On September 8, 2021, after Keen filed this motion, this Court granted Keen's Motion for Continuance of the October 25, 2021 Jury Trial and reset it for April 25, 2021, so this motion is moot or premature.

/

---

[1] Cherokee Nation Constitution
Article III. Bill of Rights The People of the Cherokee Nation shall have and do affirm the following rights:
Section 1. The judicial process of the Cherokee Nation shall be open to every person and entity within the jurisdiction of the Cherokee Nation. Speedy and certain remedy, and equal protection, shall be afforded under the laws of the Cherokee Nation.
Section 2. In all criminal proceedings, the accused shall have the right to: counsel: confront all adverse witnesses: have compulsory process for obtaining witnesses in favor of the accused: and, to a speedy public trial by an impartial jury. The accused shall have the privilege against self-incrimination: . . .
Section 3. The right of trial by jury shall remain inviolate, and the Cherokee Nation shall not deprive any person of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

I. ARGUMENT

There is the difference between the defendant's right to appear at jury trial and the government's right to require the defendant to appear at jury trial *in absentia*. The cases on this subject largely focus on the government's right to try the defendant if he does not appear for trial. In this case, Gilliland has the right to waive her appearance at jury trial because she wants the jury trial to proceed.

A. Gilliland did not abscond.

Keen's hyperbole now approaches fabrication by asserting Gilliland absconded. Let's set the record straight. Gilliland did not flee the Cherokee Nation to evade prosecution and possible incarceration by absconding to Poland; she left because the charges brought by the Cherokee Nation tainted her professional reputation, got her fired from her job, kept her from getting a job in the United States, and for her husband's medical treatment.

As the Cherokee Nation well knows, Gilliland was in Poland before she was required to appear for an arraignment on an Amended Complaint. When Gilliland was provided notice, she appeared virtually by agreement with Keen and pursuant to Cherokee Nation District Court Rule Rule 50 and was arraigned on the Amended Complaint. Gilliland has not returned to the Cherokee Nation physically in the last year to appear because of the cost of international travel and Covid pandemic restrictions on travel from Poland. In fact, Gilliland and her husband got Covid in Poland several weeks ago. So, the notion that Gilliland fled the Cherokee Nation to avoid prosecution is *non-sense*.

After leaving her job at Cherokee Nation Foundation in 2012, Gilliland heard nothing from the Nation until on or about July 28, 2016, when the Nation filed nine counts of Embezzlement by Officer of a Corporation in *Cherokee Nation v. Gilliland*, CRM 2016-54. In August 2018, Gilliland

moved to Poland with her husband, a Polish citizen, and their two children because of the stigma of the Nation's criminal charges, she was terminated from her job as the Bacone College Foundation Director in 2016, could not obtain meaningful employment, and for her husband's health care; he suffered from blood cancer. Then on March 20, 2019, *32 months later*, the Nation amended the Complaint adding six counts. Gilliland did not abscond; she was in Poland before the Amended Complaint was filed herein. Gilliland has not absconded; she has advised this court of her location.

She was not tried by a jury on the original Complaint before she left for Poland because of the Nation's dilatory prosecution; she was in Oklahoma for over two years after this case was filed before she moved to Poland. During that time the Cherokee Nation made no attempt to try her at a jury.[2]

B. Criminal trials without defendant present are not prohibited by Federal Rule of Criminal Procedure ("Fed.R.Crim.P.") Rule 43.

Keen misstates the law by arguing "Criminal Trials in Absentia Are Prohibited Under Fed.R.Crim.P. 43." In U.S. *v. Ortiz*, 992 F.2d 1220 (9th Cir. 1993), the court summarized the law on a defendant's right to be present at trial and to waive that right.

> A federal criminal defendant has a statutory right to be present "at every stage of the trial including the impaneling of the jury and the return of the verdict." Fed.R.Crim.P. 43(a). This right may be waived if the defendant is voluntarily absent from the proceedings. Fed.R.Crim.P. 43(b)(2); Taylor v. United States, 414 U.S. 17, 20 (1973). An absence is voluntary if the defendant knows that the proceedings are taking place and does not attend.

Fed.R.Crim.P. Rule 43 allows the prosecution to commence a trial without the defendant if the defendant waives his right to be present at trial evidenced by his behavior; it does not limit

[2] This case was filed July 28, 2016. On February 10, 2017, the Cherokee Nation requested this case be stricken from the jury trial docket. On September 13, 2018, the Cherokee Nation joined an Agreed Motion to Strike Case from Jury docket. On April 17, 2020, this court entered a Notice of Continuance.

the defendant's right to waive his own presence at trial if it is knowing and willful. If the Gilliland can waive her rights to counsel, confront all adverse witnesses, call witnesses in her behalf, jury trial, and against self-incrimination, why can she not waive her right to be present at jury trial? If a defendant can waive her presence at a jury trial merely by not showing up, certainly she can waive it by a written waiver knowingly and willfully executed.

In *U.S. v. Houtchens,* 926 F.2d 824 (9th Cir. 1991), the defendant was arraigned in person and ordered to appear for trial. After several continuances of the jury trial because the Defendant did not appear, the court held the jury trial. Several years after the jury convicted the defendant, he was arrested and contended his conviction was infirm because he was not present at his jury trial. In *Houtchens* the Court found, "Although the sixth amendment guarantees a defendant the right to be present at trial, this right can be waived. *Diaz v. United States*, 223 U.S. 442, 456-58, 32 S.Ct. 250, 254-55, 56 L.Ed. 500 (1912) (Diaz); *Taylor v. United States*, 414 U.S. 17, 20, 94 S.Ct. 194, 196, 38 L.Ed.2d 174 (1973) (Taylor)."

Keen cites *Crosby v. United States*, 506 U.S. 255, (1993), for the proposition that Rule 43 prohibits the trial *in absentia* of a defendant who is not present at the beginning of a trial. In *Crosby*, the defendant could not be found at the beginning of a jury trial and, "As the day wore on, the court remarked several times that the pool of 54 potential jurors was being kept waiting, and that the delay in the proceedings would interfere with the court's calendar. The prosecutor noted that Crosby's attorney and his three codefendants were present, and commented on the difficulty she would have in rescheduling the case, should Crosby later appear, because some of her many witnesses were elderly and had health problems..." The government moved to prosecute Crosby *in absentia* and *Crosby's attorney objected*. Unlike in Gilliland's case where she would be the party to seek voluntary waiver of her right to appear at jury trial, in *Crosby*, the government sought

to try the defendant *in absentia* because they had not heard from him. The U.S. Supreme Court did not address a waiver requested by the Defendant and held:

> There are additional practical reasons for distinguishing between flight before and flight during a trial. As did Diaz, the Rule treats midtrial flight as a knowing and voluntary waiver of the right to be present. Whether or not the right constitutionally may be waived in other circumstances—and we express no opinion here on that subject—the defendant's initial presence serves to assure that any waiver is indeed knowing.

In *Crosby*, because the U.S. Supreme Court did not address a possible situation like Gilliland's where the defendant requests the waiver, it has no value as precedence and is irrelevant.

Keen is wrong about Rule 43 prohibiting Gilliland waiving her right to be present at jury trial. If her absence from the trial after notice is deemed a waiver, a written waiver knowingly and willfully executed suffices for her to waive her right to be present at the jury trial.

Waivers of personal attendance in federal court are common. Attached is a waiver of appearance at jury trial pursuant to Fed.R.Crim.P. Rule 43 (b)(2) in *United States v. Shalobalo* (E.D. Cal. 2021) which provides:

> The undersigned defendant, having been advised of his rights to be present at all stages of the proceedings, including all motions, legal arguments and trial, and having been advised of his right to be confronted by and cross-examine witnesses, hereby waives the right to be present at any and all proceedings herein stated.

See Exhibit "A".

C. Gilliland's right to waive her presence at trial is not based on conditions.

Mr. Keen argues that this Court does not have to accept Gilliland's waiver of her presence at trial. If her waiver is knowingly and willful, the court has no grounds to not accept her waiver just like accepting her waiver to her rights to counsel, confront all adverse witnesses, call witnesses in her behalf, jury trial, and against self-incrimination.

In *Brewer v. Raines*, 670 F.2d 117 (9th Cir. 1982), the court addressed on defendant's Petition for *Habeus Corpus* in an Arizona case for not appearing for trial on armed robbery and the Arizona court conducted his jury trial without his presence. In *Brewer,* the Court held,

> Brewer's constitutional claim is based upon the Confrontation Clause of the Sixth Amendment, which has been made obligatory upon the states through the Due Process Clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). It is true that one of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present at every stage of his trial. Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). It is equally true, however, that this right is a right that can be waived. The notion that a trial may never proceed in the defendant's absence has been expressly rejected. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934); Diaz v. United States, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912).

The Court reinforced its holding by stating "A defendant's knowing, intelligent and voluntary absence from his trial acts as a waiver of his Sixth Amendment right to confrontation." *Brewer* at 117.

Keen cites *State v. Mumford*, 136 Ariz. 465, (Ariz. App. 1982) for the proposition that the court must approve the defendant's waiver of presence at trial. However, in *Mumford*, the defendant who attended his trial on rape requested to be absent only from his in-court identification by the victim. The *Mumford* court held, "Although he may waive this right to be present in court, People v. La Barbera, 274 N.Y. 339, 8 N.E.2d 884, nevertheless the People have the right to require his presence for the purpose of identification by its witnesses." Identification of Gilliland is not an issue in this case; she is on trial for improper use of credit cards and giving Cherokee students scholarships- not rape and armed robbery of *strangers*. She can stipulate that she is the one and same as the person charged in this case and resolve any objections regarding identification.

/

D. Keen's motion is premature.

Keen predicates his entire motion on Gilliland's attorney's statement at a status disposition hearing on April 5, 2021 before this court regarding facilitating the jury trial in this case that Gilliland "may be willing to waiver right to attend the trial in person." Motion at pg 2. Gilliland may appear for trial on April 25, 2022, post the bond, proceed to trial, and show the jury what a miscarriage of justice this prosecution actually is. Until her case is called, there is nothing for Keen to object to.

E. Keen's motion is really a motion to deny Gilliland a jury trial.

There is no condition on Gilliland's constitutional right to a jury trial. There is no Cherokee Nation Constitutional requirement that she be physically present for the accusations against her to be tried by a jury. Keen requests this court to deny Gilliland a jury trial unless she is arrested and posts bond. She has been arraigned on the Amended Complaint. The Cherokee Nation has no right to do that. The Constitution provides, "The right of trial by jury shall remain inviolate . . . " Keen has the right to try Gilliland before a jury without her presence, but has no right to deny her a waiver of her presence at the jury trial.

Even Fed.R.Crim.P. Rule 43 (b)(2) that Keen cites provides that the defendant does not need to appear at trial if the crime is a punishable by imprisonment for not more than one year. Rule 43 (b)(2) provides:

> (b) WHEN NOT REQUIRED. A defendant need not be present under any of the following circumstances:
>
> (2) *Misdemeanor Offense.* The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

The Amended Complaint in this case is not one crime with several counts arising out of the same transaction otherwise it would be a felony; it is fifteen different misdemeanors each with

a different transaction, date of offense, and each with a one-year maximum penalty. If the Amended Complaint is one offense, then Keen should file a Second Amended Complaint alleging the penalty for all fifteen counts is only one year total. Not only does Gilliland have the right to waive her presence at trial, but the Cherokee Nation also has no authority to compel her to attend the jury trial because Rule 43 (b)(2) states she *need not be present* at her misdemeanor trial.

F. Gilliland may appear at jury trial by video conferencing.

Fed. R. Crim. P. Rule 43 (b)(2) provides that Gilliland may appear at trial by video teleconferencing. This court may allow Gilliland to appear by video conferencing at the jury trial set for April 25, 2021. There would be no prejudice to the Cherokee Nation. The reason for the Cherokee Nation to object to appearing by video conferencing would be to punish her before she is convicted by requiring her to expend the cost of international travel.

There is no requirement under Rule 43 for her to physically appear at a misdemeanor trial which is reinforced by Rule 43 (b)(2) allowing her appearance by video conference.

II. CONCLUSION

Keen exercises his customary hyperbole in quoting Gilliland from the Tahlequah Daily Press on July 30, 2016, "I can only assume that because these actions were filed in tribal court that the FBI and federal investigators have rejected these claims for what they are, which is a frivolous attack on a private citizen who has done nothing wrong." The Court should note contrary to Keen's assertion, that Gilliland said nothing about his Court or the Cherokee Nation Judicial system. Her comments were directed to the prosecution of this case by the Cherokee Nation, and *she was right*.

After filing this Motion, Keen filed a Motion for Continuance. This Court should not "condone or enable" Mr. Keen's "antics" to deny Gilliland a jury trial.

Because Gilliland has filed no motion to waive her appearance at trial pending before the Court for Keen to object to, this court should strike his motion as premature. In the alternative, the Court should deny his motion because Gilliland has the right to waive her presence at the jury trial in this matter.

Submitted this 9th day of September, 2021.

/ss/
Chadwick Smith
CNBA # 08
P.O. Box 11324
Palm Desert, CA 92255
chad@chadsmith.com
918 453 1707

Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 9th day of September ,2021, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

/ss/
Chadwick Smith

Ralph Keen II
Special Prosecutor
205 West Division
Stilwell, OK 74960
KeenLawOK@gmail.com

Sarah Hill
Attorney General
Cherokee Nation
Office of Attorney General
P.O. Box 141
Tahlequah OK 74465
sarah.hill@cherokee.org

EXHIBIT "A"

United States of America, Plaintiff,
v.
Andrey Shalobalo, Defendant.

No. 5:21-po-00609-JLT

No. E12003K CA71

United States District Court, E.D. California

August 26, 2021

BIGGER & HARMAN, APC Mark Bigger Attorney for Defendant, ANDREY SHALOBALO

WAIVER OF DEFENDANT'S PERSONAL APPEARANCE [FEDERAL RULE 43(B)2]

JENNIFER L. THUURSTON, U.S. MAGISTRATE JUDGE.

The undersigned defendant, having been advised of his rights to be present at all stages of the proceedings, including all motions, legal arguments and trial, and having been advised of his right to be confronted by and cross-examine witnesses, hereby waives the right to be present at any and all proceedings herein stated.

The undersigned hereby requests the court to proceed during every absence of defendant, and hereby agrees that defendant's interest will be deemed represented at all times by the presence of his attorney, the same as if the defendant was personally present in court.

Defendant further agrees that notice to defendant's attorney that defendant's presence in court on a particular day at a particular time is required, shall be deemed notice to defendant of said requirement for his appearance at said time and place.

Defendant further agrees and expressly permits defendant's attorney to enter a plea of not guilty, guilty, or no contest to the charges. And further waives defendant's presence at sentencing, agreeing that notice to defendant's attorney of the sentence in this case will be notice to defendant. If probation is granted, defendant hereby agrees to accept and follow all terms and conditions of said probation, and/or all other lawful orders of the court regarding sentencing in this matter.

Defendant expressly warrants by signing this document that he does not live in the city of Bakersfield and it would be a financial hardship for him to be present for each hearing and in the interests of justice requests that his presence not be required.

ORDER

GOOD CAUSE APPEARING, it is hereby ordered that the Defendant's appearance may be waived on Sept. 7, 2021.

EXHIBIT A-46

In the District Court of the Cherokee Nation

CRM-2016-54

Cherokee Nation v. Kimberly A. Gilliland

Order Striking the Case from the Jury Docket

The parties through counsel came before the Court on April 5, 2022 for Jury Trial Sounding Docket. Plaintiff asked that the case be continued until such time as the Defendant may personally appear before the Court and settle the warrant against her, and Defense asked that the trial proceed with Defendant not present. The Court finds and orders as follows:

Defendant has failed to appear in person before this Court for over a year. There is an outstanding warrant for the Defendant's arrest that was issued on or about on March 26, 2021. The Court was informed by counsel that the Defendant might be residing within the country of Poland.

The controlling authority on this issue is **22 CNCA § 583 (1990)** which states as follows: **"If the information is for a crime, the defendant must be personally present at the trial."** *Emphasis added*

The Court hereby strikes this matter from the jury docket until such time as the Defendant settles the warrant issued against her.

This matter shall be put on the first jury trial sounding docket available after the Court is informed that the Defendant has settled her warrant.

Hearing set on May 19, 2022 at 10:00 AM is stricken.

J. Luke Barteaux
District Court Judge

Certificate of Service

I hereby certify that on the 17 day of May, 2022, a true and correct copy of the above was emailed, mailed, hand delivered and or faxed to the following persons:

Chad Smith
22902 S. 494 Road
Tahlequah, OK 74464

Ralph Keen II
205 West Division
Stilwell, OK 74960

Kristi Moncooyea
District Court Clerk

EXHIBIT B

From: Robin Ballenger <RBallenger@flintco.com>
Date: December 19, 2012 3:25:06 PM CST
To: 'Benny Smith' <sbennysmith38@yahoo.com>, 'Casey Ross-Petherick' <crosspetherick@hallestill.com>, 'Deacon Turner' <deaconturner@mac.com>, '"Jay Calhoun"' <jay.h.calhoun@gmail.com>, 'John Gritts' <John.gritts@ed.gov>, '"Marilyn Watt, Ph.D."' <wattmj@windstream.net>, '"Shelley Butler-Allen, Ph.D."' <sbutler-allen@cherokee.org>, 'Susan Plumb' <plumbocc@yahoo.com>, 'Tonya Rozell' <trozell@grandview.k12.ok.us>
Subject: I need guidance, please

On December 4th I met with Chief Baker and Kalyn Free to hear their thoughts about the Foundation and to argue to keep our Board members whose terms come up for renewal in January. This was an extremely disappointing meeting for me because Chief Baker and Kalyn told me that they do not trust the Foundation and want to have Kimberlie removed as executive director. I countered by describing Kim's many abilities as powerfully as I could and proposing ways to keep her and still satisfy the Chief. That went nowhere. He sees her as a political rival.

I am asking the Board to help me design a way forward from here. I will also talk with our advisory committee, Chuck Hoskin jr and Joe Byrd. Kim and I met this morning and she is aware of this situation. She has been extremely gracious and professional and I am profoundly grateful to her.

A few things to get you thinking---

The Foundation is a tribally chartered nonprofit, and as such is independent from the Tribe. The Chief does not have any authority over our executive director. The CNF Board alone has authority to hire and terminate our executive director. That said, the Chief ultimately controls the funds of our major funder, Cherokee Nation Businesses. And he can make life unpleasant for Kim, her family and the Foundation. We all know the highly charged political atmosphere that exists in the 14 county jurisdiction, especially Tahlequah.

My own goals are:

- To preserve the Foundation [at least some of its programs and its corpus],

- To be fair to Kim who has done such an outstanding job for us,

- and –for me personally--to not be blackballed by the Nation [mostly for Flintco but to some degree for myself].

I feel we are committed to the following programs until mid-July: ACT, Early Edge, Jr Achievement, the England/Cherokee Cultural Exchange, and CCPI. Kim is our strong lead on most of these projects.

My initial response is to submit my own resignation, and spare myself the time consuming and messy dealings this will involve, and to remove my personal business obligations from the equation. I am very resentful about being put in the position of asking Kim to resign. I can't do that and sleep with myself. Because Kim is putting the Foundation above herself, she has offered to resign and we have discussed severance possibilities.

I ask you to let me know your thoughts on what is best for the Foundation and for Kim at this juncture. My cellphone is 918-691-6265, or you can reply by email. Please, I need your input. I am out of wisdom. We must find a course that we all can agree upon.

Robin Flint Ballenger
Flintco LLC
PO Box 490
Tulsa, Oklahoma 74101
918-587-8451
rballenger@flintco.com