**IN THE MUSCOGEE (CREEK) NATION SUPREME COURT**



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| MUSCOGEE (CREEK) NATION, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | |
| | ) | Case No.: **SC 18-03** |
| BIM STEPHEN BRUNER, | ) | (District Court Case No. CF-17-42) |
| | ) | |
| Respondent. | ) | |

Appeal from District Court, Okmulgee District, Muscogee (Creek) Nation.

Shelly Harrison, Assistant Attorney General, Muscogee (Creek) Nation; Adam Weintraub, Savage, O'Donnell, Affeldt, Weintraub, & Johnson, P.L.L.C., Tulsa, Oklahoma; for the Appellant.

Trevor L. Reynolds, Tulsa Law Group, P.C., Tulsa, Oklahoma; George Miles, James E. Frasier, Steven R. Hickman, Frasier, Frasier & Hickman, L.L.P., Tulsa, Oklahoma; Jeff Davis, Barnes & Thornburg, L.L.P., Grand Rapids, Michigan; for the Respondent.

## ORDER AND OPINION

**MVSKOKVLKE FVTCECKV CUKO HVLWAT VKERRICKV HVYAKAT OKETV YVNKE VHAKV HAKATEN ACAKKAYEN MOMEN ENTENFVTCETV, HVTVM MVSKOKE ETVLWVKE ETEHVLVTKE VHAKV EMPVTAKV.**[1]

Before: ADAMS, *C.J.*; THOMPSON, *V.C.J.*; LERBLANCE, HARJO-WARE, and MCNAC, *JJ.*

DEER AND SUPERNAW, *JJ*, recused and not participating in the decision.

PER CURIAM.

Order of the District Court Reversed.

[1] "The Muscogee (Creek) Nation Supreme Court, after due deliberation, makes known the following decision based on traditional and modern Mvskoke law."

**PER CURIAM.**

The Muscogee (Creek) Nation (hereinafter, the "Appellant") submits its interlocutory appeal of the District Court's March 29, 2018, *Order re Defendant's Application for Determination of Charge Classification.*[2] The Appellant asserts that the District Court erred in concluding that "no statutory ambiguity exists" with respect to either M(C)NCA Title 21, § 11-103 or § 11-104; that both statutes fail to include a charging classification for their respective criminal conduct, and further, that the District Court erred in failing to classify the Respondent's criminal charges as felonies. On the record presented, and for the reasons set forth below, we reverse the March 29, 2018, *Order* of the District Court, remand the matter to the District Court to continue proceedings consistent with this *Order and Opinion* and further, remove the stay of proceedings issued by this Court on May 8, 2018.

## BACKGROUND

On August 16, 2017, the Appellant filed its *Criminal Complaint and Information* in the District Court for the Muscogee (Creek) Nation, Okmulgee District, charging the Respondent with one count of *Possession of Unlicensed Gambling Device*, under M(C)NCA Title 21, § 11-103, and

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[2] The instant appeal was filed pursuant to M(C)NCA Title 27, App. 2., Rule 3 (A), which provides:

> "A non-final judgment or order not appealable as a right under Rule 2 may be appealed via an interlocutory appeal to the Supreme Court prior to a final judgment or order upon leave granted by the Supreme Court if the original hearing body determines that an interlocutory appeal will (or may):
>
> 1. Materially advance the termination of the litigation or clarify further proceedings in the litigation;
> 2. Protect the petitioner from substantial or irreparable injury; or
> 3. Clarify an issue of general importance in the administration of justice.

On May 2, 2018, District Court Judge Gregory Bigler filed with this Court a *District Court Determination Regarding Interlocutory Appeal*, wherein the original hearing body concluded "that interlocutory appeal is proper and in this instance and grants leave to file / proceed with an interlocutory appeal to the Muscogee (Creek) Nation Supreme Court." On May 8, 2018, this Court filed its *Order Accepting Appellant's Application for Interlocutory Appeal and Request to Stay the Proceedings of the District Court.*

one count of *Gambling Premises*, under M(C)NCA Title 21, § 11-104. On August 17, 2017, the Respondent made his initial appearance before the District Court, standing mute. The District Court entered a plea of "not guilty" on the Respondent's behalf and bond was set.

On August 18, 2017, the Appellant filed an *Amended Complaint and Information*, though the criminal charges remained the same. On September 18, 2017, the Respondent again appeared before the District Court, standing mute. The District Court entered a plea of "not guilty" on the Respondent's behalf. At this time the Respondent's counsel requested that the District Court determine if the criminal charges against the Respondent were classified as felonies or misdemeanors. The District Court ordered the Respondent to file a motion concerning the Respondent's charge classification by October 30, 2017.

On October 2, 2017, the Respondent filed his *Application for Determination of Charge Classification*, wherein the Respondent asserted (1) that M(C)NCA Title 21 fails to designate crimes falling under § 11-103 or § 11-104 as felonies or misdemeanors, (2) that the Nation's criminal code under M(C)NCA Title 14 defines the respective felony and misdemeanor punishment ranges for the Nation but does not make these definitions applicable to M(C)NCA Title 21, (3) that other jurisdictions classify misdemeanor crimes as those punishable by incarceration for one (1) year or less, consistent, the Respondent argues, with the crimes charged to the Respondent, and (4) that the fine amount should have no bearing on the charge classification.

On November 21, 2017, the Appellant filed the *Nation's Response to Defendant's Application for Determination of Charge Classification*, wherein the Appellant asserted that the Nation has a right to self-governance, which, it argues, includes the right to classify crimes in whatever manner the Nation sees fit (consistent with applicable Mvskoke and federal law). Further, the Appellant directed the District Court's attention to the Indian Civil Rights Act (hereinafter, the

"ICRA") and its 1986 amendment, the Anti-Drug Abuse Act, which increased Indian tribe's sentencing power from no more than six (6) months imprisonment and a $500.00 fine, to no more than one (1) year imprisonment and a $5,000.00 fine.[3] The Appellant argued that the National Council's subsequent amendment of its criminal code in M(C)NCA Title 14, defining felonies as crimes punishable by not less than thirty (30) days but not more than one (1) year incarceration and a fine of not less than $1,000.00 but not more than $5,000.00, combined with similar amendments to M(C)NCA Title 21, wherein this maximum incarceration and fine amount is used to define the punishment range for the crimes the Respondent has been charged with, evidences the seriousness of those crimes to the Nation and the Nation's intent to classify those crimes in the highest possible category, or, the Appellant argued, as felonies.

On March 29, 2018, the District Court entered its *Order re Defendant's Application for Determination of Charge Classification*, wherein the District Court held that "[s]tatutory interpretation may only begin after identification of an ambiguity. Here, no statutory ambiguity exists." The District Court examined the statutory history of both M(C)NCA Title 14 and M(C)NCA Title 21 and noted that no amendment was made attempting to classify M(C)NCA Title 21, § 11-103 and/or § 11-104, as either a felony or a misdemeanor, though the legislative body had made numerous amendments to Title 21, generally. As such, the District Court held that "Counts One and Two are crimes punishable by incarceration for up to one (1) year in jail and/or up to five thousand dollars ($5,000) in fines[,]" declining to classify the crimes as felonies or misdemeanors. It is from this *Order* that the Appellant seeks review.

[3] *See* Pub. L. No. 99-570, Title IV, Sub. C, Part V, Sec. 4217. (October 27, 1986).

## JURISDICTION, SCOPE AND STANDARD OF REVIEW

Appellate jurisdiction is proper under Muscogee (Creek) Nation Code, Title 27, § 1-101 (C).[4] This Court will review issues of law *de novo* and issues of fact for clear error.[5]

## ISSUES PRESENTED

Part I. Does the lack of a charging classification (felony or misdemeanor) for the criminal conduct prohibited by M(C)NCA Title 21, § 11-103 and § 11-104 create a statutory ambiguity?

Part II. If a statutory ambiguity does exist, what can this Court conclude (upon proper examination, applying tools of statutory construction) was the National Council's intent with respect to the charging classification of M(C)NCA Title 21, § 11-103 and § 11-104?

## DISCUSSION

### Part I. Statutory Ambiguity

As this Court has previously stated, "[w]hen a statutory provision is unambiguous, we presume the National Council intended the resulting impact of the unambiguous provision and apply the statute according to the plain meaning of its terms. Use of the "plain-meaning rule" is both an appropriate judicial deference to the National Council's constitutional law-making authority and an analytical hurdle which limits unnecessary judicial encroachment into the law-making function."[6] Further, when the Court concludes that a statutory ambiguity does exists, the

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[4] M(C)NCA Title 27, § 1-101 (C), vests this Court with exclusive appellate jurisdiction over all matters under the Nation's jurisdiction, as described in M(C)NCA Title 27, § 1-102.

[5] *See A.D. Ellis v. Checotah Muscogee Creek Indian Community, et al.*, SC 10-01 at 3, ___ Mvs. L.R. ___ (May 22, 2013); *In the Matter of J.S. v. Muscogee (Creek) Nation*, SC 93-02, 4 Mvs. 124 (October 13, 1994); *McIntosh v. Muscogee (Creek) Nation*, SC 86-01, 4 Mvs. L.R. 28 (January 24, 1987).

[6] *See Slay v. Muscogee (Creek) Nation Travel Plaza and Hudson Insurance Company*, SC 14-01, ___ Mvs. L.R. ___ (October 23, 2014), (citing *Cox v. Kamp*, SC 91-03, 4 Mvs. L.R. 75, 79 (June 27, 1991); and *A.D. Ellis v. Checotah Muscogee Creek Indian Community, et al.*, SC 10-01 at 4, ___ Mvs. L.R. ___ (May 22, 2013)). Also see this Court's recent Order and Opinion in *Lisa K. Deere v. Joyce C. Deere*, SC 17-02 at 7, ___ Mvs. L.R. ___ (May 17, 2018).

Court should not arbitrarily assign a meaning to the ambiguous term(s), but should apply tools of statutory construction to determine, "as best as can be ascertained" what the intent of the National Council was at the time of enactment.[7] Thus, before a Court of the Muscogee (Creek) Nation may infer the intent of the National Council with respect to any legislative act, that Court must first conclude that an ambiguity exists. A review of this Court's case law precedent reveals that the Supreme Court has examined various statutes and constitutional provisions for ambiguity and has determined that some of the respective provisions were unambiguous while others were found to be ambiguous.[8] In each of these instances the guiding principle used by this Court to determine if an ambiguity existed was whether the provision was susceptible to more than one reasonable interpretation.

The Appellant presents this Court with two (2) statutes which it asserts are ambiguous. The Respondent similarly argues that a statutory ambiguity exists, though the two sides' analysis diverges substantially on what charge classification the Court should ultimately assign to the criminal conduct at issue. The first statute, M(C)NCA Title 21, § 11-103 (enacted by NCA 01-183), provides,

> **Possession of unlicensed gambling device**: It shall be a crime to knowingly own, manufacture, possess, buy, sell, rent, lease, store, repair or transport any unlicensed gambling device, or offer or solicit any interest therein; whether through an agent, employee or otherwise. If a person is also in possession of an unlicensed gambling record, such person shall be presumed to be in knowing possession of the gambling

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[7] *See Lisa K. Deere v. Joyce C. Deere*, SC 17-02 at 8, ___ Mvs. L.R. ___ (May 17, 2018), (citing *Cox v. Kamp*, SC 91-03, 4 Mvs. L.R. 75, 79 (June 27, 1991)).

[8] *See Claude A. Cox v. Frank E. Kamp*, SC 91-03 at 3, 4 Mvs. L.R. 75 (June 27, 1991), where this Court concluded that "In *Bill Burden v. Principal Chief, Claude Cox*, CV-88-08 the Court stated "that the Constitution of the Muscogee (Creek) Nation must be strictly construed and interpreted and where the Constitution speaks in the plain language with reference to a particular matter, the Court must not place a different meaning on the words." This Court cannot disagree with this statement. However, the language with which we are dealing with today is not clear and unambiguous." The Court went on to conclude that the language at issue could "be given so many different meanings that the Court finds it impossible to construe the words strictly[.]" Also see *Lisa K. Deere v. Joyce C. Deere*, SC 17-02 at 8-9, ___ Mvs. L.R. ___ (May 17, 2018), where the Court reviewed the statute in question and its predecessor statute and determined that the National Council's intent was clear and unambiguous.

> device. This crime shall be punishable by incarceration for up to one (1) year in jail and up to five thousand dollars ($5,000) in fines or both.

The second statute, M(C)NCA Title 21, § 11-104 (A) (enacted by NCA 01-183), similarly provides:

> **Gambling premises**: (A) It shall be a crime to own, lease, employ, operate, occupy, or otherwise knowingly maintain, aid, or permit an unlicensed gambling premise. This crime shall be punishable by incarceration for up to one (1) year in jail and up to five thousand dollars ($5,000) in fines or both.

While an incarceration and fine range is specifically included in each statute, neither M(C)NCA Title 21, § 11-103 nor § 11-104 designate their prohibited criminal conduct as a felony or a misdemeanor. The question for this Court is whether the absence of such a designation creates a statutory ambiguity which must be clarified by the courts, or whether the statutes are unambiguous and the courts should rest entirely on the "plain meaning" of the terms included therein.

The District Court, following review of the relevant law and the pleadings filed by the parties, concluded:

> These gaming-related offenses in Title 21 do not denominate, use, nor state the felony/misdemeanor classification used for Title 14 crimes. They do, however, specify a punishment for the offenses. Rather than reach to find ambiguity regarding whether Title 21 gaming-related offenses are felonies or misdemeanors, this Court is obligated by Title 14, § 1-601.B to recognize the plain wording of Title 21 and conclude the M(C)NCA Title 21, § 11-103 and § 11-104, while crimes, are neither felonies or misdemeanors.

While the District Court is correct that neither Title 21, § 11-103 nor § 11-104 makes specific reference to a felony or misdemeanor classification, M(C)NCA Title 14, § 2-104 (B) does specifically require that "[a]ll crimes subject to the jurisdiction of the Court are [to be] classified as either misdemeanors or felonies[.]" This provision does not limit its scope to any specific Title under Mvskoke law, but rather states that it is applicable to *all crimes*. Both M(C)NCA Title 21, § 11-103 and § 11-104 specifically provide that "[i]t shall be a *crime*" [Emphasis Added] to

conduct the prohibited conduct. It is clear to the Court that the National Council intended M(C)NCA Title 21, § 11-103 and § 11-104 to prohibit criminal conduct. It is also clearly evident to the Court that these two (2) statute necessarily fall under the purview of M(C)NCA Title 14, § 2-104 (B). If, as stated above, an ambiguity exists when a provision is susceptible to more than one reasonable interpretation, then this Court concludes that an ambiguity clearly exists when M(C)NCA Title 14, § 2-104 (B) requires *all crimes* to be classified as either a felony or misdemeanor and both M(C)NCA Title 21, § 11-103 and § 11-104 fail to comply with this requirement. Under this scenario, the reader is left to speculate which classification is intended.

## Part II. Charge Classification

Having concluded that an ambiguity does exist, this Court must now apply tools of statutory construction to determine the intent of the National Council at the time of enactment.[9]

### A. Legislative History of Gaming within the Muscogee (Creek) Nation

Tribal gaming has long been regulated by the Nation within its jurisdictional boundaries. Prior to the creation of the State of Oklahoma, the Muscogee Nation, through its 1880 Constitution, enacted law prohibiting "gambling houses" and providing that any person convicted of willfully operating such an establishment would be guilty of a misdemeanor and would receive fifty (50) lashes.[10] Shortly following adoption of the modern Muscogee (Creek) Nation Constitution on August 20, 1979, the National Council enacted legislation governing "bingo" and other "games of chance" conducted on tribal land.[11] This first modern gaming law required a "valid license" in

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[9] *See* Footnote 6.

[10] *See* 1880 Constitution and Laws of the Muscogee Nation, Crimes and Misdemeanors, Chapter IV, Article X, Section 1, "Any person who shall willfully, by word or deed, disturb any private or public boarding or day school, church, council, or any other religious, political or other lawful gathering, or private family, except those which deal in spirituous liquor, or keep houses of ill fame, or gambling houses, shall be guilty of misdemeanor, and upon conviction shall receive fifty lashes on the bare back."

[11] *See* NCA 82-033.

order to conduct these specific forms of gaming, and mandated that "[a]ny enrolled Muscogee (Creek) Indians who sponsors, or who participates in a group which sponsors, without a license a "Bingo" game or other game of chance on tribal lands, or on individual lands of enrolled Muscogee (Creek) Indians, *shall be guilty of a misdemeanor*, and shall be subject to a fine of not more than $150.00 per violation."[12] [Emphasis Added]. This would be the only modern Muscogee gaming statute to provide a specific charge classification for gaming related crimes within the Muscogee (Creek) Nation. The National Council subsequently repealed this law and replaced it with a more comprehensive set of regulations governing "public gaming within the Muscogee (Creek) Nation[.]"[13] The Nation, at this time, recognized a "close relationship between professional gambling and other organized crime," and made it the official policy of the Nation to "liberally construe[e]" all provisions of this new gaming ordinance in order to effectuate its policy goals.[14] This new law contained the first statutory restrictions on "Gambling Devices"[15] and "Gambling Premises."[16] However, neither provision would state if the associated criminal conduct was to be prosecuted as a felony or a misdemeanor; instead, simply requiring that each would be prosecuted under Federal law.[17] In February of 1987 the United States Supreme Court ruled in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, that the State of California had impermissibly infringed on the Tribe's right to regulate gaming within its own jurisdictional boundaries. This

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[12] *Id.*

[13] *See* NCA 84-004. This legislative Act was incorporated, in large part, from the Model Anti-Gambling Act and Commentary, issued by the National Conference of Commissioners on Uniform State Laws.

[14] *Id.* at Section 901.

[15] *Id.* at Section 904 (4), "Whoever knowingly owns, manufactures, possesses, buys, sells, rents, leases, stores, repairs or transports any gambling device, or offers or solicits any interest therein; whether through an agent or employee or otherwise, shall be fined by the Commissioner or prosecuted under Federal Law. Subsection (2) of this section shall have application in the enforcement of this subsection."

[16] *Id.* at Section 906 (4), "Whoever as owner, lessee, agent, employee, operator, occupant, or otherwise knowingly maintains, or aids, or permits the maintaining of a gambling premise shall be fined or imprisoned, or both, and whoever does any act in violation of this paragraph within any locked, barricaded, or camouflaged place or in connection with any electrical or mechanical alarm or warning system or arrangement shall be prosecuted under Federal Law."

[17] *See* footnotes 14 and 15.

ruling had a significant impact on tribal gaming, bringing about a dramatic increase in the total number of tribal gaming establishments within the United States within a relatively short time-period. This increase ultimately gave rise to the Indian Gaming Regulatory Act of 1988 (hereinafter, the "IGRA"), with the stated purpose:

> 1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
> 2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
> 3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission [hereinafter, the "NIGC"] are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.[18]

Subsequent amendments to Title 21 have since been made in order to bring the Nation's gaming code into compliance with various IGRA regulations, to reflect changing views on gaming within the Nation, or to update the Nation's code to reflect new procedures. NCA 84-004 (with amendments enacted by NCA 85-074) was the first set of gaming laws issued by the Muscogee (Creek) Nation to receive approval by the NIGC.[19]

In October of 2001, the National Council again amended Title 21 to include the provisions related to *Possession of Unlicensed Gambling Device*, and *Gambling Premises* that are applicable to the charges filed against the Respondent.[20] These amendments were subsequently approved by

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[18] *See* 25 U.S.C., § 2702.
[19] *See* National Indian Gaming Commission, Gaming Ordinances, NCA 84-04 (September 6, 2018, 8:01 a.m.), https://www.nigc.gov/images/uploads/gamingordinances/muscogeecreeknation-Ord120285.pdf
[20] *See* NCA 01-183, Sections 1103 and 1104.

the NIGC in February of 2002.[21] Both provisions provide that the prohibited criminal conduct shall be "punishable by incarceration for up to one year in jail and up to $5,000 in fines or both."[22]

**B. Legislative History of the Muscogee (Creek) Nation Criminal Code**

In August of 1982, the National Council enacted law establishing a Judicial Code for the Nation, thereby authorizing the Tribal Courts to enforce the Nation's civil and criminal laws.[23] A tribal court funding request was subsequently made by the Nation to the Bureau of Indian Affairs (Hereinafter, "BIA") which was denied. The BIA determined that the Nation's ability to establish a Tribal Court had been precluded by prior act of the United States Congress. The Nation appealed the BIA's decision to the United Stated District Court, for the District of Columbia, which affirmed the decision by the BIA. On appeal to the United States Court of Appeals, District of Columbia Circuit, the appellate Court reversed the District Court and concluded that "the Muscogee (Creek) Nation has the power to establish Tribal Courts with civil and criminal jurisdiction[.]"[24]

In February of 1992, the National Council enacted a comprehensive criminal code, wherein criminal violations were simply classified as "offenses" subject to "a fine not to exceed $500.00 or imprisonment not to exceed 6 months in jail[.]"[25] No reference was made at this time to a felony or misdemeanor classification system.[26]

In March of 1999, the Nation again amended its criminal code adding "[j]udgment and sentence provisions" that required all Indians convicted of a criminal offence under that Act to be sentenced as either (A) a misdemeanor, with "a fine of not less than fifty dollars ($50.00) and not

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[21] *See* Approval of Muskogee [sic] Creek Nation Amended Tribal Gaming Ordinance NCA 01-183 (September 6, 2018, 8:01 a.m.), https://www.nigc.gov/images/uploads/gamingordinances/muscogeecreeknation-muscogeeamend022202.pdf
[22] *See* NCA 01-183, Sections 1103 and 1104.
[23] *See* NCA 82-030.
[24] *See Muscogee (Creek) Nation v. Hodel*, 851 F. 2d 1439, 1446. (July 15, 1988).
[25] *See* NCA 92-014, Sec. 1-526.
[26] *Id.*

more than two thousand five hundred dollars ($2,500.00); or by imprisonment of not less than one (1) day and not more than one (1) year[,]" or both,[27] or (B) as a felony, with "a fine not less than one thousand dollars ($1000.00) and not more than five thousand dollars ($5000.00); or by imprisonment of not less than thirty (30) days and not more than one (1) year[,]" or both.[28]

In July of 2010, the Tribal Law and Order Act (Hereinafter, the "TLOA") was signed into the laws of the United States.[29] This new federal law amended tribal sentencing authority in criminal matters; increasing the maximum incarceration and fine range for a single offense to no more than three (3) years incarceration and up to fifteen thousand dollars ($15,000.00) in fines.[30] In December of 2010, the National Council passed NCA 10-210, amending its misdemeanor punishment range to "a fine of not more than two thousand five hundred dollars ($2,500) and/or not more than one (1) year imprisonment[,]" and its felony punishment range to "a fine of not more than five thousand dollars ($5,000) and/or not more than three (3) years imprisonment[,]" reflecting the increased sentencing power granted tribal courts by the TLOA.[31]

### C. Legislative Intent Concerning Title 21, § 11-103 and § 11-104

While it is true that the first gaming laws within the Muscogee (Creek) Nation were classified as misdemeanor crimes, it is also clear to this Court that the scope of tribal gaming (including the size of the gaming operation within the Nation and the potential for criminal conduct) is different today than it was at the time these first laws were enacted. Tribal gaming now extends beyond its tribal members and traditional Mvskoke games and invites the public at-large onto the Nation's territory to participate. Tribal gaming is now subject to federal regulation under

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[27] *See* NCA 99-004, Section 9-701 (A).
[28] *See* NCA 99-004, Section 9-701 (B).
[29] *See* Pub. L. No. 111-211.
[30] *Id.* at Sec. 234 (b).
[31] *See* NCA 10-210, § 1-601 (E)(1) and (E)(2).

the IGRA, and the Nation must compact with the State of Oklahoma in order to offer certain classifications of gaming to the public. Our laws have been updated a various times to reflect these changes in federal regulation and to reflect the ever-growing importance our Nation has placed on gaming, as well as the Nation's desire to protect this valuable asset.

When the National Council enacted M(C)NCA Title 21 § 11-103 and § 11-104 in October of 2001, they choose to include the largest possible incarceration and fine amount available under the Nation's laws as a consequence for any violation of the two provisions.[32] This range of punishment was consistent with the Nation's felony definition at that time under Title 14.[33] Further, the fine amount included in the Title 21 crimes of five thousand dollars ($5,000.00) exceeded the Nation's misdemeanor fine range at that time of two thousand five hundred dollars ($2,500.00).[34]

The Respondent has argued that federal enactment of the TLOA in 2010, combined with the Nation's subsequent amendments to Title 14, authorizing up to three (3) years incarceration (consistent with the TLOA), evidences the Nation's intent to classify the Title 21 crimes at a lower level, since similar amendments were not made to those crimes. We do not agree. Our ambiguity analysis requires that we look at the law-in-question *at the time of enactment* and determine the intent of the National Council *at that time*. It is clear to this Court that, at the time of enactment, the National Council intended M(C)NCA Title 21, § 11-103 and § 11-104 to place the prohibited conduct in the highest possible punishment range available to the Nation. This is consistent with

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[32] *See*, NCA 01-183, Section 1103 and 1104, "This crime shall be punished by incarceration for up to one year in jail and up to $5,000 in fines or both."

[33] *See* NCA 99-004, Section 9-701 (B), "a felony shall be punished by a fine not less than one thousand dollars ($1000.00) and not more than five thousand dollars ($5000.00); or by imprisonment of not less than thirty (30) days and not more than one (1) year[,]" or both.

[34] *See* NCA 99-004, Section 9-701 (A),a misdemeanor shall be punished by a fine of not less than fifty dollars ($50.00) and not more than two thousand five hundred dollars ($2,500.00); or by imprisonment of not less than one (1) day and not more than one (1) year[,]" or both

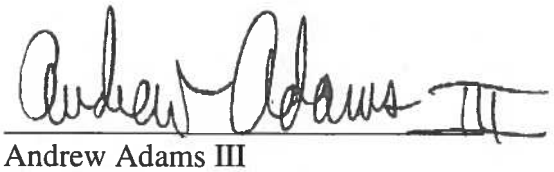
the Nation's felony designation at that time, and is conversely inconsistent with the Nation's misdemeanor designation. As such, we find that the prohibited criminal conduct, as defined by MCNCA Title 21 § 11-103 and § 11-104, is to be classified as a felony crime. Further, it may be advisable for the legislative and executive branches of government to conduct a review of the Nation's laws to ensure that the provisions in each Title work in tandem with, and not contrary to, other provisions in the same or other Titles throughout the Nation's code. However, such a review is ultimately a decision left for the political branches of government and this Court will weigh in no further.

**IT IS HEREBY ORDERED** that the District Court's March 29, 2018, *Order re Defendant's Application for Determination of Charge Classification* is **REVERSED**.

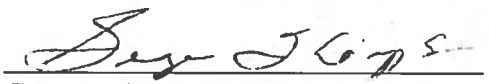
**IT IS FURTHER ORDERED** that the **STAY** of proceedings issued by this Court on May 8, 2018, is **REMOVED**.

**IT IS FURTHER ORDERED** that this matter is **REMANDED** to the District Court with direction that the District Court continue proceedings in the matter consistent with this opinion. Further, that the Respondent be afforded all due process protections guaranteed by M(C)NCA Title 14, § 1-303, and the ICRA.

**FILED AND ENTERED:** September 6, 2018



Andrew Adams III
Chief Justice



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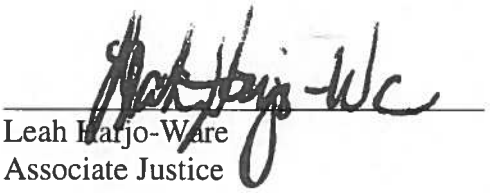
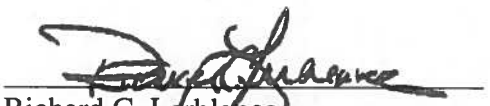
Vice-Chief Justice



Leah Harjo-Ware
Associate Justice



Richard C. Leblanc
Associate Justice

Amos McNac
Associate Justice

## CERTIFICATE OF MAILING

I hereby certify that on September 6, 2018, I mailed a true and correct copy of the foregoing Order and Opinion with proper postage prepaid to each of the following: Shelly Harrison, Muscogee (Creek) Nation, Department of Justice, P.O. Box 580, Okmulgee, Oklahoma 74447; Adam Weintraub, Savage, O'Donnell, Affedt, Weintraub & Johnson, P.L.L.C., 110 W. Seventh Street, Suite 1010, Tulsa, Oklahoma 74119; Trevor Reynolds, 1700 Southwest Blvd., Tulsa, Oklahoma 74107; George Miles, James Frasier, Steven Hickman, Frasier, Frasier & Hickman, 1700 Southwest Blvd., Tulsa, Oklahoma 74107; Jeff Davis, Barnes & Thornburg, L.L.P., 171 Monroe Avenue, N.W., Suite 1000, Grand Rapids, Michigan 49503-2694. A true and correct copy was also hand-delivered to: Donna Beaver, Clerk of the Muscogee (Creek) Nation District Court.

Laura Marks

Laura Marks, Deputy Court Clerk