

IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

OCT 24 2021

IN RE: COMBINED APPEAL OF)
ADAM JONES III AND LANISSA)
MELTON FOR FRAUD OR)
IRREGULARITIES IN 2021 PRIMARY)
ELECTION.)

Case No.: **SC-2021-07**
(District Court Case No. CV-2021-86)
(District Court Case No. CV-2021-88)

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

Carly Griffith Hotvedt, Tulsa, Oklahoma; for the Appellants, Adam Jones, III, and Lanissa Melton.

Robert Seacat, Tulsa, Oklahoma; for the Respondent, Muscogee (Creek) Nation Election Board.

ORDER AND OPINION

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

Before: LERBLANCE, C.J.; MCNAC, V.C.J.; ADAMS, THOMPSON, JJ.

DEER, HARJO-WARE, AND SUPERNAW, JJ, not participating in the decision.

LERBLANCE delivered the opinion of the Court, in which MCNAC, ADAMS, and THOMPSON joined.

Order of the District Court affirmed.

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

LERBLANCE, delivered the opinion of the Court.

M(C)NCA Title 19, § 8-209 authorizes a candidate for election in the Muscogee (Creek) Nation to file a *Petition for Fraud or Irregularities* with the Muscogee (Creek) Nation Election Board (hereinafter, “Election Board”) before 5:00 p.m. on the first Friday following the contested election.² The matter is then set before the Muscogee (Creek) Nation District Court (hereinafter, “District Court”) for hearing.³ Following completion of the hearing, an oral decision must be issued by the District Court that same day, with a written decision to follow.⁴ A party then has three (3) calendar days from the oral decision to appeal to the Muscogee (Creek) Nation Supreme Court (hereinafter, “Supreme Court”).⁵ The Supreme Court is required to issue an oral decision at the conclusion of the hearing, and a written decision is to be issued no later than three (3) calendar days later.⁶

² M(C)NCA Title 19, § 8-209, provides:

In the event a candidate contests the correctness of the announced results of an election, by alleging fraud or any other irregularities, said candidate shall file with the Manager of the Election Board a contest petition, at any time before 5:00 p.m. on the first Friday following an election, setting forth with particularity the facts which are alleged to constitute fraud and irregularities. Said petition must be accompanied by either a money order, cashier’s or certified check or a bank instrument equivalent to such checks in the nonrefundable amount of one thousand dollars (\$1,000.00) for each district affected by the petition. When such petition is properly filed and the filing fee of one thousand dollars (\$1,000.00) duly paid, the Manager of the Election Board shall immediately file or cause to be filed said contest petition in the District Court of the Muscogee (Creek) Nation. A hearing on the contest petition shall be set by the District Court no less than three (3) nor more than ten (10) calendar days from the date of the filing of said petition in the District Court. The District Court shall immediately render an oral decision at the conclusion of the hearing, and shall file a written order and opinion consistent with the oral decision no later than the following calendar day. Any appeal to the Muscogee (Creek) Nation Supreme Court shall be filed within three (3) calendar days of the oral decision of the District Court. If the deadline for filing an appeal falls on a holiday or weekend, the Appellant shall contact the Court Clerk in order to make arrangements for filing the appeal within the three (3) calendar day filing period. A hearing on the appeal shall be set by the Supreme Court no less than three (3) nor more than ten (10) calendar days from the date of the filing of the appeal in the Supreme Court. The Supreme Court shall immediately render an oral decision at the conclusion of the hearing, and shall file a written order and opinion consistent with the oral decision no later than three (3) calendar days after the date the oral decision was rendered. The decision of the Muscogee (Creek) Nation Supreme Court shall be final and conclusive.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

The 2021, Muscogee (Creek) Nation Primary Elections were held on Saturday, September 18, 2021. Appellant Jones submitted his *Petition for Fraud or Irregularities* with the Election Board on September 23, 2021, within the statutory timeframe. Appellant Melton also submitted her paperwork to the Election Board on September 23, 2021. The Election Board interpreted the paperwork solely as a *Petition for Recount*, under M(C)NCA Title 19 § 8-202. However, following this Court's election recount proceedings on September 30, 2021,⁷ it was determined by the Court that Appellant Melton sought both a *Petition for Recount* (under § 8-202) and a *Petition for Fraud or Irregularities* (under § 8-209). This Court tolled Appellant Melton's filing period until October 1, 2021, to submit her *Petition for Fraud or Irregularities*, which she filed on September 30, 2021, within the tolled deadline.

On October 8, 2021, the District Court conducted a combined hearing on Appellant Jones' and Appellant Melton's *Petitions for Fraud or Irregularities*. Pursuant to statute, the District Court issued its oral decision that same day, with a written decision filed the following day, finding:

that the current election was carried out in substantial compliance with the election laws and there are no grounds to overturn the election. There are no grounds to interfere with or otherwise require a do-over of the votes that were already counted. However, this Court has serious concerns about the high percentage of absentee votes that have not been counted in this election due to ballots being received at the post office after the 11:00 a.m. cut-off time. The harsh result required by following the letter of the law is that these votes cannot be counted.

On October 11, 2021, the Appellants (Jones and Melton) filed a *Joint Notice of Appeal* with the Supreme Court requesting "canvassing of outstanding absentee ballots received by the

⁷ See, SC-2021-05, In Re: Election Recount Petition of Lanissa Jack Melton.

Election Board in the 2021 Primary Election after the deadline[.]” or alternatively, “direction for the Election Board to hold a new Primary Election.”^{8 9}

JURISDICTION, SCOPE, AND STANDARD OF REVIEW

Appellate jurisdiction is proper under M(C)NCA Title 19, § 8-209.¹⁰ This Court will review issues of law *de novo* and issues of fact for clear error.¹¹ Each respective question will be addressed based on its applicable standard of review.

ISSUES PRESENTED

Part 1. Does a postal delay (by a non-governmental third-party) qualify as an election irregularity and, if so, to what extent must an irregularity impact the election in order to require corrective action by the Courts?

Part 2. Are citizens of the Muscogee (Creek) Nation unconstitutionally disenfranchised by postal delays that result in absentee ballots not reaching the Okmulgee Post Office before the statutory deadline?

Part 3. Are citizens of the Muscogee (Creek) Nation denied equal protection by postal delays that result in absentee ballots not reaching the Okmulgee Post Office before the statutory deadline?

⁸ The Appellants’ Joint Notice of Appeal was filed within the three (3) day statutory deadline.

⁹ See, Joint Notice of Appeal, filed on October 11, 2021, in SC-2021-07.

¹⁰ See footnote 2.

¹¹ 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. L.R. 124 (October 13, 1994); McIntosh v. Muscogee (Creek) Nation, SC 86-01, 4 Mvs. L.R. 28 (January 24, 1987); Lisa K. Deere v. Joyce C. Deere, SC 17-02 at 5, ___ Mvs. L.R. ___ (May 17, 2018); Muscogee (Creek) Nation v. Bim Stephen Bruner, SC 18-03 at 5, ___ Mvs. ___ (September 6, 2018); Derek Huddleston v. Muscogee (Creek) Nation, SC 18-02 at 3, ___ Mvs. ___ (October 4, 2018); Bim Stephen Bruner v. Muscogee (Creek) Nation, SC 18-04 at 4, ___ Mvs. ___ (May 13, 2019); Ron Graham v. Muscogee (Creek) Nation Citizenship Board, SC-2020-01 at 6, ___ Mvs. ___ (September 17, 2020).

Part 4. Should this Courts apply a public policy exception in consideration of the COVID-19 pandemic?

PART 1. ELECTION IRREGULARITY

The Appellants in the above-styled combined appeal inform the Court that 3,238 absentee ballots were distributed to citizens of the Muscogee (Creek) Nation ahead of the 2021 Primary Election. Of these absentee ballots, only 926 were received by the Election Board by the statutory deadline, and only 905 passed the Election Board’s review process and were ultimately counted. Further, that an additional 1,248 absentee ballots were subsequently collected following the statutory deadline, and have not been counted.¹² M(C)NCA Title 19, § 10-105, provides that absentee ballots are to be returned via United States mail. No other method of delivery is authorized. Further, M(C)NCA Title 19, § 10-105 and § 10-108 provide that only those absentee ballots received prior to 11:00 a.m. on election day will be accepted.¹³ The Appellants argue (1) that the number of uncounted absentee ballots, received after the statutory deadline, qualifies as an election irregularity (either by the third-party, United States Postal Service, or because of a lack of due diligence on the part of the Election Board), and (2) that in order to show by “mathematical

¹² *Brief of Joint Appellants*, at Pg. 2, filed in SC-2021-07.

¹³ M(C)NCA Title 19, § 10-105 provides:

The voter shall be required to mark his or her ballot: seal the ballot in the opaque envelope printed “ABSENTEE BALLOT”; seal the printed opaque envelope inside the return envelope; sign the statement in the space provided for the signature of the voter on the return envelope; and return both envelopes, the opaque envelope sealed inside the other, by United States mail to the Okmulgee Post Office by 11:00 a.m. on election day.

M(C)NCA Title 19, § 10-108 provides in part:

Valid absentee ballots must be received at the Election Board’s post office box in Okmulgee, Oklahoma, prior to 11:00 a.m. on election day.

certainty” that the irregularity would change the ultimate result of the election, the Court must allow canvassing and counting of the late absentee ballots.

As this Court has repeatedly 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.”¹⁴ Further stating, “[i]n contrast, when a statutory provision is ambiguous it is not this Court’s duty to merely assign a definition to the term. It is the role of this Court to examine the ambiguous term and determine, as best as can be ascertained, the intent and scope intended by the National Council.”¹⁵

The Court concludes that M(C)NCA Title 19, § 10-105 and § 10-108 are unambiguous with respect to the postal provider required for use in Muscogee (Creek) Nation elections, as well as with respect to the deadline by which return absentee ballots must be received. The Court presumes that the National Council adequately took into consideration all pros and cons prior to adopting this legislation; that it considered the possibility that shipping delays could occur and that votes might be excluded. While the number of late absentee ballots in the 2021 Primary Election is larger than past years, it is not this Courts role to say that those numbers are beyond what the National Council considered a possibility when adopting § 10-105 and § 10-108. If the National Council is alarmed by the number of excluded absentee ballots, the remedy is not for this Court to

¹⁴ See Lisa K. Deere v. Joyce C. Deere, *Order and Opinion*, at Pg. 7 (May 17, 2018), citing Slay v. Muscogee (Creek) Nation Travel Plaza and Hudson Insurance Company, SC-2014-01, ___ Mvs. L.R. ___ (October 23, 2014), Cox v. Kamp, SC-1991-03, 4 Mvs. L.R. 75, 79 (June 27, 1991), and Ellis v. Checotah, et al., SC-2010-01, at 4, ___ Mvs. L.R. ___ (May 22, 2013).

¹⁵ See Cox v. Kamp, 1991-03, 4 Mvs. L.R. 75, 79 (June 27, 1991).

overturn an election, or to create remedies not authorized by statute, but for the National Council to review and amend its legislation prior to future elections.¹⁶ With this in mind, the Court cannot conclude that an irregularity occurred, with respect to postal delays.

This Court need not address the Appellants' request for canvassing and counting of late absentee ballots in order to show a "mathematical certainty[,]" as the Appellants have not met the first element of the District Court's *Johnson* precedent requiring the existence of an irregularity.¹⁷ Additionally, as stated above, such a remedy is not currently authorized by statute. The Court agrees with the District Court's analysis, and future candidates seeking to contest election results based on fraud or irregularities should do so with a full understanding of the high burden that will be placed on them before the Courts will consider overturning election results.

The Court would also like to address the Appellant's argument concerning the definition of a "cast" ballot. Article IV, Section 4 (1) of the Muscogee (Creek) Nation Constitution provides that "[n]o candidate for office shall be considered elected unless the candidate receives a majority vote of the votes cast..." The Appellants argue that a cast absentee ballot occurs when the registered voter places the ballot in the mail. Therefore, the argument goes, no candidate may be "considered elected" until all absentee ballots have been counted. There are admittedly several

¹⁶ As stated by the District Court in its October 9, 2021, *Decision and Order*, the only remedy the Nation's Courts are currently authorized to take in the event an election fraud or irregularity is found is to declare it impossible to determine to whom a Certificate of Election shall be issued (pursuant to M(C)NCA Title 19, § 8-210) and order a new election. If the National Council determines that additional remedies should be made available to the Courts for future elections, new legislation would be required to create those options. The same holds true with respect to the absentee ballot statutory deadline. The Appellants have suggested a number of options, including accepting all absentee ballots post-marked by election day, or extending the absentee ballot deadline to 7:00 p.m. on election day, or to a later date altogether, or allowing alternate methods of delivery to the Okmulgee Post Office. These are all options best considered by the National Council. However, this Court will not legislate from the bench.

¹⁷ See, *In Re: Petition for Irregularities of Primary Election, 1997, Clyde Johnson*, 2 Mvs. L.R. 358, 360. Where the District Court concludes:

[T]he burden of proof is on the Petitioner to show an irregularity is sufficient to change the ultimate result with a mathematical certainty. Mathematical certainty exists when person "A" receives more votes than person "B".

practical flaws with this argument. Ultimately, the Court looked to the Constitution for guidance. Article IV, Section 4 was passed by referendum on December 7, 1991. Likewise, NCA 99-20, the legislation creating the Nation’s absentee voting system, was enacted on April 30, 1999, over seven (7) years later. At the time of the Constitutional referendum a cast ballot would only have applied to an in-person vote, immediately placed in the care of the Election Board at the time the vote was cast. The current absentee voting system was not yet in place and the framers did not anticipate the differences between an in-person and absentee voting system at that time. Therefore, based on the Court’s interpretation of the Constitutional provision at the time of the December 1991 referendum, the Court finds that a cast ballot occurs when a perfected ballot (meeting all statutory requirements) enters the care of the Election Board. However, if this is not the approach currently intended by the legislative branch of government or the citizens of the Nation, then appropriate steps should be taken to amend Article IV to comply with the changes in the Nation’s voting system.

PART 2. DISENFRANCHISEMENT DUE TO POSTAL DELAYS

Article IV, Section 2 of the Muscogee (Creek) Nation Constitution provides that “[e]very citizen of the Muscogee (Creek) Nation, regardless of religion, creed, or sex, shall be eligible to vote in the tribal elections provided that (a) they are registered voters for elections; (b) they are at least eighteen (18) years of age at the date of election, with the registrant providing sufficient proof of age to the Election Board; and (c) they hold citizenship.” The Appellants argue that postal delays resulting in 1,248 absentee ballots reaching the Okmulgee Post Office after the statutory cut-off time, rises to the level of an unconstitutional deprivation of the right to vote. The Court cannot agree. Title 19 authorizes citizens of the Muscogee (Creek) Nation three avenues by which to cast

their vote in any election. Pursuant to M(C)NCA Title 19, § 10-101 (B)¹⁸ a registered voter may vote early on the Wednesday or Thursday immediately preceding election day. Pursuant to M(C)NCA Title 19, § 7-102, a registered voter may cast their ballot in person on election day. Pursuant to M(C)NCA Title 19, § Chapter 10, a registered voter may request to vote via absentee ballot. There is no requirement that a registered voter choose one method of voting over another. Each individual is left to weigh the pros and cons of the various methods on their own. While at-large citizens or those with disabilities may choose to cast absentee ballots in higher numbers, it remains true that no citizen is prohibited or required to choose one method of voting over another. Further, while potentially not as convenient, each registered voter is authorized to cast an in-person vote, removing almost all risk that their vote will not be counted. Again, this Court assumes the Nation’s legislative body has taken into consideration what provides the best opportunities to vote for the most people, consistent with the Nation’s Constitution, and will defer to its judgment.

PART 3. EQUAL PROTECTION DENIED DUE TO POSTAL DELAYS

The appellants argue that absentee votes are not placed on equal footing with in-person votes, stating “[w]hen absentee ballot votes are not received by the deadline, the Election Board indicated the opportunity to cast an in-person vote instead. Absentee ballot votes should be considered of equal primacy.” However, the Appellants have shown no evidence that absentee votes that are received in compliance with M(C)NCA Title 19, Chapter 10 are given any less weight than in-person votes. A registered voter is not classified as an “in-person voter” or an “absentee voter” for purposes of equal protection analysis. They are all still classified a citizens and registered voters of the Muscogee (Creek) Nation. Each citizen is given an equal opportunity

¹⁸ As amended by NCA 18-117.

to register to vote in Muscogee (Creek) Nation elections and to select their preferred method of voting, with all the attendant pros and cons associated with their individual choice.

PART 4. PUBLIC POLICY EXCEPTION

The Appellants request, as a last resort, that this Court craft a public policy exception for absentee voters in the 2021 Primary Elections. This request centers on the current COVID-19 pandemic and the Appellants' speculative assertion that more registered voters elected to cast absentee ballots this election cycle to reduce exposure to the virus. While the Court sympathizes with the absentee voters whose ballots may not have reached the Okmulgee Post Office prior to the statutory deadline, the National Council is the only body that can adequately address the problems highlighted in the 2021 Primary Election. As stated above, this Court's only remedy in an election appeal for Fraud or Irregularities is to find, pursuant to M(C)NCA Title 19, § 8-210, that a determination cannot be made for whom a Certificate of Election shall be issued to and order a new election. The new election would proceed under the exact same laws currently in place. Delays in the United States mail are likely to produce the same results, and the Appellants (or potentially additional candidate) will petition the Courts for the same relief. No public policy exception from this Court will address the concerns of the Appellants. As such, the Court will not grant the Appellants' request in the above-styled matter.

CONCLUSION

After review of the record on appeal and consideration of the arguments of council, the Court finds that the Appellants have not met their burden to show an election fraud or irregularity as required under Title 19, Section 8-209. Issues concerning delays in the United States mail do not justify this Court overstepping its Constitutional authority into the legislative branch of government. As such, the Court denies the Appellants' *Joint Notice of Appeal*, affirms the October

9, 2021, *Decision and Order* of the Muscogee (Creek) Nation District Court and directs the Election Board to certify the results of the 2021 Primary Election.

IT IS SO ORDERED.



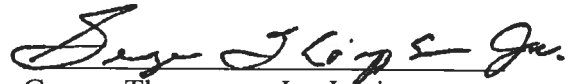
Richard LeBlance, Chief Justice



Amos McNac, Vice-Chief Justice



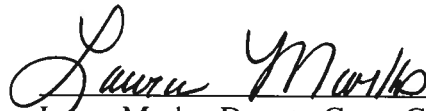
Andrew Adams III, Justice



George Thompson, Jr., Justice

CERTIFICATE OF MAILING

I hereby certify that on October 24, 2021, I mailed a true and correct copy of the foregoing Order and Opinion with proper postage prepaid to each of the following: Carly Griffith Hotvedt, 1515 East 60th Street, Tulsa, Oklahoma 74105; Robert V. Seacat, 3220 South Peoria Avenue, Suite 203, Tulsa, Oklahoma 74105. A true and correct copy was also hand-delivered to: Donna Beaver, Clerk of the Muscogee (Creek) Nation District Court.

A handwritten signature in cursive script that reads "Laura Marks". The signature is written in black ink and is positioned above a horizontal line.

Laura Marks, Deputy Court Clerk