



## NCA 22-087

### CLASSIFICATION: #14. CRIMES AND PUNISHMENTS

### A LAW OF THE MUSCOGEE (CREEK) NATION AUTHORIZING THE CREATION OF MCNCA TITLE 14, CHAPTER 1, SUBCHAPTER 11 ENTITLED "INSANITY OF ACCUSED; DETERMINATION OF COMPETENCE"

Be it enacted by the National Council of the Muscogee (Creek) Nation:

#### SECTION ONE. FINDINGS. The National Council finds that:

A. Since the establishment of a single Muscogee (Creek Nation District Court ("District Court") in 1981, the legal issues and complexities facing the Muscogee (Creek) Nation have changed and evolved. The Nation's progress over the past four decades places new demands upon our criminal justice system.

B. In order to adequately address competency issues in criminal cases, the Muscogee (Creek) Nation Code of Laws requires revision.

C. Such revisions must include thorough guidelines and parameters for determining whether a person arrested for or charged with a crime has the present ability to understand the nature of the charges and proceedings brought against him or her and to effectively and rationally assist in his or her defense.

D. The Muscogee (Creek) Nation has a duty to revise its laws, when necessary, to protect the rights of persons arrested for or charged with a crime.

E. The existing Muscogee (Creek) Nation Criminal Code does not adequately address guidelines and parameters for determining a criminal defendant's competency.

**SECTION TWO. PURPOSE.** The purpose of this Act is to authorize the amendment to the Muscogee (Creek) Nation Criminal Code by establishing clear guidelines and parameters for determining a criminal defendant's competency to stand trial.

**SECTION THREE. NEW LAW.** The following new law shall be codified in Title 14 of the Code of Laws of the Muscogee (Creek) Nation; provided that for purposes of codification of said new law and its inclusion in pocket parts for the Code of Laws of the Muscogee (Creek) Nation, the Attorney General is hereby authorized: (1) to approve any changes related to the manner in which sections, articles, chapters and sub-chapters are designated in this law in order to be consistent with the format in the Code of Laws published in 2010 by West Publishing Company; (2) to include footnoted references to

the legislative history in said pocket parts to the Code of Laws; and (3) to note in said pocket parts any editorial correction of minor clerical or grammatical errors in the following new law:

**TITLE 14. CRIMES AND PUNISHMENTS**

**CHAPTER 1. CRIMINAL PROCEDURE**

**SUBCHAPTER 11. INSANITY OF ACCUSED; DETERMINATION OF COMPETENCE**

**§ 1-1101. Definitions**

A. The following words and phrases shall have the following meanings as used through this subchapter:

1. "Adult Protective Services" is a Department within the Government of the Muscogee Creek Nation that provides services which are necessary to aid a vulnerable adult in meeting the essential requirements for mental or physical health and safety that the vulnerable adult is unable to provide or obtain without assistance.
2. "Competent" or "competency" means the present ability of a person arrested for or charged with a crime to understand the nature and consequences of the charges and proceedings brought against him or her and to effectively and rationally assist in his or her defense.
3. "Criminal proceeding" means every stage of a criminal prosecution after arrest and before judgment, including, but not limited to, interrogation, lineup, preliminary hearing, motion dockets, discovery, pretrial hearings and trial.
4. "Dangerous" means that a person's release under this section would subject that person, another person or another person's property to substantial risk of injury or damage.
5. "Incompetent" or "incompetency" means the present inability of a person arrested for or charged with a crime to understand the nature and consequences of the charges and proceedings brought against him or her and to effectively and rationally assist in his or her defense.
6. "Intellectually disabled" means a person who has significantly subaverage functioning, intelligence quotient of less than seventy (70), and existing concurrently with related limitations in two or more of the following applicable adaptive skill areas:
  - a. Communication;
  - b. Self-care;
  - c. Home living;
  - d. Social skills;
  - e. Use of community resources;
  - f. Self-direction;

- g. Health and safety;
  - h. Functional academics;
  - i. Leisure; and
  - j. Work.
7. "Person requiring treatment" means a person who because of his or her mental illness or drug or alcohol dependency:
- a. poses a substantial risk of immediate physical harm to him/herself as manifested by evidence of or serious threats of or attempts at suicide or other significant self-inflicted bodily harm, or
  - b. poses a substantial risk of immediate physical harm to another person or persons as manifested by evidence of violent behavior directed towards another person or persons, or
  - c. has placed another person or persons in a reasonable fear of violent behavior directed towards such person or persons or serious physical harm to them as manifested by serious and immediate threats, or
  - d. is in a condition of severe deterioration such that, without immediate intervention, there exists a substantial risk that severe impairment or injury will result to the person, or
  - e. poses a substantial risk of immediate serious physical injury to self or death as manifested by evidence that the person is unable to provide for and is not providing for his or her basic physical needs.
8. "Qualified forensic examiner" means any person or organization who is:
- a. a psychiatrist with forensic training and experience,
  - b. a psychologist with forensic training and experience, or
  - c. a licensed mental health professional whose forensic training and experience enable him or her to form expert opinions regarding mental illness, competency and dangerousness and who has been approved to render such opinions by the court.
9. "Reasonable period of time" means a period not to exceed:
- a. a maximum period of one (1) year for a felony; or
  - b. a maximum period of six (6) months for a misdemeanor.

**§ 1-1102. Application for Determination of Competency**

A. No person shall be subject to any criminal proceedings after the person is determined to be incompetent. The question of the incompetency of a person may be raised by the person, the person's legal guardian or attorney-in-fact, the attorney for the person whose competency is in question, or the Attorney General's Office. Such question

shall be raised by an application for determination of competency. The application for determination of competency shall allege that the person is incompetent to undergo further proceedings and shall state specific facts sufficient to raise a doubt as to the competency of the person. The court, at any time, may initiate a competency determination on its own motion, without an application, if the court has a doubt as to the competency of the person. These applications and orders relating to same shall be filed under seal in the pending case and confidentially shall be maintained by the Court Clerk's Office.

B. A copy of the application for determination of competency shall be delivered to the person whose competency is questioned, the opposing counsel and the Court at least one (1) day before the person's next hearing. Emailed copies of the Application are sufficient to professionals in the case but a paper copy must be provided to the Defendant within the noted time frame. The failure to provide a file-stamped copy of the application to Defendant shall cause the matter to be continued. The Defendant shall be entitled to at least twenty-four (24) hours notice to review the Application after his or her receipt of the same.

C. If the person whose competency is in question does not have an attorney, the court will appoint an attorney for the person who shall represent the person until final disposition of the case pursuant to the practices for appointment of counsel for indigents. A person whose competency is questioned may, at all times, hire their own counsel if they so choose. They may not proceed without counsel.

D. The person whose competency is in question shall be afforded all rights as are guaranteed by the Indian Civil Rights Act or other applicable law.

E. Any criminal proceedings against a person whose competency is in question by reason of the filing of the Application to Determine Competency, shall be suspended pending the determination of the competency of the person. The Court should make reasonable efforts to employ the least restrictive means of detaining the person as possible. Hospitalization, if available, should always be favored over detention unless the Court finds by a preponderance of the evidence that the person is dangerous.

F. Any person who is being detained pending the determination of competency shall have his or case reviewed at least every thirty (30) days with the Court reviewing status of evaluation completion and detention. The Court's findings as to these issues should be recorded by written court minute and filed in the case at each such review.

G. Any expiration of time following the filing of an Application for Determination of Competency shall be excluded from any time computation related to a Speedy Trial.

**§ 1-1103. Examination of Accused**

A. Upon filing of an application for determination of competency, the court shall examine the application for determination of competency to determine if it alleges facts sufficient to raise a doubt as to the competency of the person. Any additional evidence tending to create a doubt as to the competency of the person may be presented at the first hearing post-application. The Court should inquire if the counsel involved in the case objects to the evaluation and, if so, the reasons for the objection and take those reasons in conjunction with the matters set forth in the application and submitted in support of the application in determining whether an evaluation should be ordered. The Defendant's position with regard to the Application and examination should be stated in the Court record for this hearing date.

B. If the court finds there is no doubt as to the competency of the person, it shall order the criminal proceedings to resume.

C. If the court finds there is a doubt as to the competency of the person, it shall order the person to be examined by a qualified forensic examiner designated by the Chief Judge of the District Court to perform competency examinations. If indigent, the cost shall be paid from the Court Fund. If NOT indigent, the Muscogee Creek Nation court fund shall initially pay; however, the cost shall be taxed in the case as other court costs and upon a finding or plea of guilty shall be paid as other costs are paid. The Court has the authority to waive all, or part, of the cost of the examination.

D. The person shall be examined by a qualified forensic examiner to be conducted in the community, or if detained, the jail or detention facility where the person is held. Should the person be detained and the examiner wish to conduct the evaluation outside of the custodial setting, it shall be the duty of the Muscogee Creek Nation Attorney General's office to prepare the transport Order and provide same to the Court. Upon signing the Order, the Court shall cause the Order to be sent to Lighthorse Police for effectuation of transfer.

- E. The qualified forensic examiner(s) shall examine the patient to determine:
1. If the person is able to appreciate the nature and consequences of the charges made against such person;
  2. If the person is able to consult with a lawyer and rationally assist in the preparation of the defense of such person;
  3. If the person is unable to appreciate the nature of the charges or to consult and rationally assist in the preparation of the defense, whether the person can attain competency within a reasonable period of time if provided with a course of treatment, therapy or training;
  4. If the person is incompetent because they are a person requiring treatment;
  5. If the person is incompetent because the person is intellectually disabled;
  6. If the answers to questions 4 and 5 are no, why the person is incompetent; and

7. If the person were released from detention, whether such person would presently be dangerous.

F. Upon completion of the competency evaluation, the qualified forensic examiner designated by the Court to perform competency examinations shall notify the court, all counsel of record, and the defendant of the findings of the examination and the seven (7) questions in writing.

G. Court appointed qualified forensic examiners shall be entitled to sovereign immunity to the same extent as an employee of the Muscogee (Creek) Nation for purposes of providing forensic medical opinions herein, provided that such medical opinions do not deviate from the applicable medical standard of care.

#### **§ 1-1104. Post-Examination Competency Hearing**

A. A post-examination hearing of the person whose competency is in question shall be held within thirty (30) days after the qualified forensic examiner has made the determination required.

B. The court, at the hearing, shall determine by a preponderance of the evidence if the person is incompetent. Such determination shall include consideration of all reports prepared by the qualified forensic examiner and any evidence entered by an attorney for either party. The person shall be presumed to be competent. The proponent of the application shall have the initial burden of proof.

C. The person whose competency is in question shall have the right to be present at the hearing either in-person or by video technology unless it is made to appear to the court that the presence of the person makes it impossible to conduct the hearing in a reasonable manner.

D. At the Court's discretion, all witnesses shall be subject to cross-examination in the same manner as in any other contested hearing, testimony may be given by telephone or by video technology. No statement, admission or confession made by the person whose competency is in question obtained during the examination for competency may be used for any purpose except for competency proceedings. No such statement, admission or confession may be used against such person in any criminal action whether pending at the time the hearing is held or filed against such person at any later time, directly, indirectly or in any manner or form. The rules of evidence are relaxed in these hearings and all competent evidence shall be received by the court so long as it bears significant indicia of reliability.

E. The competency question is to be tried by the court, and with no jury present and the court shall make the required findings in writing and file said writing of record, but under seal.

F. The court shall answer the same questions as used by the forensic examiner and make required written findings with respect to those same areas of inquiry.

G. Upon the completion of the required findings by the Court, the Court shall issue the appropriate order regarding the person pursuant to the following section.

H. Either party may immediately appeal, as a matter of right, the District Court's findings, and conclusions to the Muscogee (Creek) Nation Supreme Court. Notice of intent to appeal the District Court's findings and orders shall not automatically result in an immediate stay of such orders. Either party may seek relief from the District Court in the form of a stay relating to some or all of the Court's orders.

#### **§ 1-1105. Post-Examination Competency Hearing Orders**

A. If the Court finds the person is competent, it shall order the criminal proceedings to resume.

B. If a person is found to be incompetent, the Court shall proceed to the following sections to further guide it on making further appropriate disposition orders.

C. All proceedings pursuant to this section shall take place in a closed courtroom only open to attorneys and necessary court staff. These proceedings shall be recorded but not released to any person without a court order authorizing release upon good cause shown.

D. All orders, findings or other dispositions pursuant to this section shall be reduced to writing. A court minute may suffice if nothing substantive took place at a specific hearing or court date.

#### **§ 1-1106. Incompetent Persons Capable of Achieving or Returning to Competency**

A. If the person is found to be incompetent but capable of achieving competence with treatment or education within a reasonable period of time, the court shall suspend the criminal proceedings and order the appropriate health-care provider or agency within the MCN health care network to provide treatment, therapy or training which is calculated to allow the person to achieve competency. The Court or appropriate healthcare entity within the Nation may designate a willing third-party entity to provide such competency restoration services, provided the entity has qualified personnel and is approved by the Court. Such competency restoration services shall begin immediately, but no later than fourteen (14) days after the Court has determined that the person is not competent to stand trial. The date of the post-exam competency hearing shall be day one for purposes of the computation of the "reasonable period of time" set forth for regaining competency.

B. The mental health provider or other designee shall make periodic reports to the court as to the competency of the defendant. These reports shall be generated at least every sixty (60) days. The reports shall be provided to the Court who will distribute to the Attorney General's Office, the attorneys of record, and to the defendant.

C. The mental health provider or other designee shall supervise the course of treatment. The proposed treatment may be either inpatient or outpatient care depending on the facilities and resources available to the court or the mental health provider or other designee and the type of disability sought to be corrected by the court's order. If services outside of the MCN Healthcare system are used, the cost for those services shall be paid by behavioral health in the same manner as other services when a referral for outside care is used.

D. The person must be maintained in either a detention facility or secure mental health facility (if available) if they are found to be dangerous. If the person is not dangerous, they should be released and ordered to maintain regular contact with the Court's pre-trial services officer. Inpatient treatment shall not be considered detention and the person may be ordered retained at a mental health facility by the Court.

E. If the person has not regained competency within a reasonable period of time and is not dangerous, the Court must dismiss all charges in the interests of justice.

F. If the person has not regained competency within a reasonable period of time and is dangerous, the Court shall refer the matter to MCN Behavioral Health for secure placement. The charges shall be dismissed; however, the person must be maintained in secure placement until no longer dangerous. The matter shall be referred to Adult Protective Services and shall be placed on the docket handling these matters. The case shall be reviewed at least every ninety (90) days for continued secure placement review. The Court shall make written findings at each review of the factual basis for its finding. Once the person is no longer dangerous, they shall be released from secure placement and the matter is concluded.

#### **§ 1-1107. Dispositional Orders**

A. If the person is found to be incompetent because the person is a person requiring treatment, but not capable of achieving competence with treatment within a reasonable period of time, if the person is found to be incompetent primarily because the person is intellectually disabled and not capable of achieving competency within a reasonable amount of time, or if the person is found to be incompetent for any other reason and not capable of achieving competency within a reasonable amount of time, the court shall dismiss the criminal proceedings, and shall place the person into the custody of Adult Protective Services.

B. Adult Protective Services shall act with all powers delineated it within the MCN code, and:

1. Adult Protective Services shall place any person placed in its custody under this title in a facility or residential setting, private or public, willing to accept the individual and that has a level of supervision and security that is appropriate to the needs of the person.

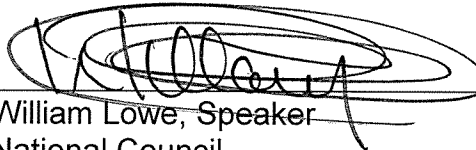


2. Such placements shall be within the sole discretion of Adult Protective Services with oversight by the Court. However, if the person is dangerous, they shall be maintained in a secure facility.
3. These matters shall be then placed on the docket wherein other cases proceeding with Adult Protective Services are placed. Adult Protective Services shall report to the court at least every six (6) months as to the status of the person including, but not limited to, the type of placement, services provided, level of supervision, the medical and psychological health of the person, whether the person would be dangerous if conditionally released into a nonsecure environment, and the assistance and services that would be required for such conditional release.

**SECTION FOUR. EFFECTIVE DATE.** This Act shall become effective immediately upon proper approval and execution in accordance with the requirements of the Muscogee (Creek) Nation Constitution.

**ENACTED** by the Muscogee (Creek) National Council on this **30<sup>TH</sup>** day of **July, 2022.**

**IN WITNESS WHEREOF**, the Speaker of the Muscogee (Creek) National Council has hereto attached his signature.



William Lowe, Speaker  
National Council  
Muscogee (Creek) Nation

**CERTIFICATION**

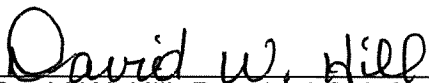
I, the undersigned, certify that the foregoing is a true extract from the minutes of the Muscogee (Creek) National Council comprised of Sixteen members with **Sixteen** members attending this meeting on the **30<sup>th</sup>** day of **July, 2022** and that the above is in conformity with the provisions therein adopted by a vote of **15** in favor, **0** against and that said Law has not been rescinded or amended in any way and the above is the signature of the Speaker of the National Council.



Alicia Stroble, Recording Secretary  
Muscogee (Creek) National Council

**APPROVAL**

I, the Principal Chief of the Muscogee (Creek) Nation, hereby affix my signature on this 2<sup>nd</sup> day of August, 2022 to the above Law, **NCA 22-087** authorizing it to become a Law under Article VI., Section VI., of the Constitution of the Muscogee (Creek) Nation.

  
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David W. Hill, Principal Chief  
Muscogee (Creek) Nation

