

AUG 15 2013

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IN THE SUPREME COURT OF THE MUSCOGEE (CREEK) NATION

COURT CLERK  
MUSCOGEE (CREEK) NATION

MUSCOGEE (CREEK) NATION,	)	
	)	
Plaintiff-Respondent,	)	
	)	Case No. <b>SC 11-13</b>
v.	)	(District Court Case No. CRF 2011-11)
	)	
JOHNSON, Dana Michelle,	)	
	)	
Defendant-Appellant.	)	

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

Gregory G. Meier, Meier & Associates, Tulsa, Oklahoma, for Defendant-Appellant.

Shelly L. Harrison, Assistant Attorney General, Muscogee (Creek) Nation, for Plaintiff-Respondent.

**ORDER AND OPINION**

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

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

ADAMS, *V.C.J.*; delivered the opinion of the Court, in which SUPERNAW and THOMPSON, *JJ.*; joined.

Conviction and sentence vacated; matter remanded for additional proceedings.

HARJO-WARE, *J.*, filed an opinion concurring in-part, dissenting in-part, and concurring in judgment.

DEER, *J.*, filed a dissenting opinion, in which LERBLANCE, *C.J.*, joined.

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

**ADAMS, V.C.J., delivered the opinion of the Court.**

Defendant-Appellant Dana Michelle Johnson appeals an order of the Muscogee (Creek) Nation District Court convicting her of four counts of bribery under M(C)NCA Title 14, § 2-802. Based on trial court error resulting from failure to observe initial appearance procedure required under M(C)NCA Title 14, § 1-404.C.(1)-(4), we must vacate the conviction and remand the matter to the District Court for additional proceedings consistent with the following opinion.

**BACKGROUND**

At the conclusion of a trial by jury, Appellant was found guilty of four counts of bribery. For each count, Appellant was sentenced to a fine of \$5,000 and thirty days consecutive jail time. Jail time for count two was suspended provided payment of the fine imposed for count one was paid in-full no later than December 31, 2012. Likewise, jail time for counts three and four were suspended provided the fine for counts two and three were paid in-full no later than December 31, 2013, and December 31, 2014, respectively.

Appellant asserts that multiple trial court errors require reversal of the conviction: (1) the District Court lacked jurisdiction because the Nation failed to establish that Appellant is an Indian person or the crimes charged against Appellant occurred in Muscogee (Creek) Indian country; (2) the District Court erroneously denied Appellant's motions for acquittal at the close of the Nation's case-in-chief and at the close of evidence because the Nation failed to prove beyond a reasonable doubt the necessary elements of bribery; (3) the District Court erroneously denied Appellant's motion to suppress because Appellant's purported confession was obtained in violation of *Miranda v. Arizona*;<sup>2</sup> and (4) the District Court erroneously instructed the jury regarding the *prima facie* elements of bribery.

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

In response, the Nation argues that the conviction must be affirmed on all four counts because (1) Appellant's Indian status was established by District Court questioning at initial appearance and the locations of the crimes charged were proven at trial to be either immaterial or within Muscogee (Creek) Nation Indian country; (2) the Nation met the burden to prove all material elements of the crimes charged beyond a reasonable doubt; (3) Appellant's motion to suppress was properly denied because Appellant's confession occurred during a voluntary interview with Muscogee (Creek) Nation Lighthorse officers, rather than custodial interrogation; and (4) the jury was properly instructed regarding the *prima facie* elements of bribery.

### **JURISDICTION, SCOPE AND STANDARD OF REVIEW**

Jurisdiction is proper under Muscogee Creek Nation Code Title 27, § 1-101.C.<sup>3</sup> We review challenges to District Court jurisdiction *de novo*. Based on the procedural history of the underlying case and mandatory pre-trial due process requirements under M(C)NCA Title 14, § 1-303 and § 1-404.C.(1)-(4), our review is limited to Appellant's claim that the District Court lacked jurisdiction.

### **ISSUES PRESENTED**

Part I. Under M(C)NCA Title 14 and Title 27, is the Indian status of a criminal defendant solely a jurisdictional factor, or is Indian status a *prima facie* element of a crime that requires proof beyond a reasonable doubt to sustain a conviction?

Part II. Under M(C)NCA Title 14, § 1-303, at initial appearance before the District Court, what are the minimum pre-trial due process protections guaranteed to felony criminal defendants and when do the protections attach?

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<sup>3</sup> M(C)NCA Title 27, § 1-101.C, vests this Court with exclusive jurisdiction to review final orders of the Muscogee (Creek) Nation District Court.

## DISCUSSION

### Part I. Muscogee (Creek) Nation Criminal Jurisdiction and Indian Status

As a matter of tribal law, Muscogee (Creek) Nation courts are courts of general jurisdiction.<sup>4</sup> Accordingly, the Nation's courts have broad authority that encompasses all types of criminal proceedings except those excluded by tribal law or specifically reserved for federal courts under federal law.<sup>5</sup> In order to subject a defendant to criminal proceedings for alleged violations of the Nation's laws, the District Court must possess both subject-matter jurisdiction over the crime and personal jurisdiction over the defendant.<sup>6</sup> Like any other court of general jurisdiction, the District Court is presumed to have both types of jurisdiction until the existence of either is properly challenged.<sup>7</sup>

Subject-matter jurisdiction generally refers to the authority of a court to hear cases involving specific types of crime or specific types of criminal proceedings. The District Court has broad subject-matter jurisdiction to preside over the prosecution of alleged violations of Muscogee (Creek) Nation criminal laws.<sup>8</sup> A defendant may raise lack of subject-matter jurisdiction as a bar to tribal jurisdiction at any time during a proceeding, even for the first time on appeal, regardless of whether the issue was preserved.<sup>9</sup> Subject-matter jurisdiction may not

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<sup>4</sup> M(C)NCA Title 27, § 1-101.A (citing *1790 [U.S.] Treaty with the Creeks*, (Aug. 7, 1790), M(C)NCA Vol. 1, 269-74; and *1866 [U.S.] Treaty with the Creeks*, (July 19, 1866), M(C)NCA Vol. 1, 348-55).

<sup>5</sup> M(C)NCA Title 27, § 1-102.C (“The Muscogee Courts shall have original jurisdiction over all Indians alleged to have committed in Muscogee (Creek) Nation Indian Country a criminal offense enumerated and defined by any law or statute of the Muscogee (Creek) Nation insofar as not prohibited by federal law. The Muscogee Courts shall also have original jurisdiction over all Indians alleged to have committed an offense involving the theft, misappropriation or misuse of Muscogee (Creek) Nation property or funds, regardless of the geographical location of any specific act or omission involved or resulting in such theft, misappropriation or misuse.”).

<sup>6</sup> See *McIntosh v. Muscogee (Creek) Nation*, 4 Mvs. L. R 207, 211 (July 25, 2001).

<sup>7</sup> See *supra* notes 4-6.

<sup>8</sup> M(C)NA Title 27, § 1-101.B (“Exclusive original jurisdiction over all matters described in Title 27, § 1–102 and not otherwise limited by Tribal law is vested in the District Court of the Muscogee (Creek) Nation, Okmulgee District.”).

<sup>9</sup> M(C)NCA Title 27, App. 2, Rule 25.B (“Defects affecting jurisdictional or constitutional rights may be noticed although they were not brought to the attention of the District Court sitting as the District Court.”). Unlike Rule 25.B “plain errors” that may present grounds for a new trial even when not preserved, Rule 25.A errors may be

be waived.<sup>10</sup> If a defendant fails to raise the issue, the District Court is obligated to review its jurisdiction *sua sponte* and dismiss the action if subject-matter jurisdiction is absent.<sup>11</sup> If it is discovered on appeal that a final judgment of the District Court was delivered without subject-matter jurisdiction, the Supreme Court necessarily lacks jurisdiction to reach the merits of the appeal and must reverse the underlying decision on jurisdictional grounds alone.<sup>12</sup>

In contrast to subject-matter jurisdiction, personal jurisdiction is derived from a factors related to the criminal defendant rather than the type of crime charged. Personal jurisdiction is established when a defendant is accused of committing a crime within the territorial jurisdiction of the Nation and statutory notice requirements are subsequently observed in bringing the defendant before the District Court.<sup>13</sup> Muscogee (Creek) Nation criminal procedure contains two general requirements for personal jurisdiction to exist. First, a criminal complaint or citation containing information that invokes the Nation's criminal jurisdiction must be filed in the District Court.<sup>14</sup> Second, the District Court must subsequently issue an arrest warrant or summons to appear.<sup>15</sup> Unlike subject-matter jurisdiction, any defect in personal jurisdiction must be timely asserted by the party seeking to benefit from the defect as a jurisdictional bar.<sup>16</sup>

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deemed “harmless” and considered waived if not preserved for appeal. Under Rule 25.A, harmless errors generally will not result in reversal or a new trial unless the outcome of the lower court proceeding would have been different if not for the error.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> M(C)NCA Title 27, § 1-101.C (“Exclusive appellate jurisdiction over all matters described in Title 27, § 1-102 is vested in the Supreme Court of the Muscogee (Creek) Nation.”).

<sup>13</sup> M(C)NCA Title 14, § 1-401 *et seq.*

<sup>14</sup> M(C)NCA Title 14, § 1-401 (criminal complaints) and § 1-403 (citations).

<sup>15</sup> M(C)NCA Title 14, § 1-402.

<sup>16</sup> See *McIntosh v. Muscogee (Creek) Nation*, 4 Mvs. L. R 207 (July 25, 2001). In *McIntosh*, we held that a criminal defendant's Indian status must be proven beyond a reasonable doubt because the Nation's criminal code at that time included the term “Indian person” within the elements that defined criminal conduct. Legislation enacted after *McIntosh* removed all reference to a defendant's Indian status from Title 14 sections that define elements constituting criminal behavior under Muscogee (Creek) Nation law. The effect of subsequent amendments to Title 14 was to limit judicial consideration and treatment of a criminal defendant's Indian status to solely a component of personal jurisdiction.

Any defendant who fails to timely raise the issue of personal jurisdiction may be deemed to have waived the defect and consented to prosecution for the charged crimes.<sup>17</sup>

Although the Muscogee (Creek) Nation exercises general criminal jurisdiction inherently, the Nation's Code incorporates a significant statutory limitation that impacts how general jurisdiction is exercised. M(C)NCA Title 27, § 1-102.C, limits the Nation's general criminal jurisdiction to "Indians alleged to have committed in Muscogee (Creek) Nation Indian [c]ountry a criminal offense enumerated and defined by any law or statute of the Muscogee (Creek) Nation insofar as not prohibited by federal law."<sup>18</sup> Section 1-102.C's limitation does not alter the starting presumption that, until successfully challenged by the defendant, Muscogee (Creek) Nation courts possess both types of jurisdiction at the outset of every criminal proceeding. The limitation does, however, cloud the procedural distinctions between subject-matter and personal jurisdiction and render unclear the jurisdictional categorization of Indian status and Indian country.

Modern Muscogee jurisprudence includes only one appellate review of a criminal conviction;<sup>19</sup> however, the decision is instructive and serves as a starting point to approach proper jurisdictional categorization of Indian status and Indian country. In *McIntosh v. Muscogee (Creek) Nation*, the defendant (McIntosh) was charged with three counts of embezzlement under NCA 99-04, sect. 5-701, that stated "[i]t shall be unlawful for any Indian [p]erson to [embezzle]. . . [.]"<sup>20</sup> NCA 99-04, sect. 1-701 defined "Indian person" as "any human

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<sup>17</sup> *Id.*

<sup>18</sup> M(C)NCA Title 27, § 1-102.C, generally excludes non-Indians from Muscogee (Creek) Nation criminal jurisdiction based on the U.S. Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). We expressly reject *Oliphant* and note that its suspect reasoning has resulted in unnecessary federal encroachment on inherent tribal authority and created a jurisdictional morass that has plagued tribal nations for over thirty years. Regardless of our stance on *Oliphant*, we are bound to recognize limitations on jurisdiction created by either the Muscogee (Creek) Nation Constitution or Code.

<sup>19</sup> *McIntosh v. Muscogee (Creek) Nation*, 4 Mvs. L. R 207 (July 25, 2001).

<sup>20</sup> NCA 99-04, § 5-701 (April 1, 1999).

being who is: (i) a member of a federally recognized Indian tribe, and (ii) eighteen years of age or older.” McIntosh was convicted by a jury on all three counts.<sup>21</sup> On appeal, McIntosh argued, *inter alia*, that the District Court committed reversible error by denying his demurrer to the evidence after the prosecution failed to establish defendant’s Indian status or that the alleged crimes occurred within the lands of the Muscogee (Creek) Nation. Regarding Indian country, we held that a question of whether a crime occurred in Indian country was a component of subject-matter jurisdiction and that trial evidence presented by the prosecution regarding location of the crimes was sufficient to sustain the District Court’s jurisdiction.

Regarding Indian status, we held that McIntosh’s Indian status was a component of personal jurisdiction; however, the only trial evidence regarding Indian status was McIntosh’s affirmative response to the prosecutor’s cross-examination questioning during presentation of defendant’s case-in-chief.<sup>22</sup> On appeal, we found such prosecutorial questioning to constitute impermissible burden shifting that violated the defendant’s privilege against self-incrimination.<sup>23</sup> We held that to sustain a criminal conviction under NCA 99-04, § 5-701, and applicable federal law,<sup>24</sup> a defendant’s Indian status must be proven beyond a reasonable doubt by the prosecution at trial as an essential element of the crime.<sup>25</sup> We additionally directed that during criminal trials, “[w]hether the Nation has prove[n] that a defendant is an Indian [p]erson must also be included in the jury instructions given by the courts of the Nation.”<sup>26</sup> Due to insufficient evidence of defendant’s Indian status, we reversed the conviction and ordered the charges be

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<sup>21</sup> *McIntosh v. Muscogee (Creek) Nation*, 4 Mvs. L. R. 207 (July 25, 2001).

<sup>22</sup> *Id.* at 211.

<sup>23</sup> *Id.* at 213 n. 1.

<sup>24</sup> Federal law applied in *McIntosh* included the Indian Civil Rights Act (25 U.S.C. § 1301 *et seq.*) and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

<sup>25</sup> *McIntosh v. Muscogee (Creek) Nation*, 4 Mvs. L. R. at 212.

<sup>26</sup> *Id.*

dismissed.<sup>27</sup> *McIntosh* is no longer wholly applicable, however, due to subsequent amendments to NCA 99-04.

The legislative history of the Muscogee (Creek) Nation criminal code reveals that three weeks prior to delivery of the *McIntosh* decision on July 25, 2001, its holding regarding prosecutorial burden to prove a defendant's Indian status as an element of the crime was superseded.<sup>28</sup> NCA 01-110 established a separate chapter within Title 14 for criminal procedure and amended the definition of "Indian person" to include "a person who is a member of the Muscogee (Creek) Nation; or a person who is a member of any other federally recognized tribe, including Native Hawaiians and Alaska Natives; or a person who possesses a [CDIB]; or a person who under oath confirms to the District Court that he/she is Indian."<sup>29</sup> Since NCA 01-110 did not remove the term "Indian" from each crime defined in Title 14, the prosecutorial burden to prove defendant's Indian status as if it were an element of the crime appears to have remained unaltered. The amended definition of "Indian person" did, however, seemingly render a defendant's affirmative response to questioning under oath at any point during the criminal proceeding as evidence sufficient to sustain the Nation's jurisdiction when a defendant raised non-Indian status as a bar to personal jurisdiction. Neither NCA 01-110, nor any subsequent legislation, has altered the *McIntosh* approach of categorizing Indian status as a component of personal jurisdiction and Indian country as a component of subject-matter jurisdiction. Those analytical distinctions have never been disturbed and remain applicable today.

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<sup>27</sup> *Id.*

<sup>28</sup> Regarding Indian status, the *McIntosh* decision properly relied on the applicable Muscogee (Creek) criminal code provisions in effect when the defendant was charged in July 2000. The effect of subsequent amendment to NCA 99-04 was to limit the *McIntosh* holding regarding prosecutorial burden to prove defendant's Indian status as an element of the crime to just the facts presented by *McIntosh* itself.

<sup>29</sup> NCA 01-110, § 101.F, (July 6, 2001) (emphasis added and grammatical errors corrected). The uncorrected definition states ". . . or a person who is under oath confirms to the District Court that he/she is Indian."



NCA 01-110's definition of "Indian" remained unchanged until 2007, when NCA 07-179 was enacted.<sup>30</sup> NCA 07-179 replaced the term "Indian" with the term "person" in each Title 14 provision that defined elements of criminal acts. The previous definition of "Indian person" was stricken from Title 14 and no definition for the term "person" was added. The legislative history indicates that NCA 07-179 was enacted in anticipation that the U.S. Congress might convey limited tribal criminal jurisdiction over non-Indians to combat increasing production, sales and use of methamphetamines in Indian country.<sup>31</sup> NCA 07-179 included National Council findings at Section 2 that state, *inter alia*, that "[t]he Muscogee (Creek) Nation Criminal Code implicitly excludes non-Indians by express application to Indians[,] [t]he Muscogee (Creek) Nation Code is discriminatory by qualifying applicability base[d] on race[,] and [i]t is in the best interest of the Muscogee (Creek) Nation to administer a Criminal Code that is transparent."<sup>32</sup> NCA 07-179 signaled a clear legislative shift in recognition of the Nation's inherent general criminal jurisdiction. Rather than maintain Indian status as a material element requiring proof beyond a reasonable doubt to sustain a conviction, NCA 07-179 limited the significance of Indian status to procedural determinations of jurisdiction.

In 2010, NCA 10-053 amended Title 14 to include a definition for the term "person" that remains applicable today.<sup>33</sup> "Person" is defined as "a human being who is a member of a federally recognized Indian tribe or a human being who is eligible to be a member of a federally recognized tribe."<sup>34</sup> Noticeably absent from the definition was the previous provision under NCA 01-110 that allowed the District Court judge to determine a defendant's Indian status by questioning the defendant under oath. Based on NCA 07-179's clear legislative shift away from

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<sup>30</sup> NCA 07-179 (July 10, 2007).

<sup>31</sup> *Id.* at § 2.

<sup>32</sup> *Id.*

<sup>33</sup> NCA 10-053 (May 27, 2010).

<sup>34</sup> M(C)NCA Title 14, § 2-113.W.

requiring prosecutors to prove Indian status as a *prima facie* element, we do not view NCA 10-053's definition of "person" to signal a return shift. On the contrary, by limiting Indian status to a definition of "person", the National Council implicitly chose not to include Indian status in the *prima facie* description of each crime identified under Title 14. Neither of the two amendments to Title 14 enacted after NCA 10-053 evince a different conclusion.<sup>35</sup>

It is abundantly clear from the legislative history that Title 14 requires the Nation's courts to treat a criminal defendant's Indian status as a component of personal jurisdiction established by a properly filed criminal complaint that invokes the Nation's jurisdiction, followed by the subsequent issue of an arrest warrant or summons by the District Court that complies with statutory notice requirements.<sup>36</sup> A defendant's failure to timely raise non-Indian status as a defect to personal jurisdiction prior to trial or entry of a "guilty" or "nolo contendere" plea may be deemed to constitute waiver of the defect.<sup>37</sup> If raised prior to trial or entry of a trial-precluding plea, however, the issue of whether a defendant is Indian presents a question of fact that must be proven beyond a reasonable doubt by the prosecution in order for the case to proceed.<sup>38</sup> If the prosecution is unable to prove defendant's Indian status beyond a reasonable doubt, the District Court is obligated to dismiss the case for lack of jurisdiction.

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<sup>35</sup> NCA 10-210 (December 29, 2010) (adopting the expanded sentencing power made available by the 2009 Tribal Law and Order Act) and NCA 11-021 (February 11, 2011) (enacting revisions to the criminal offenses code). NCA 11-021 added over twenty different crimes to Title 14, the majority of which use the term "whoever" for the perpetrator and "person" for the victim.

<sup>36</sup> See notes 13-15 *supra*.

<sup>37</sup> See note 16 *supra*. Unlike other courts of general jurisdiction, proper venue necessarily results from Muscogee (Creek) Nation courts possessing proper personal and subject-matter jurisdiction over a criminal proceeding. In contrast, when a state court has both personal and subject-matter jurisdiction over a criminal proceeding, proper venue may lie in a different judicial district based on state law.

<sup>38</sup> In contrast to the Indian status component of personal jurisdiction, the Indian country component of subject matter jurisdiction presents a mixed question of law and fact for the District Court if raised by a defendant prior to trial. Prior to trial, unless the crime involves "theft, misappropriation or misuse of the Nation's property or funds" under M(C)NCA Title 27, § 1-102.C, the prosecution must prove the location of the crime beyond a reasonable doubt and the District Court judge must determine as a matter of law whether the location is within Muscogee (Creek) Nation Indian country as defined by Title 27, § 1-102.A. If Indian country is raised for the first time after a jury trial has commenced, and assuming the crime charged doesn't involve "theft, misappropriation or misuse of the Nation's

In the instant appeal, Appellant's first proposition of error asserts that the District Court lacked jurisdiction because the Nation failed to prove that Appellant is an Indian person. The record indicates the criminal complaint filed by the Special Prosecutor and the arrest warrant subsequently issued by the District Court both stated Appellant was Indian;<sup>39</sup> therefore, Appellant was provided sufficient notice that criminal proceedings were to commence under the District Court's general criminal jurisdiction.<sup>40</sup> The record contains no indication that Appellant attempted to raise non-Indian status as a defect to personal jurisdiction at any time prior to the instant appeal. If Appellant had merely failed to raise the issue prior to trial or entry of a trial-precluding plea, the District Court may have properly deemed the Indian status component of personal jurisdiction waived. The record indicates, however, that the District Court, *sua sponte*, questioned Appellant under oath at initial appearance.<sup>41</sup> Since the provision allowing such questioning of a defendant under oath was removed from Title 14 by NCA 07-179 and never subsequently replaced,<sup>42</sup> our review must consider whether the District Court's questioning of Appellant under oath at initial appearance was prejudicial.

## Part II. Pre-trial Due Process Protections

Under M(C)NCA Title 14, § 1-303,<sup>43</sup> and the Indian Civil Rights Act (ICRA),<sup>44</sup> basic due process protections are guaranteed to all defendants subjected to criminal proceedings before

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property or funds" under M(C)NCA Title 27, § 1-102.C, the location of the crime presents a factual question for the jury. Whether the location is within Muscogee (Creek) Nation Indian country presents a question of law for the District Court judge to resolve.

<sup>39</sup> *Criminal Complaint and Information*, CRF 2011-11 (May 19, 2011); and *Criminal Warrant*, CRF 2011-11 (May 19, 2011).

<sup>40</sup> See notes 13-15 *supra*.

<sup>41</sup> Initial Appearance-Johnson, (00:00:00 – 00:16:55) (May 20, 2011) (DVD recording). See also note 50 *infra* and accompanying transcript.

<sup>42</sup> *Supra* notes 30-32.

<sup>43</sup> M(C)NCA Title 14, § 1-303. **Rights of Defendant.** In all criminal proceedings, the defendant shall have the following rights:

Muscogee (Creek) Nation courts. “Criminal proceeding” is broadly defined as “any proceeding in which a person is charged with a criminal offense of any degree, brought to trial, convicted, or punished.”<sup>45</sup> Section 1-303.C, codifies a criminal defendant’s right against self-incrimination in

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- A. **Representation.** The defendant shall have the right to appear and represent himself; to be represented by a[n] Indigent Defense Attorney upon application and approval by the Court if found qualified for free representation; [or] to be represented at his or her own expense by any attorney admitted to practice before the District Court.
  - B. **Nature of charges.** The defendant shall have the right to be informed of the nature of the charges against him and to have a written copy of the complaint containing all information required by Title 14, § 1-401 herein.
  - C. **Testimony by defendant.** The defendant shall have the right to testify in his or her own behalf, or to refuse to testify regarding the charge against him or her, provided, however, that once a defendant takes the stand to testify on any matter relevant to the immediate proceeding against him or her, he or she shall be deemed to have waived all right to refuse to testify in that immediate criminal proceeding. However, such a waiver in one distinct phase of the criminal trial process, such as a motion hearing, trial or sentencing hearing, shall not be deemed to constitute a waiver of defendant’s right to remain silent in other distinct phases of the criminal trial process.
  - D. **Confront witnesses.** The defendant shall have the right to confront and cross-examine all witnesses against him, subject to evidentiary requirements in the Judicial Code or other applicable law of the Muscogee (Creek) Nation.
  - E. **Subpoena.** The defendant shall have the right to compel by subpoena the attendance of witnesses on his or her own behalf.
  - F. **Speedy trial.** The defendant shall have the right to have a speedy public trial, which shall be held within one-hundred and eighty (180) days of the date of the defendant’s arraignment if he or she has made bail and within ninety (90) days of the date of the defendant’s arraignment if he or she is incarcerated due to his or her failure or inability to make bail, unless the defendant has waived his or her right to a speedy trial, said trial to be held before an impartial judge or jury as provided in this Title or other applicable law of the Nation.
  - G. **Appeal.** The defendant shall have the right to appeal in all cases.
  - H. **Spouse’s testimony.** The defendant shall have the right to prevent his or her present or former spouse from testifying against him concerning any matter which occurred during such marriage, except that: (1) [t]he defendant’s present or former spouse may testify against him in any case in which the offense charged is alleged to have been committed against the spouse or the immediate family, or the children of either the spouse or the defendant, or against the marital relationship; and (2) [a]ny testimony by the spouse in the defendant’s behalf will be deemed a waiver of this privilege.
  - I. **Double jeopardy.** The defendant shall have the right to not be twice put in jeopardy by the Nation for the same offense, provided that nothing herein shall be construed as prohibiting the prosecution in the Muscogee (Creek) Nation Courts of a defendant following a state or federal jeopardy.

<sup>44</sup> 25 U.S.C. § 1301 *et seq.* See Title 27, § 1-103.B (“[t]he Muscogee (Creek) Nation [c]ourts shall apply the [f]ederal Indian Civil Rights Act[.]”); and Title 14, § 1-301.D (“In any case wherein provisions which would govern specific procedural issues are not contained in this chapter, the District Court may resort to the Judicial Code or other applicable law of the Nation, subject always to the due process rights of the defendant and the fundamental fairness of the proceedings. If no provisions addressing such procedural issues are contained in the Judicial Code or other applicable law of the Nation, the Court may proceed in a lawful fashion consistent with Muscogee (Creek) Nation laws, the Constitution of the Nation, and the federal Indian Civil Rights Act, subject always to the due process rights of the defendant and the fundamental fairness of the proceedings[.]”). ICRA at § 1302(a), establishes, *inter alia*, basic due process requirements for tribal prosecutions that essentially mirror those under M(C)NCA Title 14, § 1-303.

<sup>45</sup> M(C)NCA Title 14, § 1-301.B (emphasis added).

all criminal proceedings and requires that every “defendant shall have the right to testify in his or her own behalf, or to refuse to testify regarding the charge[s] against him or her[.]”<sup>46</sup>

Under M(C)NCA Title 14, § 1-404, criminal pre-trial process includes two separate, distinct appearances by a defendant before the District Court: initial appearance and arraignment. Regarding initial appearance, Title 14, § 1-404.A, is procedurally ambiguous and specifies only that initial appearance must occur within forty-eight hours of post-arrest detention and must conclude with a District Court “[determination of] whether a detention after the arrest of an accused person is reasonable”<sup>47</sup> Unlike § 1-404.A’s brief and procedurally vague description of initial appearance, § 1-404.B-D, provides detailed statutory requirements for arraignment procedure.<sup>48</sup> Based on § 1-303’s unambiguous application of the right against self-incrimination to proceedings where a defendant is charged, we find that procedure for initial appearance under § 1-404.A, must necessarily incorporate § 1-404.C.(1)-(4),<sup>49</sup> whenever initial appearance includes charging a criminal defendant.

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<sup>46</sup> Title 14, § 1-303.C, is also consistent with ICRA’s prohibition on any exercise of tribal self-government that would “compel any person in any criminal case to be a witness against himself.” 25 U.S.C. § 1302(4).

<sup>47</sup> M(C)NCA Title 14, § 1-404.A.

<sup>48</sup> M(C)NCA Title 14, § 1-404.B. At arraignment, a defendant is informed of the charges filed by the prosecutor and provided an explanation of rights by the District Court. The defendant will enter a plea at arraignment and, if the defendant is in custody, the District Court will set a bail amount. Title 14 does not provide for probable cause hearings, nor does it create additional pre-trial proceedings for felony defendants.

<sup>49</sup> M(C)NCA Title 14, § 1-404.C. Procedure at arraignment. Arraignments shall be conducted in the following order:

1. The District Judge should request the Prosecutor to read the charges.
2. The Prosecutor should read the entire complaint, deliver a copy to the defendant unless he or she has previously received a copy thereof, and state the minimum and maximum authorized penalties.
3. The District Judge should determine that the accused understands the charge against him and explain to the defendant that he or she has the following rights:
  - a. The right to remain silent;
  - b. The right to be tried by a jury upon request; and
  - c. The right to consult with an attorney at his or her own expense and that if he or she desires to consult with an attorney the arraignment will be continued.
4. The District Judge shall ask the defendant if he or she wishes to obtain counsel and, if the defendant so desires, he or she will be given a reasonable time to obtain counsel. If the defendant shows his or her indigence and counsel is available for appointment, an Indigent Defense Attorney may be appointed to serve as counsel.

The instant record indicates Appellant was charged with four counts of bribery at initial appearance; however, the proceeding was not conducted in accordance with § 1-404.C.(1)-(4).

DISTRICT COURT: Okay, if you'll come forward please, ma'am.

DEFENDANT: (Defendant rises and stands before the District Court judge. The prosecutor hands Defendant a copy of the Criminal Complaint and Information.)

DISTRICT COURT: There are formalities I must go through because of orders from the Supreme Court, etc., of the United States and our Supreme Court. The first one is, would you raise your hand and swear after me?

DEFENDANT: (Defendant complies by raising her right hand.)

DISTRICT COURT: Do you swear to tell the truth, the whole truth, and nothing but the truth so help you God?

DEFENDANT: Yes I do.

DISTRICT COURT: Alright. Are you a citizen of the Creek Nation?

DEFENDANT: (Defendant's response redacted)

DISTRICT COURT: Okay. In the Creek Nation tribal courts, you have a right to a trial by jury. If you are in jail, you have a right to that trial within ninety (90) days. If you are out on bond, you have a right to that trial within one hundred and eighty (180) days unless you come before the court and affirmatively waive the right to a speedy jury trial. Do you understand that ma'am?

DEFENDANT: Yes.

DISTRICT COURT: Alright. You also have the right to an attorney. Are you able to afford to hire an attorney?

DEFENDANT: No.

DISTRICT COURT: Donna [Court Clerk], would you give her the affidavit? I need to have you fill out a pauper's affidavit while you're here this morning . . .

DEFENDANT: Okay.

DISTRICT COURT: . . .and if we can give her time to do that then the prosecutor must look at it and I must look at it before we can approve court-appointed counsel, okay?

DEFENDANT: Okay.

DISTRICT COURT: Is there a bond recommendation, sir?

PROSECUTOR: Your honor, Ms. Johnson is charged with four counts of bribery, all felonies. She's been handed a copy of the criminal complaint and information. The Nation requests a ten thousand dollar (\$10,000) bond.

DISTRICT COURT: Okay, the Nation is requesting a ten thousand dollar (\$10,000) bond. Do you understand that, ma'am?

DEFENDANT: Yes.

DISTRICT COURT: Okay. That will be set. At this time I need to have you make out your pauper's affidavit and we'll try to see if we can appoint you counsel, okay? Do you have any other questions?

DEFENDANT: Um, as far as the bond . . .

DISTRICT COURT: Yes ma'am?

DEFENDANT: [pauses]

DISTRICT COURT: The Lighthorse will see that you contact a bondsman today.

DEFENDANT: I don't have the money to pay for a bond.

DISTRICT COURT: Okay. I understand that ma'am and I'm not involved in that. You'll need to talk to them and see what kind of arrangements you can make. That is a private treaty between you and whoever the bondsman might be. If you cannot make a bond then, as I've explained to you, we'll have a trial within ninety (90) days.

DEFENDANT: I mean, can I not . . .

DISTRICT COURT: . . . do what?

DEFENDANT: . . . talk to them about being released on my own recognizance?

DISTRICT COURT: That is between the prosecutor and you right now. The Court is not involved in that. If you'll make out that affidavit, we'll take care of that next. Thank you.

DEFENDANT: (Defendant complies by completing pauper's affidavit from 00:02:45 – 00:14:28.)

PROSECUTOR: (Reviews pauper's affidavit from 00:14:30 to 00:15:50. Prosecutor gives affidavit to District Court at 15:50:53.)

DISTRICT COURT: Do you approve that, sir?

PROSECUTOR: Uh-huh.

DISTRICT COURT: Ms. Johnson, is this in fact your signature?

DEFENDANT: Uh-huh.

DISTRICT COURT: Donna [Court Clerk], will you notarize this at the end of this hearing? The Court is going to approve your request. There are some requirements on this that don't involve you, but this is not to be an appointment from the indigent defense contract, nor the legal department of the Creek Nation. It has to be a private attorney from our bar list. Do you have any questions, ma'am?

DEFENDANT: (Defendant responds "no" by shaking head.)

DISTRICT COURT: Can you make sure the clerk knows how to get a hold of you by cell phone or address so that we can notify you as to who your attorney might be?

COURT CLERK: Did you put it on the paper?

DEFENDANT: Yes.

DISTRICT COURT: Is it on here?

DEFENDANT: Yes sir.

DISTRICT COURT: Okay. Donna [Court Clerk], that's yours to notarize and my request to the Lighthorse is that she be allowed to contact a bondsman. She's in your custody at this time, sir. The bond is set at ten thousand dollars (\$10,000). That is all.<sup>50</sup>

The Nation contends that personal jurisdiction was proper in the underlying prosecution because "it is the longstanding practice of the District Court to establish personal jurisdiction over [a] defendant by inquiring about tribal affiliation at initial appearance."<sup>51</sup> The Nation's argument is erroneous. As discussed in Part I of this opinion, personal jurisdiction was properly established by the criminal complaint and information filed by the Nation and subsequent arrest warrant issued by the District Court. Here, additional steps to maintain personal jurisdiction would have become necessary only if Appellant had asserted non-Indian status prior to the start of trial.

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<sup>50</sup> Initial Appearance-Johnson, (00:00:00 – 00:16:55) (May 20, 2011) (video recording).

<sup>51</sup> *Appellee's Brief in Response* 7 (May 2, 2012).



Although the record contains no indication that Appellant raised non-Indian status as a defect to personal jurisdiction prior to the instant appeal, we cannot deem an implied waiver of personal jurisdiction occurred under the instant procedural history. By questioning the unrepresented Appellant under oath at initial appearance, the District Court permitted burden shifting identical in effect to the type that we held violated a criminal defendant's right against self-incrimination in *McIntosh*. Indian status is no longer a material element under Title 14; however, the prosecutorial burden to prove a defendant's Indian status may still be triggered by a criminal defendant's challenge to personal jurisdiction prior to trial or entry of a "guilty" or "nolo contendere" plea. This approach strikes an appropriate balance between protecting a defendant's rights during the pre-trial process and ensuring the Nation has clear authority to assert criminal jurisdiction.

The District Court's error is plain under Appellate Rule 25.B.<sup>52</sup> By failing to observe the procedural requirements set forth by § 1-404.C.(1)-(4) that protect Appellant's fundamental right against compelled testimony under § 1-303.C,<sup>53</sup> the District Court prejudicially interfered with Appellant's ability to challenge personal jurisdiction and removed any resulting prosecutorial burden created by such a challenge. The conviction and sentence must be overturned because the prejudicial effect of the District Court's plain error inextricably impacted all subsequent proceedings that ultimately led to Appellant's conviction. We cannot speculate on how a timely challenge to personal jurisdiction might have affected the lower court proceedings. Likewise, we cannot speculate on whether the Nation could have proven Appellant's Indian status beyond a

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<sup>52</sup> M(C)NCA Title 27, App. 2, Rule 25.B ("Defects affecting jurisdictional or constitutional rights may be noticed although they were not brought to the attention of the District Court sitting as the District Court.").

<sup>53</sup> We have overturned the District Court twice previously for, *inter alia*, error resulting from interference with individual fundamental rights. *Courtwright v. July*, 4 Mvs. L. R. 105 (June 28, 1993) (denial of chartered community voting rights); and *McIntosh v. Muscogee (Creek) Nation*, 4 Mvs. L. R. 207 (July 25, 2001) (denial of criminal defendant's right against self-incrimination).

reasonable doubt prior to trial if necessary. It remains unclear whether the District Court had jurisdiction to render the judgment of conviction and sentence. Accordingly, this Court lacks jurisdiction to reach the remaining arguments raised on appeal or evaluate whether the evidence presented at trial was sufficient to sustain the jury's verdict.

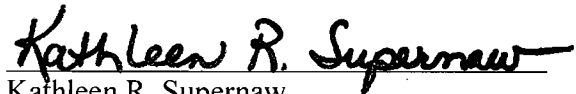
**IT IS HEREBY ORDERED** that the judgment of conviction and sentence against Appellant on all four counts of bribery are **VACATED**.

**IT IS FURTHER ORDERED** that this matter is **REMANDED** to the District Court for additional proceedings consistent with this opinion.

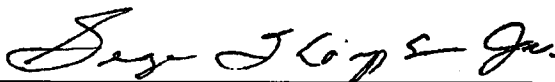
**DELIVERED AND FILED:** August 15, 2013.



Andrew Adams III  
Vice-Chief Justice



Kathleen R. Supernaw  
Associate Justice



George Thompson Jr.  
Associate Justice

**HARJO-WARE, J., concurring in-part, dissenting in-part, and concurring in judgment.**

Appellant-Defendant (Appellant) was arrested and charged with four counts of bribery.<sup>54</sup> During initial appearance before the Muscogee District Court, Appellant responded affirmatively when questioned by the District Court Judge regarding Appellant's Muscogee Nation citizenship.<sup>55</sup> The record on appeal indicates that at no time during pendency of lower court proceedings did Appellant attempt to recant the affirmative response provided at initial appearance or otherwise deny being a Muscogee (Creek) citizen or Indian person. Appellant was ultimately tried by a jury of Muscogee citizens and found guilty on all four bribery counts. Appellant timely appealed the conviction, asserting the Nation lacked jurisdiction because the Special Prosecutor presented no evidence that proved Appellant was an Indian person subject to tribal jurisdiction. The Attorney General responded that longstanding District Court practice is to determine a criminal defendant's Indian status during initial appearance.<sup>56</sup>

**I. JURISDICTION**

I concur with the majority opinion in finding that our Nation's courts, inherently, are courts of general criminal jurisdiction. The instant case requires us to re-examine our treatment of a criminal defendant's Indian status for the purpose of determining whether our courts have the requisite jurisdiction (legal authority) to prosecute alleged criminal conduct. The decisions of other courts are not binding on the Muscogee Supreme Court; however, a study of federal court decisions and decisions from courts of our sister Indian nations reveals that those courts consider being Indian as a factor in determining jurisdiction (legal authority) to prosecute criminal conduct. In my opinion, being Indian is not a crime. Thus, I agree with the approach

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<sup>54</sup> The Criminal Complaint charged Appellant as an Indian person.

<sup>55</sup> The Muscogee (Creek) Nation Constitution provides "Each Muscogee (Creek) Indian by blood shall have the opportunity for citizenship in the Muscogee (Creek) Nation." M(C)NCA Const. Art. II, § 1.

<sup>56</sup> The Special Prosecutor withdrew on February 9, 2012, and the case was assumed by the Nation's Attorney General.

used by federal and other tribal courts that treats Indian status as a jurisdictional element rather than an element of criminal conduct.

Federal criminal jurisdiction extends to crimes committed in Indian country predominantly pursuant to two federal statutes: the General Crimes Act (GCA);<sup>57</sup> or the Major Crimes Act (MCA).<sup>58</sup> Under the GCA, federal courts may only exercise criminal jurisdiction in Indian country for crimes committed by an Indian perpetrator against a non-Indian or vice-versa. If neither the perpetrator nor victim is an Indian person, generally, federal jurisdiction is absent and state jurisdiction is exclusive.<sup>59</sup> If both perpetrator and victim are Indian, federal jurisdiction exists only for the major crimes enumerated under the MCA or for non-major crimes not punished by tribal authority. For non-major Indian-on-Indian crimes, tribal jurisdiction is exclusive once exercised. Clearly, under this framework, Indian status is a jurisdictional consideration rather than an element of culpable criminal behavior.

Under the GCA, federal courts do not consider the Indian status of a criminal defendant until a defendant raises non-Indian status as an affirmative defense to avoid federal prosecution. The burden to disprove a defendant's Indian status does not shift to the federal government until

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<sup>57</sup> 18 U.S.C. § 1152. The General Crimes Act provides: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

<sup>58</sup> 18 U.S.C. § 1153. The Major Crimes Act provides: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under Chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in Section 1365 of this title), assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

<sup>59</sup> *U.S. v. McBratney*, 104 U.S. 621 (1881), and *Draper v. U.S.*, 164 U.S. 240 (1896).

a defendant presents evidence regarding Indian status sufficient to sustain the affirmative defense.

Under the MCA, which combines the jurisdictional element of Indian status with the description of criminal conduct, the federal government has the initial burden to prove a defendant's Indian status in order to sustain federal jurisdiction; however, Indian status continues to be recognized as a jurisdictional factor, rather than an element of culpable criminal conduct.<sup>60</sup> The procedural difference in treatment of Indian status between GCA and MCA prosecutions lies in the initial burden of proof.

“[A defendant's] Indian status operates as a jurisdictional element under [the MCA], which is generally resolved by a judge, rather than an affirmative defense [under the GCA], which must be submitted to the jury after the defendant carries his production burden.”<sup>61</sup>

Consistent with the federal treatment, our sister Indian nations have held that Indian status is a jurisdictional element rather than being an element of the crime of which the accused is charged. In *McCauley v. Pyramid Lake Paiute Tribe*, the court held Indian status is not an element of the crime of driving under the influence.<sup>62</sup> The *McCauley* court also held that, absent the defendant timely raising non-Indian status, the tribe was not required to prove defendant's Indian status in order to assert tribal criminal jurisdiction.<sup>63</sup> Likewise, in *Seymour v. Colville Confederated Tribes*, the court surveyed various state court decisions and determined the burden of proving lack of jurisdiction should be on the accused.<sup>64</sup>

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<sup>60</sup> 18 U.S.C. § 3242. “All Indians committing any offense listed in the first paragraph of and punishable under section 1153 [the MCA] (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.”

<sup>61</sup> *United States v. Bruce*, 394 F.3d 1215, 1228 (9th Cir. 2005) citing *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974). See also, *United States v. Cruz*, 554 F.3d 840 (9th Cir. 2009).

<sup>62</sup> 2005 WL 6344534 (Nev. Inter-Tribal C.A.)

<sup>63</sup> *Id.*

<sup>64</sup> 3 CTCR 40, 6 CCAR 5 (Colville Confederated Tribes Tribal Court 2001).

Unlike the jurisdictional approach to Indian status used by other courts discussed above, the Muscogee Supreme Court departed from the treatment of Indian status as a jurisdictional element in *McIntosh v. Muscogee (Creek) Nation*.<sup>65</sup> In *McIntosh*, this Court interpreted statutory language from NCA 99-04 that provided, “[i]t shall be unlawful for any **Indian** [p]erson to [embezzle]. . . [.]”<sup>66</sup> NCA 99-04, much like the federal Major Crimes Act, comingled Indian status with the description of criminal conduct to be punished. The *McIntosh* court, however, interpreted NCA 99-04 as a requirement to treat Indian status as a material element of any crime charged.

We find that, under the holding of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 491, 98, SCt. 1011, 55 L.Ed2d 209 (1978) and Federal law codified in the Indian Civil Rights Act, **an element of any criminal charge** filed by the Nation is whether a defendant is an Indian Person and that the Nation has the burden to prove that element just as it must prove any other **element of the crime**. See *Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 SCt. 2078, 2080, 124 L. Ed. 2d 182 (1993) (holding that “[t]he prosecution has the burden to prove all elements of the offense charged”). Whether the Nation has proved a defendant is an Indian Person must also be included in the jury instructions given by the courts of the Nation. If the Nation does not provide such proof, a defendant is entitled to have a demurrer sustained and his case dismissed.<sup>67</sup>

In my view, Indian status should have been interpreted as a jurisdictional element rather than an element of the crime of embezzlement. Being Indian is not a crime. I therefore respectfully dissent to any reliance on the *McIntosh* holding.

On July 6, 2001, three weeks prior to this Court’s decision in *McIntosh*, the Nation’s criminal code was amended by NCA 01-110. NCA 01-110 established a separate chapter for a

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<sup>65</sup> *McIntosh v. Muscogee (Creek) Nation*, 4 Mvs. Rep 207 (2001).

<sup>66</sup> NCA 99-04, § 5-701 (April 1, 1999) (emphasis added).

<sup>67</sup> *McIntosh v. Muscogee (Creek) Nation*, 4 Mvs. Rep 207, 208 (2001) (emphasis added). Additionally, the *McIntosh* court relied on *Sullivan v. Louisiana* as authority that required the Nation to prove beyond a reasonable doubt a defendant’s Indian status as a material element of the crime. *Sullivan* didn’t, however, involve Indian-status or whether “person” is an element of the crime charged. In *Sullivan*, the U.S. Supreme Court reversed the defendant’s conviction for first-degree murder when jury instructions included an erroneous definition of “reasonable doubt”. Such an error, the Court held, amounts to denial of a defendant’s Sixth Amendment right to jury trial and necessarily failed harmless error review.

new criminal procedure code under Title 14 and defined “Indian” as “a person who is a member of the Muscogee (Creek) Nation; or a person who is a member of any other federally recognized tribe, including Native Hawaiians and Alaska Natives; or a person who possesses a [CDIB]; **or a person who is under oath confirms to the District Court that he/she is Indian.**”<sup>68</sup> NCA 01-110 rendered the *McIntosh* decision applicable only to the repealed statute it interpreted. NCA 01-110 effectively superseded this Court’s previous holding regarding prosecutorial burden to prove a criminal defendant’s Indian status. Regarding the instant appeal, Appellant was charged under Title 14 as amended by NCA 10-053.<sup>69</sup> Unlike the criminal code provisions interpreted by the *McIntosh* court, NCA 10-053 clearly bifurcated Indian status from the descriptions of criminal conduct sought to be punished.

## II. CRIMINAL CONDUCT

Punishment of bad conduct is the purpose of criminal statutes. The express purpose of the Muscogee (Creek) Nation Code of Criminal Offenses “is to define the **conduct** constituting crimes and prescribe the punishment for each.”<sup>70</sup> Title 14, § 2-103, defines “crime” as “a social harm which is defined and made punishable by legislative enactment . . . [.]”<sup>71</sup> In the instant case, Appellant was charged with the crime of bribery under Title 14, § 2-802. By enacting § 2-802, the National Council criminalized bribery and described the following material elements necessary to prove a defendant engaged in criminal conduct:

### § 2–802. Bribery

A. It is a crime for a person, having corrupt or deceitful intent, to give or offer to give any benefit, money, property or other thing of value to a Tribal official, member of a Board of the Muscogee (Creek) Nation, employee of the Muscogee (Creek) Nation or employee of any Board of the Muscogee

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<sup>68</sup> NCA 01-110, § 101.F, (July 6, 2001) (emphasis added and grammatical errors unaltered).

<sup>69</sup> NCA 10-053 (May 27, 2010).

<sup>70</sup> M(C)NCA Title 14, § 2-102 (enacted as NCA 10-053, May 27, 2010) (emphasis added).

<sup>71</sup> *Id.* at § 2-103 (NCA 10-053, May 27, 2010).

(Creek) Nation, in exchange for or to induce the performance of any act which is within the scope of or is in any manner related to his official duties or responsibilities. Any person convicted of violating the foregoing provision shall be guilty of a felony.

B. It is a crime for a person, who is a Tribal official, member of a Board of the Muscogee (Creek) Nation, employee of the Muscogee (Creek) Nation or employee of any Board of the Muscogee (Creek) Nation and having corrupt or deceitful intent, to accept or agree to accept any benefit, money, property or other thing of value in exchange for the performance of any act which is within the scope of or is in any manner related to his or her official duties or responsibilities as such an official or employee. Any person convicted of violating the foregoing provision shall be guilty of a felony.<sup>72</sup>

Clearly, Indian status does not appear as an element of the crime of bribery. In my view, Indian status can be nothing other than a factor for the determination of what court has the legal authority to adjudicate a case. Being a citizen of our Nation or any other Indian tribe is not crime under Muscogee law.

### III. SELF-INCRIMINATION

I cannot agree that the District Judge violated Appellant's constitutional right against self-incrimination.<sup>73</sup> Despite the majority's recognition that *McIntosh* decision is inapplicable to the instant case, it appears Indian status continues to be treated as an element of the crime of bribery in the instant case for the purpose of burden shifting. No self-incrimination could have been compelled if Indian status were not considered to be part of a criminal charge. Our Nation protects against self-incrimination as follows:

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<sup>72</sup> M(C)NCA Title 14, § 2-802.

<sup>73</sup> Article II of our Constitution protects the rights our citizens enjoy as citizens of other governments and our tribal towns. Section 2 does not apply the laws of those governments to limit the Muscogee (Creek) Nation's jurisdiction over its own citizens and other Indians in the Muscogee Nation. The United States Constitution does not mention the Muscogee National Council. Article VI, § 7 refers to federal constitutional protections made applicable to Indian Nations by the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. § 1302. By adopting the Indian Civil Rights Act, the United States Congress imposed certain restrictions upon tribal governments similar, but not identical to, those contained in the Bill of Rights and the Fourteenth Amendment to the United States Constitution. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). These individual protections have been incorporated into Muscogee Code provisions at Title 14, § 1-303, and Title 27, § 1-103.D. See Majority Opinion *supra* at notes 43 and 44.



The defendant shall have the right to testify in his or her own behalf, or to refuse to testify regarding the **[criminal] charge** against him or her, provided, however, that once a defendant takes the stand to testify on any matter relevant to the immediate proceeding against him or her, he or she shall be deemed to have waived all right to refuse to testify in that immediate criminal proceeding. However, such a waiver in one distinct phase of the criminal trial process, such as a motion hearing, trial or sentencing hearing, shall not be deemed to constitute a waiver of defendant's right to remain silent in other distinct phases of the criminal trial process.<sup>74</sup>

This provision is our Nation's version of the Indian Civil Rights Act's prohibition on any exercise of tribal governments that would "compel any person in any criminal case to be a witness against himself,"<sup>75</sup> "Incrimination" is defined as "to charge with or involve in a crime or other wrongful act; to indicate the guilt of."<sup>76</sup> Protection against self-incrimination only applies, however, if a defendant might be admitting to conduct which, if convicted thereof, would result in a fine, imprisonment or both. In the instant matter, Indian status is not conduct that would have subjected Appellant to fines or imprisonment. The District Court's inquiry into whether it had jurisdiction did not cause Appellant to admit to the commission of a crime or admit to involvement in any kind of criminal conduct.

After NCA 01-110 was repealed, the question of who is responsible for proper determination of Indian status for jurisdictional purposes was left unanswered and remained unanswered until today. In my opinion, prior to today's decision, it continued to be the duty of the District Judge to determine the District Court's jurisdiction at initial appearance.<sup>77</sup> I maintain that it is not a crime to be Indian. The District Judge's inquiry regarding Indian status was strictly a jurisdictional determination that did not compel self-incrimination by Appellant.

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<sup>74</sup> MCNCA Title 14, § 1-303 (2010) (emphasis added).

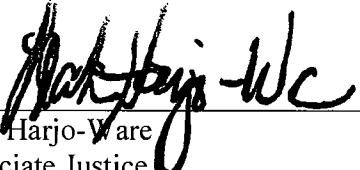
<sup>75</sup> 25 U.S.C. § 1302(4).

<sup>76</sup> *Webster's Illustrated Encyclopedic Dictionary*, Tormont Publications, Inc. (1990).

<sup>77</sup> 20 Am. Jur. 2d *Courts* § 60 (2013).

#### IV. DUE PROCESS

Our National Council has set forth what process is due to criminal defendants in our criminal pretrial process.<sup>78</sup> The procedure used by the District Court for Appellant's initial appearance was recorded on video and cited verbatim in the majority's opinion.<sup>79</sup> A criminal defendant's due process protections are outlined in great detail in the Nation's pre-trial arraignment procedures.<sup>80</sup> Here, Appellant's arraignment was memorialized only by one sentence in a District Court minute report.<sup>81</sup> In my opinion, the record is insufficient to demonstrate on appeal that the detailed, mandatory due process requirements for arraignment were followed. For this reason, I concur with the majority that the judgment of conviction and sentence against Appellant should be vacated on all four counts and the case remanded to the District Court for further proceedings.<sup>82</sup>

  
Leah Harjo-Ware  
Associate Justice

<sup>78</sup> M(C)NCA Title 14, § 1-104.

<sup>79</sup> Majority opinion at 13-14.

<sup>80</sup> Majority opinion at 11-13.

<sup>81</sup> *Minutes Report-Arraignment*, CRF 2011-11 (July 25, 2011).

<sup>82</sup> I agree with the majority's decision to remand the instant matter for additional proceedings. I also agree with the unstated implication that necessarily results from the majority's decision: On appeal from a criminal conviction, reversal due to trial court error does not terminate original jeopardy. The dissent suggests that M(C)NCA Title 14, § 1-303.I, requires the underlying matter be dismissed with prejudice; however, this Court has never interpreted the scope of double jeopardy protection under the Muscogee (Creek) Nation Code and no party to the instant appeal has raised double jeopardy as an issue. Until it becomes necessary for this Court to interpret the double jeopardy provision of § 1-303 pursuant to an active case or controversy, it is appropriate to note simply that U.S. Supreme Court precedent, although not binding on any ultimate decision by this Court pertaining to double jeopardy, does not apply double jeopardy as a bar to second prosecution after a criminal conviction is reversed on appeal for trial court error. *Burks v. U.S.*, 437 U.S. 1, 16 (1978) ("In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.") (internal citations omitted). See also *United States v. Tateo*, 377 U.S. 463 (1964); *U.S. v. DiFrancesco*, 449 U.S. 117 (1980); *Lockhart v. Nelson*, 488 U.S. 33 (1988).

**DEER, J., with whom LERBLANCE, C.J., joins, dissenting.**

I concur with the lead opinion insofar as it concludes the conviction and sentence must be vacated. I respectfully disagree with remanding the matter for additional proceedings, however, because remand exposes Appellant to further prosecution and ignores applicable, mandatory constitutional authority that requires the charges be dismissed with prejudice. Appellant's conviction and sentence should be vacated and remanded with instructions to dismiss all four counts of bribery. Dismissal of all counts is appropriate because the Nation failed to provide evidence of Appellant's Indian status, a *prima facie* element of bribery that requires proof beyond a reasonable doubt.

The modern Muscogee (Creek) Nation Constitution, ratified in 1979, affords basic protections to the Nation's citizens. Article II, § 2 specifies that "[t]his Constitution shall not abridge the rights and privileges of individual citizens of the Muscogee (Creek) Nation enjoyed as citizens of the State of Oklahoma and of the United States of America."<sup>83</sup> Article VI, § 7 also limits legislative alteration of those protections by specifying the National Council's legislative authority is "subject to any restrictions contained in the Constitution and laws of the United States. . . [.]"<sup>84</sup> No single legislative act or legislative history divined from a series of acts may diminish individual constitutional rights.<sup>85</sup>

The M(C)N Code, in recognition of these constitutionally-based protections, requires M(C)N courts to apply the Indian Civil Rights Act (ICRA).<sup>86</sup> ICRA specifies, *inter alia*, that the exercise of tribal self-government shall not "compel any person in any criminal case to be a

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<sup>83</sup> M(C)NCA Const. Art. II, § 2.

<sup>84</sup> M(C)NCA Const. Art. VI, § 7.

<sup>85</sup> M(C)NCA Const. Art. II, § 2; and Art. VI, § 7.

<sup>86</sup> M(C)NCA Title 27, § 1-103.B. (2010) ("The Muscogee (Creek) Nation Courts shall apply the Federal Indian Civil Rights Act, 25 U.S.C. § 1301 et seq."). *See also* M(C)NCA Title 14, § 1-301.D. (2010).

witness against himself.”<sup>87</sup> Muscogee criminal procedure codifies this privilege against self-incrimination by providing that “[t]he defendant shall have the right to testify in his or her own behalf, or to refuse to testify regarding the charge against him or her[.]”<sup>88</sup> Under Title 14, § 2-802, the term “person” appears with the *prima facie* elements that constitute bribery.<sup>89</sup> “Person” is defined as “a human being who is a member of a federally recognized Indian Tribe or a human being who is eligible to be a member of a federally recognized Indian Tribe.”<sup>90</sup> Given the fact that the term “person” appears with the other *prima facie* elements of bribery under § 2-802 and, by definition, the term excludes non-Indians, judicial treatment of a criminal defendant’s Indian status remains the same today as it did when *McIntosh v. Muscogee (Creek) Nation* was decided.<sup>91</sup> The majority relies on “abundantly clear” legislative history of Title 14 to erroneously conclude that Indian status is a mere procedural consideration; however, analytical placement of Indian status into either a procedural or substantive category does not alter the reality that non-Indians, generally, are not subject to tribal criminal jurisdiction. The right against self-incrimination is guaranteed under the M(C)N Constitution and cannot be diminished by mere legislative act. The right against self-incrimination, in my view, includes a criminal defendant’s right not to respond to questions under oath regarding Indian status while unrepresented at initial appearance.

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<sup>87</sup> 25 U.S.C. § 1302(4).

<sup>88</sup> M(C)NCA Title 14, § 1-303.C. (2010).

<sup>89</sup> M(C)NCA Title 14, § 2-802. (2010) (“A. It is a crime for a **person**, having corrupt or deceitful intent, to give or offer to give any benefit, money, property or other thing of value to a Tribal official, member of a Board of the Muscogee (Creek) Nation, employee of the Muscogee (Creek) Nation or employee of any Board of the Muscogee (Creek) Nation, in exchange for or to induce the performance of any act which is within the scope of or is in any manner related to his official duties or responsibilities. Any **person** convicted of violating the foregoing provision shall be guilty of a felony. B. It is a crime for a **person**, who is a Tribal official, member of a Board of the Muscogee (Creek) Nation, employee of the Muscogee (Creek) Nation or employee of any Board of the Muscogee (Creek) Nation and having corrupt or deceitful intent, to accept or agree to accept any benefit, money, property or other thing of value in exchange for the performance of any act which is within the scope of or is in any manner related to his or her official duties or responsibilities as such an official or employee. Any **person** convicted of violating the foregoing provision shall be guilty of a felony.”) (emphasis added).

<sup>90</sup> M(C)NCA Title 14, § 2-113.W. (2010).

<sup>91</sup> 4 Mvs. L. R. 207 (July 25, 2001).

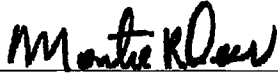
By questioning the unrepresented Appellant under oath at initial appearance regarding Indian status prior to providing an adequate explanation of rights, the District Court disregarded procedural due process minimums for initial appearance under M(C)NCA Title 14, § 1-404. Such questioning was prejudicial because it relieved the Nation's burden to prove Appellant's Indian status; therefore, no statements made by Appellant during initial appearance are admissible to demonstrate Appellant's Indian status. The record is absolutely void of any indication that the prosecution presented evidence which proved Appellant is Indian. The record also clearly reveals that, as required under *McIntosh*, no jury instruction was issued regarding whether the prosecution proved Appellant's Indian status. Lack of evidence of Appellant's Indian status renders further analysis unnecessary. When reviewed *de novo*, but in a light most favorable to the Nation, the lower court's denial of Appellant's *Motion for Acquittal* cannot be affirmed because the evidence of Appellant's Indian status, a *prima facie* element of the crime, was entirely insufficient to sustain a guilty verdict.

Under M(C)NCA Title 14, § 1-303, “[t]he defendant shall have the right to not be twice put in jeopardy by the Nation for the same offense.”<sup>92</sup> In the District Court, original jeopardy attached when the jury was empaneled and sworn. Reversal of a conviction on appeal for insufficient evidence amounts to acquittal which terminates original jeopardy. Once acquitted, the principle of double jeopardy should protect Appellant from subsequent prosecution for the same charges. Here, the Nation failed to carry its burden to prove all essential elements necessary to sustain a conviction. Additionally, the District Court violated Appellant's due process rights by relieving the Nation of its burden to prove Appellant's status as an Indian person. Under the instant facts and procedural history, Appellants' conviction and sentence


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<sup>92</sup> M(C)NCA Title 14, § 1-303.I. (2010). Likewise, the Indian Civil Rights Act prohibit tribes from “subject[ing] any person for the same offense to be twice put in jeopardy.” 25 U.S.C. § 1302(3).

should be vacated and remanded with instructions to dismiss all four bribery counts with prejudice.



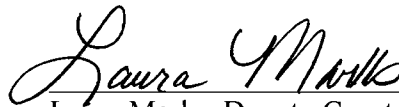
Montie R. Deer  
Associate Justice



Richard C. Lerblance  
Chief Justice

**CERTIFICATE OF MAILING**

I hereby certify that on August 15, 2013, I mailed a true and correct copy of the foregoing Order and Opinion and two separate, minority opinions with proper postage prepaid to the following: Gregory G. Meier, Meier & Associates, 1524 S. Denver Ave., Tulsa, OK 74119-3829; and Shelly Harrison, Esq., Muscogee (Creek) Nation, Office of the Attorney General, P.O. Box 580, Okmulgee, OK 74447. Copy e-mailed to: Donna Beaver, Clerk of the Muscogee (Creek) Nation District Court.



Laura Marks, Deputy Court Clerk