FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA

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FORT PECK TRIBES,
Plaintiff/Appellee,

vs. **Appeal No. 084**

CALVIN FIRST,
Defendant/Appellant.

THIS APPEAL is from a judgment of guilty of Criminal Contempt, a violation of III CCOJ 410, entered on the 1st day of September, 1983 at the Fort Peck Tribal Court, Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, Poplar, Montana. The Honorable Terry L. Boyd, Associate Judge, presided.

FOR APPELLANT: Melissa Melton, Lay Counselor, P.O. Box 214, Wolf Point, Montana 59201.

FOR APPELLEE: Daniel Schauer, Tribal Court Prosecutor, P.O. Box 1027, Poplar, Montana 59255.

CRIMINAL: THE TRIBAL COURT CANNOT EXERCISE ITS INHERENT POWER TO PUNISH FOR CONTEMPT WHEN THE ALLEGED VIOLATION OF III CCOJ 410 OCCURS OUTSIDE THE TRIBAL COURTROOM; IN ALLEGED CRIMINAL VIOLATIONS, A COMPLAINT MUST BE FILED WHICH COMPLIES WITH II CCOJ 101; THE TRIBAL COURT MUST AFFORD DEFENDANTS THEIR RIGHTS AS PROVIDED FOR IN THE ICRA AND CCOJ; A TRIBAL JUDGE WHOSE IMPARTIALITY MIGHT REASONABLY BE QUESTIONED OR HAS PERSONAL KNOWLEDGE OF ANY DISPUTED FACTS MUST DISQUALIFY HIMSELF; AND A TRIBAL JUDGE CANNOT ARBITRARILY SHIFT THE BURDEN OF PROOF IN III CCOJ 103(a).

ARGUED: October 6, 1989. **DECIDED:** October 6, 1989.

Opinion by Arnie A. Hove, Chief Justice, joined by Gary James Melbourne and Floyd Azure, Associate Justices.

HELD: IT IS THE UNANIMOUS DECISION OF THIS COURT TO REVERSE THE JUDGMENT OF CONVICTION ENTERED AGAINST APPELLANT ON SEPTEMBER 1, 1989 ON THE CHARGE OF CRIMINAL CONTEMPT. IT IS FURTHER ORDERED THE PROCEEDINGS AGAINST APPELLANT FOR THE AUGUST **29, 1989** INCIDENT ARE DISMISSED WITH PREJUDICE.

FACTS:

On August 30, 1989, appellant was charged with Criminal Contempt, a violation of III CCOJ 410. Appellant was brought before the tribal court on September 1, 1989 at 10:00 a.m. by way of an Order to Show Cause signed by Chief Judge Howard Bemer. The Criminal Contempt charge which occurred in the Tribal Court Building in Poplar on August 29, 1989 at 2:55 p.m. and directly involved Associate Judge Terry L. Boyd.

On September 1, 1989, appellant appeared before Judge Boyd with other defendants. Judge Boyd informed appellant and the other defendants that this was their arraignment and advised them of their rights. Each of the defendants and appellant were asked if they understood their rights and they indicated by answering yes. All of the other defendants were made to sit down and Judge Boyd then proceeded to question appellant.

Judge Boyd asked appellant if he was represented by counsel and he indicated in the affirmative. Judge Boyd then acknowledged that the tribal court received an Order denying Request for Continuance from this Court. Judge Boyd then read the Criminal Contempt statute, III CCOJ 410 and advised appellant that Criminal Contempt was a Class A Misdemeanor punishable by Three (3) months confinement, a fine of Five Hundred Dollars ($500.00) or both. Finally, Judge Boyd, in referring to the incident which occurred on August 29, 1989 at 2:55 p.m., stated, "...So the burden is on the Defendant to show the Court why he should not be held in Contempt for his actions on that date and time." (Transcript, p.3, 1.9—11.)

The prosecutor then requested a delay until the completion of arraignment of the other defendants and Judge Boyd stated, "I don't see no reason to delay it for a half an hour." (Transcript, p.3, 1.19-20.) When discussions were held on the witnesses, Judge Boyd who was to have received a summons to testify stated, "Well, the Court will not respond to that summons since I'm the sitting Judge." (Transcript, p.4, 1.4-5.)

Appellant proceeded with his case and called Edith Adams, Cheryl Culbertson, and Clayton Reum. After the testimony and evidence presented by appellant, Judge Boyd found appellant guilty of Criminal Contempt. Judge Boyd immediately imposed a sentence of fifteen (15) days confinement and in lieu thereof would accept an apology. Appellant apologized and the apology was accepted. Appellant appeals the judgment.

The grounds for appellant's appeal are set forth in a Notice of Appeal dated September 6, 1989. The grounds were as follows:

> "** On September 1, 1989 Mr. First was found in Criminal Contempt and was sentenced to apologize to the Court in lieu of (15) days confinement. Presiding Judge was Honorable Terry L. Boyd.
>
> Mr. First feels there were Procedural errors/Irregularities made thereby constituting a violation of his rights as follows:
>
> "I. 25 USC Section 1302.(6) (8); CCOJ Title II, CH 1, Sec 101.(a); (b) (1); (5)
>
> Mr. First was Ordered To Show Cause for Criminal Contempt without a complaint or previous statement for basis.

"II. 25 USC Section 1302.(8); CCOJ Title I, CH 3, Sec 307

‘** A request for continuance and disqualification of Judge was denied.

"III. 25 USC Section l302.(8); CCOJ Title I, CH 3, Sec 307

"** Motion brought before the bench prior to commencing the hearing requesting the presiding judge disqualify himself was again denied. Basis for the Motion was that the judge had personal knowledge of the incident.

"IV. 25 USC Section 1302.(6)(8); CCOJ Title II, CH 1, Sec 101

"** Informed by the bench at the time of hearing that the charge stemmed from an incident on August 29. Still no written specifics were submitted.

"V. 25 USC Section 1302.(3) (8); CCOJ Title II, CH 5, Sec 501

"** Action and punishment had already been meted to the Defendant on an administrative level.

"VI. 25 USC Section 1302.(6) (8); CCOJ Title II, CH 5, Sec 501

"** There were no witnesses presented against Mr. First"

The issues presented on appeal which will be addressed are as follows:

1. Whether there were procedural errors or irregularities as a result of the Criminal Contempt charge and at the hearing on September 1, 1989 which constituted violations of appellant’s rights under the Indian Civil Rights Act and CCOJ.

2. Whether tribal judge with personal knowledge of the incident August 29, 1989 and being the chief complaining witness erred in denying appellant’s motion to disqualify himself.

3. Whether the Tribes sustained its burden of proof and appellant was properly found guilty of Criminal Contempt for the August 29, 1989 incident.

I.

Whether there were procedural errors as a result of the Criminal Contempt charge and at the hearing on September 1, 1989 which constituted violations of appellant’s rights under the Indian Civil Rights Act and CCOJ.

In the instant case, there were procedural errors as a result of the Order to Show Cause hearing on September 1, 1989 on a Criminal Contempt charge which was an alleged violation of III CCOJ 410. These procedural errors violated appellant's rights under the Indian Civil Rights Act (hereinafter ICRA) and CCOJ. In the following, this Court will address the procedural errors and briefly discuss the inherent power of the tribal court to immediately punish for a contempt committed in its presence in the tribal courtroom.

On August 30, 1989, Chief Judge Howard Bemer issued an Order to Show Cause on a Criminal Contempt charge for an August 29, 1989 incident involving appellant and Judge Boyd. The incident was an exchange of words between Judge Boyd and appellant in a hallway of the Tribal Court Building in Poplar.

In a letter dated August 29, 1989, Judge Boyd describes the incident to Chief Judge Bemer. Judge Boyd's letter read in full as follows:

> "On today's date, at 2:55 p.m., I found Calvin First in Edith Adams' office and requested that he transfer Sonja Red Elk from detention to the IHS clinic to meet with Tony Boxer.
>
> "First said 'I suppose you violated her again,' I told First that Sonja couldn't keep her 'shit' together.
>
> "He became very emotional at that point and said that she was his relation and he would 'kick your fucking ass' if I didn't leave her alone. He was very belligerent and verbally abusive. I told him again to take her to the clinic. He asked me if I would fire him if he didn't.
>
> "At this point, he turned and walked away. I checked at the clinic, and he did in fact deliver her.
>
> "I believe that First's actions warrant immediate termination. His past behavior indicated his total lack of responsibility and his present actions confirm it.
>
> "He is lazy, uncooperative and childlike when he doesn't get his way.
>
> "I don't feel that his supervisor should be in a position to be verbally assualted (sic) in public. (Emphasis Added.)
>
> "His actions today were witnessed by at least four members of the public, and in addition, Lay Counselor Reum, Edith Adams and Cheryl Culbertson."

In this letter, Judge Boyd acknowledges he was acting in his capacity as appellant's supervisor. Judge Boyd then describes the incident as an exchange of words which resulted from a request that appellant transfer an individual to the IHS clinic. Finally, Judge Boyd admits to making a derogatory statement regarding the individual who was a relative of appellant's wife. There was conflicting testimony as to what was the derogatory statement.

Regardless of the above, Judge Boyd's letter resulted in appellant receiving a Notice of Dismissal dated August 30, 1989 from Chief Judge Bemer which read as follows:

"Pursuant to Chapter 5, Section 1, Subsection 2, 'Termination by Tribes', you are hereby given notice that effective 9/13/89 you are dismissed from your position as Juvenile Officer for the Fort Peck Tribes. Your are further advised that as of 8/30/89 you are placed on leave without pay status. Be advised that Chapter 6, Section 1 defines your options to this action.

"The cause of this action was your actions toward Judge Boyd on August 29, 1989. A copy of his letter is attached. This Court will not accept conduct of this manner from employees. Be also advised that you may also face Criminal Contempt charges as a result of your actions."

Appellant did appear on September 1, 1989 at 10:00 a.m. and Judge Boyd arraigned him on the Criminal Contempt charge. Appellant was not asked to enter a plea and a hearing was held immediately following the arraignment of appellant and the other defendants. As previously mentioned, Judge Boyd was the presiding judge and during the hearing refused to be called as a witness.

The ICRA rights set forth in 25 USC Section 1301 which appellant contends were violated read as follows:

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

"...

"(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

"...

"(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

"...

This Court will address each of appellant's rights that it perceives were violated under 25 USC 1302(6) as a result of the judge's actions and the September 1, 1989 hearing. This Court will also discuss whether appellant was denied equal protection of the Tribes laws or deprived of liberty or property without due process of law under 25 USC 1302(8).

As required under 25 USC 1302(6), the record reflects the tribal court afforded appellant a speedy and public trial since the incident occurred on August 29, 1989 at 2:55 p.m. and a trial by judge was held on September 1, 1989 at 10:00 a.m.

As required under 25 USC 1302(6), the record reflects the tribal court advised appellant of the nature and cause of the accusation against him at his arraignment on September 1, 1989. This portion of the transcript reads:

Judge Boyd: I believe its Melissa Melton. Okay! This is in the matter of Fort Peck Tribes-versus-Calvin First. An Order to Show cause (sic). For the record, the court has received an Order denying request for continuance on the Criminal contempt charge, in the matter of Fort Peck Tribes—versus Calvin First. Received by telefax at 10:25 AM. Okay! Section 410, Title III, Criminal Contempt, "All Courts of the Assiniboine and Sioux Tribes have power to punish for contempt of their authority the following offenses: Misbehavior of any persons in their presence or so thereto as to obstruct the administration of justice or disobedience, or resistance to any process, order, subpoena, warrant or comman (sic) of the Court. Criminal Contempt is a Class A Misdemeanor which is punishable by Three (3) months confinement, a fine of Five Hundred ($500) dollars or both." Okay! The Court had a Order to Show Cause issued for Mr. First to show cause why he should not be held in Contempt for resistance to a verbal order of this Court issued on the I believe the 29th day of August, 1989 at 2:55 PM. So the burden is on the Defendant to show the Court why he should not be held in contempt for his actions on that date and time." (Hearing Transcript p.2, 1.11 to p.3,1.11.)

Despite the tribal court affording a speedy trial and advising appellants of his rights and nature and cause of the accusation on September 1, 1989, proper procedure was not followed in the charging of and hearing on the alleged Criminal Contempt for the August 29, 1989 incident.

Criminal Contempt is a violation of III CCOJ 410 and the tribal court dealt with the incident in part as such a violation and in part as an exercise of the inherent power of the court. Title III CCOJ 410 reads in full as follows:

> "All courts of the Assiniboine and Sioux Tribes have the power to punish for contempt of their authority the following offenses:
>
> "(a) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; or
>
> "(b) disobedience or resistance to any process, order, subpoena, warrant or command of the Court."

Appellant was accused of Criminal Contempt in an Order to Show Cause dated August 30, 1989 and issued by Chief Judge Bemer.. The August 29, 1989 incident between Judge Boyd and appellant was alleged to be a violation of III CCOJ 410 and occurred outside of the tribal courtroom. Because there was not an immediate exercise of the inherent power of the tribal court to punish for a contempt of court in the tribal courtroom, , the procedures set forth in the CCOJ for the charging of any criminal violation must also be followed in the instant case. Therefore, appellant must be charged as required by II CCOJ 101. This section reads in full as follows:

> "(a) A complaint is the written statement of the essential facts charging that a named

individual has committed a particular criminal offense. All criminal prosecutions shall be initiated by a complaint filed with the Court signed by the prosecutor and sworn to before a judge. All complaints initiated by the prosecutor shall be based on probable cause that the crime charged happened and that the defendant(s) committed the crime charged. A judge shall have the authority to demand the filing of an information by the prosecutor or to hold a preliminary hearing to determine whether lawful probable cause as to the crime exists, and whether the appropriate defendant(s) exist prior to the issuance of a summons or warrant for the arrest of the defendant(s).

"(b) Complaints shall contain:

"(1) A written statement of the violation describing in ordinary language the nature of the offense committed, including the time and place as nearly as may be ascertained by persons having personal knowledge may be expressly referenced in and attached to the complaints.

"(2) The name and description of the person(s) alleged to have committed the offense.

"(3) A statement describing why the Court has personal jurisdiction of the defendant.

"(4) A description of the offense charged.

"(5) The signature of the prosecutor sworn to before a judge." (Emphasis Added.)

The tribal court did recognize the proceedings involved a criminal offense which required an arraignment under II CCOJ 401 and appellant was in fact arraigned. However, a complaint signed by the prosecutor was not filed with the Court and the Order to Show Cause dated August 30, 1989 does not meet the requirements of II CCOJ l0l(b)(l),(2),(3),(4), and (5). In addition, the procedure set forth in II CCOJ 401 should have been followed. The applicable portions of this section dealing with what would should have been given opportunity to exercise which will be briefly discussed read as follows:

"...

"(b) Arraignment shall be held in open court without unnecessary delay after the accused is taken into custody and in no instance shall arraignment be later that the next regular session of Court.

"(c) Before an accused is required to plead to any criminal charges the judge shall;

(1) Read the complaint to the accused and determine that he/she understands the complaint and the Section of the Tribal code which he/she is charged with violating, including the maximum authorized penalty; and

(2) Advise the accused that he/she has the right (a) to remain silent, (b) to have a speedy and public trial where he/she will be confronted with witnesses against him/her after

he/she has had sufficient time to prepare his/her defense if he/she pleads "not guilty," (c) to be tried by a jury if the offense charged is punishable by imprisonment, and (d) to be represented by counsel at his/her own expense, before he/she pleads to the charge.

(d) If the arrest was without a warrant, and the defendant is to be continued in custody, the judge shall also determine during arraignment whether there is probable cause to believe that an offense against Tribal law has been committed by the named accused.

(e) The judge shall call upon the defendant to plead to the charge:

(1) If the accused pleads "not guilty" to the charge, the judge shall then set a trial date and consider conditions for release prior to trial as provided in Section 402.

(2) If the accused pleads "guilty" to the charge, the judge shall accept the plea only if he/she is satisfied that the plea is made voluntarily and the accused understands the consequences of the plea, including the rights which he/she is waiving by the plea. The judge may then impose sentence of defer sentencing for a reasonable time in order to obtain any information he/she deems necessary for the imposition of a just sentence. The accused shall be afforded an opportunity to be heard by the court prior to sentencing.

(3) If the accused refuses to plead, the judge shall enter a plea of "not guilty" on his/her behalf.

Under subsection (b), appellant was arraigned in open court and without delay. Under subsection (c) (1), appellant was informed of the offense in the order to show cause which was issued by Chief Judge Bemer and read the rights set forth in subsection (c) (2). As required by subsection (c) (2), appellant was not given an opportunity to exercise his right to a trial by jury. As required under subsection (e), appellant was not called upon to plead to the charge Criminal Contempt charge and a trial was immediately held.

This Court recognizes the tribal court attempted to proceed and deal with the August 29, 1989 incident as an exercise of its inherent power. This is only proper for the immediate punishment of a contempt of court which occurs in the presence of the tribal judge during a proceeding in a tribal courtroom. The tribal court recognized the August, 1989 incident as criminal in nature and a violation of III CCOJ 410, and yet, proceeded in disregard of proper criminal procedure.

In addition, the procedure at the September 1, 1989 hearing was confusing because the tribal court improperly shifted the burden of proof under III CCOJ 103. Judge Boyd stated, "So the burden is on the Defendant to show the Court why he should not be held in Contempt for his *actions* on that date and time." (Hearing Transcript p.3, 1.9—11.) Title III CCOJ 103 reads in part as follows:

"(a) The Tribes have the burden of proving each element of an offense beyond a reasonable doubt.

"...."

This procedural error or irregularity denied appellant a basic fundamental right and equal protection under the law. In addition to the above, there were other procedural errors or irregularities evident from the record.

During the hearing and after the resulting conviction, it is evident the tribal court denied appellant other rights specifically provided for in II CCOJ 501, 502, 506, 507 and 604. Under II CCOJ 501 appellant was denied his rights to confront the witnesses against him and to demand a trial be an impartial jury since the offense was punishable by imprisonment. This section reads in full as follows:

> "No person shall twice be put in jeopardy for the same offense, nor shall he/she be compelled in any criminal case to be a witness against himself/herself. The accused shall have the right to speedy and public trial, the right to be confronted with witnesses against him/her, the right to assistance of counsel at his/her own expense and the right to demand trial by an impartial jury if the offense, or combination of offenses, charged is punishable by imprisonment." (Emphasis Added.)

At the September hearing, appellant was not confronted with all of the witnesses against him, and was denied compulsory process for obtaining witnesses in his favor as is required by II CCOJ 501 (and 25 USC 1302(6)). Appellant was denied compulsory process when the chief complaining witness, Judge Boyd, refused and was not required to respond to the summons. The applicable portion of the transcript reads:

Judge Boyd:	Well . . . we were scheduled for 11 . . and his witnesses were scheduled for 11 so . . . I don't see no reason to delay it for a half an hour. For the witnesses that were summoned, they should be in the Courtroom, if they were summoned. Mr. Reum, could you round up those individuals that were summoned?
Leighton Reum:	Who were they, Your Honor.
Judge Boyd:	They were Edith Adams, Cheryl Culbertson, Clayton Reum . . . anybody else?
Melissa Melton:	Yourself, Your Honor.
Judge Boyd:	Well, the Court will not respond to that summons since I'm the sitting Judge." (Hearing Transcript, p.3, 1.18 to p.4, 1.5.)

The record reflects appellant attempted to exercise this right when on September 1, 1989 and when appellant's counsel filed a request for summons to be issued to Edith Adams, Lay Counselor Clayton Reum, Cheryl Culbertson and Terry Boyd. The attempt on September 1, 1989 resulted in the above exchange. In addition, the record does not reflect a summons was prepared for and not issued to Judge Boyd as would be required under II CCOJ 502. Title II CCOJ 502 reads in part as follows:

> "(a) Upon reflects of the defendant or upon the Court's own initiative, the Court shall issue subpoenas to compel the testimony of witnesses, or the production of books, records, documents of any other physical evidence relevant to the determination of the case and not an undue burden on the person possessing the evidence. An employee of the Court may act of behalf of the Court and issue subpoena which have been signed by a trial judge and which are to be served within the confines of the Reservation. (Emphasis Added.)
>
> "...."

Because Judge Boyd was the chief complaining witness against appellant who had a right to confront the witnesses against him, and Judge Boyd refused to respond to the summons, his actions could be deemed contempt of court. Title II CCOJ 504 reads as follows:

> In the absence of a justification satisfactory to the Court, a person who fails to obey a subpoena may be deemed to be in contempt of court.

The tribal court consists of one (1) chief judge and two (2) associate judges and either the chief judge or other associate judge could have heard the matter. Therefore, Judge Boyd cannot justify his failure to obey a summons and testify since he was the chief complaining witness and available to testify.

Title II CCOJ 506 deals with trial procedure. The specific portions of this section which were not followed, and therefore, denied appellant his rights read as follows:

> "...
>
> "(c) All testimony of witnesses shall be given orally under oath in open court and subject to the right of cross-examination. Documentary and tangible evidence shall also be received in open court and available to the defendant.
>
> "(d) The defendant is presumed to be innocent. The prosecution has the burden of proving the defendant's guilt beyond a reasonable doubt, including the facts that a crime has actually been committed, and that the defendant committed it with the requisite intent, when intent is an element of the offense.
>
> "(e) The prosecution shall present its case first, followed by the case of the defendant. If rebuttal is required, the prosecution shall proceed first, followed by the defendant.
>
> "(f) At the conclusion of the evidence, the prosecution and defendant each in turn shall summarize the proof and make final argument, with the prosecution having the right of final rebuttal.
>
> "...."

First, under subsection (c) all the testimony of witnesses was not given under oath and subject to cross—examination when Judge Boyd refused to testify. Second, under subsection (d), defendant was arbitrarily stripped of the presumption of innocence. Third, under subsection (e) the prosecution did not present its case first followed by appellant. Finally, under subsection (f), at the conclusion of the evidence, neither the prosecution or appellant were permitted to summarize the proof. In fact, the confusion of Judge Boyd as to his roles as judge and supervisor and the exercise of the inherent power of the tribal court and proper procedure of a criminal matter is evident throughout the record. The following will briefly discuss Judge Boyd's confusion.

In his August 29, 1989 letter to Chief Judge Bemer, Judge Boyd stated, "I don't feel that his supervisor should be in a position to be verbally assualted ((sic) in public." At the September 1, 1989 hearing, Judge Boyd stated the following:

"You may step down. This is and Order to Show cause why he should not be held in contempt for disobedience or resistance to any process, order, subpoena, warrant or command of the Court. There seems to some confusion as part of Counsel for the Defendant, as to what constitutes a command, if being a Judge and the matter involves a juvenile which was part of a court proceeding. It was an order of the Court. from the bench Judge . .And the Defendant himself, said that he received an order. Just because a Judge steps out of his (sic) office and . . it does not change his status from Judge to supervisor . . . when I step outside the building, it does not change my status as Judge. When I go home, it doesn't change my status as a Judge. I'm still an officer of this Court. And any order I issue. whether it is written or oral, is a order of this Court. Any matter that involves this Court ... and kind of judicial proceedings, whether it be adult or juvenile, it seems we have some faulty memories involving one particular clerk her . . . Mr. First, seems to be mishearing or changing direction of the inquiry . . seems to have changed his statements somewhat but that still does not resolve him from that fact that he offered resistance to a verbal order of this Court . . and being an officer of this Court, he has no excuse for that attitude that he's displayed or the actions that he has displayed in that case. At this point, the Court will find the Defendant in contempt for resistance or disobedience to a command of the Court. As a sentence of this Court, the Defendant will serve 15 days confinement . . but due the circumstances, his actions seem to have caused him enough grief. He has been terminated from his position. I assume if he's incarcerated in the jail, there, being a formal law enforcement officer, he might be subject to physical injury. I've taken those into consideration, the Court will in lieu in jail time, accept an apology from Mr. First directed to the bench. And this will be . . the matter closed. Do you have a problem with that?" (Emphasis Added.) (Transcript, p.21, 1.3 to p.22, 1.21.)

In his August 29, 1989 letter, Judge Boyd specifically acknowledged he issued an order to appellant as his supervisor. In that letter, Judge Boyd also acknowledged that upon checking whether his order was obeyed and the juvenile delivered, he determined it had been. Judge Boyd to make statements that his status as a judge is not changed whether in the building or not or at home is correct. However, Judge Boyd is incorrect in stating that any order he issues when off the bench is an order of the court and is an arbitrary extension of the power of a tribal judge and their inherent power to punish for contempt. Any alleged violation of III CCOJ 410 outside of the tribal courtroom must be punished only after strict adherence to criminal procedure as hereinabove set forth and in the CCOJ.

The last two (2) rights which appellant was denied are found in II CCOJ 507 and 604. Title II CCOJ 507 requires that appellant, because he was accused of a crime punishable by confinement, be granted a jury trial upon his request at the arraignment. This section reads in applicable part as follows:

"(a) Any person accused of a crime punishable by imprisonment shall be granted a jury trial, upon his/her request made at time of arraignment. A jury shall consist of at least six (6) members of the Tribe selected at random from a list of eligible jurors prepared each year by the Court.

"...."

The transcript of the arraignment does not reflect Judge Boyd giving appellant any opportunity to request a jury trial. Judge Boyd proceeded to hear the matter and found appellant guilty of Criminal Contempt.

After imposition of Judge Boyd's judgment of guilty, appellant was entitled to appeal the same. Title II CCOJ 604 requires the Court to notify appellant of this right. This section reads as follows:

> "Following the imposition of judgment of guilty, except upon a plea of guilty, the Court shall inform the defendant that he/she has a right to appeal. If the defendant requests, the clerk of the court shall prepare and file a Notice of Appeal on behalf of the defendant. The defendant, or the clerk of the court filing on his/her behalf, must file the Notice of Appeal within fifteen (15) working days of the judgment."

The transcript does not reflect appellant was notified of this right.

In conclusion, there were numerous procedural errors or irregularities as a result of the Criminal Contempt charge and at the hearing on September 1, 1989. These procedural errors or irregularities constitute serious violations of appellant's rights under the ICRA and the CCOJ and denied appellant equal protection of the Tribes' laws. Therefore, appellant is entitled to relief from imposition of the judgment of guilty by the tribal court.

II.

> Whether tribal judge with personal knowledge of the incident August 29, 1989 and being the chief complaining witness erred in denying appellant's motion to disqualify himself.

On August 31, 1989, appellant filed a document requesting the disqualification of all sitting Judges and a continuance of the hearing on the Criminal Contempt charge. Judge Boyd denied the requests. On August 31, 1989, appellant filed a similar document with this Court which was also denied, since pursuant to I CCOJ 202, jurisdiction extends only to final orders and judgments of the tribal court.

At the September 1, 1989 hearing, appellant's counsel renewed the motion and requested the sitting Judge disqualify himself. This portion of the transcript reads as follows:

Melissa Melton:	Yes. Your Honor. I have some witnesses to call but before I do. I have a Motion for the Court.
Judge Boyd:	Okay!
Melissa Melton:	My client asked me to request that the Court move that the sitting Judge disqualify himself because he has personal knowledge of this and he feels that the Court could not render an unbias (sic) or unprejudice (sic) decision.
Judge Boyd:	Okay! The request is denied, basically, because I'm the Judge that the contempt happened in front of and since I have direct knowledge of it and the Court has that authority to punish for contempt in its presence and obviously, if I have another Judge sit on it, he's not aware of the contempt in my prescense (sic) so that request is denied.

Melissa Melton:	Thank you, Your Honor. (Transcript, p. 5, 1.2—17.)

Title I CCOJ 307 specifically addresses when a justice or judge shall be disqualified. By Judge Boyd's own admission of personal knowledge of the incident, he erred in denying appellant's request for a disqualification of himself under I CCOJ 307. This section reads in full as follows:

> "A justice or judge shall be disqualified in any proceeding in which his/her impartiality might reasonably be questioned, in which he/she has any personal bias or prejudice concerning any party, in which he/she or a member of his/her or a member of his/her immediate family might be a witness, has any interest, or has any personal knowledge of any disputed evidentiary facts concerning the proceeding, or has acted or is acting as a lawyer or lay counselor in the proceeding, or in which he/she might otherwise appear to be biased or prejudiced. The Lawyer Judge must determine all disqualifications in the Tribal Court. In cases where the Lawyer Judge disqualifies himself/herself, the case shall be assigned, by the Chief Judge, to a judge other than the Lawyer Judge. As used in this Section, immediate family shall include spouses, grandparents, parents, children, grandchildren, brothers, sisters and in—laws." (Emphasis Added.)

In addition to Judge Boyd's personal knowledge of disputed evidentiary facts, it was evident throughout the transcript that his impartiality might reasonably be questioned. the following is an example during the cross—examination of one of appellant's witnesses by the prosecution.

Daniel Schauer:	And when Mr. Boyd is in the building, what is he referred to as?
Edith Adams:	Judge Boyd.
Daniel Schauer:	And to your knowledge, was he acting in the capacity of his office?
Melissa Melton:	I object. The client has already stated twice that he was not acting in an official capacity so further questioning on this line would be harassment of the witness.

Judge Boyd:	Well, it's kind of ridiculous. I'm the sitting judge here and it happened in my presence. Obviously, you don't understand the nature of the charge. It's . . I'll read it to you again to refresh your memory. For Criminal Contempt, Disobedience to any process, order, subpoena, warrant or command of the Court." Also, I would like to advise Ms. Adams here of Section 409. Perjury . . *"A* person who in any official proceedings of the Assiniboine and Sioux Tribes makes a false statement or interpretation under oath or equivalent affirmation or swears or affirms the truth of a statement previously made, when the statement is material, and the Defendant does not believe it to be true, is guilty of perjury. Falsification is material if it could have affected the course or outcome of the proceeding." Perjury is a Felony. At this time, Ms. Adams, do you wish to stand by your statements that you made? (Emphasis Added.)
Edith Adams:	Yes, I do.
Judge Boyd:	Okay. I'm directing the Prosecutor to investigate this matter and Ms. Adams, here . . . to be charged with perjury.
Edith Adams:	I have everything written down.
Daniel Schauer:	I didn't hear you.
Edith Adams:	I said I will write down everything again that happened that day.
Judge Boyd:	Will you submit to a polygraph exam? Or we'll make that determination at a later date. We can refer this to another Judge then. Does anybody have any further questions?

In the cross—examination, the witness, Edith Adams, was informed by Judge Boyd he did not believe her testimony and that he was going to have her investigated and charged with perjury. In addition to having a chilling effect and intimidating the witness, this exchange demonstrates the obvious. Judge Boyd's mind was made up as that appellant was guilty of the Criminal Contempt charge and regardless of the law and any testimony presented.

In conclusion, Judge Boyd had personal knowledge of disputed evidentiary facts. Judge Boyd's impartiality would reasonably be brought into question when as a result of the incident he recommended termination of appellant's employment to Chief Judge Bemer who then issued the notice of termination of employment. Judge Boyd's impartiality would also reasonably be brought into question when by his own statements witnesses testifying on behalf of appellant were committing perjury. Therefore, Judge Boyd should have removed himself from hearing the case and appellant is entitled to relief from the judgment of guilty of Criminal Contempt entered by Judge Boyd.

III.

Whether the Tribes sustained its burden of proof and appellant was properly found guilty of Criminal Contempt for the August 29, 1989 incident.

Appellant was charged with Criminal Contempt, a violation of III CCOJ 410. In charging appellant with Criminal Contempt, under III CCOJ 103(a), the Tribes had the burden of proof at the September 1, 1989 hearing. At the hearing, the Tribes did not or would they be able to sustain their burden of proof.

Judge Boyd alleged appellant violated III CCOJ 410(b). The facts of the August 29, 1989 incident make it impossible for the Tribes to sustain their burden of proof. First, Judge Boyd was acting in his supervisor capacity during the incident which

he acknowledged in his August 29, 1989 letter. Second, Judge Boyd requested appellant transfer an individual from detention to the IHS clinic, and although there was an exchange or words, Judge Boyd admits in the same letter that he checked at the clinic and appellant had delivered the individual.

The testimony at the September 1, 1989 hearing in addition to Judge Boyd's letter demonstrates the Tribes failed to sustain their burden of proof. First, all of the witnesses were presented by appellant. Second, the appellant presented sufficient evidence to support a defense that he did not commit the offense of Criminal Contempt when Judge Boyd was in fact acting as his supervisor and he did deliver the individual to the clinic as requested. Therefore, the Tribes would be unable to meet their standard of proof and prove beyond a reasonable doubt that appellant committed Criminal Contempt.

In conclusion, the Tribes failed to sustain its burden of proof. Therefore, appellant's judgment of conviction is reversed. Because II CCOJ 501 states, "No person shall twice be put in jeopardy for the same offense...", this matter should be dismissed.

IT IS THE UNANIMOUS DECISION OF THIS COURT TO REVERSE THE JUDGMENT OF CONVICTION ENTERED AGAINST APPELLANT ON SEPTEMBER 1, 1989 ON THE CHARGE OF CRIMINAL CONTEMPT. IT IS FURTHER ORDERED ANY CRIMINAL PROCEEDINGS AGAINST HIM FOR THE AUGUST 29, 1989 INCIDENT ARE DISMISSED WITH PREJUDICE.

DATED this _____ of October, 1989.

BY THE COURT OF APPEALS:

_____
ARNIE A. HOVE, Chief Justice

_____
GARY JAMES MELBOURNE, Associate Justice

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FLOYD G. AZURE, Associate Justice