IN THE SUPREME COURT
OF THE
MISSISSIPPI BAND OF CHOCTAW INDIANS

PIERCESON FARVE **APPELLANT**

vs. **CAUSE NO. SC 2014-07**

MISSISSIPPI BAND OF CHOCTAW INDIANS **APPELLEE**

OPINION AND ORDER

(Per Curium) This matter comes before the Court on direct appeal filed by Appellant Pierceson Favre following his May 29, 2014, conviction in the Choctaw Criminal Court on two counts of a four-count complaint. The charges stemmed from a February 4, 2014, incident in the Tucker Community. Defendant/Appellant Pierceson Favre was tried in a bench trial presided over by Judge Christopher Collins, a nontribal member contract judge. At the conclusion of the Criminal Court proceedings, Judge Collins found the defendant guilty on one count of Resisting Lawful Arrest, a class B or C offense, and one count of Disorderly Conduct, a class C offense. Judge Collins further found Defendant Favre not guilty on two counts of Aggravated Assault Domestic, class A offenses. The court sentenced defendant to serve 60 days in jail on the Resisting Lawful Arrest charge, and to serve a consecutive 30-day jail sentence on the Disorderly Conduct conviction. In total, defendant was ordered incarcerated for 90 days. Additionally, he was ordered to pay a total of $350 in fines. The Appellant through counsel then filed on June 2, 2014, his Motion to Reconsider, or Alternatively, for a New Trial on the two charges of conviction. That motion was denied by Judge Collins on June 27, 2014. Defendant then filed his Notice of Appeal July 27, 2014. He was granted release from incarceration pending the outcome of his appeal by the Chief Justice of the Tribal Supreme Court that same date. The case has been fully

briefed by both parties, and oral arguments were held June 23, 2015; at the conclusion of which the case was submitted. This opinion and order follows.

Factual Background

Based on a reading of the trial transcript, it is difficult for this Court to discern with any degree of certainty precisely what happened, and the sequence of events that took place that day, and in what order. Suffice it to say that Tribal Police Officer Joey Cotton was dispatched on a "gun call" to the home of Sheralyn Farve in the Tucker Community. Upon arrival, Officer Cotton encountered Pierceson Farve sitting on a picnic table. Officer Cotton issued a series of commands to Farve, telling him variously to show his hands, stand up, go down, and put his hands behind his back so he could be handcuffed. At no point does the record reflect that Officer Cotton duly advised the cursing Farve that he was under arrest. (Choctaw Rules of Criminal Procedure Rule 6 (c) requires that "At the time of making the arrest, the arresting officer or other person shall advise the person that he is under arrest and the basis or charge for which the arrest is being made.") *Mississippi Band of Choctaw Indians vs. Donovan Allen,* Cause No. SC 2013-03 (2014). Ultimately, Officer Cotton forcibly took the Defendant to the ground, put his body weight on top of him, as did an assisting officer, and Officer Cotton twice tasered the cursing and resisting Farve before he would come into compliance and submit to handcuffing. Afterwards, Officer Cotton saw shotgun shells lying on the picnic table. Another officer, or officers, recovered a .12 gauge shotgun inside a parked truck and another gun was found inside the house. Based on the incident described above, Pierceson Farve was arrested, transported, and ultimately charged.

Issues presented

The brief of appellant raises three issues on appeal:

1. The presiding trial judge was not qualified to hear the case against appellant.
2. Choctaw Tribal Code section 4 resisting lawful arrest is unconstitutional.
3. The verdict is against the weight of the evidence presented.

Only after the May 29, 2014, trial and conviction of Defendant Farve did his trial attorney file his June 2, 2014, Motion to Reconsider, or Alternatively, For a New Trial, raising for the first time issues numbered one and two of this Appeal. Issue number 3, of course, was raised at trial's end.

This Court's opinion shall address primarily and principally Appellant's Issue Number one since it is dispositive of the case.

Arguments and Analysis

Though not mentioned in briefs of either party, at oral argument the Court inquired as to whether or not CTC § 1-3-3 is jurisdictional in nature. We turn first to that basic question because this Court holds that the answer to that question is controlling of the outcome and determination of this appeal.

PART 1

Code § 1-3-3 is Jurisdictional

Establishment of Courts: The Revised Constitution and By-laws of the Mississippi Band of Choctaw Indians' Article VIII is that portion set forth **the Powers and Duties of the Tribal Council.** Article VIII, Sec.1 (m) confers the Tribal Council with power and duty "[t]o establish and enforce ordinances * * * providing for the * * * order and the administration of justice; * * * establishing a tribal court; and defining the powers and duties of that court." Subsection (p) of that same title and section also lists among the constitutional powers of the Tribal Council the authority "To pass any ordinances and resolutions necessary or incidental to the exercise of any of the foregoing powers and duties." The Tribal Council has done so.

Structure of Courts: CTC Title 1, Chapter 2, headed "**Jurisdiction**" in its initial § 1-2-1 declares it "a matter of Tribal policy and legislative determination by the Tribal Council * * * that the Tribe provide an effective means of redress * * * * [that] extends to authorize the prosecution of criminal offenses committed within Tribal jurisdiction by Indian offenders." Acting within their constitutional mandate and statutorily declared Tribal Policy, the Tribal Council by CTC § 1-3-1 has established a Choctaw Tribal Court System consisting of their four separate lower courts:

Civil Court, Criminal Court, Youth Court, and the Iti-Kana-Ikbi Court, which is also known as the Peacemaker Court. Then, CTC § 1-3-2 establishes a Choctaw Supreme Court. Finally, CTC Title 1's Jurisdiction Section 2 at § 1-2-5 headed "**General Subject Matter Jurisdiction and Limitations,**" at subsection (1) pertinently reads: "Subject to any contrary provisions, exceptions, or limitations contained in * * * this Tribal Code, the Courts of the Mississippi Band of Choctaw Indians shall have jurisdiction * * * over all offenses occurring within the jurisdiction defined by the Tribal Code." Collectively, these constitutional and statutory provisions above form the bases for the structuring of the court system.

Judicial Staffing of Courts: As regards the staffing patterns and the qualifications of judges of each of the courts, the Tribal Code is very restrictive and also very explicit as to who may and who may not serve in their respective courts. §1-3-3(1) sets out seven requirements needed to serve in three of the separate lower courts: Criminal Court, Youth Court, and the Iti-Kana-Ikbi (peacemaker) Court. Notably, onlythe first six requirements may be waived by the Chief, and the Tribal Council may confirm such waiver. As regards the seventh requirement that any judge appointed to service in the tribal criminal court be an enrolled member of the tribe, it cannot be waived.

§1-3-3 Qualifications of Judges

(1) No person shall be eligible to be a judge assigned to the Criminal Court, the Youth Court or the Iti-Kana-Ikbi Court unless he or she:
(a) is at least thirty (30) years of age;
(b) has successfully completed at least two (2) years of accredited college-level course work;
(c) has never been convicted of a felony;
(d) is of good moral character and integrity;
(e) can read, write and understand the English language;
(f) is familiar with the provisions of the Tribal Code, Choctaw Court procedures, federal law applicable to the Choctaw Indian Reservation, Choctaw customs, and is capable of preparing the papers and reports incidental to the office of the judge; and
(g) is an enrolled member of the Tribe.
The Chief may waive any provision in §1-3-3(1) of the Tribal Code except subpart (g) and the Tribal Council may confirm with such waiver if in the Chief's discretion, he finds such to be in the best interest of the Tribe. [Emphasis and italics added.]

CTC § 1-3-3(2), the next subsection, allows a different set of qualifications for tribal civil court judges. It provides:

(2) No person shall be appointed as a judge in the Choctaw Civil Court unless he or she has the qualifications listed above, excepting the ability to speak and understand the Choctaw language and membership in the Tribe, and is an attorney who shall have graduated in good standing from an accredited law school and be duly admitted to the practice of law in the State of Mississippi.

Finally, CTC § 1-3-3's subsection (3) requires a specific screening and selection process prior to their appointment and assignment to any of the tribal court positions or systems. It reads:

(3) No person shall be confirmed as a judge in **any** court until his or her qualifications and competence have been examined by the Committee on Judicial Affairs and Law Enforcement of the Tribal Council and a written report of such examination has been filed with the Tribal Council.

The role of tribal membership in shaping the jurisdictional powers of tribal courts has been prominent throughout the nation's history, and jurisdictionally the tribal criminal courts are no exception. For instance, the prosecution of criminal offenses committed within Tribal jurisdiction by non-Indian offenders was deliberately left out of Choctaw Tribal Code Section 1-2-3 headed " Personal Jurisdiction," for it deliberately reads: "(b) any Indian person for any charge or criminal offense prohibited by the Tribal Code or other ordinance of the Tribe when the offense is alleged to have occurred within the Choctaw Indian Reservation." This is because personal jurisdiction over offenses committed by non-Indians – previously exercised by some tribal courts prior to 1978 -- became exempt as a result of the U S Supreme Court's ruling in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). That decision stated that Indian tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, and hence may not assume such jurisdiction unless specifically authorized to do so by Congress. For many years, Congress chose not to grant authorization. That situation recently changed February 28, 2013, when Congress passed The Violence Against Women Reauthorization Act, *Pub. L. No. 113-4, tit. IX, 127 Stat. 54, 118–26.* Section 904 of VAWA 2013 which recognizes inherent tribal authority to prosecute non-Indians accused of domestic and dating violence, It therefore partially reverses the Supreme Court's rejection of tribal courts' criminal jurisdiction over non-Indians in *Oliphant v. Suquamish Indian Tribe, supra.* Important, too, "By redefining the contours of tribal authority over non-Indians, it represents a reclamation by Congress of the lead role — occupied by the [US Supreme] Court for more than three decades — in balancing tribal sovereignty and constitutional values." 127 Harvard Law Review No. 5, p. 1509 at p. 1511

(March, 2014). The Mississippi Band of Choctaw Indians is now in the process of determining whether to broaden its criminal jurisdiction.

Another Tribal Code example can be seen where a comparable issue – tribal courts' jurisdiction over members of other tribes -- was raised two years after *Oliphant* in a case called *Duro v. Reina*, 495 U.S. 676 (1990). Once again the United States Supreme Court concluded that Indian tribes could not prosecute Indians who were members of other tribes for crimes committed by those nonmember Indians on a different tribes' reservations. Following the High Court's ruling that time, Congress stepped in and amended a section of the Indian Civil Rights Act, 25 U.S.C. § 1301, to include the power to "exercise criminal jurisdiction over all Indians" as one of the powers of self-government. For that reason Choctaw Tribal Code Personal Jurisdiction Section 1-2-3(2)(b) presently states that Choctaw Tribal Courts shall have jurisdiction over: "(b) ***any Indian person for any charge of criminal offense*** prohibited by the Tribal Code or other ordinance of the Tribe when the offense is alleged to have occurred within the Choctaw Indian Reservation...." Both the *Oliphant* and the *Duro v. Reina* cases underscore the importance of tribal governments' addressing tribal membership as part of their defining the scope and limitations to exercises of tribal courts' jurisdictions.

On the other side of the issue of state versus tribal jurisdiction over Indians, of course, the Mississippi Band of Choctaw Indians has twice played a defining state and national role upon the jurisdiction limits upon state jurisdiction exercises over Choctaw reservation lands, Choctaw Tribal Courts, and members of Indian tribes – including their children - of the Choctaw Reservation. See e.g, *John v. State*, 347 So.2d 959 (Miss. 1977), *rev 'd & rem 'd.* 437 U.S. 634, 98 S.Ct 2541, 57 L.Ed2d 489 (1978). *U.S. v. John*, 560 F.2d 1202 (5th Cir. 1977); *rev 'd & rem 'd.* 437 U.S. 634, 98 S.Ct 2541, 57 L.Ed2d 489 (1978); on remand 587 F.2d 683 (5th Cir. 1979); *cert den.n*441 U.S. 295, 60 L.Ed2d 399, 99 S.Ct 2036 (1979). and *In the Matter of B.B. and G.B., Minors*, 511 So2d 918 (Miss. 1987); *rev 'd & rem 'd sub nom Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 104 L.Ed2d 29, 109 S.Ct. 1597 (1989). The *John* cases were litigated in courts at all state court levels of the State of Mississippi, and also at all federal court levels of our nation.

For the above discussed reasons, this Court holds that the requirement of CTC §1-3-3(1)(h) on the question of whether non-tribal member judges are duly qualified to preside over the Choctaw Criminal Court on a regular and ongoing basis – such as was the case here - is clearly a question that is jurisdictional in nature. Given too, that the core objection Appellant raises on this appeal is that "[t]he presiding trial judge was not qualified to hear the case against Appellant," this Court considers it a jurisdiction challenge in relation to the Choctaw Tribal Criminal Courts and therefore-, the applicable Standard of Review is *de novo.*

PART 2

Trial Court's Opinion and Order

Having answered the question as to whether Code § 1-3-3 is jurisdictional in the affirmative, our analysis turns next to a review and response to the lower trial court's Opinion and Order.

Opinion Review: As regards Defendant Farve's "Motion to Reconsider, or Alternatively, For a New Trial," Judge Collins issued a June 27, 2014, written "Order Denying Relief From Judgment." In his ruling, the lower court found that the Tribe's arguments as to the lack of timeliness in defense counsel's raising its objections and his lack of affidavits regarding Farve's motion were well-taken. Furthermore, Judge Collins wrote that "the issue raised by defendant challenging qualifications of a judge pursuant to CTC § 1-3-3 (g)" warranted further address by the Court." The balance of the two-page Trial Court Order reads as follows:

> CTC § 1-3-3 (g) provides, "is an enrolled member of the Tribe" as a requirement for a judge serving in the Criminal Court. Yet, CTC § 1-3-6 Hearing of Cases During Absences or Vacancies directs "(1) In the event one of the courts of the Choctaw Court System is without a judge due to absence or vacancy the following rules shall govern: . . . . (b) a judge of the Civil Court shall preside in the criminal court."
>
> The Domestic Violence Court of the Tribe was established pursuant to a federal grant which provided for funding of this court through September 30, 2014. An enrolled member of the Tribe was duly appointed to serve as

> Judge for the Domestic Violence Court, a part-time position. Subsequently, after approximately a year of service to the Domestic Violence Court, said part-time judge was appointed to the full time position of Criminal Court Judge. During the period of time that the Domestic Violence Court functioned as an independent court the docket became quite voluminous. **A heavy docket and a limited window of service with a terminus a few months later were challenging issues that the Department of Family and Community Services considered in making recommendations to the Tribal Chief for the hiring of judges to fulfill the obligations of the federal grant.**
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> On July 16, 2013 Resolution CHO 13-107 of the Tribal Council of the Mississippi Band of Choctaw Indians was duly adopted. This Resolution authorized a contract with the Court to serve as an Associate Judge with the Choctaw Civil Court Division. This contract authorized by the Tribal Council further assigned that among services to be rendered by the Court would be "to serve as on-call judge on a rotational basis for criminal cases." It is the opinion of the Court that the judicial vacancy in the Domestic Violence Court is the type of vacancy contemplated by CTC § 1-3-6 and by Resolution CHO 13-107. [Emphasis added.]

In summary, the trial judge denied Appellant's motion because: (1) any objections were waived because they were not timely raised; (2) the Department of Family and Community Services (DFS) needed two criminal court judges quickly because grant time was running out and fast hiring action was required to meet program grant requirements; (3) a growing criminal case backlog needed eliminating; (4) DFS decided the fastest available judges were the Civil Court judges already under part-time contracts which it determined might be modified; and (5) it was reasoned that CTC § 1-3-5 permitting civil court judges to hear criminal cases during absences or vacancies allowed their criminal court service by the Tribal Coouncil's passage of Resolution CHO 13-107 approving contract modifications. There is no indication the contract addendum was ever submitted to the Tribal Council for approval.

Analysis

Overview: Stated simply, the lower court's rationale that the Department of Family and Community Services' needs to fulfill its federal grant obligations somehow justified avoiding the § 1-3-3 (1) (g)'s restriction is purely an argument of expediency lacking legal basis.. The performance requirements of no Executive Branch tribal program or agency can ever trump the Article VII Tribal Constitutional investiture powers and duties of the Tribal Council including

their power, "(m) To establish and enforce ordinances * * * providing for the * * * order and the administration of justice; [and] * * * establishing a tribal court; and defining the powers and duties of that court." Neither can the Department of Family and Community Services exigencies justify their causing the avoidance of compliance with CTC' § 1-3-3 (g)'s clearly non-waivable mandate that "(1) no person shall be eligible to be a judge assigned to the criminal court * * * nless he or she: * * * (g) is an enrolled member of the tribe." The performance needs of no Executive Branch tribal program or agency can ever trump those Article 8 tribal constitutional investitures of powers and duties unto the tribal Council.

Hearing of Cases During Absences or Vacancies

This Court's review finds that the stated rationale of the lower court order claiming that this prosecution fell within the absences or vacancies exception by which non-tribal member judges may regularly preside over a criminal case docket is also flawed. The manner employed to assign non-tribal member judges to preside over criminal cases over an extended period of time simply does not meet the CTC § 1-3-7 criteria of being due to an absence or vacancy contemplated by CTC § 1-3-6.

Absence or Vacancy: As previously mentioned, CTC § 1-3-6 says that a judge of the Civil Court shall preside in the Criminal Court in the event the court is without a judge due to absence or vacancy. Because CTC § 1-3-6 is immediately followed by CTC § 1-3-7 addressing situations where judges on their own motions recuse themselves and situations where an affidavit of prejudice results in a judge's disqualification from presiding over a given case, this Court narrowly reads self-recusal as a vacation of the bench and a judicial disqualification by a party litigant as forcing a judge's absence from his/her assignment to a given case. Those circumstances primarily justify applying CTC § 1-3-6 for an assignment of a civil court judge to the criminal court.

Naturally there are other absence or vacancy situations than by § 1-3-6's recusal or disqualification that result in a judge being unavailable to preside over a case or docket for an

individual case or occasional or brief periods of time. Those other judicial absences or vacancies likely contemplated by CTC § 1-3-6 might reasonably include absences due to sickness, medical treatment, vacation, and requisite attendance at continuing judicial education programs. Vacancy likely anticipates those situations such as death, incapacitation, major injury or extended illness, removal from office, and resignation. None of these occurred here.

Vacancy of judicial office, therefore, if true force and effect is to be given to the Code requirements and restrictions placed by CTC § 1-3-3(g) requiring that only a tribal member judge be appointed over any tribal criminal court, should be filled without delay and as immediately as possible following due recruitment, selection, and approval by the Tribal Council. This is the only Constitutional way for fulfilling Article VIII's Powers and Duties of the Tribal Council subsection (p) "To pass any ordinances and resolutions necessary or incidental to the exercise of any of the foregoing powers and duties." It is also the same procedure to exercise Constitutional powers and duties referred to in Article VIII, subsection (m)'s wording "[t]o establish and enforce ordinances governing the conduct of tribal members; providing for the maintenance of law, order and the administration of justice * * * and defining the powers and duties of that court * * * *." Finally, it is the means and mechanism which ensures that only tribal members become appointed to routinely preside over Tribal Criminal Courts.

Premises considered, the lower court judge's theory that CTC § 1-3-6 validated his presiding over Defendant Pierceson Farve's criminal trials was erroneous. As discussed next, the absence or vacancy interpretation was not simply erroneous in theory: it was also incorrect factually.

Factually incorrect: The record in this case is largely silent - and certainly incomplete - as to how long the non-tribal member Civil Court judge actually served part-time "on a rotational basis" to fill the special Domestic Violence Court Judge's position. In December of 2013, the Hon. Rita Jones, a practicing attorney and an enrolled member of the Mississippi Band of Choctaw Indians, who had been filling the part-time Domestic Violence Court Judge position, was appointed to be a full-time Criminal Court judge and was taken off the special Domestic Violence Court bench. Judge Jones' formerly part-time Domestic Violence Court Judge position

was then replaced with a full-time judicial position. This position change was done, the lower court Judge found, because "[a] heavy docket and a limited window of service with a terminus a few months later were challenging issues that the Department of Family and Community Services considered in making recommendations to the Tribal Chief for the hiring of judges to fulfill the obligations of the[ir] federal grant." However, the full-time judicial position was filled by the appointment of two non-tribal member Civil Court judges to each preside on a 20-hour weekly part-time basis in lieu of the appointment of one full-time tribal member judge. In combination, therefore, these actions constituted an abolishing of the half-time position and the creation of a new Criminal Court position. The CTC § 1-3-3(g) requirement that an enrolled member of the Tribe serve over such courts simply cannot be circumvented that way. There was neither an absence nor a vacancy, but the creation of a new position. This Court's view has since been validated when a year later on December 23, 2014, the appointment of the Hon. Tim Taylor, an attorney and an enrolled member of the tribe, to fill that full-time Domestic Violence Court position, took place and became effective December 29, 2014.

The stated intention of these appointments was in order to meet the September 15, 2010, Coordinated Tribal Assistance Solicitation (CTAS) Grants Management System (MS) Award 2010-TW-AX-0023 and to clear out a serious backlog of special Domestic Violence Court cases prior to the grant's scheduled expiration a few months later. The contract addendum stated it would become effective December 1, 2013, and terminate September 30, 2014, -- a 10-month span of time. The lower court's order acknowledges that a heavy docket and limited remaining grant period were the challenging issues driving the Department of Family and Community Services to make these hiring recommendations to the Tribal Chief – in effect, to short circuit the Tribal Code mandated judicial appointment process and ostensibly to justify getting around the CTC § 1-3-3(g) requirement that the judge be an enrolled tribal member. Ironically, though, it seems this urgent necessitation disappeared. During the June 23, 2015, oral arguments, it was mentioned that the term of that grant had been extended and was still ongoing -- a nine-month additional span of time. Not until at or about the end of December, 2014, or early January, 2015, the Hon. Tim Taylor, also a practicing attorney and an enrolled member of the tribe, was

ultimately appointed to serve as a full-time Domestic Violence [criminal] Court judge to replace the two civil court judges who had been fulfilling those duties.

The other reasons provided by the lower court for "Denying Relief from Judgment" were specifically, the lack of timeliness in defense counsel's raising its objections, and his lack of affidavits regarding Defendant Farve's motion. This opinion shall first address the lack of affidavits regarding Defendant Farve's motion and then the lack of timeliness finding. Both interpretations are incorrect.

Lack of Affidavits

Presumably, when the lower court judge wrote of lack of affidavits regarding Farve's motion, it was in relation to the claim that "[t]he presiding trial judge was not qualified to hear the case against appellant." Presumptively, too, the judge was referring to the "Disqualification of Judges" provision of CTC Section 1-3-7(2) reading, "A judge may be disqualified on his own motion ***or after a hearing on the filing of an affidavit of prejudice by any party to the proceeding....***" [Emphasis and italics added.] The Reply Brief of Appellant at p. 5, however, succinctly addresses that matter. It states, "The issue presented by trial counsel for Appellant was that the trial judge could not have heard the case due to the enrollment requirements of the Choctaw Tribal Code, thus the provisions for disqualification, recusal, and/or excusal were/are not the methods to be used."

Lack of Timeliness

This Court has set forth at length in Part 1 of this opinion the absolute premise that Issue No. 1 raised by Appellant Farve is jurisdictional in nature. As to the trial judge's ruling that Farve had failed to raise the issue in a timely manner and that by failing to timely do so, such failure gives rise to the legal conclusion that Farve, or his counsel, waived his right to do so after the fact, that simply is not so. The entirety of black-letter law on the subject is to the effect that a challenge to the jurisdictional power exercises of a court can be raised at any stage of proceedings.—including, in criminal cases post-conviction and even after the exhaustion of all appeals.

Furthermore, the question can be raised by either party, or by the court itself of its own motion. As will be pointed out, the jurisprudence stemming from several cases occurring within Choctaw Reservation lands has borne this out.

First, however, a quick overview of the "black letter law" on the subject of challenges to courts' jurisdiction is in order. Tribal Courts are comparable to the Federal Courts in that each court of both systems have only as much power – that is, jurisdiction, as are statutorily conferred upon them. They are also comparable in that the Tribal Courts have largely adopted the federal rules on criminal procedure, civil procedure, and evidence and so federal decisions on many matters serve as clear guidance to the Choctaw court system on how they might rule. For example, FRCP Rule 12(h)(3) reads: "(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." By comparison, CTC Title VI, Chapter 1 includes the Choctaw Rules of Civil Procedure - which largely covers, too, criminal proceedings – is nearly identical. CTC Rule 12(h)(3) provides: "(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action ***or transfer the action to the court of proper jurisdiction***." [Emphasis added.] Thus, CTC Title VI, Rule 12(h)(3) differs from FRCP Rule 12(h)(3) in wording only by adding the transfer provision language. Furthermore, the language "[w]henever it appears" that is included in both provisions has been held by courts to invariably mean that the jurisdiction challenge can be made at any time. Additionally, CTC Rule 12(h)(3) is directly on point not only in making this issue able to be raised at any point and not subject to general rules on timeliness, but also in directing what action lower Domestic Violence Court judge could have taken; namely, to ***transfer the action to the court of proper jurisdiction***. In this Parve case, Judge Collins could have ordered the case transferred to the Tribal Criminal Court presided over by a tribal member judge - Judge Rita Jones. This was not done.

Initially, it should be understood there are different types of jurisdiction challenges. Though citing the Tennessee state constitution as authority, the following quote states the universal rule: "Before a court may exercise judicial power to hear and determine a criminal prosecution, that court must possess three types of jurisdiction: jurisdiction over the defendant, jurisdiction over the alleged crime, and territorial jurisdiction." Const. Art. 1 sec. 9,*State v.Legg*, 9 S.W.3d 111

(1999) "Without jurisdiction, criminal proceedings are a nullity." State v. Inglin, 592 N.W.2d 666, 274 Wis.2d 764 (1999). Determining on this present case which type or types of jurisdiction is/are lacking is largely a matter of hair-splitting, but is best termed criminal subject matter jurisdiction. "Criminal subject matter jurisdiction is the power of the court to inquire into charged crime, to apply applicable law, and to declare punishment." W.S.A. Const. Art. 7, sec. 8; W.W.A. 753.03, State v. West, 571 N.W.2d 196, 214 Wis.2d 468, review denied 579 N.W.2d 44, 216 Wis.2d 612 (1997).

On the matter of who can raise a defect in jurisdiction, and when it may be raised, the U.S. Supreme Court has said, "[t]he objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, **at any stage** in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) [Emphasis added.] A number of Mississippi Choctaw cases stemming from jurisdictional challenges show the range. Prior to commencement of the state criminal trial in ***Tubby v. State***, 327 So.2d 272 (Miss. 1976) defense counsel challenged Mississippi court jurisdiction to prosecute a case arising on Indian allotment trust land. At the U.S. district court level in U.S. v. John, after the federal jury acquitted defendants on felony charges, but convicted them of a simple misdemeanor assault, jurisdiction of the federal court to impose sentence upon the crime of conviction was raised by defense counsel. Then, on appeal to the U.S. Fifth Circuit Court of Appeals, the Appellate Court itself questioned whether Mississippi's federal courts had jurisdiction over any Choctaw reservation lands. ***U.S. v. John***, 560 F.2d 1202 (5th Cir. 1977).. Only after the U.S. Supreme Court reversed the Fifth Circuit's decision and remanded the case again to the lower Fifth Circuit Appeals Court was the misdemeanor jurisdiction question ruled upon. See *U.S. v. John*, on remand 587 F.2d 683 (5th Cir. 1979); *cert den.* 441 U.S. 295, 60 L.Ed2d 399, 99 S.Ct 2036 (1979). Meanwhile, a state felony conviction in early 1974, followed by exhaustion of all possible appeals avenues over a two-year period, and finally more than a year's incarceration in the Mississippi State Penitentiary was state territorial jurisdiction over defendant successfully reversed in ***Sam v. State***, 310 So.2d 923 (Miss. 1975); *cert. denied* 96 S.Ct. 454; 423 U.S. 1018; 46 L.Ed2d 390 (1976). [Habeas corpus citation unavailable.] Defendant Sam's conviction was voided and he was ordered released from prison. Without jurisdiction, criminal proceedings are a nullity." See e.g., *State v. Inglin*, 592 N.W.2d 666, 274 Wis.2d 764 (1999)

Thus it is abundantly clear in black-letter law, cited case holdings of only a sampling quoted herein, and in the Mississippi Choctaw case experiences related in the paragraph immediately above that the trial judge's ruling in this case before us that Farve's failure to raise the issue in a timely manner gives rise to the legal conclusion that Farve, or his counsel, waived his right to do so after the fact is not so.

CONCLUSION

Though lengthy, Part 1 of this opinion sets forth how the entire body of Federal Indian Law clearly proves how it comes about that CTC § 1-3-3 – and in particular -- CTC § 1-3-3(g) requiring the judges regularly presiding over criminal court cases must be enrolled members of the Mississippi Band of Choctaw Indians as a prerequisite to all exercises of criminal court power but the occasional exception situations of § 1-3-7 upon recusal or disqualification. Part 2 of this opinion sets forth how and where the trial court's opinion runs afoul of overwhelming statutory and case law precedential authority, and to the handling of prior case experiences relating to Mississippi Choctaw jurisdiction. The initial "**Analysis Overview's**" lines of Opinion Part 2 set out the required established and exercised method whereby the judge regularly assigned to preside over Domestic Violence Court (which both Appellant and Appellee counsel acknowledge in briefs is a criminal court) are carried out in a Choctaw Tribal Constitutional manner. That procedure was not followed in the assignment Civil Court judges which preceded the appointment of the Hon. Tim Taylor's in December, 2015 to preside over Domestic Violence Court's proceedings. The measures taken to independently contract by addendum the Civil Court judge services in a criminal court capacity were inadequate: neither did the passage of the July 16, 2013 Resolution CHO 13-107 of the Tribal Council remedy the situation in a manner required by the Choctaw Tribal Constitution, nor to satisfy the requirements of CTC § 1-3-3(g) that any regularly presiding criminal court judge be a tribal member. Regardless of how urgently the Department of Family and Community Services felt their situation necessitated their selection and recommendation to meet prior shortcomings in fulfilling their grant requirements, no agency's performance needs can ever trump the powers of the Tribal Council or of the Tribal Constitution and By-Laws to so affect Tribal Court operations.

We therefore hold that the Domestic Violence Court lacked jurisdiction to try Appellant Farve because the presiding judge was a non-tribal member who was not presiding due to absence or vacancy and therefore not qualified to hear the case. Accordingly, the judgment of the lower court in CR 2014-238 is hereby reversed and rendered a nullity. It is so ordered.

SO ORDERED this the 28th day of July, 2015.

Associate Justice

CERTIFICATE OF SERVICE

I do hereby certify that I have this, the 28th day of July, 2015 caused to be forwarded by the United States Mail and hand delivery, a true and correct copy of the above and foregoing document to the below listed counsel of record.

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(Hand Delivery)

Hon. Ashley Lewis, Director
Choctaw Legal Defense
Choctaw, Mississippi 39350
(Hand Delivery)

Hon. Melissa Carleton
Acting Attorney General
Mississippi Band of Choctaw Indians
(Hand Delivery)

Hon. Judge Christopher A. Collins
Choctaw Tribal Court
Choctaw, Mississippi 39350
(Hand Delivery)

Jane Charles

Jane Charles, Supreme Court Clerk

CHOCTAW SUPREME COURT
CHOCTAW, MS