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CHOCTAW SUPREME COURT
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IN THE SUPREME COURT
OF THE
MISSISSIPPI BAND OF CHOCTAW INDIANS

KEITH WILLIS

APPELLANT

vs.

CAUSE NO. SC 2014-10

MISSISSIPPI BAND OF CHOCTAW INDIANS

APPELLEE

*Decided Oct. 13, 2014.
Opinion March 27, 2015*

Per Curium. This matter came before the Court for Expedited Hearing on Defendant/ Appellant Keith Willis' [hereinafter "Willis" or "Appellant"] Motion for Release on Bond pending outcome of his criminal appeal, as well as on Appellee Mississippi Band of Choctaw Indians' Cross-Motion Opposing Appeal Bond and Requesting a Hearing on the Matter.

Procedural History

A Criminal Complaint alleging Failure to Update Registration Information as a Class "B" offense, a violation of Section 32-8-3 of the Choctaw Tribal Code, was filed against Appellant Willis on April 22, 2014. On May 14, 2014, a Warrant to Apprehend was issued against Willis on the charge. The subject was finally served on the 29th day of May. At the time of the filing of the criminal complaint, the warrant's issuance, and the defendant's service, Mr. Willis was already incarcerated and serving time in the Choctaw Adult Detention Facility for a probation violation on an earlier sentence for failure to register as a sex offender. On September 4, 2014, Defendant/ Appellant was tried and found guilty as charged on this new charge of Failure to Update Registration Information. The Order of Sentencing reads as follows: "The defendant is guilty of failure to update his registration. The defendant is sentenced to 90 days in custody concurrent from this day forward with any other sentences. The defendant's release date is December 4, 2014 at 4:30 p.m. The defendant shall pay a \$250.00 [fine] due on January 5, 2015. The defendant shall re-register while in custody." By the date of sentencing, the defendant had already serve 98 days in pretrial detention since the arrest warrant's service. No credit for this time incarcerated was given. A Motion to Reconsider and, or, Alternatively, Set a Trial *De Novo* was filed on September 10, 2014, and denied September 24, 2014. Defendant, through counsel, duly filed his Notice of Appeal October 9, 2014; furthermore, Appellant requested immediate release from adult detention pending appeal on this criminal case pursuant to CTC §7-1-5(2) & (3) titled "Stay Pending Appeal: Bond." That same date Appellee Mississippi Band of Choctaw Indians [hereinafter "Appellee" of "Tribe"] filed a response "Motion Opposing Appeal Bond and Requesting a Hearing on the Matter of Appeal Bond."

This Court granted expedited hearing and arguments were made on Monday, October 13, 2014. Immediately following that proceeding, the Court issued a Minute Order granting Appellant release on bond pending final outcome on Appeal and announced that this opinion would follow.

Arguments and Analysis

The Court is called upon for interpretation or reconciliation of what is argued by counsel as two competing or otherwise seemingly conflicting statutes.

The Tribe places the weight of its argument on Rule 8 of the Choctaw Tribal Code Rules of Criminal Procedure, which reads in relevant part to their argument as follows:

Rule 8 Bail and Release from Custody

(a) Release and Detention Pending Trial

* * *

(4) Release or Detention Pending Appeal: A judge of the Choctaw Tribal Court exercising jurisdiction over an offense or a judge of the Choctaw Tribal Appellate Court exercising appellate jurisdiction, shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal, be detained, unless the Judge finds, after petition by the person, by clear and convincing evidence:

(i) that the person is not likely to flee or pose a danger to the safety of any other person of the community if released during the pendency of the person's appeal; and

(ii) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in a reversal, an order for a new trial or a sentence that does not include a term of imprisonment of less than the total amount of time already served plus the expected duration of the appeals process.

The Tribe argues that Rule 8 of the Choctaw Rules of Criminal Procedure should be interpreted to mean that the determination of defendant's suitability for release on bond is a procedure to be made initially at the lower court level, subject to that decision's appeal and review by the higher court. They maintain that pursuant to Rule 8 (4), the presumption following an adjudication of guilt shall be that one incarcerated be detained pending the appeal's outcome. That presumption on appeal, according to the Code, shall be that detention continue unless, by clear and convincing evidence, the defendant establishes to the satisfaction of the lower court initially, that release will not result in flight or danger to the safety of any other person of the community, and secondly, that the appeal is not simply a delaying tactic, but is likely to result in a reversal of the conviction or an order for a new trial.

Counsel for Defendant/Appellant argues, however, that because the question is now before the Choctaw Supreme Court, §7-1-5 **Stay Pending Appeal: Bond** governs, rather than Rule 8 of the

Rules of Criminal Procedure. In his Notice of Appeal, Defendant/Appellant maintains, "In addition, the Appellant respectfully request[s] immediate release from adult detention pending appeal on this criminal case pursuant to §7-1-5(2) & (3), *Stay Pending Appeal: Bond*, respectively." That provision in material part is as follows:

§7-1-5 Stay Pending Appeal: Bond

(2) In criminal cases, a stay of the lower court's judgment or sentence shall be automatic upon filing of a Notice of Appeal pursuant to §7-1-4 of the Tribal Code.

(3) Release Pending Appeal on Criminal Cases: At the time of the entry of the judgment and sentence, the Criminal Court shall review the conditions of release pending appeal to assure the conditions are sufficient to secure the appearance of the defendant and the judgment of the Criminal Court. The Criminal Court may utilize the criteria listed in Rule 2 [Actually Rule 8] of the Choctaw Rules of Criminal Procedure, and may also consider the defendant's conviction and the length of sentence imposed. The conditions of release shall be included on the judgment and sentence. A defendant released pending trial shall continue on release pending an appeal to the Supreme Court under the same terms and conditions as previously imposed, unless the court determines that other terms and conditions are necessary to assure the defendant's appearance or to assure that the defendant's conduct will not obstruct the orderly administration of justice. In the event the lower court requires a bail bond in the same amount as that established for release pending trial, the bond previously furnished shall continue pending appeal or disposition of a motion for a new trial, unless the surety has been discharged by order of the lower court. **If the lower court determines that the previously imposed conditions are not sufficient to assure the appearance of the defendant or the orderly administration of justice, the court may increase the amount of the bond on appeal or terminate the conditions of release to assure the appearance of the defendant or the orderly administration of justice.** Nothing in this rule shall be construed to prevent the lower court from releasing a person not released prior to or during trial.

Appellant argues that since this provision is in Title VII, which addresses matters of the Supreme Court, the statute effectively reverses the presumption from ongoing detention to automatic release as of right, unless continued incarceration is required to assure his appearance or ensure the orderly administration of justice.

Analysis
Federal and Tribal Constitutional
Rights to Bail and of Appeal

Besides the above-quoted Ordinance and Rule of Criminal Procedure, or portions thereof, other considerations apply. The Eighth Amendment to the United States Constitution states, "Excessive bail shall not be required." Likewise, The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-1304 (ICRA), requires at 25 U.S.C. § 1302(a): No Indian tribe in exercising powers of self-government shall....(7)(A) require excessive bail." Next, the Constitution and By-Laws of the Mississippi Band of Choctaw Indians, Article X, Sec. 1, mandates that "The Mississippi Band of Choctaw Indians, in exercising powers of self-government

shall not: (g) Require excessive bail." Title II, the Choctaw Rules of Criminal Procedure, of the Tribal Code Rule 3 headed, "Rights of Defendant reads, In all criminal proceedings, the defendant shall have the following rights:... (g) the right to appeal in all cases;" and "(i) all other rights and protections which the Choctaw Tribal Court may from time to time determine to have been conferred upon the defendant by the Indian Civil Rights Act of 1968, 25 U.S.C. §1301 et. seq. (as amended by Pub. L. 99-570, Title IV, §4217, Oct. 27, 1986) by the Constitution and Bylaws of the Mississippi Band of Choctaw Indians or by other federal or tribal law." Under "**Rule 24 Appeals**" of the Choctaw Rules of Criminal Procedure, "A party who is aggrieved by the judgment or final order in a criminal action may appeal to the Choctaw Supreme Court by filing with the clerk a Notice of Appeal within thirty (30) days of the entry of the order from which the appeal is taken." Then, **§7-1-2 Right to Appeal** provides, "Any party who is aggrieved by any final order, commitment or judgment of the Tribal Court may appeal in the manner prescribed by these rules...."

Taken together, while neither the federal constitution nor the Indian Civil Rights Act expressly mandate conferral of a right of appeal, *per se*, the Tribal Constitution, the Tribal Code, and the Tribal Rules of Criminal Procedure do clearly confer that right.

Furthermore, the U.S. Constitution, the Indian Civil Rights Act, the Tribal Constitution, the Tribal Rules of Criminal Procedure, and Title VII of the Tribal Code all expressly recognize criminal defendants' right to bail. It is against this backdrop that the provisions in question must be construed. In so doing, this Court adheres to Tribal Code general provision **§1-5-7 Principles of Construction** that "(4) This Tribal Code shall be construed as a whole to give effect to all its parts in a logical, consistent manner."

Available Procedures for Bail Release

No proper understanding or interpretation of the individual sections, and subsections, of the bond statutes and rules cited by either counsel can be made in isolation. Instead, their proper scope and meaning must be made within their context in relation to the overall progression of criminal proceedings from the point of initial arrest and detention to the final ruling upon appeal. Furthermore, this can only be done by recognizing the interrelationship of those provisions dealing with the treatment of Class B and C offenses, in contrast to that for Class A charges. Lastly, as outlined in the paragraph above, all must be interpreted with due regard -- and deference as appropriate -- to right of bail and appeal guarantees of federal and tribal constitutions.

In the normal course and scheme of things, persons arrested only on class C and/or class B charges are statutorily provided immediate release from jail before having even to appear before a judge by simply posting an appearance bond. See, *e.g.*, Choctaw Rules of Criminal Procedure, Rule 8(a)(2). By contrast, Rule 8(a)(1) requires persons arrested on Class A

offenses to first appear before a Tribal Judge, who shall then determine if the person should be detained or released pending trial. Orders of detention shall be supported by written findings in support of detention, and Rule 8(a)(1)(4) (iv) authorizes such a detainee to appeal the Detention Order to the Choctaw Supreme Court within five (5) days of the Order of Denial. That appeal shall then be determined promptly in accordance with the Choctaw Rules of Appellate Procedure. Arraignment is the next stage of appearance where persons charged are informed of their charge(s) and of their rights, including the right to bail. For persons already released on bond, even that arraignment appearance may be waived in a manner specified per Rule 9(e)'s requirements. Thus, neither persons charged only with class B and/or C offenses out on bond, nor persons charged with Class A offenses previously released on bond, must appear back until the time scheduled for trial or pretrial hearings.

Only upon conviction does the presumptive liberty status of both categories of defendants change. But again, two separate processes and presumptions standards apply: one for persons convicted of class B and/or C charges and those convicted of Class A offense(s) who have been on pretrial release, and another for those convicted of class A offense(s) who have not been out on bond pending trial. § 7-1-5(3) states: "A defendant released pending trial shall **continue on release pending an appeal to the Supreme Court under the same terms and conditions as previously imposed**, unless the court determines that other terms and conditions are necessary to assure the defendant's appearance or to assure that the defendant's conduct will not obstruct the orderly administration of justice." (Emphasis added.) By contrast, Criminal Procedure Rule 8(4) titled, "Release or Detention Pending Appeal" suggests a presumption of detention continue for those not on pretrial release unless they petition and satisfy "by clear and convincing evidence" that they pose neither a flight risk nor a danger pending appeal and that the appeal is not for purposes of delay and raises a substantial question of law or fact likely to result in reversal, new trial, or a sentence that does not include a term of imprisonment of less than the total amount of time already served plus the expected duration of the appeals process." In short, § 7-1-5(3) presumes release on bond to continue for pre-trial releases, whereas Criminal Rule 8(4) shifts the presumption to continued incarceration for those in pretrial detention, unless defendants are able to overcome that presumption. Yet even Rule 8's provisions under § 7-1-5(3) may be overridden for detainees since subsection (3)'s final sentence clearly states that "[n]othing in this rule shall be construed to prevent the lower court from releasing a person not released prior to or during trial." Section 7-1-5(3) also changes application of the Rule 8 criteria for release from mandatory to discretionary with its language saying the Court "**may** also consider the defendant's conviction and the length of sentence imposed" [emphasis added] in determining whether release pending appeal should be granted. Absent findings otherwise for detention, then, length of sentence imposed is therefore a highly compelling consideration favoring release whenever balanced against the time required to process appeals.

Tribal Code § 1-5-7 entitled “Principles of Construction” under subsection (4) requires that “This Tribal Code shall be construed as a whole to give effect to all its parts in a logical, consistent manner.” Taking all of Rule 8 of the Choctaw Rules of Criminal Procedure and Code §7-1-5 as a whole, unless the appeal is a frivolous delaying tactic, or the convicted person is a flight risk, or a likely danger if released, or may pose an obstruction to the orderly administration of justice, then release pending appeal should most likely be granted.

Application of Facts to the Law

Neither Appellant nor Appellee cited any case law as guiding authority other than citing their separate selective/respective provisions of the Criminal Procedure Rules and Title VII’s provision. The Court looks therefore to Title 18 of the United States Code, Section 3143(b)(1) and federal court rulings thereon for guidance because that language from the Bail Reform Act of 1984 is virtually identical to that found in the Tribal Code. That statute reads as follows:

(b) Release or Detention Pending Appeal by the Defendant.—

(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142 (b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142 (b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

Of the 50 federal court reported cases found interpreting 18 U.S.C. §3143(b)(1), fully 80% or 40 of the cases hinge on that portion of 3141(b)(1)(B) other than the “...the appeal is not for the purpose of delay...” language. Both Appellant Willis and Appellee Tribe agree that a

substantial question of law is involved, so those 40 cases need not be here considered. The remaining ten cases do, however, offer guidance and precedence for our determination.

Flight Risk

In *United States v. Terry Davis*, 664 F.Supp.2d 86, (US District Court, District of Columbia) (2009), the court concluded that, "given the amount of time remaining on the defendant's sentence, the Court is not convinced that the defendant will not flee to avoid serving the remainder of his sentence." In *U.S. v. Swenson*, Case No. 1:13-cr-00091-BLW, (Dist. Court, Idaho) (October 14, 2014), length of sentence considerations prompted release denial, for the 66-year-old defendant had been sentenced to 240 months of prison. By contrast, given that appellant Willis has already credited with serving 39 days of his 90-day sentence, the stakes upon his release pending the appeals outcome are far higher against him now if he were to flee since he could be facing the possibility of another 235 days of imprisonment upon recapture. On that basis alone, the court by the *U. S. v. Davis* standard may readily find Willis' chances of being a flight risk are minimal.

The federal courts also looked to the inherent nature of the respective offenses of conviction in their determinations of risk of flight. Crimes of deception prompted several denials of release pending appeal. *U.S. v. Pollard*, 2:08-CV-332 JCM (GWF), (Dist. Court, Nev.) (Sept. 20, 2012), for instance, entailed multiple counts of bank fraud, aggravated identity theft, and conspiracy. Similarly, *U.S. v. Shabazz*, No.3:12-CR-64, (Dist. Court, M.D. Penn.) (May 23, 2013) involved convictions for aggravated identity theft, fraud and related activity, and fictitious obligations. *U.S. v. Thompson, et al.*, *Crim. Action No. 6: 09-16-S-DCR*, (Dist. Court, N.D. of KY) (May 6, 2011) convictions were for conspiracy to violate RICO, conspiracy to commit money laundering, obstruction of justice, conspiracy against rights, and conspiracy to commit vote-buying. Appellant Willis' offense of conviction, Failure to Update Registration Information, does not require proof of fraud or deception as a necessary element of the criminal charge. No risk of flight on that basis can therefore be inferred to the defendant either.

Danger to Safety

As regards the question of whether he is likely to flee are pose a danger to the safety of any other person or the community if released, in each of the four cases where bail was denied due to defendants' potential dangerousness, the courts' finding was always made due to the inherent dangers associated with the nature of the crime(s) of conviction. Three were drug cases, *U.S. v. Arturo Romero*, Case No. 06-193, (Dist. Court, District of Columbia); *U.S. v. Manso-Portes, et al*, (838 F.2d. 889) (Seventh Circuit, 1988); and *U.S. v. Fournier-Olavarria*, 796 F.2d.285, (Dist. Court, D. Puerto Rico, 2012). With convictions of serious drug offenses, under Sec. 3143 drug offenders are presumed to pose a continuing danger to the community. *United States v. Strong*, 775 F.2d 504, pp. 506 - 08 0 (3rd. Cir. 1985) Fournier-Olavaro also stood convicted of

carrying firearms in furtherance of a drug trafficking crime in violation of 18 U.S.C. §924(c). Here, appellant Willis' offense of conviction had no connection whatsoever to illegal narcotics, nor to firearms. In actuality, §32-8-3, Failure to Update Registration Information, is classified as an act of *omission*, rather than *commission*, and there is therefore no inherent danger imputed to the nature of the crime. Furthermore, his offense is of Class B classification and, as indicated under Rule 8(2) of the Choctaw Rules of Criminal Procedure, he could have obtained release at any time prior to arraignment without appearing before a judge on personal recognizance or, if required, by posting a cash or surety bond if he had not already been incarcerated on a separate matter.

Perhaps the most telling consideration influencing the Court's determination that he does not pose a danger if released pending appeal arose in the course of oral arguments in this case. The Court inquired through Appellant's counsel as to whether Willis would agree to electronic monitoring if release were to be granted; he replied that he would so agree. Next, the court inquired of Appellee counsel what conditions the prosecution would like to have placed on defendant if release pending appeal were to be granted. To that question appellee's response was, "None, your honor."

Seemingly, to this court, although the tribal attorney was arguing against Appellant's release pending the appeal's outcome, they apparently did not regard him as a serious enough danger to warrant requesting the imposition of any of the many available special conditions and restrictions -- including electronic monitoring -- to further assure that his release would not pose a threat to any person or community if released pending the appeal's outcome. Under similar circumstances in *U.S. v. Lill*, Case No. 13-cr-00448-TEH, (Dist. Court, N.D. of CA)(Nov. 6, 2014), the Government unconvincingly argued that Defendant posed a flight risk, even while they had earlier agreed to allow Lill to remain at large both before and after sentencing, and had even recently allowed her to continue her self-surrender date until after the bail motion hearing. The Lill court held the prosecutor's argument "disingenuous," especially since appellant could be equipped with electronic monitoring while the appellate court considered her appeal. We agree with the Lill court's logic in the Willis situation..

Orderly Administration of Justice

Section 7-1-5 further requires that the court determine whether interim release might be necessary to assure that the defendant's conduct would not obstruct the orderly administration of justice. Given the nature of the question of law raised on appeal, the court foresees no practicable manner in which obstruction of the orderly administration of justice could possibly take place on the part of the defendant/appellant.

In *United States v. Thompson, supra.*, the defendant was convicted on, among other charges, the obstruction of justice. In denying release, the court wrote:

Moreover, evidence was presented at trial concerning multiple acts of witness intimidation and retaliation by conspiracy members. The Court previously determined, based on such evidence and the apparent ongoing nature of the conspiracy -- which includes numerous unindicted co-conspirators -- that post-conviction release was not warranted for any defendant. (Slip Opinion p. 3.)

No comparable circumstances exist in this instant case. What's more, with the legal question raised in the appeal being solely a question of law -- and not of facts or of law and facts -- obstruction could not be possibly accomplished.

On the other hand, fundamental to the fulfillment of any orderly administration of justice are the guarantees of meaningful appellate rights. Those rights of appeal and of bail are expressly written into the United States Constitution, the Indian Civil Rights Act, the Tribal Constitution and By-Laws, the Choctaw Rules of Criminal Procedure, and Title VII of the Tribal Code as has been previously set forth : furthermore, Tribal Code Title I's mandate to construe the Code as a whole to give effect to all its parts in a logical, consistent, manner would inevitably thwart justice whenever, without compelling cause, defendants must serve their entire sentence while awaiting their appeal's outcome.

This, too, seemed obvious at oral argument when the Tribe's Attorney was asked, "How is it feasible for the defendant to be availed of the right, meaningful right, to appeal if he is incarcerated for his whole term of this sentence before the appeal is ultimately adjudicated?" To this question the Tribe's Attorney countered, "Your honor, I understand this timeline but I don't think an appeal bond is an automatic process." Subsequently he added, "I do think the court should move away from an automatic application of an appeal bond merely because a person has filed a notice of appeal."

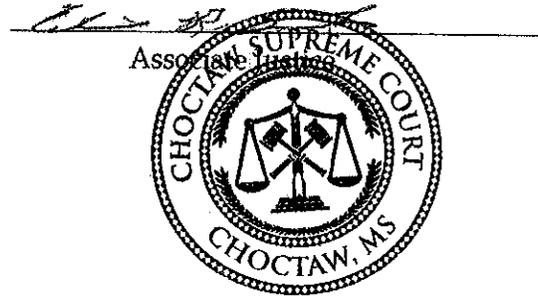
Appeal Bond is not Automatic: Appellee Tribe's answer begs the question, for application of an appeal bond is not an automatic measure in all cases under the Tribal Code's provisions. Criminal Procedure Rule 8(4) titled, "Release or Detention Pending Appeal" instead suggests a presumption of detention continue for those not on pretrial release unless they petition and satisfy "by clear and convincing evidence" that they pose neither a flight risk nor a danger pending appeal and that the appeal is not for purposes of delay and raises a substantial question of law or fact likely to result in reversal, new trial, or a sentence that does not include a term of imprisonment of less than the total amount of time already served plus the expected duration of the appeals process." This Court adheres to the holding in *United States v. Manso-Portes*, 838 F.2d 889 (7th Cir. 1989). The federal appeals court there said, "[t]he defendants have presented no evidence to rebut this presumption [of continued incarceration]; it is perforce not "clear and convincing," even though the district judge said that he thought these defendants were not dangerous. The court went further to say, "Although we do not hold that it would be

impossible for the district court to find the presumption rebutted with respect to the defendants, the court did not do so." *Supra*, at p. 890.

Conclusion

In this present case, this court determines by the clear and convincing standard of review that the presumption for incarceration was effectively rebutted principally by the case's very posture: his is a Class "B" offense and an act of omission rather than one of commission; he has already served 43% of his total sentence; the tribe declined to request electronic monitoring if released even though defendant was willing to consent to the arrangement; both sides stipulated that his appeal raises a substantial question of law; the question on appeal is solely one of law such that the defendant could not possibly obstruct justice; this appeal is not solely for purposes of delay; and his required service of the balance of his sentence would impede the orderly administration of justice if the appeal resulted in a ruling in his favor because he would have already nonetheless served the sentence. Granting of this appeal bond has therefore not been an automatic process.

WHEREFOR, PREMISES CONSIDERED, the Court rules that Appellant's release on bond is in accordance with the minute order issued upon hearing hereby GRANTED.



CERTIFICATE OF SERVICE

I do hereby certify that I have this, the 2nd day of April, 2015 caused to be forwarded by the United States Mail, a true and correct copy of the above and foregoing document to the below listed counsel of record.

Hon. Kevin W. Brady
Kevin W. Brady Law Office, P.L.L.C
Post Office Box 4055
Brandon, Mississippi 39047

Hon. Kevin Payne
Mississippi Band of Choctaw Indians
Attorney General's Office
Post Office Box 6258
Choctaw, Mississippi 39350

Hon. Melissa Carleton
Acting Attorney General
Mississippi Band of Choctaw Indians
Post Office Box 6258
Choctaw, Mississippi

Hon. Jeffrey Webb
Choctaw Tribal Court Judge
Smith John Justice Complex
Choctaw, Mississippi 39350
(Hand Delivery)

Hon. Ashley Lewis
Choctaw Legal Defense
Post Office Box 6255
Choctaw, Mississippi 39350


Jane Charles, Clerk of Court
Choctaw Tribal Court
