In the Southwest Intertribal Court of Appeals for the San Juan Southern Paiute Tribal Court

IN THE MATTER OF THE CHALLENGE BY EVELYN JAMES, HENRY WHISKERS, AND DANLYN JAMES TO THE RESULTS OF THE RECALL ELECTION HELD ON NOVEMBER 18, 2006

Petitioners-Appellants.

SWITCA No. 06-004-SJSP

Appeal from the San Juan Southern Paiute Tribe
Kevin Gover, Judge

Appellate Judge: Steffani Cochran

OPINION

SUMMARY

Appellants appealed the lower court's dismissal of their complaint challenging the results of a recall election. Two issues were raised on appeal. First, that the lower court erred in upholding the recall results when the Appellants were denied due process which, if provided, would have resulted in different election results. Secondly, that the lower court erred in reversing the actions of the Tribal Council to remove Election Board members when such actions were not at issue before the court. The Appellate Court found that Appellants were provided with sufficient notice through mailings and postings of the recall election and that notice was further evidenced by Appellants' subsequent actions to void the recall election. Additionally, the Court found that the Appellants had the opportunity to respond to the recall petitions by attending the recall meeting but chose instead to discourage attendance. The Court also found that the Election Board's actions were put before the lower court when Appellants argued that such actions to hold the recall election were improper due the removal of the Election Board. Decision affirmed.

* * *

This matter having come before the Southwest Intertribal Court of Appeals upon the appeal taken by Evelyn James, Henry Whiskers and Danlyn James (hereinafter "Petitioners-Appellants") in the above-styled cause, and this Court having thoroughly considered the appeal based upon the record of the lower court, this Court finds that there is no error in the lower court's order dismissing the challenge to the election results.

This case is a challenge by three members of the San Juan Southern Paiute Tribal Council to the results of a recall election held on November 18, 2006. The lower court held a hearing on December 9, 2006, hearing testimony from witnesses and arguments, and accepting evidence from both the challengers and the supporters of the recall effort. In the lower court, Petitioners-Appellants had the burden of proving by clear and convincing evidence that the Election Board violated the Election Ordinance or otherwise conducted an unfair election and that the outcome of the election would have been different.

The lower court determined that the Petitioners-Appellants established by clear and convincing evidence that the Election Board violated the Election Ordinance thus meeting the first prong of their burden. The lower court also concluded, however, that the Petitioners-Appellants failed to provide that the outcome of the election would have been different were it not for the Election Board's errors. Thus, the court concluded that the challenge should be dismissed and declared the election valid.

MOTION TO INTERVENE AND REQUEST FOR ORAL ARGUMENTS

As a preliminary matter, this Court must address a Motion to Intervene filed by the San Juan Southern Paiute Election Board (hereinafter "Intervenor") on March 2, 2007. The Election Board presents several arguments in support for intervention, including additional arguments in support of reversing the lower court and discussions based on facts not in the record. Lee Choe and Marcella M. Jerry (hereinafter "Respondents-Appellees") ask this Court to deny the Motion as untimely, as prejudicial to Respondents and the Tribe, and as inconsistent with this Court Scheduling Orders. The Respondents-Appellees' response is well taken. Further delay in this dispute to remand for consideration of facts not considered by the lower court cannot be justified.[1] The Motion to Intervene is denied.

[1] Intervenor also argues that a decision to uphold the results of the recall election will have a direct effect on the Election Board because it will be forced to conduct a special election one month prior to the General Election. This argument misconstrues the requirements of both the Constitution and the Election Ordinance that provide in relevant part, "[i]f a Tribal Council Member should . . . be recalled from office, the Tribal Council shall declare the position vacant. The Tribal Council shall fill a vacancy by special election unless less than six (6) months remain in the term, in which the Tribal Council shall leave the position vacant." (Emphasis added). *Constitution of the San Juan Southern Paiute Tribe, Art. IX, §3(a); Election Ordinance, Art. XV, §§(a) and (b).* There currently remains less than six months in the term; therefore, the Tribal Council is instructed to leave the position vacant. As noted by Respondents-Appellees, the purpose of this provision is to avoid precisely the burden suggested by Intervenor.

After reviewing the briefs already filed, this Court finds that no additional briefing is required. This Court also finds that oral argument is not required.

BACKGROUND

The relevant facts, as found by the lower court, are as follows. Marcella Jerry, a tribal member, presented a written request on October 10, 2006 to Thomas Secody, Chairperson of the San Juan Southern Paiute Election Board, for recall petition forms to initiate recall proceedings. Mr. Secody declined to issue the petition forms and advised Ms. Jerry to contact other Board members. Ms. Jerry submitted a second written request to the Election Board on October 13, 2006. Ms. Jerry then presented a third request to the Election Board on October 16, 2006. Maria Choe, a Board member, issued the official recall petition forms to Ms. Jerry.

A day after Ms. Choe issued the recall petition forms, the Tribal Council held a Special Meeting and passed a resolution titled "Release of Former Election Board." The Resolution accepted the resignation of two Election Board members, including Mr. Secody, and removed three other members, including Ms. Choe. The Tribal Council did not inform the Board members of the grounds for removal and no charges were made against the removed members. The Resolution provides that the Board members were released "in the best interest of the Tribe." The Petitioners-Appellants constituted three of the four votes cast in favor of removing the Board members.

The minutes of the Special Meeting indicate, without further explanation, that the motion acted upon by the Tribal Council included a statement that ". . . any process that was being conducted [by the Election Board] was in direct violation of the constitution." Further evidence of the Tribal Council's reasoning is in its October 24, 2006 letter to Ms. Choe advising her that she was removed from the Election Board. According to the letter, ". . .[a]fter the resignation of the Tribal Election President, the San Juan Southern Paiute Tribe Tribal Council, by majority vote, found it in the best interest to **remove all Election Board member** [sic] and selection of a newly appointed board are in process." (Emphasis in original.) Although the Tribal Council was aware that recall proceedings were initiated, it did not replace the removed members during the October 17th Special Meeting.

On October 19, 2006, Ms. Jerry returned the petition forms bearing 35-37 tribal members names calling for recall proceedings against Petitioners-Appellants. Each of their positions expires at the next General Election on the first Saturday in May 2007. Ms. Choe attempted to implement the procedures specified in the Election Ordinance for conducting recall proceedings. She certified that each petition had enough signatures to satisfy the requirements of the Election Ordinance for the institution of recall proceedings. She issued the required public notices and mailed notice of the Recall Meeting to each eligible tribal voter on October 20, 2006. Ms. Choe also appointed poll workers, counted the votes and certified the results.

Prior to the recall elections, Petitioners-Appellants also posted notices at the tribal offices providing, in large block handwritten letters across the face of the Notice of Election, that such Notice was "VOID" because there was "NO ELECTION BOARD." The Petitioners-Appellants also sent letters to the Election Board Members advising that any recall proceedings conducted by the "former Election" board would "be in direct violation of" the Constitution and the Election Ordinance.

The Recall Meeting was conducted on November 18, 2006. Of the 105 eligible voters, 38 appeared and cast ballots in favor of recall. As to Evelyn James and Henry Whiskers, 32 voted in favor of recall and six voted against. As to Danlyn James, 33 voted in favor of recall and five voted against. Petitioners-Appellants filed a challenge to the Recall Meeting on November 21, 2006.

ARGUMENTS OF THE PARTIES ON APPEAL

Whether the lower court erred in its decision in upholding the recall results where Petitioners-Appellants were not provided with any notices, petitions of the recall, or given an opportunity to respond to the charges.

Whether the lower court erred in reversing the actions of the
Tribal Council to remove the Election Board members where the validity of the Tribal Council decision to remove such Board members was not an issue before the court.

OPINION

COCHRAN, Judge.

The general rule is that trial courts resolve issues of fact and appellate courts give those factual findings a great deal of deference. *See e.g.*, *Cloud v. Southern Ute Indian Tribe*, 13 SWITCA Rep. 1 (2002); *Archuleta v. Archuleta*, 9 SWITCA Rep. 27 (1998); *Burch v. Southern Ute Indian Tribe*, 5 SWITCA Rep. 2, at 3 (1994) ("The appellate court shall review the evidence in the light most favorable to the trial court's findings.") An appellate court will reverse a lower court's decision only where it is not supported by substantial evidence in the record or where "there is a strong showing that the court abused its discretion, acted arbitrarily or capriciously, made a clearly erroneous decision, or made an illegal decision."

Hualapai Nation v. D.N., 9 SWITCA Rep. 1, at 3-4 (1997).

After carefully reviewing the entire record of the lower court and reviewing all of the arguments presented on appeal, this Court concludes that the lower court's decisions were supported by substantial evidence, that the lower court did not abuse its discretion, and that the lower court's decision was not improper in any other respect. Accordingly, this Court affirms the decision of the lower court.

This case presents a difficult challenge as to how a court should resolve a dispute where the actions of all interested parties failed to comply with tribal law. Thus, this Court shall begin its analysis with reference to the Preamble of the Tribe's Constitution, which provides that "We the people of the San Juan Southern Paiute Tribe . . . adopt this Constitution in order to . . . promote self-government and *ensure the political integrity of the Tribe."* (emphasis added). This Court believes that the lower court's decision clearly reflects the tension between those actions of the Tribal Council and those of the Election Board as they affected the political integrity of the election processes. The lower court concluded, as this Court does, that the Tribe's political integrity is best preserved by dismissing Petitioners-Appellants' challenge to the recall election. This Court also concludes that substantial evidence supports a conclusion that although conducted with irregularity, the Recall Meeting was fair and open and the results sufficiently reflect the will of the people.

The Constitution, Article IX governs removal, recall and vacancy in the Tribal Council. *Constitution of the San Juan Southern Paiute Tribe, Art. IX, §2.* Once recall proceedings are initiated, the election is a question put to the vote of the people; that is, whether or not an officeholder should be recalled. The conclusion of a recall election necessarily implies that the votes authorize a recall or not." *Committee for Better Tribal Gov't v. Southern Ute Election Board*, 2 SWITCA Rep. 6, 9 (1991). The lower court began its analysis by noting that Petitioners-Appellants had the burden of proving by clear and convincing evidence that the Election Board violated the Election Ordinance or otherwise conducted an unfair election, and that the outcome of the election would have been different.

I

The Petitioners-Appellants first issue on appeal relates to the determination of whether the Election Board violated the Election Ordinance or otherwise conducted an unfair election. As at the hearing, on appeal the Petitioners-Appellants argue that the lower court erred in dismissing their challenge because the recall proceeding was initiated against Tribal Council members whose term expires within six months in violation of the Election Ordinance.

> Any adult tribal member may initiate recall proceedings against any Tribal Council member by filing a written request with the Election Board, Provided, that a recall proceeding may not be initiated against any Tribal Council Member whose term expires within six (6) months. *San Juan Southern Paiute Tribe Election Ordinance, Art. XIV, §1(b).*

The next General Election is scheduled for the first Saturday in May 2007. The record indicates that Ms. Jerry requested recall petition forms, in writing, on October 10, on October 13 and again on October 16, 2006. Although the Election Board violated the Election Ordinance by failing to provide the requested forms until October 16, Ms. Jerry "initiated recall proceedings" when she filed her first written request with the Election Board. *See San Juan Southern Paiute Tribe Election Ordinance, Art. XIV, §§(b)* and *2(a)* ("Any adult tribal member may initiate recall proceedings . . . by filing a written request with the Election Board." "After receipt of the written request, the Election Board shall issue Official Recall Petitions, **Form H**, to the Tribal member(s) who initiated the recall."). The recall proceedings were initiated nearly seven months prior to the scheduled General Election. Thus, despite the Election Board's failure to provide the recall petition forms until October 16, substantial evidence supports the lower court's decision that Ms. Jerry initiated the proceedings outside the six months during which recall proceedings may not be initiated.

Petitioners-Appellants also contend that the lower court erred in its decision because Petitioners-Appellants were not provided with any notices, petitions of the recall, or given an opportunity to respond to the charges. Further, Petitioners-Appellants contend that the results of the election would have been different if they had been provided proper notices and an opportunity to defend themselves. The essence of Petitioners-Appellants' argument is that they were denied due process which, if provided, would have resulted in different election results.

Substantial evidence supports the lower court's finding that a Notice of Recall Meeting for November 18th was mailed to each eligible tribal voter on October 20, 2006. As eligible voters, Petitioners-Appellants would have been entitled to notice. The record does not indicate that the notices for Petitioners-Appellants were among those returned to the Election board as undeliverable. Ms. Choe also caused public Notices of Election to be publicly posted. A conclusion that Petitioners-Appellants had notice of the Recall Election is further evidenced by the

lower court's finding that they caused to be posted, at the tribal offices, the Notice of Election with a handwritten notation that the Notice was "VOID" because there was "NO ELECTION BOARD." Similarly, in its October 24, 2006 letters to the removed Board members, the Petitioners-Appellants stated that "The Recall proceedings conducted by the `former' Election Board . . . for the Month of November 18, 2006 has become inactive . . .." This Court is without explanation as to how Petitioners-Appellants can now complain that they did not have notice of the Recall Meeting.

II

The Petitioners-Appellants remaining due process arguments must also fail. Petitioners-Appellants were provided an opportunity to respond to the recall petitions. The Constitution provides that "[t]he person initiating the recall and the person subject to recall shall be given a reasonable opportunity to speak and present evidence at the recall meeting." *Constitution of the San Juan Southern Paiute Tribe, Art. IX, §2(d).* The lower court record does not evidence that the Petitioners-Appellants attended the Recall Meeting and yet they now complain. The provisions for recall are unlike those for removal from office. *See e.g., Constitution of the San Juan Southern Paiute Tribe, Art. IX, §1(c)* (providing that ". . . the Tribal Council Member in question shall be afforded full due process rights including a written statement of the charges, [and] the right to respond to those charges . . ."). Nothing further than the opportunity to speak and present evidence at the Recall Meeting is required by either the Constitution or the Election Ordinance. Even if more were required, the Petitioners-Appellants do not explain how the results would have been different had they attended the Recall Meeting instead of actively attempting to discourage attendance.

III

The Election Ordinance provides that only the Election Board shall administer recall proceedings. *San Juan Southern Paiute Tribe Election Ordinance, Art. XIV, §1(a).* According to Petitioners-Appellants, all members of the Election Board either resigned or were removed by Tribal Council Resolution. Therefore, according to their arguments on appeal, the November 18, 2006 recall proceedings failed to comply with tribal law because there was not duly constituted Election Board to conduct the proceedings. Moreover, according to Petitioners-Appellants, the lower court abused its discretion in reviewing the actions of Tribal Council to remove Election Board members.

In examining this issue, the trial court concluded that the removal of Mr. King, Ms. Long, and Ms. Choe from the Election Board was improper. The lower court's findings are supported by substantial evidence and will not be disturbed by this Court. The record contains no offering by Petitioners-Appellants at any point throughout these proceedings to support overturning these conclusions. Instead, Petitioners-Appellants now argue that the lower court erred in its decision because the Removal Resolution was passed by the Tribal Council in accordance with the Tribal Constitution, Article IV, Section 8, which provides that "Four (4) or more members of the Tribal Council shall constitute a quorum for any regular or special Tribal Council meeting." This argument only supports a conclusion that a quorum of Tribal Council members was present to conduct a vote on a matter subject to Tribal Council's actions were otherwise in accordance with tribal law. Moreover, Petitioners-Appellants put the validity of the Tribal Council's action squarely before the lower court by arguing that there was no Election Board to conduct recall proceedings.

As discussed in the lower court's decision, the Election Ordinance authorizes the Tribal Council to remove an Election Board member for good cause "so long as the Election Board member in question is informed of the grounds for removal and given an opportunity to respond to the charges." The Ordinance, therefore, clearly obligates the Tribal Council to afford due process to its Election Board members prior to removal. *San Juan Southern Paiute Tribe Election Ordinance, Art. III, §1(d).* Substantial evidence in the record supports the lower court's conclusion that the Tribal Council failed to afford any process to the removed Election Board members and, consequently, inappropriately acted to remove those members.

The lower court also noted that the Election Ordinance requires that "good cause" be shown before any Board member is removed. As found by the lower court, the Tribal Council removed the Board members as in the "best interest of the Tribe" and because the Chairman of the Election Board had resigned. The court determined that these reasons fall "well short" of the good cause standard set forth in the Election Ordinance and this Court agrees. To the contrary, the record supports a subsequent finding by the lower court that the Petitioners-Appellants motive for removing the Board members was specifically to interfere with the efforts to initiate recall proceedings. Moreover, the Tribal Council failed to fill any resulting vacancies (whether by resignation or removal) as mandated under the Election Ordinance to conduct the anticipated Recall Meeting. *San Juan Southern Paiute Tribe Election Ordinance, III, §1(a).* Instead, the majority determined that the recall proceedings could not occur if they acted to remove all Election Board members and delay in making replacement appointments. As discussed in the lower court order,

> Even as I wondered aloud at the hearing whether I should remand the matter to the Election Board to set a new date for a recall meeting and vote, they [Petitioners-Appellants] made clear that they would take their time about appointing Election Board members to fill the vacancies, and that they would assert that the recall process was not initiated six months before the next General Election.

The lower court's findings clearly evidence that the Tribal Council failed to uphold its constitutional obligation to *ensure the political integrity of the Tribe*. More importantly, these findings offer substantial evidence to support the lower court's determination that the Tribal Council's efforts to remove Election Board members must fail. They do not support a conclusion that there was no Election Board to conduct the recall proceedings as argued by Petitioners-Appellants. The lower court's finding that only one Board member, Ms. Choe, did not either resign or abandon her responsibilities evidences that she was the only individual in this matter who attempted to *ensure the political integrity of the Tribe* by performing the duties of the Election Board as prescribed by the Constitution and Election Ordinance. *San Juan Southern Paiute Election Ordinance, Art. III, §2(a).* The Petitioners-Appellants have not made a strong showing that the lower court abused its discretion, acted arbitrarily or capriciously, made a clearly erroneous decision, or made an illegal decision as to this issue.

CONCLUSION

For the foregoing reasons, this Court finds no error in the lower court's order dismissing the challenge to the election results. The decision of the lower court is affirmed.

IT IS SO ORDERED.

March 18, 2007

L.E., as guardian and next friend of, P.K., a minor,

Appellants,

v.

ZUNI PUBLIC SCHOOL DISTRICT and WELLS MAHKEE, JR., individually and in his individual capacity,

Appellees.

SWITCA No. 06-001-ZTC
ZTC No. CL-2000-004

Appeal Filed February 13, 2006

Appeal from the Zuni Tribal Court
Sharon M. Begay, Judge

Appellate Judges: Elizabeth C. Callard, Roman J. Duran, and Neil T. Flores

DECISION AND ORDER ON APPELLANT'S MOTION FOR RECONSIDERATION

SUMMARY

The Appellants filed a Motion for Reconsideration and Memorandum in Support of Motion for Reconsideration. The Appellate Court denied the motion upon a finding that the Appellants did not raise any new issues nor cite any authority that was not already fully considered by the panel prior to entering its decision and order. Motion denied.

* * *

This matter comes before the Southwest Intertribal Court of Appeals (hereafter "SWITCA") on the Appellant's Motion for Reconsideration and Memorandum in Support of Motion for Reconsideration. The Court has reviewed the pending motion, as well as the Respondent Zuni Tribe's Response in Opposition to Appellant's Motion for Reconsideration and the Response of Amicus Curiae New Mexico Public Schools Insurance Authority to Motion for Reconsideration. The Appellate Panel has conferred with respect to the issues raised and has reached a decision.

The Appellate Panel finds that the Appellant has raised no new issues and has cited no authority that were not fully considered by the Appellate Panel prior to entering its Decision and Order. The Appellants' Motion for Reconsideration is without merit and should be denied.

IT IS SO ORDERED BY THE APPELLATE PANEL.

October 1, 2007

RONALD ROMERO,

Appellant,

v.

PUEBLO OF NAMBE,

Appellee.

SWITCA Case No. 07-004-NTC
Tribal Cause No. CR-07-011

Appeal Filed July 11, 2007

Appeal from the Nambe Tribal Court
Marti Rodriguez, Judge

Appellate Judge: Stephen Wall

OPINION

SUMMARY

Appellant was found guilty on numerous criminal charges. Immediately after the tribal court entered its sentencing order, the Appellant submitted a Notice of Appeal. The Notice of Appeal did not identify specific grounds for the appeal. Despite the lack of information, the Appellate Court allowed the appeal to be heard given that the Appellant was represented pro se and the tribal court notice form did not provide all the information required under SWITCA rules. Liberally construing the rules to the notice, the Court determined that Appellant's claims for the appeal were based on a denial of the right to counsel and a failure to apprise the Appellant of his rights against self-incrimination. The Appellate Court held that there was no basis for dismissing the charges or reversing the finding of guilt against the Appellant on either claim. Decision affirmed.

* * *

On May 30, 2007, the Tribal Court of the Nambe Pueblo found the Appellant guilty of twelve (12) charges including three counts of False Imprisonment and one count each of Battery on a Household Member, Assault on a Household member, Battery, Assault, Assault on a Peace Officer, Criminal Damage to Property, Interference with Communication, and Criminal Trespass.

After a Sentencing Hearing on June 15, 2007 the Nambe Pueblo Tribal Court sentenced the Appellant to the maximum jail sentence allowed for each charge under the Indian Civil Rights Act, 25 U.S.C.A. 1302(7). The sentence for four (4) counts were to run concurrently and the remaining eight (8) counts were to be served consecutively for a total of 2,920 days in jail. In addition, the Appellant was fined one thousand dollars ($1000) per count, however the fine for five (5) of the counts was suspended leaving fines totaling seven thousand dollars ($7000) plus fifty dollars ($50) in court costs. Lastly, the Nambe Pueblo Court ordered the Appellant to five (5) years' probation upon his release from the Chief Ignacio Justice Center.

Immediately after the sentence was entered, the Appellant appealed the Court's order to The Nambe Tribal Council. The Nambe Tribal Council, upon advice of counsel, submitted the appeal to the Southwest Intertribal Court of Appeals (SWITCA) on July 17, 2007. SWITCA jurisdiction in this matter is based in SWITCARA #2(a) and resolutions passed by the Nambe Tribal Council establishing a relationship with SWITCA. The Notice of Appeal dated June 15, 2007, did not identify specific grounds for appeal and the Appellant was represented *pro se* during the trial and sentencing hearing. Since the Appellant was represented *pro se*, the SWITCA will liberally construe the application of SWITCARA #11(e), rules of procedures relating to the contents of the notice of the appeal. Also, the Nambe Tribal Court Appeal notice form does not provide all of the information that is required under SWITCARA #11(e) and the Defendant did not know of the SWITCA requirements. The SWITCA will allow the appeal to be heard. During the trial and in a subsequent letter to the Nambe Pueblo Tribal Court, the Appellant requested that the charges be dismissed since he did not have the benefit of counsel and that he was not "Mirandized," meaning that the Appellant was not read or apprised of his right against self-incrimination under the United States Constitution at the time of arrest. SWITCA will assume that the grounds for the appeal are based in the Appellant's complaints about the lack of access to counsel and the failure to be Mirandized, since no other issues were specifically identified by the Appellant and in its review of the record, SWITCA did not find any other possible bases for appeal.

RIGHT TO COUNSEL

The Appellant is claiming that he was denied the right to counsel and therefore the charges must be dismissed because of that denial. The right to counsel is guaranteed to defendants in criminal trials in American Indian tribal courts through the Indian Civil Rights Act, 25 U.S.C.A. 1302(6). The Indian Civil Rights Act was passed to guarantee Indian defendants in tribal courts some of the rights that extend to American citizens in Federal and

State courts since the Bill of Rights protections of the United States Constitution does not apply to tribal governments. The Indian Civil Rights Act was very clear that the right to counsel in tribal court was not an absolute right. The wording of 25 U.S.C.A. 1302(6) indicates that the right to counsel is dependent upon the defendant's ability to secure and pay for counsel. There are some tribes that have the funds to provide indigent legal counsel in criminal cases in tribal court, but apparently the Pueblo of Nambe does not provide that service. In this case, the court record indicates that the Judge for the Tribal Court of Nambe Pueblo made an effort to identify counsel for the Appellant. The Appellant had quite a bit of time from the time arrest to locate counsel and had the option to continue the case pending his ability to secure counsel. The record does not show any request by the Appellant for a continuance pending the securing of counsel. The Appellant does not have an absolute right to counsel. The Court made a reasonable attempt to locate counsel for the Appellant and the record does not indicate that the Appellant made any attempt to locate counsel on his own behalf or requested a continuance to provide additional time to secure counsel. Thus, there is no basis for dismissing the charges based on denial of right to counsel.

SELF INCRIMINATION

The purpose of the Miranda warnings is to insure that Defendants are aware of their right not to make statements that may incriminate themselves. The Miranda warnings are usually given at the time of arrest and at other times when the Defendant may make a statement that could be self-incriminating. The Miranda warnings also tell the Defendant that they have a right to have an attorney present at the time of questioning. In tribal courts, the right to an attorney is not absolute. This means that under 25 U.S.C.A. 1302(6) a lawyer can only be required to be present at any questioning of the Defendant if the Defendant has the funds to pay for counsel. However, the test of whether a person's right against self-incrimination has been violated is not whether the Miranda warnings were given, but whether non-Mirandized self-incriminating evidence was used in the finding of guilt. If a self-incriminating statement was taken without the Defendant knowing of the right against self-incrimination or waiving that right and the statement was used to determine guilt, then the conviction could be reversed. However in this case the record does not indicate that self-incriminating statements were taken from the Appellant at the time of arrest and the BIA Criminal Investigator testified that when he interviewed the Appellant, the Appellant was Mirandized. Thus, the failure to Mirandize the Appellant at the time of arrest did not prejudice the Appellant and there is nothing in the record that indicates self-incriminating evidence taken from the Appellant was used to determine guilt, thus there is no basis for reversing the conviction based on the failure to Mirandize the Appellant.

SWITCA finds no other basis for dismissal of the charges or reversal of the finding of guilt.

November 7, 2007
