

APPLICATION FOR DISTRICT COURT JUDGESHIP

A. PERSONAL INFORMATION

1. Full name.
Kelly P. McDonald
2. Birthdate.
[REDACTED]
3. Current home address.
[REDACTED]
4. Email address.
[REDACTED]
5. Preferred phone number.
[REDACTED]
6. Judicial position you are applying for.
Twentieth Judicial District Court Judge
7. Date you became a U.S. citizen, if different than birthdate.
N/A
8. Date you become a Montana resident.
May 15, 1996

B. EDUCATIONAL BACKGROUND

9. List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.

Florence-Carlton High School, Florence, Montana, January-May 1997, no degree. Obtained G.E.D. 1997
University of Montana, Missoula, August 1997-May 2001, Bachelor of Arts Native American Studies
and Anthropology.

University of Montana, Missoula, August 2001-May 2004, Master of Arts major Cultural Anthropology
and minor in Anthropological Linguistics.

University of Kansas, Lawrence, KS, May 2003-May 2005, Juris Doctor, with Tribal Law Certificate.

University of Montana, Missoula, Montana, August 2024-present (enrolled in phd program) in Applied
Anthropology and Cultural Heritage Studies.

10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.

Bonnie HeavyRunner Native American Studies Scholarship 1999-2000

Golden Key National Honor Society member, 2001

President, Montana Anthropology Student Association, and editor *UM Anthropology Newsletter* 2003

Peer Advisor, UM Academic Advising Office, 1999-2000

Participated in University of Kansas Moot Court Competition, March 2005

University of Kansas Tribal Judicial Support Clinic, January-May 2005

C. LEGAL AND PROFESSIONAL EXPERIENCE

11. In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.

October 2023-present: Chief Justice, CSKT Court of Appeals, Pablo, Montana (part-time contract)

August 2022-present: Faculty/Instructor, Department of Tribal Governance and Administration, Native American Studies division, Salish Kootenai College, Pablo, Montana (full-time)

August 2006-November 2018: CSKT Tribal Prosecuting Attorney, CSKT Tribal Prosecutor Office, P.O. Box 278, Pablo, Montana

April-May 2016: City Prosecutor, Missoula City Attorney Office, Missoula, Montana

May 2006-July 2006: Guardian ad Litem, Missoula, Montana.

April 2006-June 2006: Volunteer Law Clerk, Judge John Larson, Missoula, Montana.

August 2005-July 2006: Library Assistant, Missoula Public Library, Missoula, Montana.

12. In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.

2006 Montana State Bar

2006 United States District Court for the District of Montana

13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., real estate, water rights, civil litigation,

criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc).

During the past one year with CSKT Court of Appeals, legal areas consist of civil appeals 40%, criminal appeals 60%

During my previous years with CSKT Tribal Prosecutor Office, legal areas of concentration consisted of criminal cases (65%), youth court cases (10%), child protection cases (15%) mental health commitment cases (5%), adult protection cases (5%).

14. Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).

My experience as an attorney is primarily a prosecuting attorney. For several years, I was a part of the Native American Domestic Violence Fatality Review Team in Montana. We would meet twice each year to review a Native American fatality case in detail. This team is the first in the U.S. domestic violence fatality review team that focuses specifically on Tribal peoples. The work of the team would include traveling to and spending several days within the community where the fatality took place in order to complete the review. We would invite in the local professionals to assist with helping us to understand the case and making recommendations based on the case. The coordinator of both the Montana team and the Native American Montana team creates a report every other year, with recommendations for the State Legislature about any changes to be considered in the state or local communities to help address the issue of domestic abuse fatalities.

Since 2022 I have been teaching college level courses in Tribal Governance and Administration at Salish Kootenai College. Teaching and advising college students has been rewarding as well.

15. Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.

I have appeared in state court in Missoula in a family law case, pro bono, ten years ago. In the past ten years I have participated/ communicated with Lake County Attorney Office and Sanders County Attorney Office regarding felony cases transferred between Tribal Court and State District Court.

16. If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.

I have not appeared before the Montana Supreme Court.

17. Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.

The most important, challenging, and complex legal issue I have dealt with is definitely domestic violence. These cases are prevalent and serious, and at the same time frequently misunderstood. The domestic violence cases often involve repetitive patterns of violence that may escalate to serious violence, physical, mental, sexual or emotional abuse, or even become lethal. In addition

to 12 years as a prosecutor at CSKT, the several years I spent in the Native American Domestic Violence Fatality Review Team in Montana (described in question 14 above) allowed me to gain a deeper understanding of many of the warning signs and red flags for domestic violence fatality. It also allowed me to learn how to trauma-informed approaches in the law, in education, in any facet of life. Through trainings and experience I learned about evidence-based prosecution, and reluctance of victim/survivor to participate in the legal proceedings. I believe this information and other facts about domestic violence are important for all of the community and society to know and understand. The most dangerous time in a domestic violence relationship is when the relationship is ending or soon thereafter. Therefore, safety planning is critical, for the family and for the community overall. In my job as a prosecutor, I made a point to spend part of each day reaching out to help educate domestic violence victim/survivors individually about the domestic violence fatality warning signs, to help gain understanding of potential lethality risk factors.

A second important, challenging, and complex legal issue I have dealt with is drug addiction/ chemical dependency. Drug addiction takes many resources out of rural communities and requires consistent effort and support to help break the cycle of addiction and addictive behavior. Many criminal cases may also include a component of drug or alcohol addiction. Drug addiction often leads to homelessness and loss of family connections. Addiction weakens the community by tearing families apart. In my involvement with handling child protection cases during 12 years as a prosecutor for CSKT, I learned that infants are frequently exposed to drugs or even born addicted to substances. This is unfair for any infant to experience pain of drug withdrawal upon birth. Our society needs to face and address many of the issues surrounding drug abuse and find ways to heal and prevent these situations.

A third important, challenging, and complex legal issue I have dealt with is P.L. 280 jurisdiction. The CSKT reservation being a P.L. 280 reservation requires an understanding of the jurisdictional issues and how the public safety, legal, and court systems interact and overlap. The recent topic and potential of P.L. 280 withdrawal requires understanding, planning and communication of the jurisdictional issues.

18. If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.

I have not authored or published books or articles.

19. If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.

I presented at a continuing legal education seminar on December 14, 2017 in the conference room at the Lake County Courthouse in Polson, Montana. The title of the presentation was "Best Practices in Prosecuting Domestic and Sexual Violence Cases." The group I presented to consisted of attorneys, a judge, professionals and other community members from the area. The following is the description of the training:

FREE two-hour training on **December 14th from 1pm-3pm** addressing **Best Practices in Prosecuting Domestic and Sexual Violence Cases** in the large conference room of the Lake County Courthouse in Polson.

- University of Montana law professor Andrew King-Ries will discuss best practices, evidentiary issues, and common challenges in prosecuting domestic and sexual violence cases.
- Confederated Salish and Kootenai Tribal Prosecutor Kelly McDonald will discuss lethality factors and assessments.
- Brandi Ries (Ries Law Group P.C.) and Hilly McGahan (SAFE Harbor) will discuss effectively using expert witnesses.

This training has **been approved for 2 CLE credits** by the MT CLE Commission.

Since 2022, I have taught as a full-time faculty member at Salish Kootenai College. The courses that I teach include the Federal Indian Law course in fall of 2023 and fall of 2024. The course lasts one quarter, which is a term of 10 weeks meeting twice per week. The course was attended by SKC students.

20. Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.

None in the past five years, I have wanted to but have not had the time or resources to continue working on pro bono cases.

21. Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.

I have not held positions with the state bar or other legal professional societies.

22. Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received.

None.

23. If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.

I was a volunteer law clerk for Judge Larson in Missoula drafting legal memoranda in April-June 2006. In law school in 2005 I was in a Tribal Judicial Support Clinic at the University of Kansas, which allowed me to draft opinions for Tribal Courts of Appeals in the region.

From 2023-present I have worked in a part-time position with CSKT Appellate Court as Chief Justice. The court convenes several times per year. I have handled one oral argument, the nature of the case was criminal. During the past year I have been on the panel of less than five cases to date, about 40% were civil and 60% were criminal in nature.

24. Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a judge.

I have been trained for many years to specialize in domestic violence/stalking/dating violence/ violation of protection orders. I have experience with understanding the jurisdictional questions of the Flathead Reservation.

D. COMMUNITY AND PUBLIC SERVICE

25. List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.

I am not in any civic, charitable or professional organizations or legal professional societies. However, I was formally honored in Polson by SAFE Harbor on October 14, 2015 as a Community Honoree "hometown hero," for my work as a prosecutor in helping to break the cycle of domestic violence.

26. List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I have not held any public office or been a candidate for public office although in 2024 I did briefly consider whether to run for a Lake County Commissioner seat as an Independent.

E. PROFESSIONAL CONDUCT AND ETHICS

27. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

I have never been disciplined for breach of ethics or unprofessional conduct.

28. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

I have never been charged or found guilty of contempt or any other offense, or sanctioned by any court for any reason.

29. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

No I have never been arrested or convicted of violating the law.

30. Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case

or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number).

No.

31. Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No.

F. BUSINESS AND FINANCIAL INFORMATION

32. Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge.

I am not involved in any business.

33. Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain.

Yes.

34. Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? If so, give details.

No.

G. JUDICIAL PHILOSOPHY

35. State the reasons why you are seeking office as a district court judge.

I am seeking office as a district court judge because I would like to use my legal background and education to contribute further to the local community and the State of Montana. I have worked for CSKT as a prosecutor for many years and now as part of their Appellate Court. Because most of Lake County and part of Sanders County overlaps with the Flathead Indian Reservation, I would like to contribute the knowledge about the jurisdictions as well as historical and cultural understandings to the 20th Judicial District, which is useful for this community. I would like to see additional collaboration and planning between the State Courts, Tribal Courts, and Federal Court system, and I believe I would provide a good connection with the reservation community and the CSKT Court system.

36. What three qualities do you believe to be most important in a good district court judge?

Fair and impartial /Ethical behavior; Lifelong learner; Strong desire to understand/ serve community

I believe the first quality that is important for good district court judges is to be committed to ethical behavior and equipped with a strong moral compass. Providing a fair, impartial, and consistent forum for dispute resolution is encompassed within ethical behavior. Being free from substance abuse,

or any kind of abuse or addictions, is included in ethical behavior as well. Being an attorney, judge, or any professional in a community means leading by example. Ethical behavior includes being clear, prompt, efficient, professional, and having a good overall demeanor.

The second quality that is important to be a good district court judge is to be a lifelong learner. We live in an increasingly complex and constantly changing society and world. Advances in technology and the issues we face in today's world require the professionals in a community to understand these issues and the changes taking place, and aim to be at the cutting edge of new and best practices. At the same time, I believe it is important to learn from past traditions and be able to understand enough to determine when and how to include traditional knowledge and beliefs within our modern lives. Included in the quality of lifelong learner is the willingness to listen, protect, and learn from the local community.

This leads to the third important quality for good district court judges and that is a strong desire to understand people, human behavior, and a strong desire to serve the community. Compassion for humans and the community overall, and drive for public service is important for judges to embody.

37. What is your philosophy regarding the interpretation and application of statutes and the Constitution?

My philosophy is that judges should interpret and apply the statutes and Constitution to the facts of any case, according to the plain language of the law and following with the judicial precedent.

H. MISCELLANEOUS

38. Attach a writing sample authored entirely by you, **not to exceed 20 pages**. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics. I am attaching a legal opinion I wrote.

39. Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.

Attorney and Montana State Senator Shane Morigeau, CSKT Legal Department, Pablo, Montana.
406-675-2700 ext.1160

Attorney Ann Miller, CSKT Public Defenders Office, Pablo, Montana. 406-675-2700 ext.1125

Attorney Michael Wheeler, CKST Legal Department, Pablo, Montana. 406-675-2700 ext.1160

CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as District Court Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

January 13, 2025
(Date)

/s/ Kelly P. McDonald
(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Monday, January 13, 2025.

Mail the signed original to:

Hannah Slusser
Governor's Office
P.O. Box 200801
Helena, MT 59620-0801

Send the electronic copy to: hannah.slusser@mt.gov

**IN THE APPELLATE COURT
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD NATION, PABLO, MONTANA**

CONFEDERATED SALISH AND KOOTENAI TRIBES, Plaintiff/Appellee, vs. STEVEN BIGCRANE, Defendant/Appellant.	Cause No. AP-21-0574-CR OPINION
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Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes, Honorable Chief Judge Bradley A. Pluff, presiding.

Appearances:

Thomas Myers, Tribal Prosecutor Office, Confederated Salish & Kootenai Tribes, for Plaintiff/Appellee

James Gabriels, Tribal Public Defenders' Office, for Defendant/Appellant

Before: Chief Justice Kelly McDonald, Associate Justice Danny Tenenbaum, and Associate Justice Robert McDonald

Opinion by Chief Justice K. McDonald, concurred by Justice Tenenbaum and Justice R. McDonald

INTRODUCTION

Before this Court is Defendant/Appellant's appeal of the Tribal Court's order dated July 13, 2023. Appellant argues that there was not a knowing, intelligent, and voluntary waiver of right to jury trial in this matter, and therefore the waiver of

right to jury trial was invalid. We agree. For reasons set forth below, we REVERSE the convictions that resulted from the Bench Trial, and REMAND to the Tribal Court for further proceedings consistent with this opinion.

ISSUES PRESENTED

The issues raised on appeal are as follows:

1. Did the trial court err when it found that Defendant had failed to maintain contact with defense counsel and therefore had forfeited his right to a jury trial; embedded in this issue, is the greater issue we take up here: Is the CSKT statute that allows waiver of the right to a jury trial by failing to maintain contact with defense counsel (*CSKT Laws Codified* §2-2-1001(3), which states, in part: “. . . By failing to maintain contact with counsel, a defendant waives his or her right to a jury trial.”) either: (1) legal, (2) invalid under the CSKT Constitution, or (3) void for vagueness and therefore unconstitutional.
2. Did the trial court err when it found Defendant guilty of Count I Failure to Support or Care for Dependent Person.

BACKGROUND

CSKT Laws Codified § 2-2-1001 states as follows:

2-2-1001. Right to a jury trial. (1) A defendant charged with a Class B, Class C, Class D, or Class E offense has a right to trial by jury of six fair and impartial jurors.

(2) A defendant may waive the right to a jury trial in a written voluntary statement to the Court.

(3) A defendant must maintain contact with his or her counsel. *By failing to maintain contact with counsel, a defendant waives his or her right to a jury trial.* (emphasis added)

On May 30, 2021, Steven BigCrane was driving a vehicle within the exterior boundaries of the Flathead Reservation, and was stopped by law enforcement.

There were two children in the back seat of the vehicle. One child, a 4 year old, was not in a seatbelt, and an 8-month old child was buckled in a carseat.

A female passenger, the children's mother, was also present in the vehicle in the front passenger seat. Officer observations indicated her behavior was consistent with methamphetamine use and influence of a stimulant.

Law enforcement requested permission to search the vehicle and Defendant BigCrane gave permission to search. The search located a silver container with several pieces of drug paraphernalia including a glass "meth pipe," balloons, a spoon, and tin foil on the floor of the vehicle near the feet of the 4 year old child. There was white residue in the pipe and upon using a field test, the residue in the pipe tested positive for methamphetamine. Tribal Officer on scene spoke with

Defendant; Defendant claimed ownership of the meth pipe and other paraphernalia located in the vehicle.

Defendant BigCrane was arrested due to an outstanding warrant through Lake County, and he was cited by Tribal Police for Child Endangerment and Criminal Possession of Drug Paraphernalia.

On June 24, 2021 the CSKT Prosecutor signed a criminal complaint charging Mr. BigCrane with Count I Failure to Support or Care for Dependent Person, a Class D offense for first offense, or a Class E offense for a second conviction of this offense, and Count II Possession of Drug Paraphernalia, a Class C offense. *CSKT Laws Codified* § 2-2-705 states “A person commits the offense of failure to support or care for a dependent person by knowingly: . . . (b) endangering the health, welfare or emotional well being of any child under the person’s care.” The factual paragraph of Count I of the complaint alleges as follows:

On or about May 30, 2021 at approximately 7:52 p.m. on US Highway 93 in the area of Pablo, Montana, within the boundaries of the Flathead Indian Reservation, the above named Defendant committed the offense of FAILURE TO SUPPORT OR CARE FOR DEPENDENT PERSON by knowingly endangering the health, welfare or emotional well being of any child under the person’s care, by being in possession of drug paraphernalia, including a methamphetamine pipe with residue, in proximity to his four year old child and eight month old child in a motor vehicle. (21-0574-CR *Criminal Complaint*, p. 2).

On July 1, 2021, Tribal Court Judge found probable cause for the charges and the complaint was filed.

There is a signed Acknowledgment of Rights in the case, which states:

IF YOU WANT TO HAVE A JURY TRIAL YOU MUST MAINTAIN CONTACT WITH YOUR ATTORNEY OR ADVOCATE. IF YOU DO NOT MAINTAIN CONTACT WITH YOUR ATTORNEY YOU WILL WAIVE YOUR RIGHT TO A JURY TRIAL, AND YOUR CASE WILL BE TRIED BY THE JUDGE.

The Acknowledgment of Rights was signed by defense counsel not by Defendant BigCrane, because Initial Appearance was conducted via zoom rather than in person, due to COVID-19 pandemic. On November 29, 2021, Defendant pleaded not guilty and requested a jury trial, and the Court scheduled a jury trial for February 24, 2022. At a later date, due to COVID-19 concerns, the February date for jury trial was vacated and re-set for August 11, 2022.

At a pre-trial conference on August 1, 2022, Defendant BigCrane was not present at Court for the pre-trial conference hearing, and the Court found/ruled the defendant had waived his right to jury trial. Defendant through counsel objected to

the Court finding the defendant waived his right as an abuse of discretion and application of an unconstitutional standard.

The Court held a status hearing on September 12, 2022 and the Defendant was not present. The Court noted that Defendant BigCrane was not present for status hearing, and had waived his right to jury trial. Defense counsel again objected to a waiver of jury trial. At another status hearing October 17, 2022 Defendant BigCrane was again not present.

On November 14, 2022, the Court scheduled a bench trial for January 5, 2023. The bench trial was later continued to February 9, 2023 and Defendant failed to appear for bench trial. The Court issued an arrest warrant. Defendant was arrested on March 24, 2023.

The Court held a bench trial on May 11, 2023. The Court issued an Order, July 13, 2023, with findings of fact, conclusions of law, and verdict, finding Defendant guilty of Counts I and II and setting a sentencing date for August 7, 2023. Mr. BigCrane filed a timely notice of appeal on August 7, 2023.

STANDARD OF REVIEW

This Court reviews questions of law de novo. *CSKT v. Old Person*, AP-09-1549-CR (2011), citing *Northwest Collections, Inc. v. Pichette*, AP-93-077-CV (1995).

DISCUSSION

The purpose of the Indian Civil Rights Act of 1968, 25 U.S.C.1302 et seq., is to “secur[e] for the American Indian the broad constitutional rights afforded to other Americans, and thereby to protect individual Indians from arbitrary and unjust actions of tribal governments.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed2d 106 (1978).

The Indian Civil Rights Act of 1968 (ICRA) is a federal statute passed by U.S. Congress, which granted certain civil rights to American Indians. These rights are found at 25 U.S.C. Section 1302 and are as follows:

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

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

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

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500.00 or both;

- (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
- (9) pass any bill of attainder or ex post facto law; or
- (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

The ICRA has been incorporated into the CSKT Constitution. The CSKT Constitution states, in relevant part:

Any member of the Confederated Tribes accused of any offense shall have the right to a prompt, open and public hearing, with due notice of the offense charged, and shall be permitted to summon witnesses in his own behalf and trial by jury shall be accorded, when duly requested, by any member accused of any offense punishable by more than 30 days' imprisonment, and excessive bail or cruel or unusual punishment shall not be imposed. *The Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Article VII, Bill of Rights, Section 4.*

The civil right at issue here is at 25 U.S.C. 1302(10), which Appellant has addressed as having been denied. Under 25 U.S.C. Section 1302(10), a defendant has "the right, upon request, to a trial by jury of not less than six persons." This is a fundamental right and imperative to the proper administration of justice.

Appellant contends that he was denied his right to a jury trial, in violation of the ICRA and therefore in violation of the CSKT Constitution. We agree.

The U.S. Supreme Court has held that a waiver of an "important constitutional right, such as the right to trial by jury, cannot be assumed from a silent record even though the defendant was represented by counsel." Further, "The burden is on the prosecution to establish that the waiver was knowing and

voluntary.” *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274, 89 S. Ct. 1709 (1969). In criminal law, there is “insistence upon community participation in the determination of guilt or innocence.” *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444 (1968).

The U.S. Supreme Court has stated in *Boykin* that a waiver of the right to jury trial must be knowing and voluntary. Additionally, in determining a waiver of right to jury trial, courts are to make every reasonable assumption against waiver. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S.Ct 809 (1937). Waiving a fundamental right must be done via intentional, knowing, and voluntarily waiver. *Johnson v. Zerbst*, 304 U.S. 458, 464-465, 58 S.Ct. 1019 (1938).

Here, we find that Defendant did not make a knowing and voluntary waiver of the right to jury trial, a fundamental civil right that the Court cannot remove without such knowing and voluntary waiver. Anything less than a knowing and voluntary waiver does not comport with ICRA or the CSKT Constitution. In light of the Defendant’s civil rights, this Court is unable to affirm a waiver on behalf of the Defendant via a finding that Defendant had failed to maintain contact with defense counsel. We conclude that there was not a knowing and voluntary waiver of the fundamental civil right to trial by jury.

The CSKT Court has previously confronted the topic of the ICRA in combination with the question of what constitutes a knowing and voluntary waiver

of the right to a trial by jury. In *CSKT v. Peone*, the CSKT Court opinion stated as follows:

While it is noted by this court that in order to maintain a court system that is effective and responsive to the people within its jurisdiction and that in order to do this a court may find it necessary to fix various rules allowing for the smooth administration of justice those rules must be flexible enough to allow for the appropriate protection of the rights of those accused of criminal acts. . . . The right to a jury trial in criminal cases is also spelled out with clarity in the *Indian Civil Rights Act*, 25 U.S.C. § 1302 para 10 which reads: No Indian tribe in exercising powers of self-government shall: . . . deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.” *CSKT v. Peone*. (1989), CR-58-89, 16 ILR pp. 6136-6137.

The *Peone* Court opinion further noted that “. . . at no time did the defendant orally or in writing ever indicate an intention to waive his right to a trial by jury.” *Id.* The Tribal Court held that a waiver of the right to jury trial must be knowing and intelligent, and the Defendant did not make a knowing and valid waiver when defendant failed to request a jury trial. The Court stated that it “must conclude that the failure of the accused to make a request for a jury trial constitutes a valid waiver only when the failure to request a jury trial is made knowingly and intentionally, and the accused is aware that s/he is giving up his/her right to a trial by jury.” *Id.* The CSKT Court in *Peone* found the waiver of right to a jury trial was invalid, and thus granted request for jury trial. *Id.*

The Ninth Circuit Appellate Court has confronted the issue of the ICRA and the right to jury trial when it stated, “Under the Indian Civil Rights Act (ICRA), tribes may not deny criminal defendants facing imprisonment ‘the right, upon request, to a trial by jury.’ 25 U.S.C. § 1302(a)(10).” *Alvarez v. Lopez*, 835 F.3d 1024 (2016). Additionally, for instances “[w]here the tribal court procedures under scrutiny differ significantly from those commonly employed . . . courts weigh the individual right to fair treatment against the magnitude of the tribal interest . . . to determine whether the procedures pass muster under” ICRA. *Alvarez v. Lopez*, 835 F. 3d 1024 (2016), p. 1028, citing *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988). Further, the Ninth Circuit noted, “all tribal courts presented with the question have concluded that there must be a knowing and voluntary waiver of ICRA’s conditional jury right.” *Alvarez v. Lopez*, 835 F. 3d 1024 (2016), pp. 1029-1030, quoting Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordham L. Rev. 479, 555 (2000).

We therefore must ask whether both the CSKT statute § 2-2-1001(3) and the finding of the Tribal Court that the Defendant had failed to maintain contact with defense counsel and therefore had waived the right to jury trial, would amount to a knowing and voluntary waiver and therefore pass muster under ICRA.

In considering the procedural history of this case, we recognize the real need for a practical reconciliation of the fundamental right to jury trial, to be balanced with the actual and finite resources that are expended through the process of holding a jury trial. The reality of calling in a jury pool of 50 or more people from the community, summoning these community members away from their daily responsibilities, jobs, and families, to commute to the court for voir dire in the morning and potential selection of several from the jury pool, to be empaneled onto a jury for a criminal trial that will last at least the better part of one day, is not something to take lightly. Combine this with the time and travel of any witnesses, Court staff and personnel, holding a jury trial becomes a large undertaking and we do not take this lightly. It would be an unnecessary burden to call in a jury pool, witnesses and court personnel, for a trial that has no chance of taking place, simply because the defendant has no intention of showing up for it. It is instances such as this that the CSKT statute and Court intends to avoid, via ordering to proceed with a bench trial. However, sanction by denial of right to jury trial is also not taken lightly.

We find § 2-2-1001(3) in practical application unusable for two major reasons. First, it does not align or comport with the ICRA of 1968 and the CSKT Constitution, due to the jury trial right being a fundamental right in both, which requires a knowing, intelligent, voluntary waiver for a valid waiver to occur.

Second, it likely can never be effectively enforced due to the attorney-client confidentiality that is a protected privilege under *CSKT Laws Codified* § 1-2-611.

Privileged confidentiality in certain relations. “There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following enumerated cases.” Of particular relevance here is subsection (2), which states:

- (a) An attorney or Court advocate cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given to the client in the course of professional employment.
- (b) A client cannot, except voluntarily, be examined as to any communication made by him to his attorney or Court advocate or the advice given to him by his attorney or Court advocate in the course of the attorney’s or Court advocate’s professional employment.” *CSKT Laws Codified* §1-2-611(2).

While there are likely correlations between failing to appear at court and failing to maintain contact with defense counsel, these are not mutually exclusive, and this presents ethical dilemmas and conflicts of interest. Assuming or presuming the failure to appear at court equals failure to maintain contact with defense counsel is not factually viable. Therefore it becomes impossible for the prosecution and the Court to factually ascertain, prove, or make findings of a failure to maintain contact with defense counsel, short of, in effect, making defense counsel a witness against their client, which results in a conflict of interest and is ethically inadvisable. Therefore, establishing that a waiver of the right to jury trial

was knowing and voluntary, based solely on the defense counsel's lack of information presented to the Court regarding failure to appear, becomes a practical impossibility, without making defense counsel a witness against the client.

Seeking additional guidance, this Court examined statutes and cases from other jurisdictions to determine how other jurisdictions are handling the need for a balance between the efficient administration of justice and rights of defendants. It appears other jurisdictions may place greater emphasis on defendants' failure to appear for court hearing as a trigger for determining the defendant has knowingly and voluntarily waived the right to a jury trial. This will be a matter for the Tribal Council to consider in relation to revisions of this section of the Tribal Code.

The treatment we have found among other jurisdictions indicates that there is an emphasis on the need for defendant to appear at court hearings, in order for courts to administer justice efficiently, and while the loss of a right to jury trial may be a legal outcome to failing to appear (see, e.g. *State v. Thompson*, 2015 MT 279 (2015); but see *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 30 396 Mont. 57 (2019); see also *Preston v. Seay*, 684 F.2d 172, 173 (1st Cir. 1982)), there are other reasonable sanctions designed to encourage attendance of court hearings without waiving the right to jury trial.

For example, in the Navajo case mentioned in Appellant's brief, the Navajo District Court found that the right to jury trial is fundamental and cannot be

removed, due to need for compliance with ICRA; however the Court at Navajo found Defendant in Contempt of Court and ordered him to jail with possibility of release only if he posts a bond, additionally ordered him to pay within 10 days the cost of summoning the jury pool and if not paid within 10 days to be jailed until it is paid, and finally imposed a requirement that defense counsel must file with the court no less than 10 days prior to trial an affidavit stating that they have personally advised defendant of the date, time and place scheduled for jury trial. *Navajo Nation v. Davis*, 1982 Navajo Dist. LEXIS 7. This case is not binding precedent but is merely one example from another jurisdiction.

Other examples of how jurisdictions can encourage appearance at court hearings do include potential waiver of right to jury trial. For example, the Fort Peck Tribal Code Title 6, Sec. 507 states: "A defendant waives his/her right to a jury trial if the defendant fails to appear at the scheduled jury trial. Waiver of the jury trial will result, without delay, in a bench trial in absentia for misdemeanor charges and a scheduled bench trial for felony charges." Additionally, the Crow Tribal Code Title 8A-1-103 provides: "The court may vacate a jury trial and schedule a trial before the court on the charge(s) if the defendant or the defendant's counsel fail to appear at any scheduled court appearance in connection with the charge(s)." These differ from the CSKT statute in that the waiver of the right to jury trial is explicitly tied to a failure to appear, not to a failure to maintain contact

with defense counsel. Again, these are not binding authority in this Court but are additional examples of other Tribal jurisdictions.

It is worth noting that the process of proving a failure to appear is, in practice, readily achievable in practical application; and additionally, proving or finding a failure to appear does not present the ethical dilemma and constraints that come with proving and finding failure to maintain contact with defense counsel. Indeed, the requirements for defendant to make all court appearances and maintain contact with defense representative are release conditions in essentially every criminal case that is heard for Initial Appearance in the CSKT Tribal Court, and our intent is for that to remain in place as a requirement of the release conditions ordered by the Court, to which defendants must adhere. It is in the furtherance of justice for defendants to maintain contact with their defense representative(s).

Afterall, it is the client, not the attorney, who is to be driving the case (the attorney is there to assist the client in achieving a legal and enforceable outcome the client desires). Failing to maintain contact with defense counsel will result in a breakdown of attorney-client communication, and while due to attorney-client privilege we cannot (without voluntary consent) inquire as to what that communication encompasses, we can continue to emphasize that the client must keep in contact with defense counsel, in the interests of justice. It is the job of the defense attorney to define with their clients the parameters and expectations for

maintaining contact. Those parameters may vary with each client and therefore are not codified in statute. We find we cannot sanction failure to maintain contact through a waiver of right to jury trial. The waiver of right to jury trial was invalid.

Notably, failing to maintain contact with counsel in many instances does factually coincide with routinely failing to appear in court. Failure of appearance is discouraged because it will likely result in a release order violation and possible arrest warrant issuing, and/or increase in bond and/or finding of contempt.

Similarly, failing to maintain contact with defense counsel is to be discouraged.

Other caselaw from other jurisdictions, several of which were cited in the Appellee brief, provide that a court may impose reasonable sanctions for either failing to appear at court or failing to maintain contact with defense counsel, which may include issuing arrest warrant, finding contempt for failing to appear, and/or revoking own recognizance or revoking and increasing bond. These reasonable sanctions are designed to encourage compliance and appearance at court hearings, and in practice will achieve the same ends as *CSKT Laws Codified* §2-2-1001(3), without intruding into attorney/client confidentiality and privilege.

The practical outcome will be that defendants who fail to appear at Court may see their bond revoked/increased or their own recognizance release revoked and arrest warrant(s) issued. The Court may increase bond, and in practical application, a defendant with a history of failing to appear at routine court hearings

may face higher bond amounts and spend time in jail awaiting a trial date, and/or ordered to pay a fine or sit jail time for Contempt of Court for failing to appear.

CSKT Laws Codified § 1-2-102 provides this Court the authority to review final decisions and orders of the Tribal Court. As a matter of clarification, CSKT Appellate Court has previously noted that “this Court cannot strike a law from the Code. . . . It is the Tribal Council’s determination to physically remove any wording from the Code. However, this Court has the power, as directed by the Tribal Council, through the Code to find a statute, in part or in whole, unconstitutional.” Therefore this Court can find a section of *CSKT Laws Codified* to be unconstitutional, thus rendering it unusable. *CSKT v. Old Person*, AP-09-1549-CR “Clarification of Final Opinion,” (2013), at pp. 2 and 3.

Statutes are presumed to be constitutional. While we find the language of *CSKT Laws Codified* §2-2-1001(3) to be plain and unambiguous on its face and designed to promote the efficient administration of justice, we find it simultaneously impractical, ineffective, and factually unusable in application. Therefore while we do not find void for vagueness, it nevertheless is unusable due to inconsistency with ICRA, the CSKT Constitution, and the privileges codified in *CSKT Laws Codified* § 1-2-611. The sentence should be redrafted, employing language that is similarly plain and unambiguous, yet usable and practically

applicable, consistent with the ICRA, the CSKT Constitution, and the privileges codified in *CSKT Laws Codified* § 1-2-611.

In finding that there was not a knowing and voluntary waiver of the right to trial by jury, the issue of whether the trial court erred when finding Defendant guilty of Count I Failure to Support or Care for Dependent Person becomes moot.

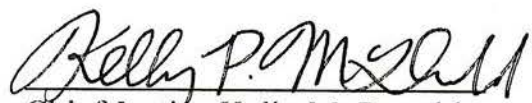
CONCLUSION

This Court finds the section of CSKT Laws Codified stating, “By failing to maintain contact with counsel, a defendant waives his or her right to a jury trial,” to be both inconsistent with ICRA and impractical in its application. It violates the CSKT Constitution and is therefore unconstitutional.

IT IS THE ORDER OF THIS COURT that the convictions in this matter shall be REVERSED and REMANDED back to the Tribal Court, for either a jury trial or an opportunity for Defendant to make a knowing and voluntary waiver of the right to jury trial.

Ordered this 9th day of January, 2025.




Chief Justice Kelly McDonald

Certificate of Mailing

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed a true and correct copy of the Opinion to the persons first named therein via email this 9th day of January, 2025.

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