Criminal Law Outline

- For cases relating to the proper interpretation of criminal statutes, see Statutory Interpretation Outline.
- For cases relating to trespass, see Property Outline.
- For cases relating to the disqualification of judges, see Courts Outline.

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I. General criminal concepts

A. Purpose of criminal law

- The purpose of the Navajo Criminal Code is to proscribe conduct that unjustifiably and inexcusably threatens or inflicts substantial harm to individual or public interests. *Navajo Nation v. Platero*, 6 Nav. R. 422 (Nav. Sup. Ct. 1991).

- Within the framework in which the dominant theme is the prevention of offenses, a number of specific factors are articulated which are believed to be the principal objectives of the definitional process. The major goal is to forbid and prevent conduct that threatens substantial harm to individual or public interests and that at the same time is both unjustifiable and inexcusable. Subsidiary themes are to subject those who are disposed to commit crimes to public control, to prevent the condemnation of conduct that is without fault, to give fair warning of the conduct declared to be criminal, and to differentiate between serious and minor offenses on reasonable grounds. *Navajo Nation v. Platero*, 6 Nav. R. 422 (Nav. Sup. Ct. 1991).

- Two reasons for the Navajo Criminal Code are (1) To differentiate on reasonable grounds between serious and minor offenses and to prescribe proportional penalties for each; and (2) to protect the public interest of the Navajo Nation by defining the act or omission which constitutes each offense, and to apply the provisions of this title equally and unfavorably to all persons within the territorial jurisdiction of the Navajo Tribal Courts. *Begay v. Navajo Nation*, 6 Nav. R. 20 (Nav. Sup. Ct. 1988).

B. *Diné bi beenahaz’áanii*


- Our modern criminal law, as it is found in the Navajo Nation Criminal Code, is foreign to traditional Navajo society. Navajos, traditionally, did not charge offenders with crimes in the name of the state or on behalf of the people. What are charged as offenses today were treated as personal injury or property damage matters, and of practical concern only to the parties, their relatives, and, if necessary, the clan matriarchs and patriarchs. These "offenses" were resolved using the traditional Navajo civil process of "talking things out." Nalyeeh (restitution) was often the preferred method to foster healing and conciliation among the parties and their relatives. The ultimate goal being to restore the parties and their families to *hozho* (harmony). *Navajo Nation v. Blake*, 7 Nav. R. 233 (Nav. Sup. Ct. 1996).


- Navajo tradition teaches that you do not punish a person needlessly, which is interpreted by modern courts as the requirement to prove guilt beyond a reasonable doubt. A defendant should not be punished unless the prosecution can show a valid reason for doing so. *Navajo Nation v. Platero*, 6 Nav. R. 422 (Nav. Sup. Ct. 1991).

- While Navajos would shun a repeat offender, or one who committed a particularly heinous crime, they would not do so unless the act was willful or intentional. Individuals also would not be shunned or punished for good faith acts. *Navajo Nation v. Platero*, 6 Nav. R. 422 (Nav. Sup. Ct. 1991).

Under Navajo tradition, all offenses (with the exception of witchcraft) were punished by payments to the victim or the victim's immediate family and clan. *Matter of Interest of D.P.*, 3 Nav. R. 255 (Crwn. Dist. Ct. 1982).


The Navajo tradition recognized that the central ideas of punishment were to put the victim in the position he or she was before the offense by a money payment, punish in a visible way by requiring extra payments to the victim or the victim's family (rather than the king or state), and give a visible sign to the community that wrong was punished. The offender was given the means to return to the community by making good his or her wrong. This is a far better concept of justice than to leave the victim out of the process of justice and leaving the victim with no means of healing the injury done. *Matter of Interest of D.P.*, 3 Nav. R. 255 (Crwn. Dist. Ct. 1982).

C. Witchcraft and the traditional origins of crime

Beginning with the time of the creation stories, witchcraft has been firmly embedded in the minds and the lives of the Navajos. Problems with witchcraft have unfolded since, penetrating distrust rivalry and hostility throughout Navajo society. In general, the treatment of witchcraft crimes and accusations is often by clandestine arrangements. *Hasteen v. Tapaha*, 7 Nav. R. 532 (Ship. Dist. Ct. 1997).

Witchcraft is the most heinous of all Navajo crimes, for it affects the health and wealth of not only the individual or individuals, but it terrorizes the whole countryside as well. The practice, although now rare, is not as uncommon as most people believe. In recent years, employees of the Indian Services have been forced to publicly burn medicine bags of suspected witches in order to quell the wrath of the Navajos. Within the past five years, a witch was killed by a semi-educated boy, who, probably because of his education, had lost some of the superstition and terror that most Navajo have of these “poisoners.” *Hasteen v. Tapaha*, 7 Nav. R. 532 (Ship. Dist. Ct. 1997).

In one version, First Man and First Woman were transformed from two primordial ears of corn, one white and one yellow. Upon producing five sets of twins, First Man and First Woman were sent to the east mountain. After five (5) days sojourn, First Man and First Woman returned, having acquired knowledge of good and bad. They also brought back the secrets of witchcraft, over which they took control. In another version, First Man and First Woman came up through the earth. Water came up right behind them. First Man said, “We forgot something underneath,” First Woman said, “What is it, my husband.” “It is medicine [ant’i’ - evil medicine ...]. We left it down there,” he replied. “Well we shouldn’t do that,” said the woman. They could not stay without it. They had to make it some way so that it could be brought up by something. *Hasteen v. Tapaha*, 7 Nav. R. 532 (Ship. Dist. Ct. 1997).

Usually the suspected witch is a medicine man who is attempting to gain wealth by blackmail. In other cases individuals with warped minds have been known to be accused of the practice. Sometimes individuals will charge other persons of witchcraft if they have a grievance against them. *Hasteen v. Tapaha*, 7 Nav. R. 532 (Ship. Dist. Ct. 1997).

Should a witch publicly admit his crime (they sometimes did), or even be strongly suspected on circumstantial evidence. The punishment sanctioned by the Countryside is death. The kinsmen of
the witch will not demand blood money. It is further believed that undetected witches eventually

- When a person becomes an apprentice or becomes a medicine man or takes up the practice of
becoming a ceremonial practitioner, he/she runs the risk of being suspected of using knowledge
for bad ends, or witchcraft. Thus, such accusations can be used as a means of control. This risk
comes with the trade, so to speak. Medicine practitioners or apprentices heed care lest they be
accused of witchcraft. The ceremonial practitioner or apprentice who was obligated to perform or
learn his ritual ran the risk of being suspected of using his knowledge for bad ends. *Hasteen v.

D. Definitions

- The definition of “person” in the Criminal Code includes any natural Indian individual. 17 N.N.C.
§ 208(17) (now see 17 N.N.C. § 209(R)). Navajo law does not require affirmative proof of the
terms "person" or "Indian" as an element of any crime. *Navajo Nation v. Hunter*, 7 Nav. R. 194
- “Unlawful” means contrary to law or, where the context so requires, not permitted by law; it does

E. Burden of proof

1. Beyond a reasonable doubt

- Each element of the offense must be proved beyond a reasonable doubt. *Navajo Nation v. Hunter*,
- The prosecution must prove each element of an offense, including intent, beyond a reasonable
- The Navajo Nation must prove each element of each statutory violation charged beyond a
- Navajo people believe that it is wrong to hurt a person needlessly, so criminal case must be proven
beyond a reasonable doubt. A valid reason for inflicting punishment must be clearly present before
- In every criminal case, the Navajo Nation must prove every element of the offense beyond a
- The amount of proof required in a criminal case; including traffic violations, is proof beyond a

2. Must negate taint of illegitimate evidence

- The prosecutor's burden of proof is a heavy one, which is not limited to negation of taint. *Navajo
- The prosecutor's burden of proof imposes on the prosecution the affirmative duty to prove that the
evidence is derived from a legitimate source wholly independent of compelled testimony. *Navajo
3. Presumption of innocence


4. Burden only extends to statutory requirements

- While the prosecution must prove each and every element of an offense, that does not include matters which are unconnected with the conduct the statute seeks to prevent in its definition. *Navajo Nation v. Platero*, 6 Nav. R. 422 (Nav. Sup. Ct. 1991).
- While the state has the burden of proving every element of the offense beyond a reasonable doubt, it is not required to anticipate and rebut defenses, including any affirmative defense which does not negate an element of the offense. *Navajo Nation v. Platero*, 6 Nav. R. 422 (Nav. Sup. Ct. 1991).

F. Criminal jurisdiction

1. General criminal jurisdiction

- 17 N.N.C. § 203 gives express territorial jurisdiction to the Navajo courts over any person who commits an offense by his or her own conduct if the conduct constituting any element of the offense or a result of such conduct occurs within the jurisdiction of the Navajo Tribal Courts. *Begay v. Navajo Nation*, 6 Nav. R. 20 (Nav. Sup. Ct. 1988).
- So far as the Congress is concerned, the Indian Courts may assert jurisdiction over any offense which involves an Indian complainant and an Indian defendant regardless of where the cause arose. *Navajo Tribe v. Holyan*, 1 Nav. R. 78 (Nav. Ct. App. 1973).

2. Criminal jurisdiction over non-Indians

- The United States Supreme Court has recognized severe limitations on inherent tribal authority over non-Indians. It has held that Indian tribes generally have no criminal jurisdiction over non-Indians, because such power is allegedly inconsistent with the dependent status of tribes. *In the Matter of A.P.*, 8 Nav. R. 671 (Nav. Sup. Ct. 2005).
3. **Criminal jurisdiction over non-member Indians**

- A non-member Indian, by reason of his marriage to a Navajo, longtime residence within the Navajo Nation, his activities here, and his status as a hadane, consented to Navajo Nation criminal jurisdiction. This is not done by "adoption" in any formal or customary sense, but by assuming tribal relations and establishing familial and community relationships under Navajo common law. *Means v. District Court*, 7 Nav. R. 383 (Nav. Sup. Ct. 1999).

4. **Territorial jurisdiction**

- The Navajo Nation courts have jurisdiction over "any person" who commits an offense "if the conduct constituting any element of the offense" occurs within the territorial jurisdiction of the Navajo Nation. *Navajo Nation v. Hunter*, 7 Nav. R. 194 (Nav. Sup. Ct. 1996).
- District Court has territorial jurisdiction over criminal proceeding where the offense is alleged to have occurred upon and within the exterior boundaries of the Navajo Indian reservation. *Navajo Nation v. Haag*, 7 Nav. R. 443 (Chin. Dist. Ct. 1992).

5. **Challenging jurisdiction**

- The prosecution is not required to prove that the defendant is an Indian. *Navajo Nation v. Hunter*, 7 Nav. R. 194 (Nav. Sup. Ct. 1996).

G. **Special prosecutors**

1. **General**

- The Special Prosecutor Act was enacted to provide for the appointment of a special prosecutor, and to establish such counsel's duties and responsibilities. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).
- The Special Prosecutor Act authorizes the Navajo Nation Attorney General to conduct a preliminary investigation to see if any official enumerated in the section had violated a federal, state, or tribal law. These officials referred to include the chairman and vice chairman of the Navajo Nation Council (now president and vice president), their executive staff members, Council standing committee chairmen, the attorney general, directors and deputy directors of agencies and entities, and employees or agents who may have acted with a conflict of interest. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).
- The special prosecutor may coordinate activities with the Office of the Prosecutor and obtain its assistance for prosecutions, as was done in this case. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).
It is within the spirit and coverage of the Special Prosecutor Act to uphold prosecutions of those who conspire with or aid and abet covered public officials. As long as rights are protected, scarce tribal financial and judicial resources are better used when all defendants who are charged with these crimes are prosecuted together. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

2. **Appointed in cases of conflicts of interest**

If the attorney general finds from the preliminary investigation that there are reasonable grounds for further investigation or prosecution, and there is a conflict of interest by the attorney general or the prosecutor's office, he or she may apply to the Special Division of the Window Rock District Court for appointment of a special prosecutor. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

A central concept of the Special Prosecutor Act, which pervades Section 2021, is that the Navajo Nation needs a special prosecutor where the regular prosecutorial officials of the Navajo Nation have a personal, financial, or political conflict of interest. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

3. **Powers**

Under the Special Prosecutor Act, the special prosecutor has full power and independent authority to exercise all functions and powers of the Attorney General and the Office of the Prosecutor, and has specific authority to proceed against any person or entity in a civil or administrative action. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).


The special prosecutor has all necessary and proper power and authority incident to the exercise of his or her other powers and authority. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

4. **Limited to tribal officials**

The Special Prosecutor Act at 2 N.N.C. § 2021(b) (under provisions that have since been modified), limits the prosecutor's jurisdiction to tribal officials. This limitation, however, is to avoid conflicts of interest. For example, the chief prosecutor may be hesitant to prosecute the president, because he is appointed by the attorney general, who is appointed by the president. An independent counsel would not have the same conflict of interest as the chief prosecutor. Thus, the purpose of the section is to avoid conflicts of interest. It is not a jurisdictional statute. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

5. **Other investigations suspended**

Once a special prosecutor assumes jurisdiction, the attorney general and chief prosecutor must suspend all investigations “except insofar as such special prosecutor and the Attorney General agree in writing that such investigations and proceedings may continue.” *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).
II. Substantive criminal law

A. Mental states


• The mere fact that the elements of the two or more statutory offenses are fulfilled by a defendant's action does not, by itself, show clear intent. *Navajo Nation v. Kelly*, SC-CR-04-05, slip op. (Nav. Sup. Ct. July 24, 2006).

• A person shall not be guilty of an offense unless he acted intentionally, knowingly, recklessly, or negligently as the law may require with respect to each material element of the offense. *Navajo Nation v. Hunter*, 7 Nav. R. 194 (Nav. Sup. Ct. 1996).

• A person shall not be guilty of an offense unless he acted intentionally, knowingly, recklessly, or negligently as the law may require with respect to each material element of the offense. *Navajo Nation v. Platero*, 6 Nav. R. 422 (Nav. Sup. Ct. 1991).

• Where the mental state required for the crime is absent, conviction is precluded (although an individual may be convicted of a lesser included offense). *Navajo Nation v. Platero*, 6 Nav. R. 422 (Nav. Sup. Ct. 1991).


• Some offenses require an awareness of certain facts or circumstances. For example, in a prosecution arising out of an assault and battery conviction resulting from a false arrest, the state was required to prove that the arresting officer actually knew the arrest warrant was defective. *Navajo Nation v. Platero*, 6 Nav. R. 422 (Nav. Sup. Ct. 1991).

B. Offenses

1. Inchoate offenses

• To prove that the defendant committed the offense of conspiracy, prosecution must (1) the intent (2) to promote or facilitate (3) the commission of an offense (4) by an agreement with one or more persons (5) that at least one of them (6) will engage in conduct constituting an offense, (7) and one of them commits an overt act in furtherance of the agreement. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).

• Conspiracy is a broad offense, which covers any conduct by at least two persons to take some action in the commission of an offense. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).

• Circumstantial evidence may be used to prove conspiracy. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).

• A person may be charged with and convicted of an offense as an accomplice if he or she intentionally or knowingly solicits, counsels, commands, facilitates, aids, agrees to aid or attempts to aid in its commission, although he or she did not directly commit the crime and although the principal who directly committed such offense has not been prosecuted or convicted, or has been convicted of a different offense. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).
2. Offenses against persons

a) Battery

- The offense of aggravated battery allows a sentence of up to one year, a fine of up to $5,000, or both. *Navajo Nation v. Morgan*, 8 Nav. R. 732 (Nav. Sup. Ct. 2005).
- A police officer may use such force as is reasonably necessary in the discharge of his official duties and is not liable for an assault or battery in so doing. But no greater force can be used than is reasonably necessary for the performance of his duties. *Navajo Nation v. Platero*, 6 Nav. R. 422 (Nav. Sup. Ct. 1991).
- Where a police officer acts with reasonable cause, or uses sound discretion under the circumstances, without force which is unreasonably dangerous, there is no assault or battery. *Navajo Nation v. Platero*, 6 Nav. R. 422 (Nav. Sup. Ct. 1991).
- A person commits aggravated battery if he or she: (1) Unlawfully applies force to the person of another or strikes the person with a deadly weapon; or (2) Intentionally or knowingly causes serious physical injury to the person of another. *In re Interests of Lewis*, 6 Nav. R. 560 (W.R. Fam. Ct. 1991).
- To obtain a conviction for aggravated battery, the Navajo Nation must prove, beyond a reasonable doubt, that the defendant unlawfully applied force to the victim, or that the defendant intentionally or knowingly caused serious physical injury to the victim. *Navajo Nation v. Murphy*, 6 Nav. R. 10 (Nav. Sup. Ct. 1988).

b) Contributing to the delinquency of a minor


c) Threatening

- A person commits threatening if he or she threatens by word or conduct to cause physical injury to the person of another with the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person. *Navajo Nation v. Lee*, 4 Nav. R. 185 (W.R. Dist. Ct. 1983).

3. Weapons and explosives

- The Navajo Criminal Code defines deadly weapon as “anything designed for lethal use or any instrument used in a lethal manner; the term includes a firearm.” *In re Interests of Lewis*, 6 Nav. R. 560 (W.R. Fam. Ct. 1991).

4. Theft and related offenses

5. Forgery and related offenses

[No Navajo cases on this topic at this time].

6. Burglary

[No Navajo cases on this topic at this time].

7. Bribery and related offenses

- It is an offense for a tribal official to (1) solicit, accept, or agree to accept (2) any benefit (3) upon an agreement or understanding (4) that his opinion, judgment, exercise of discretion or other action as a tribal official (5) may be influenced. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).
- The Council intended the law to punish solicitation, acceptance and agreement separately, and to authorize separate or multiple punishments for each. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).
- The Council intended that a public official should be punished for each separate act of soliciting a bribe, entering into an arrangement or agreement for a bribe and/or actually accepting the bribe. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).

8. Obstruction of Navajo Nation Administration

[See Attorneys I(F) for Unauthorized Practice of Law]

9. Criminal damage to property

[No Navajo cases on this topic at this time].

10. Controlled substances

- A Defendant is guilty of possession or sale of controlled substances when she uses peyote unless she is a member of the Native American Church and the peyote is used in connection with recognized religious practices. *Navajo Nation v. Haag*, 7 Nav. R. 443 (Chin. Dist. Ct. 1992).
- Defendant is under no obligation to testify that she had a sincere religious belief or that she only used Peyote in the ceremonies of the Native American Church. Placing such a burden on the Defendant would unduly place the burden of proof upon the defendant as she cannot be compelled in any criminal case to be a witness against herself as provided by the Navajo Nation Bill of Rights and the Indian Civil Rights Act. *Navajo Nation v. Haag*, 7 Nav. R. 443 (Chin. Dist. Ct. 1992).

11. Obscenity

[No Navajo cases on this topic at this time].
12. Intoxicating liquors

- To be found guilty of Delivery of Liquor, Defendant must intentionally or knowingly deliver or is in possession of liquor with intent to deliver. *Navajo Nation v. Hunter*, 7 Nav. R. 465 (Ship. Dist. Ct. 1995).
- There is a presumption that there was intent to deliver the liquor when a person has 12 or more bottles of beverage with an alcohol content of 10% or greater or when she is in possession of 24 or more bottles or cans of beverage with an alcohol content of less than 10%. The presumption can be rebutted by the Defendant. *Navajo Nation v. Hunter*, 7 Nav. R. 465 (Ship. Dist. Ct. 1995).
- Everyone knows, or should know, that it is illegal to possess or transfer liquor within the Navajo Nation, and it is a federal crime as well. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).
- A person commits the offense of bootlegging if he or she intentionally or knowingly manufactures, delivers, or possesses, with intent to deliver, any beer, ale, wine, whiskey, or any other beverage which produces alcoholic intoxication. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).
- For the offense of bootlegging, “deliver or delivery” means the actual or constructive transfer of possession of any alcoholic beverage as described above, with or without consideration, whether or not there is an agency relationship. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).
- Illegal delivery of liquor is a serious offense, because liquor has caused far reaching devastation on the Navajo Nation. As such, the Navajo courts have the power and the duty to protect the public interest of the Navajo Nation from people who engage in such illegal activity. *Begay v. Navajo Nation*, 6 Nav. R. 20 (Nav. Sup. Ct. 1988).

13. Gambling

*[No Navajo cases on this topic at this time]*.

14. Prostitution

*[No Navajo cases on this topic at this time]*.

15. Sexual offenses

*[No Navajo cases on this topic at this time]*.

16. Offenses against the family

a) Endangering the welfare of a minor

• Endangering the welfare of a minor is when defendant intentionally or knowingly contributes, encourages or causes a person under 18 years of age to be subjected to the infliction of physical or mental injury including failing to maintain reasonable care and treatment thereof. *Navajo Nation v. Hunter*, 7 Nav. R. 465 (Ship. Dist. Ct. 1995).

• In applying this section of the Criminal Code, liberal construction is to be given in favor of the Navajo Tribe for the protection of the minor from the effects of the improper conduct, acts or bad examples of any person which may be calculated to cause, encourage or contribute to the adverse welfare of minors, although such person is in no way related to the minor. *Navajo Nation v. Hunter*, 7 Nav. R. 465 (Ship. Dist. Ct. 1995).

17. Animals; livestock

• It is unlawful to be in possession of an unbranded animal. *Navajo Nation v. Jesus*, 3 Nav. R. 241 (W.R. Dist. Ct. 1982).

• It is a crime to willfully allow livestock to drift from one district to another, and the owner is subject to a trespass action if he permits such drifting. *Navajo Nation v. Jesus*, 3 Nav. R. 241 (W.R. Dist. Ct. 1982).

18. Interference with judicial proceedings

• When a defendant is convicted of the offense of interfering with judicial proceedings, the district court is only permitted to order nályééh, a peace or security bond, and or a sentence of labor or community service. *Thompson v. Greyeyes*, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).


• If a respondent in a Domestic Abuse Protection Act case violates a protection order, the family court or the police department may refer the incident to the prosecutor for criminal prosecution. *Thompson v. Greyeyes*, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).

• The family court lacks jurisdiction to hear a criminal case, meaning the prosecutor is required to file a criminal complaint in the district court. *Thompson v. Greyeyes*, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).


• A person can be charged with the crime of “interfering with judicial proceedings,” if after receiving notice of a protection order, the person disobeys the order. *Petition of Austin*, 7 Nav. R. 346 (Nav. Sup. Ct. 1998).

• Since a prosecution for the criminal charge of interfering with judicial proceedings was not commenced by a Navajo Nation prosecutor against the Petitioner, the family court could not use subsection 1663 (A) to impose a jail term on the Petitioner. *Petition of Austin*, 7 Nav. R. 346 (Nav. Sup. Ct. 1998).

• A person can be held in criminal contempt, after the court finds beyond a reasonable doubt that the person violated a term of a protection order. The person may be punished with a jail term of up to 180 days, or a fine of $250.00, or both. *Petition of Austin*, 7 Nav. R. 346 (Nav. Sup. Ct. 1998).

• The law requires a finding that a person violated a term of a protection order before jail becomes an option. The courts are prohibited from imposing a jail sentence on a person simply on the basis of the person's admission to an allegation in a domestic abuse protection petition. *Petition of Austin*, 7 Nav. R. 346 (Nav. Sup. Ct. 1998).
19. **Offenses against the public order**

   a) **Unlawful assembly**

   - A person is guilty of unlawful assembly if they assemble with others for the purpose of instructing or training in guerilla warfare or sabotage, to engage in rioting or the violent disruption of, or the violent interference with any educational, religious, social, political, recreational or scientific endeavor. *Keeswood v. Navajo Tribe*, 1 Nav. R. 362 (Ship. Dist. Ct. 1978); *Now see* 17 N.N.C. § 481.
   
   - “With others,” for the purpose of the unlawful assembly statute, must include at least three persons. *Keeswood v. Navajo Tribe*, 1 Nav. R. 362 (Ship. Dist. Ct. 1978); *Now see* 17 N.N.C. § 481.
   
   - To meet the standards imposed by the courts in unlawful assembly, the unlawful conduct or acts of a few cannot change the otherwise peaceful assembly unless the majority concurs in the unlawful conduct or acts. *Keeswood v. Navajo Tribe*, 1 Nav. R. 362 (Ship. Dist. Ct. 1978); *Now see* 17 N.N.C. § 481.

20. **Robbery**


21. **Fish and wildlife violations**

   *No Navajo cases on this topic at this time*.

22. **Forests and woodlands violations**

   *No Navajo cases on this topic at this time*.

23. **Curfew violations**

   
   - Under the curfew statute, an Indian child committing a curfew violation shall be deemed to have committed a delinquent act and may be deemed a delinquent child. *In the Matter of A.P.*, 8 Nav. R. 671 (Nav. Sup. Ct. 2005).
   
   - Under the curfew statute, a non-Indian child may be excluded from the territorial jurisdiction of the Navajo Nation or be ordered to pay a civil penalty not to exceed $500 or both. *In the Matter of A.P.*, 8 Nav. R. 671 (Nav. Sup. Ct. 2005).
   
   - To reconcile the curfew statute and the Children’s Code, the Court interprets the difference between Indian children and non-Indian children as one of remedy, not type of proceeding. *In the Matter of A.P.*, 8 Nav. R. 671 (Nav. Sup. Ct. 2005).

24. **Motor vehicle offenses**
a) Reckless driving

- The elements of the offense of reckless driving include acting carelessly in willful or wanton disregard of the rights or safety of others, and in a manner so as to endanger or be likely to endanger any person or property. *Navajo Nation v. Kelly*, SC-CR-04-05, slip op. (Nav. Sup. Ct. July 24, 2006).
- Reckless driving is the unlawful operation of a motor vehicle, and, therefore, if a death occurred due to the reckless driving, there is sufficient evidence to sustain a conviction for homicide by vehicle. *Navajo Nation v. Kelly*, SC-CR-04-05, slip op. (Nav. Sup. Ct. July 24, 2006).

b) Homicide by vehicle

- Reckless driving is the unlawful operation of a motor vehicle, and, therefore, if a death occurred due to the reckless driving, there is sufficient evidence to sustain a conviction for homicide by vehicle. *Navajo Nation v. Kelly*, SC-CR-04-05, slip op. (Nav. Sup. Ct. July 24, 2006).

c) Driving while intoxicated

- The mere fact that an officer smells the odor of alcohol on the person and has dirty clothes is not sufficient to convict a person of Driving While Intoxicated. *Navajo Nation v. Carty*, 1 Nav. R. 296 (Nav. Ct. App. 1978).
- A person charged with driving or under actual control of a vehicle while under the influence of intoxicating liquor can be held to be guilty of the charge under evidence that the defendant's truck was found parked near the roadway with the lights on and the engine running and with defendant sitting behind the driver's wheel passed out from the influence of intoxicating liquor. *Navajo Tribe v. George*, 1 Nav. R. 45 (Nav. Ct. App. 1972).
- A complaint charging the defendant with driving while under the influence of intoxicating liquor is sufficient to notify the defendant of the nature of the charge. *Navajo Tribe v. George*, 1 Nav. R. 45 (Nav. Ct. App. 1972).

25. Offenses by juveniles

- 9 N.N.C. § 1121 provides that the District Court shall have original exclusive jurisdiction of a 14 N.N.C. § 707(A) violation involving a child when the person alleged to have committed the violation is a child who has reached his fifteenth birthday. This statute, however, conflicts with sections of the Children's Code which state that a “delinquent act” includes a violation of 14 N.N.C. §707(A), and that a child under the age of eighteen (which logic would dictate would also include a child aged fifteen) would be treated as a delinquent child and not as a criminal defendant. *Navajo Nation v. Castillo*, 8 Nav. R. 866 (Crwn. Dist. Ct. 2005).
As a matter of law, because of these contradictory elements of the Children's Code, which make it difficult if not impossible for a child to determine whether or not he may be criminally liable for the behavior he is alleged to have engaged in, make 9 N.N.C. § 1121 void as a matter of law based on the Navajo principle of ĭshjáni ādoolnil. Navajo Nation v. Castillo, 8 Nav. R. 866 (Crwn. Dist. Ct. 2005).

C. Defenses

- Where an officer has no motive other than to discharge his duty, and has an honest and reasonable belief that his conduct is necessary in the performance of his duty, a criminal action cannot be maintained against him. Navajo Nation v. Platero, 6 Nav. R. 422 (Nav. Sup. Ct. 1991).
- There is no liability where a public official obeys the lawful command of the government or if an official carries out the imperative duty of obeying an order of a superior in good faith. Navajo Nation v. Platero, 6 Nav. R. 422 (Nav. Sup. Ct. 1991).
- Conduct is justified and an affirmative defense when it is required or authorized by law. Navajo Nation v. Platero, 6 Nav. R. 422 (Nav. Sup. Ct. 1991).
- A police officer is a "peace officer," and that means any person who is a law enforcement officer vested by law with a duty to maintain public order or make arrests, whether that duty extends to all offenses or is limited to specific classes of offenses or offenders. Navajo Nation v. Platero, 6 Nav. R. 422 (Nav. Sup. Ct. 1991).

III. Civil rights of the accused

A. Right to be free from unreasonable searches and seizures

1. Fundamental right

- Navajo Nation Bill of Rights protects the right of the people to be secure in their persons and property against unreasonable searches and seizures of government, including unreasonable arrest and detention. Apachito v. Navajo Nation, 8 Nav. R. 339 (Nav. Sup. Ct. 2003).

2. When warrant required

- In any situation in which the police have information in advance of a planned operation sufficient to establish probable cause to obtain a search warrant, they must obtain such a warrant. Navajo Nation v. Franklin, 1 Nav. R. 145 (Nav. Ct. App. 1977).
- To allow searches without warrants when police have advanced notice would in effect negate the substantive protections of 1 N.N.C. §4 – the “search and seizure” section of the Navajo Bill of Rights. Navajo Nation v. Franklin, 1 Nav. R. 145 (Nav. Ct. App. 1977).

3. Warrantless searches generally

- If an arrest upon which a warrantless search is bona fide, and is based upon an offense for which the arresting officer reasonably believes that fruits, instrumentalities, contraband or mere evidence of the crime may be found, the search for these items is proper. Navajo Tribe v. Todacheene, 1 Nav. R. 87 (Nav. Ct. App. 1973).
4. Plain view doctrine

- The officer had a right to knock on the door while investigating a case, and she had a right to check the rear of the house while performing her duties. *Navajo Nation v. Halona*, 3 Nav. R. 189 (W.R. Dist. Ct. 1981).
- Police officers are entitled and indeed have a duty to act when they see what appears to be marijuana while performing their duties. *Navajo Nation v. Halona*, 3 Nav. R. 189 (W.R. Dist. Ct. 1981).
- The plain-view doctrine only permits the seizure of the thing actually in plain view, the theory being that no "search" was really necessary to reveal the evidence seized. Therefore, once the police gain access to a place to seize something they have seen while outside, they can only seize the object which was already visible and any other materials that then are in plain view of the thing being seized. *Navajo Nation v. Franklin*, 1 Nav. R. 145 (Nav. Ct. App. 1977).
- The plain-view doctrine has limits. It does not authorize the police to open doors, drawers, and cabinets. Nor does this doctrine allow police to enter and search areas not within plain view of the thing being seized. *Navajo Nation v. Franklin*, 1 Nav. R. 145 (Nav. Ct. App. 1977).

5. Search incident to arrest

- Because of the mobility of automobiles, enabling their speedy disappearance from the scene of an arrest, their usefulness in the perpetration of crime, specialized rules have been developed by courts for determining the reasonableness of the search of an automobile. *Navajo Tribe v. Todacheene*, 1 Nav. R. 87 (Nav. Ct. App. 1973).
- If the defendant is arrested in or by his automobile, then his automobile is subject to search for fruits, instrumentalities, contraband or mere evidence of the crime which might assist the police in apprehending or convicting the suspect. *Navajo Tribe v. Todacheene*, 1 Nav. R. 87 (Nav. Ct. App. 1973).
- To validate a warrantless automobile search, the original arrest must have been for an offense of the type for which some physical evidence might be found. An arrest for simple speeding, improper turn, defective tail lights or even reckless driving would not support an officer's incidental search. With the exception of driving while intoxicated, there is probably no simple traffic offense for which any object other than the vehicle itself which could be considered evidence of the crime. *Navajo Tribe v. Todacheene*, 1 Nav. R. 87 (Nav. Ct. App. 1973).
- If a search is valid as a search incident to an arrest, unlike the search for weapons or means of escape, a search for physical evidence of a crime is not confined to those areas of the automobile to which the arrestee has immediate access. The search may extend to the entire vehicle including the glove compartment, truck space, or any other position of the car that might reasonably conceal one of the items sought. *Navajo Tribe v. Todacheene*, 1 Nav. R. 87 (Nav. Ct. App. 1973).
- An officer’s authority to search would not terminate simply because the suspect was handcuffed. This is because the rule supporting an incidental search for physical evidence is based less on the need to prevent destruction of the evidence than on the broader consideration of reasonableness. *Navajo Tribe v. Todacheene*, 1 Nav. R. 87 (Nav. Ct. App. 1973).
6. Execution of warrant


B. Right to a speedy trial

1. Generally

- The speedy trial right exists to protect the criminal defendant's ability to defend himself or herself, primarily by preventing the loss of witnesses, their memory of events, or other evidence through the passage of time. *Navajo Nation v. Badonie*, No. SC-CR-06-05, slip op. (Nav. Sup. Ct. March 7, 2006).
- Criminal defendants have a right to a speedy trial that may be violated by delays. *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 617 (Nav. Sup. Ct. 2005).
- Fairness to the other party to the litigation, both in civil and criminal cases, mandates that there be a smooth and predictable process leading up to trial. *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 617 (Nav. Sup. Ct. 2005).
- Navajo courts are sensitive to the speedy trial right of defendants, and they balance it against the right for a sufficient time to prepare the defense. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

2. When elapsed time is calculated to protect right

- A criminal defendant's right to a speedy trial extends to certain post-trial actions by a district court, including, at least, the completion of findings and conclusions to support a conviction. *Navajo Nation v. Badonie*, No. SC-CR-06-05, slip op. (Nav. Sup. Ct. March 7, 2006).
- A lengthy delay between a remand to the District Court with instructions to make findings and conclusions and the actual completion of that task prejudices the defendant and violates his right to a speedy trial. *Navajo Nation v. Badonie*, No. SC-CR-06-05, slip op. (Nav. Sup. Ct. March 7, 2006).
- Either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge will give rise to the protections of the right to a speedy trial. *Navajo Nation v. Bedonie*, 2 Nav. R. 131 (Nav. Ct. App. 1979).
- The right to a speedy trial does not arise in the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusations: his situation does not compare with that of a defendant who has been arrested and held to answer. *Navajo Nation v. Bedonie*, 2 Nav. R. 131 (Nav. Ct. App. 1979).
3. Factors considered

- In determining whether the right to a speedy trial has been violated, the Court applies four factors: 1) the length of the delay, 2) the reason for the delay, 3) the defendant's assertion of the right, and 4) the prejudice to the defendant caused by the delay. *Navajo Nation v. Badonie*, No. SC-CR-06-05, slip op. (Nav. Sup. Ct. March 7, 2006).


- The right of a speedy trial is necessarily relative, as it is consistent with delays and depends upon circumstances and secures rights to a defendant, but does not preclude the rights of public justice. *Navajo Nation v. Badonie*, No. SC-CR-06-05, slip op. (Nav. Sup. Ct. March 7, 2006).

- When defendant claims violation of his right to speedy trial, court must examine (1) the length of delay; (2) the reason for delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).


- While anxiety and concern are valid components of prejudice, they must be balanced with the right of the parties, the court and the public to an orderly trial. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

- In evaluation an objection based upon the right to a speedy trial, the Court should evaluate these factors: (1) length of delay; (2) reason for the delay; (3) defendant's assertion of his right; and (4) any prejudice to the defendant. *Navajo Nation v. Bedonie*, 2 Nav. R. 131 (Nav. Ct. App. 1979).

- A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay. *Navajo Nation v. Bedonie*, 2 Nav. R. 131 (Nav. Ct. App. 1979).

- For speedy trial challenges, the enumerated factors are related and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. *Navajo Nation v. Bedonie*, 2 Nav. R. 131 (Nav. Ct. App. 1979).

4. Speedy trial right, prejudice to defendant

- A criminal defendant can also be prejudiced in the ability to present his or her case on reconsideration in the district court, or on appeal in the Supreme Court, if there is a long period of time between a trial and the issuance of findings and conclusions supporting the convictions. *Navajo Nation v. Badonie*, No. SC-CR-06-05, slip op. (Nav. Sup. Ct. March 7, 2006).

- The possibility that, due to the passage of time, the judge might reconstruct his or her findings and conclusions from memory, and not from the actual evidence presented, requires that a judge complete findings and conclusions within a reasonable time after trial. *Navajo Nation v. Badonie*, No. SC-CR-06-05, slip op. (Nav. Sup. Ct. March 7, 2006).

- Defendant was not prejudiced by any delay caused by the prosecution of co-defendant where there was no indication that evidence was lost, memories were dimmed, defense witnesses disappeared.
or the defense was impaired, and defendant was not confined pending trial. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

- Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, [deprive] the defendant of witnesses, and otherwise interfere with his ability to defend himself. *Navajo Nation v. Bedonie*, 2 Nav. R. 131 (Nav. Ct. App. 1979).
- In speedy trial challenges, prejudice should be assessed in light of the interests of defendants which the speedy trial right was designed to protect. Three such interests have been identified: (i) incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Navajo Nation v. Bedonie*, 2 Nav. R. 131 (Nav. Ct. App. 1979).
- In speedy trial challenges, the most serious is the possibility that the defense will be impaired, because the inability of a defendant to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. *Navajo Nation v. Bedonie*, 2 Nav. R. 131 (Nav. Ct. App. 1979).
- In speedy trial challenges, there is prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown. *Navajo Nation v. Bedonie*, 2 Nav. R. 131 (Nav. Ct. App. 1979).

5. Speedy trial rights, particular delays reviewed

- As a matter of law, the six and one-half months from arraignment to trial in this case does not rise to a presumption of prejudice. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

C. Right to be confronted with the witnesses against the accused

- The question of whether hearsay evidence violates a defendant’s right to confront witnesses against him will be analyzed under the hearsay rules. Where the testimony fell under recognized hearsay exceptions, it was admissible. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 206 (Nav. Sup. Ct. 1990).
- One key factor in allowing hearsay was the fact that defendant had the opportunity to cross-examine witness in prior proceeding. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 206 (Nav. Sup. Ct. 1990).
- In allowing testimony from prior proceedings, court must analyze (1) the nature of the action where the testimony is taken, (2) the strategy or theory of the case in that action, (3) the potential penalties or financial stakes, and (4) the number of issues and parties. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 206 (Nav. Sup. Ct. 1990).
- Where the issues in a prior trial are substantially the same, and where there was an opportunity for the objecting party to cross-examine the witness, a deposition is admissible in the later proceeding. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 206 (Nav. Sup. Ct. 1990).
D. Right to jury trial

1. Fundamental right

- A jury trial is a fundamental right in the Navajo Nation. A jury is a modern manifestation of the Navajo principle of participatory democracy in which the community talks out disputes and makes a collective decision. *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 617 (Nav. Sup. Ct. 2005).
- The Navajo Bill of Rights provision states that “no person accused of an offense punishable by imprisonment shall be denied the right, upon request, to a trial by jury of not less than six (6) persons.” *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 617 (Nav. Sup. Ct. 2005).
- The Indian Civil Rights Act similarly states that an Indian tribe shall not “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.” *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 617 (Nav. Sup. Ct. 2005).

2. Restrictions construed narrowly


3. Not automatic

- Unlike the equivalent federal constitutional right under the Sixth Amendment, there is no automatic right to a trial by jury, as the defendant may waive the right by failing to request it. *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 617 (Nav. Sup. Ct. 2005).

4. Court may require request for jury trial within a specific time period

- It is not unreasonable to require a defendant to request a jury trial within fifteen days after arraignment. *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 617 (Nav. Sup. Ct. 2005).

5. Knowing and intentional waiver

- As a matter of due process, a waiver of a jury trial must be a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 617 (Nav. Sup. Ct. 2005).
- There must be meaningful notice and an explanation of the right to request a jury trial before the Supreme Court will recognize the failure to request the jury trial as “knowing and intelligent.” *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 617 (Nav. Sup. Ct. 2005).
• *Hózhó'ógo* requires, at a bare minimum, that the Nation give notice that the right to a jury trial may be waived by inaction. *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 617 (Nav. Sup. Ct. 2005).

• For notice to be meaningful, and therefore a waiver to be effective, the Navajo government must explain to the defendant that the jury trial right is not absolute, as it may be waived by doing nothing within a certain time. *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 617 (Nav. Sup. Ct. 2005).

• Absent an explanation regarding waiver of the right to a jury trial, the information received by a defendant is incomplete, as it appears the right is automatic and perpetual, like the federal constitutional right. *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 617 (Nav. Sup. Ct. 2005).

• Without information regarding waiver of the right to a jury trial, the waiver by inaction is not truly knowing and intelligent, and would violate the defendant's right to due process. *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 617 (Nav. Sup. Ct. 2005).

• The rule regarding waiver of the right to a jury trial which requires a patient, respectful discussion of a suspect's rights is not conditioned upon any subjective considerations of the individual involved. *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 617 (Nav. Sup. Ct. 2005).

• Failure to attend a jury trial is not a waiver of the right to a jury trial. *Navajo Nation v. Davis*, 3 Nav. R. 248 (W.R. Dist. Ct. 1982).

E. **Right to counsel**

1. **Fundamental right**

• Criminal defendants in the Navajo Nation court system are entitled to the appointment of counsel if they are indigent. *Means v. District Court*, 7 Nav. R. 383 (Nav. Sup. Ct. 1999).

• Under the Navajo Nation Bill of Rights, no person accused of an offense punishable by imprisonment shall be denied the right to have the assistance of counsel, at their own expense, and to have defense counsel appointed in accordance with the rules of the courts of the Navajo Nation upon satisfactory proof to the court of this inability to provide for their own counsel for the defense of any punishable offense under the laws of the Navajo Nation. *Boos v. Yazzie*, 6 Nav. R. 211 (Nav. Sup. Ct. 1990).


• Every defendant in a criminal case has the right to have representation by legal counsel and in the event he has no such representation, he may proceed without legal counsel or a legal counsel may be appointed by the judge. *Boos v. Yazzie*, 6 Nav. R. 211 (Nav. Sup. Ct. 1990).

• Every defendant in a criminal case shall have the right to have representation by legal counsel and in the event he has no such representation, he may proceed without legal counsel or a legal counsel may be appointed by the judge. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 206 (Nav. Sup. Ct. 1990).

• The right to counsel is an important one. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 206 (Nav. Sup. Ct. 1990).

2. **Indian Civil Rights Act**

3. Effective assistance of counsel

a) Generally

- The last refuge of the convicted defendant is based on claims that counsel was ineffective in handling the case. It is a common claim made both by and against even the best lawyers and usually without success. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).

b) Conflicts of interest

- In ineffective assistance of counsel case, prejudice is presumed when counsel is burdened by an actual conflict of interest. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).
- For a conflict of interest to constitute ineffective assistance of counsel, the conflict of interest must be tied directly to incompetence of counsel. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).
- The ethical standard is that an attorney may not be compensated by a third person unless (1) the client consents after full disclosure, (2) the arrangement does not interfere with the attorney's professional judgment or the attorney-client relationship, and (3) the attorney-client privilege is not violated. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).
- There is no conflict of interest where (1) client knew about fee arrangement; (2) client went along with the arrangement; (3) client later states that he objected to fee arrangement; but (4) the objection is not supported by the record. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).

C) Prejudice to accused

- In ineffective assistance of counsel case, prejudice may be presumed in some limited situations. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).
- In ineffective assistance of counsel case, prejudice can be presumed in some limited situations where counsel is totally absent or prevented from assisting the accused or where counsel is burdened by an actual conflict of interest. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).
- In ineffective assistance of counsel case, prejudice may be presumed, but actual incompetence must still be shown. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).

d) Presumption of reasonable counsel conduct

- In ineffective assistance of counsel case, counsel is strongly presumed to have rendered adequate assistance to the defendant. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).
• In ineffective assistance of counsel case, there is a strong presumption that the conduct of counsel in a criminal case falls within the wide range of reasonable professional assistance or competence. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).

e) Waiver of privilege

• Where a client claims that an attorney is not providing effective assistance, the attorney-client privilege is waived to the extent necessary for a lawyer to defend himself. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).

f) Standard of review

• In ineffective assistance of counsel case, counsel's actual performance must be deficient. This determination is made after asking, whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

• To evaluate incompetence in an ineffective assistance of counsel case, the Court must assess performance without hindsight, applying the presumption of effectiveness, examining specific errors, and acknowledging the role of strategic trial decisions. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).

g) Burden of proof

• In ineffective assistance of counsel case, the burden is on the client to show that there is a reasonable probability that, but for unprofessional errors, the outcome would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).

F. Right not to be subject to double jeopardy

• Whether there is sufficient evidence to sustain a conviction, and whether a conviction violates double jeopardy are questions of law. The Court reviews such questions de novo, with no deference given to the District Court’s decision. *Navajo Nation v. Kelly*, SC-CR-04-05, slip op. (Nav. Sup. Ct. July 24, 2006).

• The Court will apply heightened scrutiny to provisions that allegedly create separate offenses based on a single action, and in the absence of clear intent that the statutory offenses indeed punish separate conduct, multiple convictions for the same action will be barred by double jeopardy. *Navajo Nation v. Kelly*, SC-CR-04-05, slip op. (Nav. Sup. Ct. July 24, 2006).

• The Diné concept of double jeopardy also means that even if the Council creates two separate offenses that clearly punish the same conduct, it cannot nonetheless mandate multiple punishments, even if its intent is clear. Multiple punishments for the same conduct are contrary to Navajo tradition. *Navajo Nation v. Kelly*, SC-CR-04-05, slip op. (Nav. Sup. Ct. July 24, 2006).

• The right to be informed of the nature and cause of the accusation is designed to give the defense of double jeopardy meaning. If the complaint is specific as to the offense, time, place and facts, an acquittal on the offense charged can be used to prevent a future prosecution. *Navajo Nation v. Lee*, 4 Nav. R. 185 (W.R. Dist. Ct. 1983).
G. Right against compulsory self-incrimination

1. Fundamental right

- Section 8 of the Navajo Bill of Rights protects criminal defendants from being compelled to be a witness against themselves. *Navajo Nation v. Rodriguez*, 8 Nav. R. 604 (Nav. Sup. Ct. 2004).

2. Advice of rights to the accused

- The right against self-incrimination requires, at a minimum, clear notice by the police in a custodial situation that the person in custody (1) has the right to remain silent and may request the presence of legal counsel during questioning, (2) that any statements can be used against him or her, (3) the right to an attorney, and (4) the right to have an attorney appointed if he or she cannot afford an attorney. *Navajo Nation v. Rodriguez*, 8 Nav. R. 604 (Nav. Sup. Ct. 2004).
- The sufficiency of the explanation in a Navajo setting means, at a minimum, that the rights be explained in Navajo if the police officer or other interviewer has reason to know the persons speaks or understands Navajo. If the person does not speak or understand Navajo, the rights should be explained in English so that the person has a minimum understanding of the impact of any waiver. Only then will a signature on a waiver form allow admission of any subsequent statement into evidence. *Navajo Nation v. Rodriguez*, 8 Nav. R. 604 (Nav. Sup. Ct. 2004).

3. Burden of proof may not be placed on the accused

- Defendant is under no obligation to testify that she had a sincere religious belief or that she only used Peyote in the ceremonies of the Native American Church. Placing such a burden on the Defendant would unduly place the burden of proof upon the defendant as she cannot be compelled in any criminal case to be a witness against herself as provided by the Navajo Nation Bill of Rights and the Indian Civil Rights Act. *Navajo Nation v. Haag*, 7 Nav. R. 443 (Chin. Dist. Ct. 1992).

4. Waiver must be knowing and voluntary

- A person cannot give information for his or her own punishment unless there is a knowing and voluntary decision to do so. *Navajo Nation v. Rodriguez*, 8 Nav. R. 604 (Nav. Sup. Ct. 2004).
- An individual must not give information to be used for his or her own punishment unless there is a knowing and voluntary decision to do so. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).
5. **Diné bi beenahaz’áanii**

- Navajos do not believe in coercion. Others may talk about a Navajo, but that does not mean coercion can be used to make that person admit guilt or the facts leading to a conclusion of guilt. *Navajo Nation v. Rodriguez*, 8 Nav. R. 604 (Nav. Sup. Ct. 2004).
- The relationship between the Navajo Nation government and its individual citizens requires the same level of respect as the relationship between one person to another. In the Navajo way of thinking people must communicate clearly and concisely to each other so that they may understand the meaning of words and the effect of actions based on those words. The responsibility of the government is even stronger when a fundamental right, such as the right against self incrimination, is involved. *Navajo Nation v. Rodriguez*, 8 Nav. R. 604 (Nav. Sup. Ct. 2004).
- The defendant’s right to not be compelled to testify against himself is a Navajo principle. Navajo common law rejects coercion, including coercing people to talk. Others may “talk” about a Navajo, but that does not mean coercion can be used to make that person admit guilt or the facts leading to a conclusion of guilt. Navajos often admit guilt, because honesty is another high value, but even after admitting guilt, defendants in Navajo courts are reluctant to speak. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

6. **When right arises**

- The right against coerced self-incrimination attaches not when the defendant first appears before the District Court, but when he was placed in police custody and was interviewed by a police officer. *Navajo Nation v. Rodriguez*, 8 Nav. R. 604 (Nav. Sup. Ct. 2004).

7. **All coercion prohibited**


8. **Immunity**

- Where defendant received immunity from United States Senate subcommittee, any prosecution would require a demonstration that the government's evidence is not based on or derived from information obtained during the immunized testimony. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).
- The due process clause of the Navajo Nation Bill of Rights, 1 N.N.C. § 3, require prosecutor to prove to the trial court, in an adversary hearing, that the evidence it used in preparing its case and the evidence offered at trial were not based on or derived from the information defendant gave to any official under either a formal or informal grant of immunity. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).
- An individual cannot be compelled to give that information unless there are safeguards and assurances that it will not be used to develop a criminal case or be used in some way to prove that case. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).
- When a defendant shows that he has testified under immunity, and that testimony is related to a criminal prosecution against him, the prosecution has a burden to show that its evidence is not

- The protection against self-incrimination extends to direct and indirect use of immunized testimony, including leads derived from the testimony. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

- The goal of the process is to ensure that a witness who is compelled to give immunized testimony will not suffer and that the defendant is in the same position as if he or she had remained silent. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

9. **Subpoenas**

- In order to assure that the act of producing the documents demanded in the "broad-sweeping subpoena" will not require the defendant to give testimonial evidence of their possession of them, their existence, or their authentication and, thus violate their privilege against self-incrimination; the district court must make further findings. *MacDonald, Sr. v. Navajo Nation*, 6 Nav. R. 290 (Nav. Sup. Ct. 1990).

10. **Guilty pleas**

- Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded from being compelled to do so – hence the minimum requirement that his plea be the voluntary expression of his own choice. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).

H. **Right against cruel and unusual punishment or excessive bail or fines**

- A criminal sentence not according to law is deemed cruel and unusual punishment prohibited by Section 9 of the Navajo Nation Bill of Rights. *Cody v. Greyeyes*, No. SC-CV-09-09, slip op. (Nav. Sup. Ct. March 11, 2009).

- Where District Court ordered Defendant’s continued imprisonment to compel payment of his fine and court fee, the jail sentence imposed does not have a definite term. Furthermore, where the Defendant was jailed for 55 days although he kept informing the District Court that he does not have the money, nor can he raise the money if he is incarcerated, the sentence is contrary to 17 N.N.C. § 223, constituting cruel and unusual punishment. *Cody v. Greyeyes*, No. SC-CV-09-09, slip op. (Nav. Sup. Ct. March 11, 2009).

- The Navajo Nation Bill of Rights prohibits incarceration for the inability to pay court imposed fines and fees in a criminal proceeding; under these circumstances, the sentence constitutes cruel and unusual punishment and an unreasonable deprivation of liberty. *Cody v. Greyeyes*, No. SC-CV-09-09, slip op. (Nav. Sup. Ct. March 11, 2009).


- The use of contempt to incarcerate a CHINS child improperly treats that child as delinquent, violates the Council's clear prohibition on incarceration of such children, and amounts to cruel and unusual punishment under the Navajo Bill of Rights. *M.G. v. Greyeyes*, No. SC-CV-09-07, slip op. (Nav. Sup. Ct. March 14, 2007).
• A jail sentence rendered outside the authority of a district court is cruel and unusual punishment under the Navajo Bill or Rights. Thompson v. Greyeyes, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).
• A criminal sentence not according to law is cruel and unusual punishment prohibited by the Navajo Nation Bill of Rights. Martin v. Antone, 8 Nav. R. 346 (Nav. Sup. Ct. 2003).
• Any sentence beyond one year is unlawful and violates the Navajo Nation Bill of Rights. Martin v. Antone, 8 Nav. R. 346 (Nav. Sup. Ct. 2003).
• As a general matter, a criminal sentence is not cruel and unusual punishment as long as it falls within the boundaries set by the legislature. Navajo Nation v. MacDonald, Sr., 6 Nav. R. 432 (Nav. Sup. Ct. 1991).
• To comply with the Navajo Bill of Rights section against cruel and unusual punishment at the minimum a detainee must be provided with a padded area to lie on, a blanket, and food to eat. Matter of A.W., 6 Nav. R. 38 (Nav. Sup. Ct. 1988).
• A sentence not according to law is a form of cruel and unusual punishment. Johnson v. Navajo Nation, 5 Nav. R. 152 (Nav. Sup. Ct. 1987).
• A convicted person is entitled to be sentenced in accordance with the law and not sentenced in accordance with what some individual believes is best for him; anything less is not justice under the law. Johnson v. Navajo Nation, 5 Nav. R. 152 (Nav. Sup. Ct. 1987).
• A convicted person is entitled to be sentenced in accordance with the law and not sentenced in accordance with what some individual believes is best for him; anything less is not justice under the law. Navajo Nation v. Jones, 1 Nav. R. 14 (Nav. Ct. App. 1971).

I. Right to impartial judge

• The right to an impartial judge is an essential element of due process and the basic right of a criminal defendant. Navajo Nation v. MacDonald, Jr., 7 Nav. R. 1 (Nav. Sup. Ct. 1992).
• Impartiality of the trial judge is a basic right of a criminal defendant. McCabe v. Walters, 5 Nav. R. 43 (Nav. Ct. App. 1985).

J. Preservation of rights absent knowing and intelligent waiver

• The Supreme Court rejects any rule that conditions the respectful explanation of rights under Navajo due process on subjective assumption concerning the defendant. This right exists for all defendants in our system. Green Tree Servicing v. Duncan, No. SC-CV-44-06, slip op. (Nav. Sup. Ct. August 18, 2008).
• Waivers of rights by criminal defendants must be knowingly and intelligently made to be valid. Navajo Nation v. Morgan, 8 Nav. R. 732 (Nav. Sup. Ct. 2005).
• Under the Diné Bi Beenahaz’áanii view of hózhó‘ógo, courts and other governmental officials must proceed carefully and patiently, clearly explaining a defendant’s rights before a waiver is considered valid. Navajo Nation v. Morgan, 8 Nav. R. 732 (Nav. Sup. Ct. 2005).
• Failure to act can be a waiver. Eriacho v. Ramah Dist. Ct., 8 Nav. R. 617 (Nav. Sup. Ct. 2005).
• Under the Common Law principle of hozho’go, meaningful notice must be given. This requires more than the provision of an English form stating certain rights. It requires a patient, respectful discussion of rights before a waiver is effective. *Eriacho v. Ramah Dist. Ct.*, 8 Nav. R. 617 (Nav. Sup. Ct. 2005).

• The sufficiency of the explanation in a Navajo setting means, at a minimum, that the rights be explained in Navajo if the police officer or other interviewer has reason to know the persons speaks or understands Navajo. If the person does not speak or understand Navajo, the rights should be explained in English so that the person has a minimum understanding of the impact of any waiver. Only then will a signature on a waiver form allow admission of any subsequent statement into evidence. *Navajo Nation v. Rodriguez*, 8 Nav. R. 604 (Nav. Sup. Ct. 2004).


### IV. Rules of criminal procedure

#### A. Pleadings

1. Complaints

   a) Who may file


   • A police officer can sign a criminal complaint and that the prosecutor should file the criminal action. *Navajo Nation v. Atcitty*, 4 Nav. R. 130 (Nav. Ct. App. 1983).

   • The prosecutor’s authority is to (1) institute proceedings before the judges of the Courts of the Navajo Nation when in the opinion of the prosecutor, he has information that offenses have been committed; and (2) to prosecute such persons to the full extent of the law. *Navajo Nation v. Atcitty*, 4 Nav. R. 130 (Nav. Ct. App. 1983).

   • As long as an officer of the Navajo Division of Public Safety or the Office of the Prosecutor has reasonable information as to the authenticity of the complaint and the facts surrounding such offense, he or she may be a signatory to the criminal complaint. *Navajo Nation v. Atcitty*, 4 Nav. R. 130 (Nav. Ct. App. 1983).

   • It is sufficient for any victim of an offense to sign the complaint and any witness connected with the prosecution of an offense to sign a complaint, as long as they have knowledge of the offense. *LaMone v. Navajo Nation*, 3 Nav. R. 87 (Nav. Ct. App. 1982).

   • The Supreme Court will uphold any complaint signed by an individual with reasonable grounds to believe a crime was committed by a given defendant. *LaMone v. Navajo Nation*, 3 Nav. R. 87 (Nav. Ct. App. 1982).

   b) Necessary specificity

   • A complaint must be sufficiently specific to permit a defendant to assert the defense of double jeopardy in any subsequent prosecution. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).
Due to the opportunity of discovery, complaint that is inartfully drafted is harmless error. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

Prosecutors must prepare complaints which allege the basic parts of the statute creating the crime and provide sufficient facts fitting within the statute to enable the defendant and his defense attorney to prepare their case. *In re Interests of Lewis*, 6 Nav. R. 560 (W.R. Fam. Ct. 1991).

A complaint which does not allege all the basic parts of the statute creating the crime is inadequate on its face and therefore defective and subject to dismissal. *In re Interests of Lewis*, 6 Nav. R. 560 (W.R. Fam. Ct. 1991).

A complaint which does not allege all the basic parts of the statute creating the crime is inadequate on its face and therefore defective and subject to dismissal. *Navajo Nation v. Lee*, 4 Nav. R. 185 (W.R. Dist. Ct. 1983).

Where the complaint cites the proper Navajo Code provision and describes the violation, and where the defendant was represented by counsel, the Navajo Code is not so complex that learned counsel could not inform himself and advise his client of the exact nature and meaning of the complaint. The complaint was therefore sufficient. *Navajo Nation v. Yazzie*, 1 Nav. R. 139 (Nav. Ct. App. 1977).

A complaint charging the defendant with driving while under the influence of intoxicating liquor is sufficient to notify the defendant of the nature of the charge. *Navajo Tribe v. George*, 1 Nav. R. 45 (Nav. Ct. App. 1972).

c) Formal requirements

No complaint filed in any court of the Navajo Nation shall be valid unless it shall bear the signature of the complainant or complaining witness, witness by a duly qualified Judge of the Courts of the Navajo Nation or by the Chairman of the Navajo Tribal Council, or his duly authorized representative. *Navajo Nation v. Atcitty*, 4 Nav. R. 130 (Nav. Ct. App. 1983).

Simply because an individual who signs a complaint does not appear at trial, that is not necessarily sufficient to challenge the validity of a complaint. *LaMone v. Navajo Nation*, 3 Nav. R. 87 (Nav. Ct. App. 1982).

The complaint must be signed by the "complainant" or the "complaining witness." The "complainant" is clearly the victim of the alleged offense, e.g. the individual who is assaulted in an assault case. *LaMone v. Navajo Nation*, 3 Nav. R. 87 (Nav. Ct. App. 1982).

d) Rights of prosecutor when filing complaint

The Navajo Nation by and through its prosecutor is absolutely entitled to their “day in court.” If any semblance of due process is to be upheld by the Courts of the Navajo Nation, it is of critical importance that the same protections afforded an accused be granted to the prosecutor in the filing and prosecuting of a criminal complaint. *Navajo Nation v. Atcitty*, 4 Nav. R. 130 (Nav. Ct. App. 1983).

To thwart due process for the prosecutor when filing and prosecuting a complaint would be to undermine the Navajo judicial process. Such due process protections is an inherent element in the jurisprudence dynamic found in the federal and state courts and is equally found within the mandates and procedures of the Courts of the Navajo Nation. *Navajo Nation v. Atcitty*, 4 Nav. R. 130 (Nav. Ct. App. 1983).
e) Who is “complaining witness”

- The "complaining witness" is the individual who is a witness to an offense. LaMone v. Navajo Nation, 3 Nav. R. 87 (Nav. Ct. App. 1982).
- It is not essential to the validity of the complaint for the complainant or the complaining witness to have actually seen the offense being committed. This would be absurd, since many crimes are proved by circumstantial evidence with no eyewitness. LaMone v. Navajo Nation, 3 Nav. R. 87 (Nav. Ct. App. 1982).
- It is sufficient when the complaining witness has enough knowledge of the offense charged to have personal reasonable cause to believe the offense was committed by the defendant. The purpose of the statute is clearly to provide a guarantee that charges are not brought against an individual recklessly. LaMone v. Navajo Nation, 3 Nav. R. 87 (Nav. Ct. App. 1982).

f) When filed

- The Navajo Nation may charge a criminal defendant at the same time as federal charges are filed. Navajo Nation v. Bedonie, 2 Nav. R. 131 (Nav. Ct. App. 1979).


g) Right to be informed of the charges against the accused

- An accused child must be informed of the nature and cause of an accusation against him in the same manner and to the same extent as an adult criminal defendant, if not more so. In re Interests of Lewis, 6 Nav. R. 560 (W.R. Fam. Ct. 1991).
- The purpose of the right to be informed of the nature of the accusation was to give criminal defendants enough information for a defense and to prevent surprises at trial. In re Interests of Lewis, 6 Nav. R. 560 (W.R. Fam. Ct. 1991).
- The right to be informed of the nature and cause of the accusation gives the defendant a fair opportunity to prepare for trial and assist in his defense. Navajo Nation v. Lee, 4 Nav. R. 185 (W.R. Dist. Ct. 1983).
- The right to be informed of the nature and cause of the accusation is designed to give the defense of double jeopardy meaning. If the complaint is specific as to the offense, time, place and facts, an acquittal on the offense charged can be used to prevent a future prosecution. Navajo Nation v. Lee, 4 Nav. R. 185 (W.R. Dist. Ct. 1983).
- The right to be informed of the nature and cause of the accusation calls upon prosecutors to prepare complaints which allege basic parts of the statute creating the crime and sufficient facts fitting within the statute to enable the defendant and his defense attorney to prepare their case. Navajo Nation v. Lee, 4 Nav. R. 185 (W.R. Dist. Ct. 1983).

2. Joinder of parties

- Where bulk of issues in case involved transactions common to co-defendants, and jury was adequately instructed on the necessity of separating charges, it was not error to try co-defendants in the same proceeding. Navajo Nation v. MacDonald, Jr., 7 Nav. R. 1 (Nav. Sup. Ct. 1992).
3. Obligation of good faith


B. Preliminary proceedings

1. Arrest warrants

- Navajo district courts have authority to issue bench warrants in criminal matters and this power is used by the district courts. *Wirtz v. Black*, SC-CV-09-06, slip op. (Nav. Sup. Ct. August 7, 2007).
- Inherent within the province of the Courts of the Navajo Nation is the responsibility of issuing summons and warrants upon the proper filing of a criminal complaint by the Office of the Prosecutor. *Navajo Nation v. Atcitty*, 4 Nav. R. 130 (Nav. Ct. App. 1983).

2. Warrantless arrests

   a) When an officer may arrest

   - An arrest can be made by a Navajo Police Officer 1) where the offense occurs in the presence of the arresting officer, 2) where the arresting officer has “reasonable evidence that the person arrested has committed an offense,” or 3) where the officer has an arrest warrant. *LaMone v. Navajo Nation*, 3 Nav. R. 87 (Nav. Ct. App. 1982).
   - No member of the Indian police shall arrest any person for any offense except when such offenses shall occur in the presence of the arresting officer, or he shall have reasonable evidence that the person arrested has committed an offense, or the officer shall have a warrant. *Keeswood v. Navajo Tribe*, 1 Nav. R. 362 (Ship. Dist. Ct. 1978).

   b) Conduct of police officers

   - The police department is an arm of the Navajo government, and as such must recognize a person’s rights in much the same ways, and to the same extent, as must our courts. *Navajo Nation v. Rodriguez*, 8 Nav. R. 604 (Nav. Sup. Ct. 2004).
   - Although our law is silent on the issue of force, it is implicit that the amount can be no more than reasonably appears necessary and should not subject the person arrested to unnecessary risk of harm. *Keeswood v. Navajo Tribe*, 1 Nav. R. 362 (Ship. Dist. Ct. 1978).
   - Where officers struck arrested persons about the body with batons, the District Court holds that police action of this nature is reprehensible to the principles of good law enforcement and shocking to the conscience. *Keeswood v. Navajo Tribe*, 1 Nav. R. 362 (Ship. Dist. Ct. 1978).

   c) Presence of officer during offense

   - Arrest upon the commission of an offense in the presence of the officer is the most obvious, and since the facts to support the main charge merge with the justification for the arrest, that ground for arrest is usually adjudicated at trial and does not become the subject of a pretrial motion. *LaMone v. Navajo Nation*, 3 Nav. R. 87 (Nav. Ct. App. 1982).
d) Reasonable evidence of offense

- The test for whether an officer had reasonable evidence that a suspect had committed an offense is whether, at the moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information, were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. *LaMone v. Navajo Nation*, 3 Nav. R. 87 (Nav. Ct. App. 1982).
- The standard under our statute is not “probable cause” – it is “reasonableness”. When the arresting officer makes his arrest, can he satisfy the judge there was enough evidence to believe the individual had committed an offense or was in the act of committing an offense? This judgment is to be made on all the facts the officer had before him and not on the basis of picking out and pooh-poohing an individual element of an offense. *LaMone v. Navajo Nation*, 3 Nav. R. 87 (Nav. Ct. App. 1982).
- Normally the trial judge’s factual determination regarding whether there was reasonable cause for an arrest will not be overturned on appeal. *LaMone v. Navajo Nation*, 3 Nav. R. 87 (Nav. Ct. App. 1982).
- To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. *Navajo Nation v. Bedonie*, 2 Nav. R. 131 (Nav. Ct. App. 1979). Note: standard is now “reasonableness”, not probable cause.

e) Serious nature of arrest

- Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. *Navajo Nation v. Bedonie*, 2 Nav. R. 131 (Nav. Ct. App. 1979).

3. Release prior to trial

a) Fundamental right

- Navajo Nation Bill of Rights protects the right of the people to be secure in their persons and property against unreasonable searches and seizures of government, including unreasonable arrest and detention. *Apachito v. Navajo Nation*, 8 Nav. R. 339 (Nav. Sup. Ct. 2003).

b) Power of court

- District Court judges are authorized to impose conditions of a date of appearance and such other conditions upon bail as are necessary or proper. 17 N.N.C. § 1813. *McCabe v. Walters*, 5 Nav. R. 43 (Nav. Ct. App. 1985).

c) Purpose of detention and bail

- The purpose of detaining certain criminal defendants is to prevent them from causing harm to the general public or a specific witness or from disrupting the judicial process by interfering with the

- Bail was intended to include release from custody by either payment of a cash bond or personal recognizance release, and that the purpose of bail is to insure that the criminal defendant appear at any subsequent hearing. *McCabe v. Walters*, 5 Nav. R. 43 (Nav. Ct. App. 1985).

  **d) When detention justified**

- Rule 15(d) of the Navajo Rules of Criminal Procedure sets out the reasons that justify detention pending the outcome of a criminal case. Detention is justified if the court has reason to believe: 1) that the defendant is dangerous to public safety; 2) that the defendant will commit a serious crime; 3) that the defendant will seek to intimidate any witness; 4) that the defendant will otherwise unlawfully interfere with the administration of justice; or 5) another reason allowed by law exists. *Seaton v. Greyeyes*. No. SC-CV-04-06, slip op. (Nav. Sup. Ct. March 28, 2006).

- When pretrial release is opposed, the question becomes whether the defendant, if released, will seek to interfere with the proper administration of justice or is a danger to the community. *Apachito v. Navajo Nation*, 8 Nav. R. 339 (Nav. Sup. Ct. 2003).

- Our rules of criminal procedure require a finding that the defendant is dangerous to public safety or that the defendant will commit a serious crime, or will seek to intimidate a witness or will otherwise unlawfully interfere with the administration of justice if released or for any other reason allowed by law. *Apachito v. Navajo Nation*, 8 Nav. R. 339 (Nav. Sup. Ct. 2003).

  **e) Seriousness of crime not enough**

- A District Court's order to continue a defendant’s detention because of the seriousness of the charge is a violation of the defendant's right to due process. Mere seriousness of the alleged offense does not, by itself, justify continued detention. The seriousness of the charged offense is not one of the four specific reasons that justify continued detention, and, the Court concludes, is not a “reason allowed by law.” *Seaton v. Greyeyes*. No. SC-CV-04-06, slip op. (Nav. Sup. Ct. March 28, 2006).

- The reference to a “serious” crime in Nav.R.Crim.P. 15(d) refers to future actions of the defendant, and does not mean the seriousness of the alleged crime for which he or she currently is being detained. *Seaton v. Greyeyes*. No. SC-CV-04-06, slip op. (Nav. Sup. Ct. March 28, 2006).

- To hold a defendant merely because the complaint alleges a serious offense improperly treats the defendant as guilty before the trial, by assuming the allegations are true and essentially punishing him or her before the Nation has established beyond a reasonable doubt that the offense occurred. This clearly violated Seaton's right to due process. *Seaton v. Greyeyes*. No. SC-CV-04-06, slip op. (Nav. Sup. Ct. March 28, 2006).

  **f) Detentions illegal when they violate civil rights**

- A detention is illegal if the court who ordered the detention violated that person's rights under the Navajo Bill of Rights. *Johnny v. Greyeyes*, No. SC-CV-52-08, slip op. (Nav. Sup. Ct. February 27, 2009).

g) Court must state reasons for detention

- Written reasons are not required, as long as the district court judge clearly and adequately explains his or her reasons for denying release to the defendant, and such reasons are available in the record of the case. *Dawes v. Eriacho*, No. SC-CV-09-08, slip op. (Nav. Sup. Ct. May 5, 2008) *overruling* *Seaton v. Greyeyes*, No. SC-CV-04-06, slip op. (Nav. Sup. Ct. March 28, 2006).
- The primary purpose of requiring reasons is so that the defendant understands why he or she will continue to be held pending trial, and may contest those reasons before the district court, and, if necessary, before this Court in a habeas corpus proceeding. *Dawes v. Eriacho*, No. SC-CV-09-08, slip op. (Nav. Sup. Ct. May 5, 2008).
- As long as the defendant is aware of the reasons that release has been denied, and such reasons are part of the district court record so that the defendant may challenge them and this Court may review them, this Court will not release a detained defendant merely because there are no written findings. *Dawes v. Eriacho*, No. SC-CV-09-08, slip op. (Nav. Sup. Ct. May 5, 2008).
- The failure to rule at all on a defendant’s request for release on bail justifies the Supreme Court in its decision to release her. Under Rule 15, Nav.R.Crim.P., the District Court's failure to respond was, in effect, a denial of her request without any reasons, whether verbal or written. *Dawes v. Eriacho*, No. SC-CV-09-08, slip op. (Nav. Sup. Ct. May 5, 2008).
- In the detention order, the Court must state the reasons for the continued detention. *Seaton v. Greyeyes*, No. SC-CV-04-06, slip op. (Nav. Sup. Ct. March 28, 2006). *Note: this holding is presented in strikeout format because it was overruled by* *Dawes v. Eriacho*, No. SC-CV-09-08, *slip op.* (Nav. Sup. Ct. May 5, 2008).

h) Speedy disposition

- A person is entitled to a prompt judicial determination of probable cause soon after arrest, but in no event later than 36 hours, if in custody during business days, or 48 hours if on a weekend or holiday. *Apachito v. Navajo Nation*, 8 Nav. R. 339 (Nav. Sup. Ct. 2003).

i) Probable cause

j) Burden of proof

- The burden of proof that must be met for a court to deny pretrial release under Nav.R.Cr.P. 15(d) is clear and convincing evidence. Apachito v. Navajo Nation, 8 Nav. R. 339 (Nav. Sup. Ct. 2003).

k) Discretion of judge

- It is an abuse of discretion for a District Court to set conditions for bail that have no nexus to the objective of ensuring attendance at trial. McCabe v. Walters, 5 Nav. R. 43 (Nav. Ct. App. 1985).
- Generally, the fact that a criminal defendant is employed is a factor justifying release on personal recognizance, and thus, it was an abuse of discretion to require a criminal defendant to leave his employment as a condition of release. McCabe v. Walters, 5 Nav. R. 43 (Nav. Ct. App. 1985).

l) Permissible conditions

- Conditions on bail may include conditions such as requiring the defendant to not leave the court's jurisdiction, or not to violate any tribal laws, or refrain from consumption of alcohol or other similar requirements. McCabe v. Walters, 5 Nav. R. 43 (Nav. Ct. App. 1985).

C. Pleas

1. Diné bi beenahaz’áanii

- Where District Court did not explain the different types of pleas and their effect, but merely stated to codefendant, but not to defendant, that he could plead guilty, not guilty, or no contest, with no explanation of what these terms mean, the omission is inconsistent with hózhó’ógo. Navajo Nation v. Morgan, 8 Nav. R. 732 (Nav. Sup. Ct. 2005).

2. Knowing and intelligent waiver of right to trial

- In the absence of some explanation, a defendant may not know the meaning of these technical legal terms, and therefore his or her choice to forego trial cannot be “knowing” and “intelligent.” Navajo Nation v. Morgan, 8 Nav. R. 732 (Nav. Sup. Ct. 2005).
- It is highly important that the district courts take great care when receiving pleas of guilty to make certain that criminal defendants know their rights, and what they may do, to be certain the plea is knowing and intelligent. Stanley v. Navajo Nation, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).
- A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under due process, it must be an intentional relinquishment or abandonment of a known right or privilege. Stanley v. Navajo Nation, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).
If a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).

The plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial - a waiver of his right to trial before a jury or judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).

A plea may be involuntary either because the accused does not understand the nature of the constitutional protection he waives, or because he has such an incomplete understanding of the charge that it cannot be an intelligent admission of guilt. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).

3. Possible sentence must be accurately explained

Where District Court did not accurately state the possible sentence faced by a defendant, the acceptance of a guilty plea violated fundamental notions of fairness embedded in the Navajo concept of due process. *Navajo Nation v. Morgan*, 8 Nav. R. 732 (Nav. Sup. Ct. 2005).

Fundamental notions of fairness in Navajo common law require that a respondent have notice of the available sentencing options before he or she pleads to an offense. *Thompson v. Greyeyes*, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).

4. Court must review meaning of pleas and allegations of complaint with defendant

Defendants have the right to know what a plea of guilty means, and therefore judges must review the complaint with the defendant and discuss the elements of the crime and the facts supporting them. *Navajo Nation v. Morgan*, 8 Nav. R. 732 (Nav. Sup. Ct. 2005).

The Court must review the complaint to ensure that it is satisfied that there is a factual basis for a guilty plea. *Navajo Nation v. Morgan*, 8 Nav. R. 732 (Nav. Sup. Ct. 2005).

When judges accept a plea, they should read beyond the plain language of Rule 21. Judges should remember that ordinary people are not likely to know the difference between a plea of “guilty” and a plea of “no contest”. *Curley v. Navajo Nation*, 8 Nav. R. 269 (Nav. Sup. Ct. 2002).

Defendants have a right to know what their pleas mean, and Judges should go through the complaint with the defendant and discuss the elements of the crime and the facts that support it. *Curley v. Navajo Nation*, 8 Nav. R. 269 (Nav. Sup. Ct. 2002).

5. No contest pleas


A nolo contendere plea cannot be used against the defendant in any civil action for the same act, and it cannot be used against the defendant as an admission of guilt in any other criminal case. *Navajo Nation v. Benally*, 6 Nav. R. 457 (W.R. Dist. Ct. 1989).
6. Plea must be voluntary

- Rule 21(b) requires the court to accept a plea of guilty or no contest if it is satisfied that the plea is voluntary and not the result of force, threats, or promises (apart from a plea bargain). *Curley v. Navajo Nation*, 8 Nav. R. 269 (Nav. Sup. Ct. 2002).
- The test of voluntariness for a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Curley v. Navajo Nation*, 8 Nav. R. 269 (Nav. Sup. Ct. 2002).
- A guilty plea is valid if the defendant made a knowing, conscious choice in entering the plea and that the court took care in advising the defendant and receiving the plea. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).
- Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded from being compelled to do so – hence the minimum requirement that his plea be the voluntary expression of his own choice. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).
- A guilty plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial - a waiver of his right to trial before a jury or judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).
- Guilty pleas must be voluntary in the sense that the defendant has received actual notice of the true nature of the charge against him. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).
- A plea may be involuntary either because the accused does not understand the nature of the constitutional protection he waives, or because he has such an incomplete understanding of the charge that it cannot be an intelligent admission of guilt. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).

7. Withdrawal of plea

- Rule 21(c) provides that a defendant may not withdraw a plea of guilty; unless the defendant shows that the plea was the result of duress or was in any way not voluntary. *Curley v. Navajo Nation*, 8 Nav. R. 269 (Nav. Sup. Ct. 2002).
- Defendants who wish to withdraw a guilty plea under a plea agreement to correct a manifest injustice may do so if it is necessary to make that correction. *Curley v. Navajo Nation*, 8 Nav. R. 269 (Nav. Sup. Ct. 2002).
• A defendant who was without counsel at the time of arraignment and may not have understood the effect or nature of his plea of guilty may withdraw his plea of guilty. *Navajo Tribe v. Bahe*, 1 Nav. R. 37 (Nav. Ct. App. 1972).

8. **Avoiding risk and expense of trial**

• A defendant may enter a guilty plea or no contest plea while claiming innocence if he makes a conscious choice to enter the plea and avoid the expense or risks of trial. *Curley v. Navajo Nation*, 8 Nav. R. 269 (Nav. Sup. Ct. 2002).

9. **Court must be satisfied there is a factual basis for guilty plea**


• The court must look into the defendant's understanding of the nature of the charge, the consequences of his plea, and be satisfied there is a factual basis for the plea. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).

• These are the methods for finding whether a factual basis exists for a guilty plea: 1. Ask the defendant what it is; 2. Ask the prosecution the basis for bringing the charges; 3. Examine a presentence report which lays out this information. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).

• The United States Constitution and the Navajo Nation Bill of Rights do not require an inquiry into the factual basis for a guilty plea, but it is good practice. A defendant may enter a plea of guilty while still asserting his or her innocence and the court need only be satisfied that there is some factual basis to support accepting a plea of guilty. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).

• When asking the defendant the basis for the plea, the court need only be concerned that the defendant admits he or she actually committed the acts recited in the complaint. The better practice is to have the defendant relate what he or she did, although an admission that the facts in the complaint are true is sufficient. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).


• The only thing required by the "factual basis" rule is that the district court be satisfied that the defendant admits or the prosecution could provide the facts alleged in the complaint. *Stanley v. Navajo Nation*, 6 Nav. R. 284 (Nav. Sup. Ct. 1990).

10. **Plea bargains**

• The district court need not accept the exact terms of a plea bargain. The court should warn the defendant that it may disregard the agreement and impose the full sentence allowed by law before accepting the plea. If the defendant still wishes to enter a guilty plea, the court should proceed to sentence. *Nation v. Blake*, 7 Nav. R. 233 (Nav. Sup. Ct. 1996).

D. **Discovery**

• Defendants must have sufficient information for a fair opportunity to prepare for trial and to assist with their defense. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

- Forty days is not insufficient time to prepare defense such that verdict will be set aside on due process grounds. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

- Where a demonstrative exhibit was altered so that the trial exhibit was different than the exhibit earlier shown to the Court, it was not so fundamentally unfair to the defendant that the District Court’s refusal to grant a new trial based on the alteration was reversible error. There was not a sufficient showing that the alteration harmed the defense. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

- Rule 12 of the Rules of Criminal Procedure (now compare Rules 24-28) gives the court the discretion to grant criminal discovery motions upon a showing the items sought "may be material to the defense" and a showing the request is reasonable. *Navajo Nation v. Bigman*, 3 Nav. R. 231 (W.R. Dist. Ct. 1982).

- Our rule permits the discovery of any books, papers, documents, etc. the prosecution has which are "obtained from the defendant or elsewhere." Therefore our rule is in reality an "open file" rule. That is, there is a common practice among the various United States Attorneys and state prosecutors to permit the defendant to inspect the prosecution file in order to see what the government's case is. *Navajo Nation v. Bigman*, 3 Nav. R. 231 (W.R. Dist. Ct. 1982).


- The scope of disclosure is broad and can encompass any kind of matter. The only limitations on the full scope of disclosure are the required showings of materiality to the defense and reasonableness. *Navajo Nation v. Bigman*, 3 Nav. R. 231 (W.R. Dist. Ct. 1982).

- Because we do have an "open file" rule and because the defense counsel has a duty to prepare for trial, the materiality element would appear to be satisfied by a showing, by saying so and by asking for certain things, that the materials are needed for trial preparation. To not do so given our rule would be ineffective assistance of counsel. *Navajo Nation v. Bigman*, 3 Nav. R. 231 (W.R. Dist. Ct. 1982).

- Witness statements are reasonable because obviously the defense would want to examine a prosecution witness on any prior inconsistent statement and would want to know that the essence of the witness' testimony will be. Tests, demonstrations and other reports based on possible demonstrative evidence are reasonable as well because the defendant will want to prepare to rebut any unfavorable results or matters shown by them. Exhibits and other documentary evidence to be introduced at trial are reasonably discoverable in order to prepare objections and rebuttal evidence. *Navajo Nation v. Bigman*, 3 Nav. R. 231 (W.R. Dist. Ct. 1982).

- Trial courts have inherent powers to require the production of all relevant facts in a criminal trial. *Navajo Nation v. Bigman*, 3 Nav. R. 231 (W.R. Dist. Ct. 1982).

- Rule 12 of the Rules of Criminal Procedure (now compare Rules 24-28) is the only method available for discovery. The rule clearly requires a motion and a showing that the items sought may be material to the defense and are reasonable. *Navajo Nation v. Tsosie*, 3 Nav. R. 216 (W.R. Dist. Ct. 1982).
E. Pre-trial motion practice

1. General practice

- Motions in criminal cases must be made in writing, and copies of all motions filed with the court must be served on the opposing party. *McCabe v. Walters*, 5 Nav. R. 43 (Nav. Ct. App. 1985).
- The opposing party is then given five days from the date of receipt to file a response. *McCabe v. Walters*, 5 Nav. R. 43 (Nav. Ct. App. 1985).
- The underlying purpose of these rules is to insure that notice is given to the parties prior to the Court's action on a motion, in conformity with basic notions of due process guaranteed under the Indian Civil Rights Act and the Navajo Bill of Rights. *McCabe v. Walters*, 5 Nav. R. 43 (Nav. Ct. App. 1985).
- Trial court should, at the very least, provide notice to the party against whom motion is filed describing the requested relief before granting motion. *McCabe v. Walters*, 5 Nav. R. 43 (Nav. Ct. App. 1985).
- At any time before trial the defendant may move to dismiss the action on the grounds of insufficiency of the complaint, lack of jurisdiction or failure of the complaint to charge a crime or on any other defense or objection which can be decided without trial of the general issue. The motion shall be in writing unless made in open court at the time of the hearing and shall move for dismissal or for other appropriate relief. The motion shall contain a certificate of service on the prosecutor. *Navajo Nation v. Bedonie*, 2 Nav. R. 131 (Nav. Ct. App. 1979).

2. Motions to suppress evidence

- If a criminal defendant wishes to have evidence suppressed, he must be prepared to show how he was injured by the conduct of the police or how his defense has been prejudiced. *Navajo Nation v. Halona*, 3 Nav. R. 189 (W.R. Dist. Ct. 1981).

3. Motions for continuances

- Continuances are within the sound discretion of the trial court a discretion that must not be arbitrary or capricious. *Navajo Nation v. Rico*, 4 Nav. R. 175 (W.R. Dist. Ct. 1983).
- In considering a motion for a continuance, the District Court must consider many surrounding circumstances, such as the practical consequences of the party having to go to trial and the opposing party having to suffer a delay. *Navajo Nation v. Rico*, 4 Nav. R. 175 (W.R. Dist. Ct. 1983).
- When requesting a motion for a continuance, counsel must (1) clearly and precisely give the court good reasons for a continuance, (2) show that prejudice will result if the continuance is not granted and (3) state specific, concrete reasons to the court. The showing of prejudice to the party asking for a continuance is most important. *Navajo Nation v. Rico*, 4 Nav. R. 175 (W.R. Dist. Ct. 1983).
- Criminal cases are special, and a court considering a motion for a continuance must always keep in mind the right of a defendant to a speedy trial and possible prejudice to the defendant. *Navajo Nation v. Rico*, 4 Nav. R. 175 (W.R. Dist. Ct. 1983).
In criminal cases the prosecution has the option of proceeding with its case or having it dismissed in situations where there is a showing that the granting of a continuance would cause a very real denial of a defendant's rights which would clearly cause him or her prejudice. *Navajo Nation v. Rico*, 4 Nav. R. 175 (W.R. Dist. Ct. 1983).

F. Trial

1. Obtaining jurors

- The rules for the creation of a jury pool are as follows: 1) juries must be drawn from a source which is fairly representative of the community, but need not mirror it; 2) all defendants may assert the right, including people who are not members of an excluded group (i.e. Indians can challenge the exclusion of non-Indians from juries); and 3) a defendant can prevail by showing a systematic exclusion of distinctive groups of people; but not an occasional mistaken exclusion. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).

2. Jury selection

- Allegations of juror untruthfulness during voir dire may justify an independent evidentiary hearing. There must be a prima facie case of juror concealment of information, which if disclosed at the time would justify juror disqualification. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).
- The groups which must not be excluded include large distinctive groups and identifiable segments playing major roles in the community. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).
- Tribal courts have unique problems selecting juries. If tribal rolls or voter registration lists are used, defendants will complain about the exclusion of nonmember Indians or non-Indians as distinctive groups or identifiable segments of the community. If tribes use county voter registration lists, on-reservation nonmember Indians will challenge being summoned for jury duty, and off-reservation individuals will contest the authority of a tribal court to summon them. It is difficult to cull motor vehicle license or registration lists, assuming they are available, due to the same considerations. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).
- The proper procedure is to challenge the array or jury panel, addressing the entire panel, in writing. The burden will be on the defendant to show that the jury does not satisfy the fair cross section requirement, which caused prejudice. Minor irregularities in drawing the panel will be disregarded. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).
- Trial Court erred in forcing defendant to use a preemptory challenge to exclude a juror who should have been excluded for cause, however the error was harmless. Juror that defendant would have excluded if he still had a preemptory challenge was an alternate, the “immunized testimony” that the juror was allegedly exposed to was not related to the issues in the trial, and there was no evidence that the juror had already made up his mind. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).
• It is sufficient if a juror can lay aside his impression or opinion and render verdict based on the evidence presented in court. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).


• Peremptory challenges are controlled by statute, and errors in denying them are not questions of constitutional law. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).

• Trial judges have the discretion to determine the order and method in which peremptory challenges may be used. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).


3. Opening statement

• The function of an opening statement is to permit counsel to present their theory of the case to the jury. It is an “opening” statement, because it gives the jury an overview of the case to be presented. Both parties have an opportunity to outline the evidence they will present. The goal is to educate the jury about what it will hear, so they can understand the evidence. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

• The opening statement is particularly important where the facts of the case may be complex. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

• The opening statement is not limited to a statement of admissible evidence. Such a rule would violate the Navajo common law principle of “talking things out.” *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).


4. Conduct of counsel

• Counsel are permitted great leeway in presenting their arguments to the court or a jury. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

• Where prosecutor referred to the defendant's lifestyle and opulence in opening statement, the Supreme Court disapproved of such statements, but they did not rise to due process proportions because there was no evidence that it swayed the jury. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

• Supreme Court will not tolerate inflammatory language, insults, abuses of people (including judges, counsel, parties or witnesses) or any inappropriately aggressive conduct. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).


• Judges have an ethical obligation to use their power to control proceedings and prevent inappropriate conduct in the courtroom. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).

• Counsel can expect that if they are discourteous, impolite or abusive, they will be disciplined, either through a contempt citation, court disciplinary action, bar disciplinary action or counseling.

5. Subpoenas

- In a criminal proceeding, subpoenas directed toward obtaining business records do not violate the defendant’s right against self-incrimination. Such subpoenas may not, however, command production of documents about which the defendant has a protected expectation of personal privacy. *MacDonald, Sr. v. Navajo Nation*, 6 Nav. R. 290 (Nav. Sup. Ct. 1990).
- To object to a subpoena that commands the production of personal documents, the defendant must raise his objection and then provide the document to the court to inspect in camera. *MacDonald, Sr. v. Navajo Nation*, 6 Nav. R. 290 (Nav. Sup. Ct. 1990).
- In order to assure that the act of producing the documents demanded in the "broad-sweeping subpoena" will not require the defendant to give testimonial evidence of their possession of them, their existence, or their authentication and, thus violate their privilege against self-incrimination; the district court must make further findings. *MacDonald, Sr. v. Navajo Nation*, 6 Nav. R. 290 (Nav. Sup. Ct. 1990).

6. Motions for directed verdict

- If evidence of a defendant's guilt, measured against the statute, is insufficient, the trial judge must enter a verdict of not guilty. That may be done on the motion of the defendant, or on the court's own motion. *Navajo Nation v. Platero*, 6 Nav. R. 422 (Nav. Sup. Ct. 1991) (concurring opinion, cited with approval in *Navajo Nation v. MacDonald*, 6 Nav.R. 432 (1991)).
- A motion for acquittal, or directed verdict, will be granted if there is insufficient evidence to support a conviction. *Navajo Nation v. Platero*, 6 Nav. R. 422 (Nav. Sup. Ct. 1991) (concurring opinion, cited with approval in *Navajo Nation v. MacDonald*, 6 Nav.R. 432 (1991)).
- The test for a motion for acquittal whether a reasonable jury, viewing the evidence and reasonable inferences there from in the light most favorable to the prosecution, could find the defendant guilty beyond a reasonable doubt. This is a question of law, under the control of the judge. *Navajo Nation v. Platero*, 6 Nav. R. 422 (Nav. Sup. Ct. 1991) (concurring opinion, cited with approval in *Navajo Nation v. MacDonald*, 6 Nav.R. 432 (1991)).

7. Jury instructions

- The contents of an instruction on the elements of an offense are within the sound discretion of the trial court. An instruction will be upheld unless it is clearly confusing to the lay person, or it misstates the contents of the offense statute. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).
- The record shows that this jury had a separate instruction on proof of the intent element. We conclude that the jury was properly and adequately instructed on the elements of each offense and the required burden of proof. *Navajo Nation v. MacDonald, Jr.*, 7 Nav. R. 1 (Nav. Sup. Ct. 1992).
- A party cannot complain about the failure to give an instruction when they did not request it of the Trial Court. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).
8. Dismissal


G. Post-verdict proceedings

1. Criminal judgments


2. Sentencing, generally

- 17 N.N.C. § 223 requires that every sentence imposed must be definite and limited to one year or less jail time. *Cody v. Greeyes*, No. SC-CV-09-09, slip op. (Nav. Sup. Ct. March 11, 2009).
- As the functional equivalent of traditional resolution through an agreement, a conviction and sentencing should be the final resolution of the dispute caused by a defendant's single action. *Navajo Nation v. Kelly*, No. SC-CR-04-05, slip op. (Nav. Sup. Ct. July 24, 2006).
- 17 N.N.C. § 223 requires that every sentence imposed must be definite and limited to one year or less jail time. *Martin v. Antone*, 8 Nav. R. 346 (Nav. Sup. Ct. 2003).
- The Major Crimes Act and Indian Civil Rights Act forbids tribes from exercising capital punishment, imprisoning a person for more than five years, and imposing a fine of more than $5,000. *Benally v. Benally*, 8 Nav. R. 796 (Kay. Fam. Ct. 2003).
- 17 N.N.C. § 220(C) gives the Navajo courts power, pursuant to its legal authority, to decree a forfeiture of property, suspend or cancel a license, require full or partial restitution, remove a non-elected public servant from office, or impose any other civil penalty, and such order or judgment may be included in the sentence. *Begay v. Navajo Nation*, 6 Nav. R. 20 (Nav. Sup. Ct. 1988).

3. Discretion of court

- District courts have been given broad discretion to craft criminal sentences that may best rehabilitate defendants and which serve the reasonable needs of the victims and the community. *Thompson v. Greeyes*, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).

4. Conditions for sentencing

- Certain conditions have to exist before the court can impose a jail sentence. There is the initial condition that someone must have reason to believe that a person violated a protection order to start the process. The law requires that a written motion for the issuance of an order to show cause naming the violator be filed; a court hearing to ascertain whether the protection order was violated must be held within fifteen days of the issuance of the order to show cause; and the court must find, using the beyond a reasonable doubt standard that the person violated the protection order. *Petition of Austin*, 7 Nav. R. 346 (Nav. Sup. Ct. 1998).
- The law requires a finding that a person violated a term of a protection order before jail becomes an option. The courts are prohibited from imposing a jail sentence on a person simply on the basis

5. **Sentence must be requested by prosecutor**

- Where the prosecutor requested restitution on behalf of business owners in the criminal complaints, but he failed to raise it for the court's decision either prior to or during sentencing, the defendant did not have a viable restitution issue to contest. A sentence of restitution was therefore reversible error. *Navajo Nation v. Blake*, 7 Nav. R. 233 (Nav. Sup. Ct. 1996).

6. **Restitution**

- Before restitution can be awarded under the criminal code, and specifically subsection 380(C), the court must be satisfied with these minimal factors: 1) Is restitution appropriate in the case; 2) Who is the injured party; 3) What is the extent of the loss or injury; 4) What kind of restitution is appropriate; and 5) If money is to be paid, what amount would satisfy the actual damages requirement. *Navajo Nation v. Blake*, 7 Nav. R. 233 (Nav. Sup. Ct. 1996).
- Restitution in criminal and quasi-criminal cases is a matter of Navajo custom and the District Court will require it whenever and wherever it is appropriate to the circumstances. *Matter of Interest of D.P.*, 3 Nav. R. 255 (Crwn. Dist. Ct. 1982).
- The fixing of an amount to be paid in order to make restitution to a victim is not a civil action for damages. There need not be the quantity and kind of evidence required in normal civil actions. It is sufficient that the court have a reasonable estimate of the injury suffered by the victim and that the juvenile be given the opportunity in a disposition hearing to contest the estimate. *Matter of Interest of D.P.*, 3 Nav. R. 255 (Crwn. Dist. Ct. 1982).
- Any identifiable damage done to the victim can be ordered paid, including medical expenses, pain and suffering, loss of wages, orthopedic devices, dependent support and even damages in general. *Matter of Interest of D.P.*, 3 Nav. R. 255 (Crwn. Dist. Ct. 1982).

7. **Forfeiture**

- 17 N.N.C. § 220(C) gives the Navajo courts power, pursuant to its legal authority, to decree a forfeiture of property, suspend or cancel a license, require full or partial restitution, remove a non-elected public servant from office, or impose any other civil penalty, and such order or judgment may be included in the sentence. *Begay v. Navajo Nation*, 6 Nav. R. 20 (Nav. Sup. Ct. 1988).
- A civil forfeiture action is one method by which the Navajo courts may use their power to protect the public interest. A civil forfeiture penalty is not specifically set down in the penalty provision of an offense. Rather it is provided for in 17 N.N.C. § 220(C) which allows the Navajo courts to decree a forfeiture of property or impose any other civil penalty. *Begay v. Navajo Nation*, 6 Nav. R. 20 (Nav. Sup. Ct. 1988).
• Through the use of a civil forfeiture action, the courts will protect the due process rights of the owner of the automobile and at the same time protect the public interest against this pervasive criminal activity. *Begay v. Navajo Nation*, 6 Nav. R. 20 (Nav. Sup. Ct. 1988).

• Criminal forfeiture, as expressly provided for by statute, will not require a separate hearing, but instead will be part of the criminal action. *Begay v. Navajo Nation*, 6 Nav. R. 20 (Nav. Sup. Ct. 1988).

• The power to forfeit property that is ordinarily used for lawful purposes, such as an automobile, must be exercised consistent with due process, and the fact issue of whether the property was being used for an unlawful purpose must be determined first. *Begay v. Navajo Nation*, 6 Nav. R. 20 (Nav. Sup. Ct. 1988).


8. Multiple sentences

• When multiple sentences of imprisonment are imposed on a defendant for more than one crime, such multiple sentences shall run concurrently or consecutively as the court determines at the time of the sentence. *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432 (Nav. Sup. Ct. 1991).

9. Contempt

• The power of contempt gives no additional authority to a trial court to imprison those the Council exempts from imprisonment. *M.G. v. Greyeyes*, No. SC-CV-09-07, slip op. (Nav. Sup.Ct. March 14, 2007).

10. Repealed laws


• Fair procedure mandates that a defendant shall be properly charged, arraigned, found guilty and sentenced for an offense that is expressly provided for under a valid Code section. *Begay v. Navajo Nation*, 6 Nav. R. 132 (Nav. Sup. Ct. 1989).

11. Motion to vacate sentence

• A motion to vacate a sentence will be granted when there has been a fundamental defect which inherently results in a complete miscarriage of justice, or an omission inconsistent with the rudimentary practices of fair procedure. *Begay v. Navajo Nation*, 6 Nav. R. 132 (Nav. Sup. Ct. 1989).

• Where the District Court set aside a sentence, but such action was arbitrary, capricious and not supported by Court rules or the law, the judgment setting aside the sentence will be reversed. *Phillips v. Navajo Nation*, 3 Nav. R. 24 (Nav. Ct. App. 1980).

12. Sentencing procedure

- It is error for Trial Court to enter a Judgment and Mittimus imposing the maximum jail term or the maximum fine allowed by law, where the court had noted that the defendant acted to some extent in reasonable self protection. 17 N.N.C. § 1817(d) (1959), which states, “The penalties listed in Chapter 3 of this title are maximum penalties to be inflicted only in extreme cases.” *Johnson v. Navajo Nation*, 5 Nav. R. 152 (Nav. Sup. Ct. 1987). Note: this holding is presented in strikeout format because 17 N.N.C. § 1817 has been repealed.

13. Probation

- Trial Court may not impose probation alone as a sentence. There is no statutory authority for this type of sentence. The Trial Court may impose a sentence permitted by the applicable statute, and then suspend the sentence and impose probation. *Johnson v. Navajo Nation*, 5 Nav. R. 152 (Nav. Sup. Ct. 1987). Note: This holding is presented in strikeout format because the Council now permits the use of probation as an original sentence. 17 N.N.C. §1818(D).
- Imposing a statutory sentence first is critical to the process, because if probation is violated, the sentence must be reinstated. *Johnson v. Navajo Nation*, 5 Nav. R. 152 (Nav. Sup. Ct. 1987). Note: This holding is presented in strikeout format because the Council now permits the use of probation as an original sentence. 17 N.N.C. §1818(D).
- The Navajo Code does not provide for a mandatory sentence of probation and rightfully so for that in itself would be cruel and inhuman. *Navajo Nation v. Jones*, 1 Nav. R. 14 (Nav. Ct. App. 1971). Note: This holding is presented in strikeout format because the Council now permits the use of probation as an original sentence. 17 N.N.C. §1818(D).

14. Nályééh

- District Court can refer criminal conviction to Peacemaking Division to fashion a sentence of nályééh. *Navajo Nation v. Boone*, 8 Nav. R. 777 (Kay. Dist. Ct. 2002).

15. Incarceration

- The Navajo Nation Bill of Rights prohibits incarceration for the inability to pay court imposed fines and fees in a criminal proceeding; under these circumstances, the sentence constitutes cruel and unusual punishment and an unreasonable deprivation of liberty. *Cody v. Greyeyes*, No. SC-CV-09-09, slip op. (Nav. Sup. Ct. March 11, 2009).