NOT FOR PUBLICATION

Per Curiam

NOTICE: As provided for in the Law and Order Code "[a]ll decisions" of this Court "including those made prior to enactment of this provision, are memorandum decisions that shall not be regarded as opinions of binding precedent in any other cases. See CRIT Law and Order Code, Article II, Chapter B, section 211(d) (as amended on December 14, 1999, by Ordinance 99-3).

IN THE COURT OF APPEALS OF THE COLORADO RIVER INDIAN TRIBES

APPEALS COURT No. 16-0001
RE: CR-AD-2015-0642

COLORADO RIVER INDIAN TRIBES,

PLAINTIFF/APPELLEE

v.

KEYLE WAYNE WELSH,

DEFENDANT/APPELLANT

Argued: January 27, 2017

Counsel of Record: Paul K. Charlton for Defendant/Appellant; LeAnne Kane, Deputy Attorney General, for Plaintiff/Appellee

Before *Chief Justice Karla J. Starr* and *Associate Justices Robert N. Clinton* and *Christine Williams.*

Per Curiam.

This matter is before this Court on the appeal of Kyle Wayne Welsh (Welsh), Defendant/Appellant, from the Tribal Court's Minute Entry and Order Sentence & Judgment (Order) entered on March 15, 2016 finding the Defendant/Appellant guilty of one Count of Threats or Endangerment in violation of Section 318(a) of the CRIT Law and Order Code. For reasons set forth below, this Court finds it must reverse the Tribal Court's Order, vacate Mr. Welsh's conviction, and order the Criminal Complaint filed against him to be dismissed.

BACKGROUND

A. Facts

The criminal charges in this matter arose from an incident that occurred on July 23, 2015 involving Defendant/Appellant Kyle Wayne Welsh and Curtiss Martin, Jr. Mr. Welsh owned and operated a successful tobacco shop in Parker, Arizona. From 2010 to 2012, Mr. Martin had been an unsuccessful business competitor of Mr. Welsh and his business eventually failed. Mr. Martin was employed by Big River Development on the date of events in question. Big River Development is a tribal entity that is responsible in part for providing electrical service. Since 2012, Welsh had sought electrical service from Big River Development for his property. On July 23, 2015, Welsh went to the offices of Big River Development to check on the status of his application. While there, Welsh and Martin exchanged words with Martin calling Welsh an "F'ing transvestite." Welsh was then asked to leave the Big River offices and did so.

The disputed events leading to the Criminal Complaint and conviction occurred as Welsh drove home from the Big River Development offices along Rio Vista Road. Exactly what happened on Rio Vista Road was hotly disputed at the Tribal Court between Welsh and Martin. Welsh testified that while driving home, he spotted Martin parked in a Big River Development truck along the roadside. Fearing for his safety since Martin knew his route home and had no other reason to be parked along the roadside, Welsh claimed he tried to avoid a confrontation. Accordingly, he claims he stopped and turned his vehicle around before reaching Martin's truck. Welsh testified that Martin then pulled his truck "immediately" behind Welsh's vehicle before both drivers turned off the road in opposite directions.

By contrast, Martin testified that he was not parked but traveling 45 miles per hour along the same road when he spotted Welsh traveling the opposite direction at approximately the same speed. Martin testified that when his truck and the vehicle driven by Welsh were "15 feet, maybe ten feet" apart, Welsh swerved into his lane. Martin claimed he had to swerve off the road to avoid a collision. Martin claimed that Welsh then spun his vehicle around, pulled next to Martin, honked his horn, and made a lewd gesture before driving away. At one point in his testimony, Martin later admitted that he pulled up behind Welsh although he claimed that he left one car length of distance between the two vehicles.

B. Procedure Below

Martin claimed to have reported his version of the events to CRIT law enforcement authorities. No tribal law enforcement officer testified at trial, however, nor was any police report admitted into evidence.

Nevertheless, on September 1, 2015 the Colorado River Indian Tribes (CRIT, Tribes, or sometimes prosecution), Plaintiff/Appellee, filed a Criminal Complaint against Welsh alleging three counts of "Threats or Endangerment" and one count of "Reckless Driving," all arising from the alleged incident along Rio Vista Road. The Complaint specifically alleged that Welsh "is a Native American male." *Id.* at 2. In its Witness and Evidence List and Request for Defense Disclosure filed prior to trial, CRIT specifically listed two tribal enrollment officers whom it intended to call as witnesses to demonstrate that Welsh is a Native American male.

On March 9, 2016, the Tribal Court conducted a bench trial on the Complaint. During the presentation of its case-in-chief, CRIT failed to call either of the two tribal enrollment officers listed in its witness list and otherwise failed to present any evidence supporting the allegation in the Complaint that Welsh "is a Native

American male." Accordingly, after CRIT rested its case, Welsh moved for a judgment of acquittal based on the claim that CRIT failed to establish that Welsh was an Indian. Following the motion for judgment of acquittal and thereby having been placed on notice that Indian status was being contested, CRIT made absolutely no effort to request that Tribal Court permit it to reopen its case in order to establish the Indian status of Welsh and no further evidence on the issue was presented. The Tribal Court denied the motion, later explaining its reasoning in its March 15, 2016 Order as follows:

> [U]nlike the Major Crimes act with an element of the crime in that the person must be a Native American; the Colorado River Indian Tribes Law and Order Code does not have that requirement. The Tribal Code only requires that a person commit the crime.

Id. at 2.

Following the bench trial, the Tribal Court took the case under advisement, subsequently rendering its decision in its March 15, 2016 Order. In that Order the Tribal Court convicted Welsh of Count A of the Complaint, violating Section 318(a), "Threats or Endangerment," and acquitted him on Counts B through D.

Welsh filed a timely Petition for Appeal which this Court granted on June 21, 2016. In his appeal and through his briefs, Welsh urges two grounds for appeal: (1) that the Tribal Court erred in denying his Motion for Acquittal and in convicting him because it erroneously found that CRIT was not required to prove his Indian status as an essential element of its case-in-chief and (2) that his conviction is not supported by sufficient evidence presented at trial.

Having reviewed the excellent and thorough briefs filed by both parties and having heard their extraordinarily helpful oral submissions, this Court finds that it need only address Welsh's first claim to resolve this appeal.

DISCUSSION

Welsh argues that both as a matter of due process of law under the federal Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8) and as a matter of CRIT law the prosecution in any criminal case brought before the Tribal Court is required to prove the Indian status of the defendant as an essential element of its case-in-chief in order to establish the Tribal Court's jurisdiction over the crime. CRIT does not dispute that an accused's Indian status constitutes a necessary element to establish the jurisdiction of the Tribal Court over a criminal offense, at least as a matter of federal law, but it denies that either federal or CRIT law requires it to produce any evidence as to that element before the accused by motion or otherwise has placed such status in question. In short, CRIT argues that the burden of production (but not the burden of proof) with respect to Indian status rests with the defendant. To ascertain which position is correct, this Court will first survey the importance of Indian status in criminal prosecutions in Tribal Court and then separately address federal and CRIT legal requirements on the issue.

A. Indian Status & Tribal Court Jurisdiction

Contrary to the assertion of the Tribal Court, in neither federal nor tribal court does Indian status constitute an element separately specified within the statutory provision explicitly defining the offense. For example, the federal government can prosecute murders committed by Indians in Indian country under the

jurisdiction afforded in the Federal Major Crimes Act, 18 U.S.C. § 1153. Such prosecutions occur under the definition of murder set forth in 18 U.S.C. § 1111. Nowhere, however, in section 1111 is Indian status mentioned as an essential element of the defined offense of murder. Rather, the federal courts hold that Indian status of the accused as well as occurrence of the crime in Indian country constitutes an essential element of the offense which must be plead and proved by the government as part of its case-in-chief. *See generally, United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015); *United States v. Cruz*, 554 F.3d 840, 845 (9th Cir.2009) (quoting *United States v. Bruce*, 394 F.3d 1215, 1229 (9th Cir. 2005)). Contrary to the assertion of the Tribal Court, the federal courts mandate this result not because Indian status constitutes part of the definitional elements of the crime, but rather because it is necessary to establish *jurisdiction* under the Federal Major Crimes Act. Thus, federal law mandates that the *jurisdictional elements* of a Federal Major Crimes Act offense, i.e. Indian status and occurrence of the crime in Indian country, must be plead and proved beyond a reasonable doubt by the government because they are jurisdictional, not because they constitute essential elements of the definition of the crime in question.

Unlike the Federal Major Crimes Act, the CRIT Law and Order Code does not expressly limit tribal criminal jurisdiction to Indians. Section 101 of the CRIT Law and Order Code reads in relevant part:

> Subject to the limitations, restrictions, or exceptions imposed by or under the authority of the Constitution or laws of the United States, or by the Constitution or By-Laws of the Tribes, or by ordinances of the Tribes, or by express provisions elsewhere in this Code, the courts of the Tribes shall have civil and criminal jurisdiction over the following persons:
>
> a. Any person residing, located or present within the Reservation for:
>
> . . .
>
> (2) any charge of criminal offense prohibited by this Code or ordinances of the Tribes when the offense [was] alleged to have occurred within the . . . Reservation.

Thus under the express provisions of Section 101, the only jurisdictional requirement expressly spelled out in the CRIT Law and Order Code is the requirement that the criminal offense occur within the reservation. By its terms Section 101 applies to "[a]ny person," reflecting the Tribes view, perhaps, that it inherently has and should have criminal jurisdiction over *all* persons who commit criminal offenses on the Reservation. It may well be this point to which the Tribal Court referred when it ruled that:

> [U]nlike the Major Crimes act with an element of the crime in that the person must be a Native American; the Colorado River Indian Tribes Law and Order Code does not have that requirement. The Tribal Code only requires that a person commit the crime.

March 27, 2016 Order, p. 2. Nevertheless, Section 101 expressly subjects the criminal jurisdiction conveyed therein to any "limitation, restrictions, or exceptions imposed by or under the authority of the Constitution or laws of the United States." The Tribal Court apparently erroneously ignored that portion of Section 101.

Despite persistent tribal objections of interference with Indian tribal sovereignty, federal law, for better or for worse, currently claims to limit tribal criminal jurisdiction solely to Indians who commit crimes on a reservation unless the crime falls within the special expanded jurisdiction over crimes of domestic violence specified in the Violence Against Women Act amendments, currently codified at 25 U.S.C. § 1304, and not applicable here. This general limitation of tribal criminal jurisdiction to crimes committed by Indians derives from the combined effects of two Supreme Court decisions and a federal statute. In *Oliphant v.*

Suquamish Indian Tribe, 435 U.S. 191 (1978) the United States Supreme Court held that Indian tribes lacked criminal jurisdiction over non-Indians because it was inconsistent with historic domestic status, notwithstanding extensive historic evidence of Indian tribes exercising such jurisdiction in the early history of the country. Relying on the writ of habeas corpus remedy set forth in 25 U.S.C. § 1303 for those in tribal detention in violation of the Indian Civil Rights Act of 1968, the Court ruled that tribal courts that try non-Indians for criminal offenses over which they lack jurisdiction deny due process under 25 U.S.C. § 1302(8) and their decisions are consequently subject to collateral attack in federal courts on writ of habeas. In *Duro v. Reina*, 495 U.S. 676 (1990) the Supreme Court expanded its curtailment by judicial fiat of tribal criminal jurisdiction by expanding its *Oliphant* holding to exclude from tribal criminal jurisdiction Indians who were not members of the governing tribe. It arrived at this unprecedented conclusion despite the fact that federal Courts of Indian Offenses that had served Indian reservations before the emergence of many tribal courts had long exercised such jurisdiction and under applicable federal regulations tribal courts could displace Courts of Indian Offenses only when they exercised comparable authority over crimes committed on the reservation. Apparently, this last departure from the long history of recognizing and respecting tribal jurisdiction and sovereignty over their reservation was far too much for Congress since it overturned the result in the *Duro* case by the so-called "*Duro*-fix" legislation currently codified at 25 U.S.C. § 1301(2). *See generally, United States v. Lara*, 541 U.S. 193 (2004). The combined effects of *Oliphant, Duro* and 25 U.S.C. § 1301(2) claim to operate, as a matter of federal law, to limit tribal criminal jurisdiction (other than the special domestic violence crimes governed by 25 U.S.C. § 1304) solely to Indians.

For two reasons, this Court need not explore the difficult question of whether the federal government has any power or authority to limit the inherent sovereignty and jurisdiction of an Indian tribe without a treaty or other form of tribal consent. *See generally*, Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002). First, despite the apparent broader language of Section 101, both Welsh and the Tribes appear to agree that the criminal jurisdiction of the CRIT Tribal Courts, other than as governed by 25 U.S.C. § 1304, is limited by federal law to Indian defendants. Second, and more important, Section 101 expressly subjects the broader criminal jurisdiction it claims to any "limitation, restrictions, or exceptions imposed by or under the authority of the Constitution or laws of the United States." Thus, Section 101 expressly incorporates the limitations on CRIT tribal criminal jurisdiction imposed by the combined effects of *Oliphant, Duro* and 25 U.S.C. § 1301(2) and makes them part of CRIT law. Accordingly, both federal and CRIT law limit CRIT criminal jurisdiction not otherwise governed by the special domestic violence jurisdiction of 25 U.S.C. § 1304 to Indian defendants. In this respect, the Tribal Court erred when it claimed that:

> [U]nlike the Major Crimes act with an element of the crime in that the person must be a Native American; the Colorado River Indian Tribes Law and Order Code does not have that requirement. The Tribal Code only requires that a person commit the crime.

March 27, 2016 Order, p. 2. By expressly incorporating federal limitations on tribal criminal jurisdiction into CRIT law, Section 101 does indeed require that the person who commits the crime must be an Indian within the meaning of 25 U.S.C. § 1301(2).

Neither Welsh nor CRIT disputes these limitations on CRIT criminal jurisdiction. Both agree that in this case the Tribal Court's criminal jurisdiction is limited to cases in which the accused can be shown to be Indian. What they disagree about is (1) the procedure by which the status of the accused is first raised in the Tribal Court (the burden of production on this question) and (2) the source of law governing that procedure – federal or tribal. Another way of phrasing the dispute is that the parties disagree on who has the burden of raising and initially going forward with evidence, i.e. the burden of production, on the

question of Indian status and whether federal or tribal law governs that procedural question.

The parties appear to be in agreement that *once the issue is properly raised* the prosecution ultimately has the burden in the Tribal Court of proving Indian status beyond a reasonable doubt. Welsh claims that both federal and tribal law impose an obligation on the prosecution as a matter of due process of law, irrespective of any motion or other action by the accused, to prove Indian status as part of its case-in-chief and that the failure to do so must result in an acquittal for failure of an essential element of its case. Relying primarily on a federal case, CRIT claims that the procedure on this question is governed by tribal, not federal, law and that under prevailing decisions, no burden of production is imposed on the prosecution to prove Indian status in its case-in-chief unless and until the accused had properly raised the issue by motion or otherwise and presented colorable evidence suggesting lack of Indian status. CRIT appears to concede, however, that once the accused has properly placed his Indian status at issue in a criminal case, the prosecution has the ultimate burden of proof and persuasion to demonstrate his Indian status beyond a reasonable doubt. In this case, CRIT argues that before the prosecution rested its case-in-chief Welsh had never by motion or otherwise placed his Indian status at issue and therefore the prosecution had no obligation whatsoever to present any evidence as to his Indian status or to prove that fact beyond a reasonable doubt since the matter had not been put at issue by Welsh. To ascertain which view of this criminal procedural quagmire is correct and who has the initial burden of production on the question of Indian status, this Court will first examine the federal law and then turn to CRIT law.

B. Federal Law and the Burden of Production on Indian Status in Tribal Court

Both Welsh and CRIT rely on separate federal decisions directly on point from different courts located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit to support their views regarding the requirements of federal law as applied to the critical procedural question of who has the burden of production for initially raising Indian status. In Appellant's Opening Brief, Welsh centrally relies on *Las Vegas Tribe of Paiute Indians v. Phebus*, 5 F. Supp.3d 1221, 1233 (D. Nev. 2014) for the following point:

> Where positive Indian status is required for prosecution, as in § 1153 cases, the prosecution properly bears the burden of production the Indian-status issue. *That will be the default rule in tribal prosecutions*, because, absent Congressional exceptions no applicable here, Indian tribes may only prosecute Indians. *So the Tribe bore the burden of production on the issue of [defendant's] Indian status.*

(Emphasis supplied).

Phebus itself constituted a rather unusual, and perhaps confused, case. In *Phebus*, the Court of Appeals of the Las Vegas Tribe of Paiute Indians had ruled that the Tribe lacked criminal jurisdiction over a person whom the Tribe had disenrolled as a member of the Tribe. Consequently, to contest and invalidate the ruling of its own highest court, the Tribe filed suit in federal court naming the disenrolled former member as a defendant and seeking a declaratory judgment that it *possessed* jurisdiction. The disenrolled member never responded and, despite the default, the Tribe sought summary judgment with no briefing or other positions asserted on the other side. The United States Supreme Court had held in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) that federal courts lacked civil jurisdiction under 28 U.S.C. § 1331 to entertain cases claiming due process and equal protection violations of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-03, not brought under the sole remedy provided in that Act, the writ of habeas corpus for those held in tribal detention afforded by 25 U.S.C. § 1303. Nevertheless, while relying on the Indian Civil Rights Act of 1968, the *Phebus* court asserted jurisdiction without ever citing the jurisdictional holding of

Martinez. While *Oliphant* and *Duro* both had been decided under the habeas jurisdiction of section 1303, the district court in *Phebus* completely ignored that fact and instead purported to find jurisdiction over the declaratory judgment claim before it by citing a set of *civil* jurisdiction cases in which non-Indians had *challenged* tribal civil regulatory or adjudicatory jurisdiction over them, such as *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). The *Phebus* court also completely ignored the distinction between a due process jurisdictional challenge to tribal jurisdiction brought by a non-Indian and an effort by a tribe to certify or validate its own jurisdiction (and thereby overturn the decisions of its own courts) which does not involve any such due process challenge or perhaps any other federal question. Finally, questions involving the burden of production and the burden of persuasion on Indian status were not even at issue in the proceeding before the *Phebus* court since the Complaint had only sought a declaratory judgment that the Tribe had criminal jurisdiction over its non-appearing former member. Thus, the point on which Welsh relies constitutes the worst form of unnecessary judicial *obiter dicta*. In short, this Court doubts the persuasive effect of *Phebus* as a matter of federal law because (1) it has serious doubt that the *Phebus* court had any jurisdiction over the case it decided; (2) no party appeared on the other side to contest the merits of the Tribe's jurisdiction; and (3) the criminal procedural point regarding the burden of production on Indian status unilaterally announced by the district court was both unnecessary to the court's decision, outside the range of the issues before the court, and beyond the district court's jurisdiction. Accordingly, this Court has reviewed the *Phebus* opinion with considerable skepticism.

That skepticism is exacerbated by the critical case on which CRIT relies – *Eagle v. Yerington Paiute Tribe,* 603 F.3d 1161 (9th Cir. 2010). Unlike *Phebus,* the *Eagle* case involved a federal habeas corpus action brought under 25 U.S.C. § 1303 by a defendant convicted in tribal court of child criminal abuse. She claimed that by referencing the Federal Major Crimes Act in the so-called "*Duro*-fix" legislation codified at 25 U.S.C. § 1301(2), Congress meant to require the tribe as part of its case-in-chief in every tribal criminal prosecution to prove Indian status beyond a reasonable doubt as they are required to do for prosecutions under the Federal Major Crimes Act. Relying on Congressional history of the "*Duro*-fix" legislation, the Ninth Circuit expressly rejected her contention:

> Congress understood that the "definition of 'Indian' for purposes of 18 U.S.C. [§] 1153 was used in the 1990 amendments to the Indian Civil Rights Act so that there would be a *consistent definition of 'Indian'* in the exercise of jurisdiction by either the Federal government or a tribal government." S. REP. NO. 102–168, at 6 (1991) (emphasis added). Congress recognized that "[i]n most cases, status as an Indian for purposes of 18 U.S.C. [§] 1153 is an element of proof" but chose not to incorporate this requirement. Id. at 5; see also H.R. REP. NO. 102–61, at 4 (1991), U.S.Code Cong. & Admin.News 1991, pp. 370, 373–74 (Section 1153 "is relevant in that Federal criminal prosecutions under Section 1153 . . . have resulted in a body of case law with regard to *who is an Indian* for purposes of Section 1153. [The 1990 Amendments] incorporate[ ] *this case law* through its definition of 'Indian', and thereby provide[] some consistency be- tween federal and tribal criminal prosecutions *with regard to the class of persons subject to such prosecutions.*") (all emphases added).
>
> We therefore conclude that to the extent ICRA, as amended, references § 1153 to define "Indian," it does so to incorporate the federal definition of "Indian." ICRA does not make Indian status an essential element of every tribal misdemeanor offense.

Eagle v. Yerington Paiute Tribe, 603 F.3d at 1164-65. The *Eagle* court went on to note that although *federal* law did not require the tribal prosecution to prove Indian status as an essential element of every tribal misdemeanor case, the *tribal* law expressly provided it. The Yerington Paiute Law and Order Code on the

dispositive question read as follows:

> Section 1–20–030 provides that the "Tribal Court shall have criminal jurisdiction over all offenses enumerated in this Law and Order Code . . . when committed within the jurisdiction of the court by any Indian. . ." Section 1–21–030 of the Code specifies that the "burden of raising the issue of non-jurisdiction (status as a Non–Indian) shall be upon the person claiming the exemption from jurisdiction but the burden of proof of jurisdiction (status as an Indian) remains with the prosecution."

The Ninth Circuit therefore suggested that:

> [The Tribal Code] implicitly contemplates that a defendant's challenge will come at a point in the case when the prosecution can introduce the required proof. Here, Dawn Eagle waited until after the close of evidence at trial – a point when the time to prove her Indian status had passed – before she raised the issue. Dawn Eagle waited too long.

This holding demonstrates two points: (1) the question of who has the burden of production on the question of Indian status is governed by *tribal*, not federal, law and (2) allocating the burden of production (as opposed to the ultimate burden of proof) on Indian status to the accused does *not*, as argued by Welsh, violate the due process protections of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8).

These two holdings of *Eagle* are flatly inconsistent with the *Phebus* obiter dicta. Since the United States District Court for Nevada is located within the Ninth Circuit and the District Court decided *Phebus* four years after the *Eagle* decision was rendered by the Ninth Circuit, any reasonable reading of the state of federal law on this question would have suggested that the *Phebus* court was bound by *Eagle* as a matter of precedent. Nevertheless, in addition to completely ignoring its dubious jurisdiction over the case, the *Phebus* court chose to ignore a binding prior precedent, attempting to distinguish it because of the clear tribal procedural ordinance on which *Eagle* relied. The problem is that *Phebus* court simply chose to declare a different result by fiat, never bothering to explain in any way why federal, rather than tribal, law governed the criminal procedural question of the burden of product and simply conflating and confusing the two separate legal questions of (1) the federal law criminal jurisdictional limitation to Indians on tribal courts and (2) the criminal procedure question regarding the burden of production on the issue of Indian status.

In short, this Court expressly rejects *Phebus* as a persuasive precedent because (1) it doubts the *Phebus* court had any jurisdiction over the case it decided; (2) the *Phebus* decision was not thoroughly briefed or argued since the defendant never appeared and the District Court accordingly heard only one side of the case; (3) the *Phebus* decision is completely inconsistent with a prior controlling Ninth Circuit precedent, the *Eagle* decision; and (4) the *Phebus* court's explanation for why the tribal prosecution bears the burden of production is analytically incoherent, unpersuasive, and completely unnecessary to the decision in the case.

Accordingly, this Court finds that the holding in *Eagle* clearly demonstrates that the issue of the burden of production on Indian status in tribal prosecutions is governed by *tribal*, not federal, law and that allocating the burden of production (as opposed to the ultimate burden of proof) on Indian status to the accused does *not*, as argued by Welsh, violate the due process protections of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8).

Thus, this Court rejects Welsh's *federal* law claims.

C. CRIT Law and the Burden of Production on Indian Status in CRIT Tribal Courts

As discussed above, Section 101 of the CRIT Law and Order Code clearly demonstrates in every CRIT criminal prosecution (other than in cases involving the special domestic violence jurisdiction authorized by 25 U.S.C. § 1304) jurisdiction is dependent upon two jurisdictional facts: (1) occurrence of the crime within the Colorado River Indian Tribes Reservation and (2) the Indian status of the accused. Section 101 expressly references the Reservation requirement and by expressly making CRIT jurisdiction "[s]ubject to the limitations, restrictions, or exceptions imposed by or under the authority of the Constitution or laws of the United States," it incorporates the limitations of *Oliphant* and 25 U.S.C. § 1301(4). Since the *Eagle* case clearly demonstrates that *tribal* criminal procedure rules, not federal law, governs the burden of production on these two jurisdictional facts, this Court must decide who has the burden of production and the burden of proof on these two jurisdictional facts.

Unlike the Yerington Paiute Law and Order Code at issue in *Eagle*, neither the CRIT Law and Order Code nor the CRIT Tribal Court Local Rules of Criminal Procedure (LRCRP) expressly address the question of which party has the burden of production and persuasion on the these two jurisdictional facts. LRCRP Rule 16, however, does implicitly suggest that the burden of such production and persuasion rests with the prosecution, not the defense. LRCRP Rule 16 explicitly lists the special defenses a defendant may seek to rely upon in a criminal prosecution and it imposes on the accused the obligation to disclose that intent to the prosecution prior to trial. It expressly includes "any defense based upon insanity, lack of mental competence to stand trial, corpus delicti, [and] mistaken identity or alibi." Failure to include lack of the two jurisdictional facts required by Section 101 within the listed special defenses for which Rule 16 allocated the burden of production to the accused plainly undermines CRIT's argument that tribal law required Welsh to raise the question of his Indian status and that the prosecution had no burden to prove that jurisdictional fact until he had done so. *See also,* CRIT Law and Order Code, Section 308 (listing as among the affirmative defenses which must be raised by the defendant "legal justification; legal authority; justifiable and reasonable defense of self, a third person or property; and those specified elsewhere in this Article III" but not lack of jurisdictional facts, which are found in Article I, not Article III)

Two observations indicate the no one thought CRIT law allocated the burden of production on the Section 101 jurisdictional facts to the accused until CRIT made that argument before this Court in an effort to uphold Welsh's conviction. First, as just noted, unlike the Yerington Paiute Tribal Law and Order Code at issue in *Eagle*, LRCRP Rule 16 and CRIT Law and Order Code, Section 308 failed to list jurisdiction, lack of Indian status, or occurrence outside the Reservation as defenses that the accused had a pretrial obligation to disclose or otherwise contest. Thus, nothing in the CRIT Law and Order Code or LRCRP afforded Welsh any notice whatsoever that the burden of production on disputing the two jurisdictional facts of Section 101 rested with the defendant. To retroactively impose such a burden on Welsh without any prior notice, as CRIT now argues this Court should do, would deny him due process of law in violation of the Indian Civil Rights Act of the 1968, as amended, 25 U.S.C. § 1302(8) and Article III, Section 3 of the Constitution and Bylaws of the Colorado River Indian Tribes. Second, the pre-trial behavior of the prosecution in Welsh's case clearly indicates that, contrary to what CRIT now argues on appeal, the Tribes understood that the burden of both production and proof on the two jurisdictional facts of Section 101 rested with the Tribes, not the defendant. The prosecution therefore listed two tribal enrollment officers in its pretrial Witness and Evidence List and Request for Defense Disclosure. Thus, whatever CRIT now argues on appeal, the behavior of its prosecutor plainly demonstrates that CRIT has long understood and that trial practice in the Tribal Court has assumed that both the burden of production and proof of the jurisdictional facts of Section 101 rests with the prosecution, not the defense, as CRIT

belatedly argues in this appeal.

Accordingly, subject to CRIT Law and Order Code, Article II, Chapter B, section 211(d) (as amended on December 14, 1999, by Ordinance 99-3), this Court needs to clarify precisely which side has the burden of production and persuasion on the two jurisdictional facts of Section 101 – Indian status and occurrence of the offense within the Reservation. For three reasons, this Court finds that CRIT law should and does follow, as a matter of tribal law, the procedure used by the federal courts for prosecutions under the Federal Major Crimes Act, 18 U.S.C. § 1153, in allocating to the prosecution both the burden of production and the ultimate burden of proof beyond a reasonable doubt on these two important jurisdictional facts.

First, as the behavior of the prosecutor in this case and the content of LRCRP Rule 16 and CRIT Law and Order Code, Section 308 strongly suggest, it appears that the positive CRIT law and the practice in CRIT criminal prosecutions in Tribal Court have long assumed and at least strongly implied that the prosecution, not the defense, bears the burden of both production and proof on these two jurisdictional facts. Thus, by clearly announcing a CRIT rule that Tribes have both the burden of production and the burden of proof on the two jurisdictional facts of Section 101, this Court understands that its ruling is only clarifying the already existing structure of CRIT law by making explicit procedural practices that already were implicit in both LRCRP Rule 16 and CRIT Law and Order Code, Section 308 and were already being followed by CRIT prosecutors.

Second, while this Court believes that LRCRP Rule 16 and CRIT Law and Order Code, Section 308 strongly imply that the prosecution, not the defense, bears the burden of both production and proof on the two jurisdictional facts of Section 101, even if one thought CRIT law silent on the subject, as CRIT's argument seems to assume, the CRIT Law and Order Code still suggests that CRIT should adopt the federal approach to this criminal procedure question. Section 312 of the CRIT Law and Order Code provides that where not inconsistent with CRIT law, "the standards of . . . (iii) criminal procedure, including determination of the elements of an offense, of the federal courts of the United States may be referred to by the Courts of the Tribes to aid in the interpretation of Article III, and in the conduct of criminal procedures under this Code." While not absolutely binding, Section 312 expresses a CRIT statutory preference for adopting federal standards to resolve unclear criminal procedure questions not otherwise resolved by CRIT law. Thus, in the absence of strong reasons not to follow the federal approach, Section 312 counsels this Court to adopt the procedural rule followed by the federal courts for prosecutions under the Federal Major Crimes Act, 18 U.S.C. § 1153, in allocating to the prosecution both the burden of production and the burden of proof beyond a reasonable doubt on the two important jurisdictional facts – Indian status and occurrence of the crime within the Reservation.

Third, and perhaps most important, a rule that allocates to the Tribes the burden of both production and proof on important jurisdictional questions, such as Indian status and occurrence of the crime within the Reservation, is not only consistent with existing CRIT law, it also safeguards CRIT criminal convictions against collateral attack in federal court. The rule announced today therefore generally serves the law enforcement interests of the Tribes. As noted above, the Indian Civil Rights Act of 1968, as amended, contains at 25 U.S.C. § 1303 a grant of jurisdiction to federal courts to issue writs of habeas corpus "to test the legality of his detention by order of an Indian tribe." As in *Oliphant* and *Duro*, the Section 1303 jurisdiction frequently has been used to collaterally attack in federal court the criminal jurisdiction of tribal courts. In federal habeas corpus proceedings under Section 1303, federal courts generally require the petitioner to exhaust all available tribal remedies before it will entertain the claim, including questions of lack of jurisdiction. *See generally. Selam v. Warm Springs Tribal Correctional Facility*, 134 F.3d 948 (9th Cir. 1998);

but see, Alvarez v. Lopez, 835 F.3d 1024 (9th Cir. 2016) (finding that Tribe waived its defense of failure to exhaust tribal remedies). Similarly, when in civil proceedings, parties collaterally attack tribal civil jurisdiction in federal court, the general rule is that those challenging tribal civil jurisdiction must first exhaust their tribal remedies before filing in federal district court. *E.g. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 856–57 (1985); *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 15–16 (1987); *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196 (9th Cir. 2013); *Burlington N. R.R. Co. v. Crow Tribal Council,* 940 F.2d 1239, 1244–47 (9th Cir.1991). As the United States Supreme Court explained in *National Farmers Union Ins. Co.,* the federal courts generally require exhaustion of tribal remedies because:

> by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made.

Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. At 856-57. The criminal trial constitutes the proper venue where the Tribes must develop a record to support its jurisdiction over the crime charged. If, as CRIT argues, it can wait for the accused to contest jurisdiction before being required to offer proof that the accused in an Indian and the crime occurred on the Reservation, that record may never get made. This concern is particularly a problem when CRIT law affords the accused no clear overt warning of his need to contest Indian status or occurrence within the reservation before the jurisdictional question is put at issue, and the Tribe therefore may forfeit its opportunity to make a clear record defending its own criminal jurisdiction over the case. Thus, to protect the criminal jurisdiction of the Tribes over the criminal cases it files, the better rule is to assure that a full record reflecting that jurisdiction is made *in every case* in order insulate any convictions the Tribes secure from collateral attack in federal court through writ of habeas corpus under section 1303 for lack of any showing of jurisdiction.

This case poses a perfect illustration of the potential threat that adopting the CRIT's position poses for defending its own sovereignty and jurisdiction in federal court. Were this Court to affirm Welsh's criminal conviction, he might theoretically seek habeas corpus relief under section 1303 from the United States District Court for Arizona. This possibility is more than merely theoretical since his extraordinarily able legal counsel is also a former United States Attorney for Arizona. Should he file a petition for writ of habeas corpus, Welsh quite rightly could claim that he exhausted his tribal remedies by raising failure of proof of jurisdiction both through his Motion for Acquittal in the Tribal Court and by contesting its denial as erroneous in this appeal. Yet, since the Tribes never presented any evidence at trial that Welsh was an Indian, the tribal record in this case would be totally devoid of any evidentiary support of the Tribe's criminal jurisdiction when reviewed by the federal district court in this hypothetical habeas corpus proceeding. Based on that fatal gap in the record, it is highly likely Welsh might prevail in any potential federal habeas corpus proceeding.

These observations suggest that as a matter of policy, the tribal interests of CRIT sovereignty and its law enforcement interest are best served by assuring that in every contested criminal trial the record must establish tribal criminal jurisdiction by demonstrating proof beyond a reasonable doubt of the two jurisdictional requirements of Section 101 – Indian status and the occurrence of the crime on the Reservation. Assuring that this record is made in every contested criminal trial can only be accomplished by following the criminal procedure rule implied in LRCRP Rule 16 and CRIT Law and Order Code, Section 308 and further suggested by Section 312 – imposing on the prosecution both the burden of production and the burden of proof beyond a reasonable doubt of facts showing the two jurisdictional

requirements of Section 101, Indians status and the occurrence of the crime on the Reservation.

As an aside, the Court also notes that even if this Court were to adopt CRIT's suggestion (which it plainly rejects) that the burden of production, or at least the burden of contesting the issue, should be allocated to the accused, CRIT still could not prevail in this case. It is uncontested that Welsh raised the failure of proof of his Indian status by his Motion to Acquit at the close of the Tribes case-in-chief. If CRIT were correct that it had no obligation to present any proof as to Welsh's Indian status until he raised the issue, that issue surely was raised in the Motion to Acquit. By CRIT's own logic, at that point in the trial, the burden should have shifted to the Tribes to demonstrate that Welsh was an Indian. While CRIT might object that it had already rested and the objection came too late, the Tribes were always free, now that the issue had been contested for the first time by Welsh, to request a reopening of their case to present evidence on Welsh's Indian status. CRIT failed to take this approach and therefore, even were this Court to accept CRIT's argument that Welsh had the burden of contesting his Indian status (which it does not), this Court would still be required to reverse Welsh's conviction.

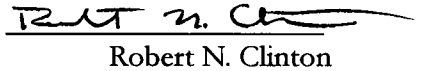
Accordingly, this Court holds that CRIT law imposes on the Tribes both the burden of production and the burden of proof beyond a reasonable doubt of the two jurisdictional facts of Section 101 – Indian status and occurrence of the crime on the Reservation. By its own admission, CRIT never presented any evidence as to Welsh's Indian status despite listing two enrollment officer witnesses for this purpose on its pretrial Witness and Evidence List. Whether these witnesses failed to testify because they had not been subpoenaed properly, failed to appear, were otherwise unavailable or simply could not testify that Welsh was an Indian this Court cannot know. The simple fact is that the Tribes offered no evidence whatsoever establishing that Welsh was an Indian and that the Tribal Court therefore had jurisdiction over the alleged crime. Accordingly, this Court must hold that the Tribal Court erred in denying Welsh's Motion to Acquit at the close of the Tribes' case-in-chief.

CONCLUSION

For the reasons set forth above, the Tribal Court's Minute Entry and Order Sentence & Judgment (Order) entered on March 15, 2016 finding the Defendant/Appellant guilty of one Count of Threats or Endangerment in violation of Section 318(a) of the CRIT Law and Order Code must be and hereby is REVERSED because the Tribal Court erred in denying Welsh's Motion to Acquit at the close of the Tribes' case-in-chief. Accordingly, the Motion for Acquittal on the non-dismissed criminal charge against Welsh is hereby granted, he is ordered acquitted, and that charge is dismissed.

IT IS SO ORDERED.

Entered this 4th day of April, 2017
on behalf of the entire panel.

By: 
Robert N. Clinton
Associate Justice