IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 10-2705

UNITED STATES OF AMERICA,

Appellee,

v.

WESLEY CHUCK JACOBS,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION
THE HONORABLE JEFFREY L. VIKEN
CHIEF, UNITED STATES DISTRICT COURT JUDGE

APPELLANT'S REPLY BRIEF

Neil Fulton, Federal Public Defender
Gary G. Colbath, Jr., Assistant Federal Public Defender
On the Brief: Mark S. Falk
703 Main Street, 2nd Floor
Rapid City, SD 57701
Telephone: (605) 343-5110
Facsimile: (605) 343-1498

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

Wesley Chuck Jacobs submits his reply brief pursuant to FED R. APP. P. 28(c). Mr. Jacobs' opening brief will be referred to as "AB" and the prosecution's responding brief will be referred to as "PB," each followed by the appropriate page reference. All other references will be the same ones used in Mr. Jacobs' opening brief.

REPLY TO STATEMENT OF CASE AND FACTUAL STATEMENT

The prosecution's statement of the case and statement of facts, (PB 1-3), do not address nor dispute the key facts identified by Mr. Jacobs. (AB 5-7, 15-21). The prosecution's silence either indicates full agreement with Mr. Jacobs' factual statements or waives any dispute.[1] These undisputed facts are fully supported by the record and control the resolution of the single jurisdictional issue.

[1] The prosecution's reference to the district court's crediting of testimony of a "domestic violence expert," (PB 3), could be construed as an implicit challenge to Mrs. Jacobs' credibility when she told the district court that she and Mr. Jacobs had reconciled and that he had no history of abuse. Even if the prosecution intends to imply such a challenge, it is not relevant to the jurisdictional issue before this Court. The prosecution has not identified any dispute in the facts necessary to determine jurisdiction.

ARGUMENT

The prosecution's argument heading reveals a misunderstanding of the jurisdictional problem in this case. (PB ii, 4). Mr. Jacobs does not contend the Fort Laramie Treaty of 1868 purported to deprive federal courts of criminal jurisdiction over tribal members. Rather, the Treaty promised the Oglala Sioux Tribe that its members could not arbitrarily be taken, prosecuted, punished, or executed by white soldiers or prosecutors. Article V sets forth a specific procedure designed to protect tribal members from arbitrary or unfair prosecutions. Article V specifically promised that an Indian agent and the Commissioner of Indian Affairs would be assigned the duty of investigating complaints and determining whether tribal members would be subjected to federal criminal jurisdiction, rather than leaving this decision to military officials or federal prosecutors.

Since the facts are undisputed and there is nothing in the record to establish compliance with the explicit protections set forth in the Treaty, the record cannot support the district court's exercise of criminal jurisdiction in this particular case. To clarify and focus the points in dispute, Mr. Jacobs will use his initial argument heading, while adding new sub-headings to identify the points in dispute and respond to the prosecution's contentions.

I.

The failure to establish compliance with Article V of the Fort Laramie Treaty of 1868, which requires an investigation, written findings, and a decision by the Commissioner of Indian Affairs before a tribal member accused of wrongdoing must be surrendered for federal criminal prosecution, deprives the district court of jurisdiction.

A. Standard of Review.

The parties agree that jurisdictional issues are reviewed *de novo*. (AB 13; PB 4).

B. Merits

1. There is no clear evidence in the record that in adopting and amending the Major Crimes Act Congress considered the Act to conflict with Article V Treaty rights, or intended the Act to abrogate these Treaty rights.

The prosecution's argument that the Major Crimes Act (MCA) has abrogated the Treaty rights identified in Article V is premised on several fundamental mistakes. First, the prosecution has overlooked the evidentiary proof required to establish abrogation of a Treaty right.

In *South Dakota v. Bourland*, 508 U.S. 679 (1993), the Supreme Court considered whether the Cheyenne Sioux Tribe's 1868 Fort Laramie Treaty right to regulate hunting and fishing by non-Indians on the reservation had been abrogated by subsequent federal legislation. In 1889, four years after adopting the MCA,

Congress enacted legislation that created the various South Dakota reservations, and took a great deal of the land. "The 1889 Act preserved those rights of the Sioux under the Fort Laramie Treaty that were 'not in conflict' with the newly enacted statute." *Id*. at 682.

In 1954, Congress passed the Cheyenne River Act, which required the Cheyenne River Sioux Tribe to give up approximately 2,000 acres of land for the Oahe Dam project in central South Dakota. *Bourland* applied a two part test to determine whether the 1954 legislation abrogated the Tribe's continued 1868 and 1889 Treaty right to regulate hunting and fishing over non-Indians on the ceded acreage within the bounds of the reservation.

This test requires "clear evidence" of two facts: (1) "Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other," and (2) Congress "chose to resolve that conflict by abrogating the treaty." *Id.* at 693, citing *United States v. Dion*, 476 U.S. 734 (1986). *Dion* identified several different means for obtaining the required evidence of a "clear and plain intent" by Congress to abrogate treaty rights. Abrogation could be established with: (1) clear evidence of an "express declaration" of the intent to abrogate treaty rights; (2) clear evidence from the "statute's 'legislative history' and 'surrounding circumstances;' " and/or (3) clear

language on "the face of the Act." *Dion*, 476 U.S. at 739. "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id*. at 739-40.

In this case, Congress intended the 1868 Treaty to subject tribal members to federal criminal jurisdiction including such offenses as "murder and other grave crimes." *United States v. Kagama*, 118 U.S. 375, 382-83 (1886). Congress adopted the 1885 MCA to fulfill this very intent after *Ex parte Crow Dog*, 109 U.S. 556 (1883), held that an exception in the pre-existing General Crimes Act (GCA) precluded federal jurisdiction over these serious crimes. (AB 18-20)

The prosecution has identified no evidence that Congress ever considered the MCA to conflict with Article V of the Treaty, nor evidence that Congress intended to resolve any such conflict by abrogation. The prosecution has identified no "express declaration" of any such intent. The prosecution has identified nothing from the legislative history nor the surrounding circumstances leading to the enactment of the MCA to support the abrogation theory. Instead, as Mr. Jacobs demonstrated, the historical record actually shows that Congress intended the Treaty itself to allow the federal criminal prosecution of tribal

members by the United States, subject to the rights and protections expressly set forth in the Treaty, and in federal law. (AB 15-21).

Thus, as a matter of historical fact, the Treaty constituted an "agreement with the Sioux Indians, ratified by an act of Congress, [that] was supposed to extend over them the laws of the United States and the jurisdiction of its courts, covering murder and other grave crimes . . . ." *Kagama*, 118 U.S. at 382-383. Such an interpretation of the Treaty is consistent with, not in conflict with, the MCA.

As *Kagama* further explained, the MCA was not adopted to abrogate any Treaty rights; rather, Congress enacted the MCA to overcome the unanticipated statutory exception contained in the GCA that contradicted the Treaty's agreement to extend federal criminal jurisdiction over tribal members. *Kagama*, 118 U.S. at 383; and *Crow Dog*, *supra.* (AB 18-21). Thus, the history and surrounding circumstances to the 1885 adoption of the MCA reveals no clear evidence that Congress perceived any conflict between the intended exercise of federal criminal jurisdiction over tribal members and the 1868 Treaty. Nor is there clear evidence that Congress intended to use the MCA to resolve any such conflict by abrogating the Treaty rights set forth in Article V of the Treaty. Rather, the MCA was

intended to allow the Treaty to operate as intended by correcting the GCA oversight.

2. Article V of the Fort Laramie Treaty is perfectly consistent with prosecutions under the Major Crimes Act.

While the prosecution argues a conflict and abrogation, it has identified nothing in the plain language of Article V of the Treaty that conflicts with and the plain language of the MCA, either as originally enacted or as amended. Article V provides:

> ARTICLE V. The United States agrees that the agent for said Indians shall in the future make his home at the agency building; that he shall reside among them, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined him by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty.

(Add. 2, Art. V). The MCA as originally enacted provided:

> § 9. That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, within any Territory of the United States, and either within or without the Indian reservation, shall be subject therefor to the laws of said Territory relating to said crimes, and shall be tried therefor in the

> same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of the said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person, within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

Kagama, 118 U.S. at 376-77, quoting 23 Stat. ch. 341, 362; § 9, 385. Although there have been several amendments to the MCA, the prosecution has identified none that address either the Treaty or the specific tribal rights set forth in Article V. The MCA and amendments simply do not address the buffer role established by Congress for the Indian agent and the Commissioner of Indian Affairs in these Treaty provisions.

Article V of the Treaty, as part of the "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, provides a tribal right to protection by both the Indian agent and the Commissioner of Indian Affairs from any arbitrary or unjustified exercise of federal criminal jurisdiction. The agent and Commissioner each play an important role in dealing with both "bad men among the whites, or among other people subject to the authority of the United States," and "bad men among the Indians." (Add. 2, at Art. I). Article V protects tribal members by setting forth the

necessary steps that must be taken by the Indian agent and the Commissioner before a prosecutor is permitted to invoke federal criminal jurisdiction against a tribal member for violating federal law, (Add. 2, at Art. V), including "murder and other grave crimes." *Kagama*, 118 U.S. at 382-83.

The Treaty did not specifically exclude any particular offenses that the "bad men" among the Indians could be punished for in a federal criminal court. Thus, under the Treaty, but prior to the passage of the MCA, Congress incorrectly concluded tribal members committing any offense would be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as whites and other persons, if the investigation and findings of the Indian agent and the final decision of the Commissioner permitted the prosecution to move forward.

After the Supreme Court determined that the GCA explicitly prohibited the exercise of federal criminal jurisdiction over tribal members for certain major offenses, *Ex parte Crow Dog*, 109 U.S. at 570, Congress merely enacted the MCA to include those offenses as originally intended. The MCA, however, did not purport to diminish the Treaty's protections for tribal members from prosecution without the requisite Indian agent investigation, report, and determination by the Commissioner. Instead, the MCA said nothing about the role established by the

Treaty for the Indian agent and Commissioner of Indian Affairs in establishing jurisdiction over "bad men among the whites, or among other people subject to the authority of the United States," and "bad men among the Indians."

Rather, the MCA extended federal criminal jurisdiction to cover the additional offenses, "subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." *Kagama*, 118 U.S. at 377. Since Congress did not indicate otherwise, those "same laws" necessarily included the protections provided for tribal members in Article V of the Treaty. U.S. Const. art. VI, cl. 2.

Because there is no conflict in the plain language of the MCA and the Treaty provisions, the prosecution's abrogation argument falls short. The Treaty itself intended to subject tribal members to federal criminal jurisdiction. Given the surrounding circumstances and the desire for peace, the Treaty provided for a peaceable method of invoking this jurisdiction through the use of Indian agents and the Commissioner of Indian Affairs. Rather than abrogating any Treaty provisions, adoption of the MCA assisted in carrying out the intended Treaty terms and assured the exercise of federal criminal jurisdiction upon a proper

determination by the United States through its designated Indian agents and the Commissioner of Indian Affairs.

3. The prosecution has misunderstood the issues and holdings in the existing case law addressing the Major Crimes Act and the Treaty.

Much of the prosecution argument flows from its mistaken perception of Mr. Jacobs' position on how the Treaty affects federal criminal jurisdiction coupled with a misunderstanding of this Court's prior decisions. In contrast to the litigants in *United States v. Dodge*, 538 F.2d 770 (8th Cir. 1976), *Consolidated Wounded Knee Cases*, 389 F. Supp. 235 (D. Neb. 1975), and *United States v. Drapeau*, 414 F.3d 869 (8th Cir. 2005), Mr. Jacobs has not argued that the Treaty precludes federal criminal jurisdiction. Since these cases relied on the MCA as authority to reject the argument that the Treaty prohibits the exercise of all federal criminal jurisdiction over tribal members, these decisions have no bearing on the issue before this Court. There is a substantial difference in law between the complete denial of jurisdiction and the process necessary to invoke federal court jurisdiction.

United States v. Blue, 722 F.2d 383, 384 (8th Cir. 1983), cited by the prosecution, (PB 5), also rejected a "no jurisdiction" argument. Mr. Blue contended federal drugs laws were not covered by either the GCA or the MCA,

hence the government could never invoke federal criminal jurisdiction against a Native American for a drug violation. Mr. Jacobs has made no such argument. Instead, Mr. Jacobs fully acknowledges that Article V of the Treaty establishes a process for the government to invoke federal criminal jurisdiction. The choice by Congress to protect tribal members by involving Indian agents and the Commissioner of Indian Affairs is a reasonable prerequisite to invoking jurisdiction that was not addressed in *Blue*.

Likewise, the three page summary decision in *United States v. Kane*, 537 F.2d 310 (8th Cir. 1976), did not address the role of the Indian agent and the Commissioner set forth in the Treaty. Instead, *Kane* addressed whether Article I required "the United States to request 'delivery' of the suspect from the Tribe." *Id.* at 311. The Court held that requiring the United States to request delivery would be inconsistent with the intent behind the MCA. In describing this Court's prior decision in *United States v. Dodge*, 538 F.2d 770 (8th Cir. 1976), *Kane* quoted District Court Judge Urbon's statement in *Consolidated Wounded Knee Cases,* that "the Major Crimes Act is 'explicit legislation which overcomes the Treaty of 1868 regarding criminal jurisdiction and is a valid and constitutional law.' " (PB 5). As explained previously, Judge Urbon did not address the treaty rights set forth in either Article I or Article V; rather, he used this language to

explain his rejection of the defendants' argument that the Treaty conclusively prohibited any exercise of federal criminal jurisdiction over tribal members.

The prosecution also relies on *Kane's* quote from *In re Long Visitor*, 523 F.2d 443 (8th Cir. 1975), that "the extension by Congress of federal jurisdiction to crimes committed on Indian reservations inherently includes every aspect of federal criminal *procedure* applicable to the prosecution of such crimes." (PB 5) (prosecution's emphasis). *Long Visitor* rejected the argument that the 1868 Treaty prevented the United States from serving and enforcing federal grand jury subpoenas upon tribal members. Thus, in context, *Long Visitor* referred not to a Treaty procedure intended to protect tribal members; rather, it referred to the use of federal criminal procedures.

In contrast to *Kane* and *Long Visitor*, Mr. Jacobs has never sought to impose "request procedures" on the United States and has not objected to any procedures set forth in the federal criminal statutes or rules. Rather, Mr. Jacobs relies upon this Court to enforce the protections promised to tribal members by the Treaty in Article V. This provision, which is "the law of the land," protects tribal members from arbitrary prosecution. It required the United States Indian agent to receive and review the complaint against Mr. Jacobs (a tribal member), conduct an investigation, make proposed findings, and submit these findings to the

Commissioner of Indian Affairs for a final decision whether federal criminal jurisdiction may be invoked to commence a prosecution of Mr. Jacobs. Unless these Treaty obligations are honored, the attempted prosecution of Mr. Jacobs is both premature and ineffective to confer jurisdiction.

While it is understandable that the prosecution objects to the Treaty's removal of considerable discretion from the prosecutor's office, it is clear from the historical period in which the Treaty was adopted that this is exactly what was intended by Congress in agreeing to the Treaty provisions.[2] The Congressional goal was to achieve peace with the Sioux Tribe in 1868 given the violence preceding and surrounding the Treaty, to stop the fighting, and to obtain federal criminal jurisdiction over tribal members. Such a goal had to be accomplished in the face of considerable suspicion and distrust by tribal leaders. Thus, to address these attitudes and gain acceptance of the Treaty, Congress provided Treaty rights in Article V assuring the Tribe that the United States would limit the unfettered discretion of federal military officers and prosecutors, by placing Indian agents and the Commissioner between tribal members and the prosecutors. This was a

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[2] For a detailed description of the historical circumstances leading up to the Treaty see, ROBERT M. UTLEY, THE INDIAN FRONTIER OF THE AMERICAN WEST 1846-1890 (1984), at chapter 4 "War and Peace: Indian Relations in Transition 1865-1869."

logical means to convince the Tribe that its members would be both protected and treated fairly if they entered into the Treaty, rather than gathered up indiscriminately and slaughtered.

Thus, Article V established a jurisdictional buffer between tribal members and potentially overzealous and politically ambitious federal military officers and prosecutors. This provision conveyed a critical promise to the Tribe that its members could not be taken away, prosecuted in the white man's federal court where they often faced a death sentence, without a prior investigation by the Indian agent and an independent determination by the Commissioner that the agent's evidence and findings justified the exercise of federal criminal jurisdiction.

Offering such protection against unfettered prosecutorial discretion, the rights guaranteed by Article V must have provided an important incentive to convince tribal members to peacefully submit to federal criminal jurisdiction if directed to by the Commissioner after the Indian agent's investigation and findings. As the Supreme Court has explained, treaties with a tribe "must be read in light of the common notion of the day and the assumptions of those who drafted them" in light of surrounding history and circumstances. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206, 208 (1978). The history and circumstances in 1868 indicate that the Treaty buffer provisions are consistent with the MCA.

Since the cases relied upon by the prosecution addressed arguments denying any means to obtain jurisdiction, and since none of these cases considered Article V, they are not controlling.

4. Through statutes and treaties Congress has the exclusive authority to establish pre-requisites to the exercise of subject matter jurisdiction.

The prosecution's argument also expresses some confusion about the nature of federal criminal subject matter jurisdiction. This is understandable since there are conflicting statements in both Supreme Court and circuit precedent. Fortunately, the Supreme Court's recent decision in *Bowles v. Russell*, 551 U.S. 205 (2007), provides substantial clarification on the nature of subject matter jurisdiction, holding that Congress has the power to both (1) decide "whether federal courts can hear cases at all," and (2) "determine when, and under what conditions, federal courts can hear them." *Id*. at 212-13.

Bowles addressed appellate court subject matter jurisdiction. In a manner similar to statutes defining the subject matter jurisdiction of federal district courts,[3] the subject matter jurisdiction of the court of appeals is set forth by statute:

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[3] See 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.").

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

28 U.S.C. § 1291.

Bowles addressed whether non-compliance with a different statute would affect the subject matter jurisdiction conferred by section 1291. In particular, 28 U.S.C. § 2107(a), required filing a notice of appeal in a civil case within 30 days of the entry of the judgment being appealed. *Bowles* provides controlling guidance on two points. First, *Bowles* clarifies how authorities viewed the concept of subject matter jurisdiction in the mid to late 1800s during the historical period when Congress entered into the Fort Laramie Treaty. Second, *Bowles* clarified the difference between laws enacted by Congress to invoke subject matter jurisdiction and claim processing rules adopted by the judiciary. *Bowles* held that non-compliance with the requirements established by Congress deprives a federal court of subject matter jurisdiction notwithstanding a general jurisdictional grant.

First, *Bowles* explained, "even prior to the creation of the circuit courts of appeals, this Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction." *Id.* at 210, citing *Scarborough v. Pargoud*, 108 U.S. 567, 568 (1883). Indeed, 19th century authorities concluded unless an appeal is "prosecuted in the manner directed, within the time limited by the acts of

Congress, it must be dismissed for want of jurisdiction." *Id*., citing *United States v. Curry*, 47 U.S. 106, 6 How. 106, 113 (1848). Thus, an "accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants." *Id.* (citation omitted).

These principles demonstrate that when the Treaty was adopted in 1868, and reaffirmed in 1871, and 1889, authorities would have considered compliance with statutory requirements to be mandatory to invoke subject matter jurisdiction. Thus, if a statute required the investigation by an agent and a subsequent decision by an official before invoking federal criminal jurisdiction, non-compliance with that statutory requirement would undermine the court's potential subject matter jurisdiction.

Under the Constitution, both statutes and treaty provisions constitute "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Thus, the Fort Laramie Treaty of 1868 must be given the same respect as a statute. This necessarily means that noncompliance with jurisdictional treaty provisions has the same effect as noncompliance with jurisdictional statutes. At the time the Treaty was adopted and reaffirmed, Congress would have considered the provisions requiring an investigation and Commissioner decision to be a jurisdictional prerequisite to the federal criminal prosecution of a tribal member.

Just as when the Treaty was adopted and reaffirmed in the 19th century, under *Bowles*, subject matter jurisdiction continues to depend in part upon strict compliance with the rules established by Congress. *Bowles* distinguished the rules adopted by Congress from similar "claim processing" rules adopted by the judiciary. Judicially created rules are "procedural rules adopted by the Court for the orderly transaction of its business that are not jurisdictional." *Id.* at 211 (internal quotation marks and citations omitted). This is so because only "Congress may determine a lower federal court's subject-matter jurisdiction." *Id.* (Citations omitted).

"Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Id.* at 212-13. "Put another way, the notion of subject-matter jurisdiction obviously extends to classes of cases . . . falling within a court's adjudicatory authority, . . . but it is no less jurisdictional when Congress prohibits federal courts from adjudicating an otherwise legitimate class of cases" due to non-compliance with the method of invoking jurisdiction. *Id.* at 213 (internal quotation marks and citations omitted).

Bowles further held because Congress enacted the statutory requirements set forth "in § 2107(c), that limitation is more than a simple 'claim-processing rule.' "

Id. Where an "appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." *Id.* (citation omitted). Just as in *Bowles*, the failure in this case to initiate a federal prosecution of Mr. Jacobs "in accordance with the [Treaty] therefore deprived the [federal district court] of jurisdiction." *Id.*

Bowles clarifies that the statements quoted by the prosecution, (PB 9), from *United States v. Pemberton*, 405 F.3d 656 (8th Cir. 2005), and *United States v. White Horse*, 316 F.3d 769 (8th Cir. 2003), cannot be read in the broad manner suggested by the prosecution. When considered in context and in light of the specific facts of *Pemberton* and *White Horse*, the quoted comments do not address actual steps that must be taken to invoke jurisdiction as in *Bowles* and the case at bar.

Rather, both *Pemberton* and *White Horse* address elements of the offense, which have been frequently described by various courts as jurisdictional elements. *Pemberton* addressed the sufficiency of the evidence to prove the defendant's Indian status under 18 U.S.C. § 1153. Since the district court received sufficient evidence of Indian status, and since Indian status is an element to be proved after the invocation of jurisdiction, rather than a step mandated by statute or treaty to be taken to acquire jurisdiction, *Pemberton* rejected the jurisdictional argument. 405

F.3d at 659-60. In *White Horse*, this Court rejected an argument made for the first time in a reply brief that Mr. White Horse should have been tried under section 1153 rather than section 1152 because he was an Indian accused of an offense against another Indian. 316 F.3d at 772. Neither 18 U.S.C. §§1152 nor 1153 fall into the type of jurisdictional rules described in *Bowles* because these statutes focus only on the status of the accused without requiring any particular steps to be taken to invoke subject matter jurisdiction.

White Horse relied on *United States v. Cotton*, 535 U.S. 625 (2002), which rejected a challenge to subject matter jurisdiction premised on a defect in the indictment allegations. Chief Justice Rehnquist wrote the majority opinions in both *Cotton* and *Bowles*. In *Cotton*, he wrote, "the term 'jurisdiction' means today, . . ., 'the courts' statutory or constitutional power to adjudicate the case.' " *Id.* at 630. In *Bowles*, Chief Justice Rehnquist clarified that Congress has the constitutional authority to limit the power of the judicial branch to adjudicate a case by enacting laws that require specific steps that must be followed to invoke subject matter jurisdiction. 551 U.S. at 212-13.

Article V of the Treaty is just such a law. It must be treated in the same manner as the jurisdictional rule enforced in *Bowles* since it explicitly requires specific steps to invoke federal criminal jurisdiction over a tribal member. The

Treaty sets out the steps to be taken by both the Indian agent (an investigation and written report), and the Commissioner of Indian Affairs (a decision), before a tribal member may be subjected to federal criminal jurisdiction under 18 U.S.C. §§ 1153 and 3231. The holding in *Bowles* clarifies that when Congress establishes such steps to invoke jurisdiction, the failure to follow these steps necessarily deprives the court of subject matter jurisdiction over the case.[4]

5. The plain language of Article V of the Treaty requires the Indian agent, "in all cases" alleging "depredation on person" to "cause the evidence to be taken in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs" for a final decision.

Contrary to the prosecution's final argument, (PB 10), the plain language of Article V applies directly to the facts of this case. Authorities alleged an assault (i.e. depredation) by a tribal member (Mr. Jacobs) on another person (his spouse) occurring at their home on the Oglala Sioux Tribe's reservation. Such a factual

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[4] The argument in footnote 2 of the prosecution's brief, (PB 8), addresses personal jurisdiction rather than subject matter jurisdiction. Under the Supreme Court's holdings in *Cotton* and *Bowles*, however, the question becomes whether the district court had the power to exercise federal criminal jurisdiction where there has been no compliance with the steps for invoking jurisdiction set forth in Article V of the Treaty.

The argument in subsection C of the prosecution's brief, (PB 8), also is misplaced, as it is apparently premised on the assumption that the answer to the controlling jurisdictional question before this Court will be decided in the prosecution's favor. Such an argument puts the proverbial cart before the horse.

allegation falls squarely within the plain language of Article V. The prosecution, however, attempts to focus on Article I in isolation, and argues that by doing so it can ignore Article V. (PB 10-11). The prosecution's desire to read the Treaty language in isolation is inconsistent with the historical circumstances surrounding the Treaty and overlooks the fundamental rules for interpreting Indian treaties.

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellin v. Texas*, 552 U.S. 491, 506 (2008). When interpreting the text on Indian treaties, the Supreme Court "has often held that treaties with the Indians must be interpreted as they would have understood them, . . . and any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970)(citation omitted). The prosecution argues, in effect that the Treaty is ambiguous. If so, the prosecution has overlooked that under the "rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians." *Winters v. United States*, 207 U.S. 564, 576 (1908).

As explained earlier, the historical context in 1868 indicated that the Sioux Tribe was resisting efforts of the United States to expand westward. White settlers sought protection from the military, and Indians soon learned to expect the military to summarily execute tribal members. This included both tribal members

who attempted to defend Indian territory and those who happened to be in the area.[5]

On its face, the promise made in Article V of the Treaty assured Tribes that tribal members accused of being bad men would not be arbitrarily removed and imprisoned or killed by white men. Instead, the Treaty promised that all allegations made against tribal members would first be investigated by an Indian agent and then considered by the Commissioner of Indian Affairs, individuals the Tribe recognized as leaders among the whites.

As the Supreme Court has explained, "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect [tribal] interests . . . ." *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942). There could be no greater tribal interest than protecting its members from arbitrarily being removed and jailed or killed by the whites. To paraphase *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), the prosecution "may not

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[5] In 1867, United States General William Tecumseh Sherman recommended, "We must act with vindictive earnestness against the Sioux even to their extermination, men, women, and children." UTLEY, *supra* at p.105, citing Senate Executive documents, 40th Congress, 1st sess., no. 13 (1867), p. 27.

wishfully insist" that the Sioux should have understood in 1868 "that federal agents would arrest and imprison tribal members" accused of wrongdoing without an investigation by the Indian agent and a determination by the Commissioner of Indian Affairs. *Id.* at 1266, n. 8. Rather, the Treaty promised just such an investigation prior to subjecting a tribal member to federal criminal jurisdiction. This Court should enforce the promise.[6]

CONCLUSION

The parties' briefs have focused the issues in this case on abrogation of treaty rights, the relationship between the Treaty and the Major Crimes Act, the meaning of subject matter jurisdiction, and what the Treaty meant to the Oglala Sioux Tribe in the 19th century. Applying the two part test from *Bourland*, *supra*, establishes that the Treaty rights in question have not been abrogated by either the

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[6] Absent enforcement of this Treaty right, Justice Douglas' unfortunate observation about "one basic truth" will hold true. "The Indian knows that termination takes many forms. He can be flooded out of his reservation; he can be relocated; his reservation can be sold out from under him if he cannot meet taxes to which it is subject. His limited power to protect himself on the reservation from local prejudice and discrimination can be wiped away by the substitution of state laws for tribal law, and state jurisdiction for tribal jurisdiction. All of these, the Indian knows, are variants on one basic truth: the United States Government does not keep its promises. Sometimes it breaks them all at once, and sometimes slowly, one at a time." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 639, n. 6 (1970) (Douglas, J. concurring). The promise made in Article V should not be broken.

MCA or any other act of Congress. The historical circumstances surrounding the 1868 Treaty and the enactment of the MCA in 1885, as well as the plain language of each, establish that the Treaty and the MCA complement each other. The 2007 decision in *Bowles*, *supra*, establishes that subject matter jurisdiction will not vest without compliance with whatever laws Congress enacts as prerequisites to invoking that jurisdiction. The Treaty is just such a law and the plain language of Article V of the Treaty applies directly to this case.

Given these circumstances, the law required compliance with Article V of the Treaty to invoke federal criminal jurisdiction under the MCA against Mr. Jacobs. It is undisputed that the United States did not comply with Article V. Therefore, the district court did not obtain jurisdiction to convict and sentence Mr. Jacobs under the MCA. Mr. Jacobs respectfully requests that this Court reverse and vacate his conviction and sentence.

Dated this 12th day of January, 2011.

Respectfully submitted,

Neil Fulton
Federal Public Defender
By:

/s/ Gary G. Colbath, Jr.
Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Wesley Chuck Jacobs
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
703 Main Street, Second Floor
Rapid City, SD 57701
(605)343-5110; Fax: (605)343-1498
filinguser_SDND@fd.org

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: */s/ Gary G. Colbath, Jr.*
Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Wesley Chuck Jacobs

I further certify that the electronic version of the foregoing has been scanned for viruses using Symantec Anti Virus Corporate Edition, and that the scan showed the foregoing is virus free.

By: */s/ Gary G. Colbath, Jr.*
Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Wesley Chuck Jacobs

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Word Perfect Version X3 was used in the preparation of the foregoing Appellant's Brief and that the word count done pursuant to that word processing system shows that there are 5,944 words in the foregoing Appellant's Reply Brief.

Dated this 12th day of January, 2011.

By: */s/ Gary G. Colbath, Jr.*
Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Wesley Chuck Jacobs