OVERTURNED IN PART William COLEMAN, Appellant,

See 3 CCAR 01 (1995) vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP93-15405, 1 CTCR 74, 20 ILR 6106

2 CCAR 1

[Stephen L. Palmberg, Attorney at Law, Grand Coulee WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Argued July 9, 1993. Decided July 22, 1993.
Before Chief Judge Bonga, Judge Chenois and Judge Collins

BONGA, C.J.

This matter came before the Appellate Panel of Chief Judge David Bonga, Judge Edythe Chenois and Judge Brian Collins for oral arguments on July 9, 1993. Present at the hearing was Tribal Prosecutor Lin Sonnenberg. Neither the appellant nor his attorney were present. The Panel decided to proceed as the file was sufficiently complete to reach a decision to uphold the ruling of the Trial Court.

DISCUSSION

I. Defendant's Right to Speedy Trial

A defendant's Time of Trial is governed by Colville Tribal Code (CTC) 2.4.03. As to Speedy Trial CTC 2.4.03(d) states:

> Provided, a defendant not released from jail pending trial shall be brought to trial not later than 60 days after the date of arraignment.

The Panel believes that the 60 day rule was adopted to shorten the period for bringing defendants to trial who are either unable to post bail or are held without bail. The 60 day rules reflects a sense of urgency to promptly bring such defendants to trial in order to keep them from unnecessarily languishing in jail pending trial. Thus, in cases where the defendant has no choice but to remain in jail, either due to inability to post bail or because he is being held without bail, the 60 day rule ensures that his rights will be promptly adjudicated. However, the Panel does not believe this is an inflexible rule. When a defendant chooses to remain in jail in order to receive credit for time served on an unrelated matter, the same urgency to rapidly bring the matter to trial is lacking. In such cases, we believe the defendant has knowingly and voluntarily waived his rights to be brought to trial within 60 days under CTC 2.4.03(d).

In this case the defendant was arraigned on September 28, 1992 with his trial date being December 10, 1992. The elapsed time between Defendant's arraignment and trial was 73 days. It is the defendant's position that he should have been brought to trial within 60 days of September 28, 1992.

The Appellate Panel finds from the record that the defendant was incarcerated at the time of his arraignment on unrelated charges. The defendant explicitly stated at the arraignment that he desired to remain in jail, so that the incarceration period would count against the unrelated jail sentence. It is the position of the Panel that following the arraignment the 60 day rule was not applicable and that Defendant's trial had to be held within 90 days of his arraignment which did happen. Therefore, the Panel holds that the defendant waived his right to Speedy Trial under CTC 2.4.03(d) by choosing to remain in jail.

It is the belief of the Panel that if the defendant had been in jail due to an inability to post bail the defendant's interpretation of the 60 day rule would have been correct in this case.

II. Right to a Jury Trial

The defendant at his arraignment requested a jury trial which was scheduled for December 10, 1992. The defendant's counsel on November 23, 1992 confirmed the December 10, 1992 jury trial. On the date of the scheduled jury trial the defendant requested and was granted a trial continuance until January 28, 1993.

The laws for the Colville Confederated Tribes at CTC 4.1.05 mandate that when a jury trial is scheduled, the defendant must confirm that jury trial no later than ten (10) days prior to the date of the jury trial. Without a confirmation the law states that there is a waiver of the right to trial by jury and the trial becomes a bench trial.

The Court record indicates that the defendant did not confirm the January 28, 1993 jury trial under the 10-day rule. As a result the January 28, 1993 hearing was a bench trial. The Appellate Panel finds that the defendant failed to abide by the laws of the Colville Confederated Tribes by not confirming the January 28,1993 hearing as a jury trial.

Furthermore, the record indicates that the trial judge gave the defendant a chance to ask for a continuance so that a jury trial could be scheduled. The defendant declined to ask for the continuance. The Panel therefore believes that the defendant knowingly waived his right to a jury trial by refusing to ask for the continuance that would allow a jury trial to be scheduled for his hearing.

The defendant's Appeal is hereby Denied.

David L. ST. PETER, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Numbers AP93-15400, AP93-15507, AP93-15508,

AP93-15509 and AP93-15510, 1 CTCR 75, 20 ILR 6108

2 CCAR 2

[Frank LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Tim Liesenfelder, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Numbers 92-15400, 92-15507 to 92-15510]

Arguments heard May 28, 1993. Decided September 28, 1993.
Before Chief Judge Collins, Judge Baker and Judge Bonga

COLLINS, C.J.

This matter was brought before the Appellate Panel seeking review of five maximum sentences imposed by the Trial Court in the above cases. In her Memorandum Opinion; Judgment And Sentence, dated February 2, 1993, Judge Elizabeth Fry imposed maximum jail sentences for two counts of Disorderly Conduct, Assault, Trespass To Buildings, and Resisting Arrest, and specified that each sentence would run consecutively to any other incarceration.

The appellant alleges that the Trial Court erred by imposing excessive sentences which are arbitrary and capricious and constitute cruel and unusual punishment, and claims his rights were violated under the Indian Civil Rights Act, 25 U.S.C. Sections 1301-1303 (ICRA) and the Colville Tribal Civil Rights Act, Title 56.01 *et seq.* (CTCRA). Appellant raises various issues in support of his Assignment Of Error concerning sentencing by the Trial Court. These issues will be addressed by the Panel.

The Appellate Panel first observes that the myriad of issues raised on this appeal were not fully researched or briefed by Appellant's counsel. Consequently, the Judges have expended considerable time and effort reviewing decisional law and secondary authority bearing on the issues raised on appeal. Many matters addressed herein are vital to the Colville Confederated Tribes and issues of first impression for the Tribal Court. The Panel believes that when such constitutional issues are raised, Appellant's counsel must engage in thorough analysis and briefing during the course of the review process.

I.

The appellant first contends that because the term "sentence" is not defined in the Colville Tribal Code, the term must be given meaning under the laws of the State of Washington. The appellant urges the Court to adopt RCW 9.94A.400 in order to give meaning to the term. The term "sentence" is not defined in the Tribes' sentencing statute, CTC 2.6.07 and the Panel has not found a definition of the term elsewhere in the Tribal Code. The Panel also has not found a definition for "sentence" in the State sentencing statute, RCW 9.94A.400.

The Colville Tribal Code provides that the Principles of Construction at CTC 1.1.07(e) are to be followed when a term is not clear on its face or in the context of the Code.

> "Whenever the meaning of a term used in this Code is not clear on its face or in the context of the Code, such term shall have the meaning given to it by the laws of the State of Washington, unless such meaning would undermine the underlying principles and purposes of this Code."

CTC 1.1.07(e).

The question Appellant raises is whether the term "sentence" used in CTC 2.6.07 means fine, jail term, or both. Because the appellant contends that the term, as used in that section, is subject to more than one interpretation, we refer to the pertinent sections of the Code and other authority for guidance.

The Principles of Construction direct the Court to follow the plain meaning of terms found in the Code.

> "Words shall be given their plain meaning and technical words shall be given their usually understood meaning where no other meaning is specified."

CTC 1.1.07(b). Moreover, the Principles of Construction also direct the Court to "[c]onstrue the Code as a whole to give effect to all of its parts in a logical, consistent manner." CTC 1.1.07(d).

The Court will look to the laws of Washington only when the meaning of a term is unclear on its face or in context of the Code. Further, the rules of construction instruct the Court to use the definition of a term given by the State only if such meaning would not undermine the underlying principles and purposes of the Code. CTC 1.1.07(e). In addition to the direction provided by the Principles of

Construction, the Court Rules provide that we may look to other authority for an appropriate definition. CTC 4.1.11.

The Panel believes that the term "sentence", both by its facial definition and in the context of 2.6.07, unambiguously means punishment. In that regard, the Plain Meaning Rule in CTC 1.1.07(b) is controlling. It is equally clear that the term "sentence" used in CTC 2.6.07 refers to the punishment to be imposed by the Court in a criminal matter following a defendant's conviction of violating a criminal statute. The remaining question is whether the term refers only to confinement in jail.

In reviewing Chapter 5.7 Penalties of the Code, usage of the term "sentenced" indicates that the Tribal Council intended the term to include "[i]mprisonment..., or a fine..., or both imprisonment and a fine." CTC 5.7.01, 5.7.02, 5.7.03. When CTC 2.6.07 is read together with CTC 5.7.01 *et seq.*, as provided by the Rules of Construction, 1.1.07(d), we believe the meaning of the term "sentence" includes imprisonment, a fine, or both.

Even if we assume that the term "sentence" is not sufficiently clear by definition or usage in the Code, we note that our interpretation of the term is the same as under Washington and Federal decisional law. The Washington courts have defined "sentence" in *State v. King*, 18 Wash.2d 747, 140 P.2d 283 (1943). In that case Washington Supreme stated as follows:

> "In its technical legal signification "sentence" is ordinarily synonymous with "judgment" and denotes the action of a court of criminal jurisdiction formally declaring to the accused the legal consequences of the guilt which he has confessed or of which he has been convicted."

18 Wash.2d at 753, citing 24 C.J.S. 15 Criminal Law, Sec. 1556. Further, the term "judgment" has been defined by the Washington courts as a "determination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in such court." *State v. Siglea*, 196 Wash. 283, 82 P.2d 583.

The federal courts have taken a similar view. A sentence in a criminal case is the action of the court fixing and declaring the legal consequences of predetermined guilt of a criminal offense. *Barnes v. United States*, 223 F.2d 891 (5th cir. 1955), citing 24 C.J.S. Sec. 1556. In *Subas v. Hudspeth*, 122 F.2d 85 (10th cir. 1941) the court differentiated between usage of the term "sentence" as an active verb and as a noun. In a legislative context, the latter denotes the punishment to be imposed on the accused by the court as part of the judgment after conviction of a criminal offense. The punishment or penalty imposed by the trial court must be within statutorily prescribed limits authorized by legislative branch. *United States v. Elkin*, 731F.2d 1005 (1985), *cert. denied* 469 U.S. 822, 105 S.Ct. 97, 83 L.Ed.2d 43. Therefore, it is the language of the statute which prescribes the punishment or penalty which may be imposed at sentencing. Further, the statute may provide punishment consisting of a fine, imprisonment, or both.

The legislative branch of government may create a broad sentencing range within which a judge may fix a particular sentence. *United States v. Butler*, 763 F.2d 11. Within the sentencing range prescribed by the legislative body, the judge has broad discretion in determining the sentence. *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592.

Although the Panel considers state and federal decisional law to be only advisory, we find that the definition of "sentence" used by those courts is the same as under Tribal law. Thus, whether or not the term "sentence" is subject to construction, the Court finds that "sentence" means an essential part of a judgment in a criminal case which involves the legal consequences of a confession of guilt or a finding of guilt, punishment. From our reading of the Code, it is clear that the Tribal Council intended, and the Panel holds, that "sentence" also means punishment consisting of a fine, a jail term, or both. CTC 5.7.01 *et seq*.

The Panel does not read CTC 1.1.07(e) to mean that the Court must adopt the Washington sentencing statute, RCW 9.94A.400, in order to give meaning to the term. The Panel declines the appellant's invitation to do so. Such a strained application of the Principles of Construction would seriously undermine the principles and purpose of the Code.

II.

We next turn our attention to review of sentences imposed upon the appellant and the sentencing procedures used by the Trial Court. Appellant contends his right to due process and right to be free from cruel and unusual punishment were contravened under the Indian Civil Rights Act, 25 U.S.C. Sec. 1302 (7),(8) and the Colville Tribal Civil Rights Act, Title 56.02 (g),(h). Because the appellant claims a violation of his civil rights based upon Tribal and federal statutes, our review will necessarily include principles of Tribal and federal law. In Trial Procedure set forth in Chapter 2.6 of the Tribal Code provides as follows:

> "All accused persons shall be guaranteed all civil rights secured under the Tribal Constitution and federal laws specifically applicable to Indian tribal courts."

CTC 2.6.09. We interpret CTC 2.6.09 to mean that a reviewing court must apply the Tribal Constitution, Tribal statutory and common law, and the Indian Civil Rights Act. We will also examine principles applied by the federal courts in sentencing review under the United States Constitution. The federal law principles for sentencing review cited *infra*, are not "specifically applicable to Indian tribal courts", CTC 2.6.09, *supra*. They are based upon the federal constitutional standards, and not on the Tribal Constitution or the Indian Civil Rights Act. Therefore, we consider such principles to be advisory only.

III.

The Indian Civil Rights Act, Act of April 11, 1968, P. L. 90-284, Sections 201-203, 82 Stat. 77-78, codified at 25 U.S.C. Sec. 1301-1303, places limitations on the exercise of tribal criminal jurisdiction. Those parts of ICRA which concern the instant appeal state:

> "No Indian tribe in exercising powers of self-government shall--
> (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year or a fine of $5,000, or both;
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;"

25 U.S.C. Sections 1302 (7), (8). We note that the Colville Tribal Civil Rights Act, CTC 56.02 (g), closely parallels the operative language in 25 U.S.C. Sec. 1302 (7) with regard to prohibitions against imposing excessive bail, excessive fines, or infliction of cruel and unusual punishment. CTC 56.02 (h) appears to contain identical language to that found in 25 U.S.C. Sec. 1302 (8).

The Indian Civil Rights Act contains similar but not identical provisions as found in the Bill of Rights. See generally, Comment, *The Indian Bill Of Rights And The Constitutional Status Of Tribal Governments*, 82 Harv. L. Rev. 1343 (1969). The legislative history of the ICRA indicates congressional intent that the Act should be read consistent with the principles of tribal self-government and cultural autonomy. See 114 Cong. Rec. 5518, 5520 (1968), (reporting the President's message urging that ICRA be enacted as part of a goal furthering Indian self determination). See also, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-64 and n. 11-15 (examining ICRA legislative history).

Although the due process and equal protection provisions under ICRA, 25 U.S.C. Sec. 1302 (8) are similar to corresponding constitutional principles under the Bill of Rights, they differ both in substance and origin. The Panel reads ICRA to mean that equal protection and due process guarantees refer to constitutional protections provided under tribal law and not federal law. *Howlett v. Salish And Kootenai Tribes*, 529 F.2d 233, 237 (9th cir. 1976). This interpretation is consistent with view that Congress, with modification, selectively incorporated certain provisions of the Bill of Rights into a substitute bill which was enacted to protect the individual rights of Indians while fostering tribal self government and cultural identity. Moreover, Congress did so recognizing that coextensive provisions of tribal constitutions and the Bill of Rights would not be identically aligned, *Wounded Head v. Tribal Council Of Oglala Sioux Tribe*, 507 F.2d 1079, 1082 (8th cir. 1975). See also *Groundhog v. Keeler*, 442 F.2d 674 (10th cir. 1971). Thus, we interpret ICRA in light of the inherent power of tribes to create and administer a criminal justice system, *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th cir. 1975) and a well established federal policy of preserving the integrity of tribal governmental structure, including the authority of tribal courts. *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1146 (8th cir. 1973). We also note that federal courts have been careful to construe notions of due process and equal protection under ICRA with due regard for historical, governmental and cultural values of Indian tribes. *Tom v. Sutton*, 533 F.2d 1101, 1104, (9th cir. 1976).

We also take note that due process and equal protection guarantees applicable to tribal courts under ICRA flow from congressional exercise of its plenary power, which, despite the United States Supreme Court's pronouncements in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), lack the clear constitutional underpinnings of the Bill of Rights. See Pommersheim, *Tribal State Relations: Hope For The Future*, 36 S.D. L. Rev. 239, 247-48. Instead, the origins of such plenary power, if a constitutional source can be found, arise from the Indian Commerce Clause. United States Constitution, Article I, Sec. 8, Clause 3. In addition, the legislative history of ICRA clearly indicates that Congress did not intend to impose full constitutional guarantees under the Bill of Rights on litigants coming before the tribal court or to restrict the tribes beyond what was necessary to give the Act the effect Congress intended. *Tom v. Sutton*, 533 F. 2d at 1103-1104. Among the goals intended by Congress in enacting ICRA were affording

constitutional protections to litigants on one hand, and supporting tribal self government and cultural autonomy on the other. We therefore apply due process principles under ICRA with flexibility and in a manner contextually adapted by the Colville Confederated Tribes.

IV.

We also note that neither the Federal Rules Of Criminal Procedure nor the Federal Rules Of Evidence have been adopted for use in the Colville Tribal Court. Therefore, the Panel will consider case law construing F.R.Cr.P. 32 as advisory and will not apply the Federal Rules of Evidence as controlling what evidence is admissible in the Tribal Court for sentencing purposes. The Federal Rules of Evidence and the Federal Rules of Criminal Procedure are not federal laws which are specifically applicable to Indian tribal courts. CTC 2.6.09, *supra*.

The Tribal Code expressly rejects use of common law rules of evidence, and directs the Court to "[u]se its own discretion as to what evidence it deems necessary and relevant to the charge and the defense." CTC 2.6.02. Further, prior to imposing sentencing, the judge is directed to allow a spokesman or the defendant to speak on behalf of the defendant and to **present any information which would help the judge in setting punishment**. 2.6.07 (emphasis added). A literal reading of 2.6.07 shows that the only restriction on what information a spokesman or the defendant may present to the Court to consider in sentencing is that the information be of a type which will "help the judge in setting punishment." *Id*. Clearly, such information is strictly within the discretion of the sentencing judge.

The Panel has not found any provision in the Code which provides guidance as to what information the Trial Court may consider from the prosecution in sentencing. The Panel believes that because the Trial Court is directed to consider any information from the defense which will be helpful in sentencing, a judge also has broad discretion in determining what information it will consider from the prosecution for that purpose. We emphasize, however, that information which is presented to a sentencing judge by either the prosecution or the defense does not necessarily mean that the judge relied on such information in determining the sentence.

Because the Panel has declined to adopt the Washington sentencing statute RCW 9.94A.400 for purposes of statutory construction, the Panel also declines to apply substantive provisions of that statute in reviewing sentences imposed by the Tribal Court. Similarly, Washington case law relating to RCW 9.94A.400 and the Washington Constitution have no application to the questions presented in this case.

V.

The appellant alleges that the Trial Court erred by considering and relying upon misinformation as to his criminal history at sentencing. The appellant further contends that he has a due process right to be sentenced on the basis of accurate information. The source of the allegedly erroneous information referred to by Appellant is a computer printout from the Federal Bureau of Investigation.

The record shows that the computer printout was used by the Colville Tribal Court Probation Department to establish at least part of St. Peter's criminal history for the Presentence Investigation Report (hereinafter "PSIR"). The record also shows that the trial judge at least referred to the printout

during the sentencing hearing. However, our review of the record indicates that the trial judge, in response to objections by appellant's counsel, disregarded state convictions reflected in the printout.

During the sentencing hearing, appellant's counsel argued that such computer printouts are unreliable and often contain erroneous information. Appellant's counsel also argued that at least one of the St. Peter's criminal convictions shown in the printout was in error. However, defense counsel did not point out which state court convictions were in error or explain the error. He further argued that the PSIR contained erroneous information since the computer printout was used, and that only certified copies of judgments could be used to establish the appellant's criminal history for sentencing.
Appellant cites *Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948) in support of his argument that a criminal defendant has a due process right to be sentenced on the basis of accurate information. Appellant's Opening Brief at 8. In *Townsend, supra*, the court acted on false assumptions as to the defendant's criminal record which were materially untrue. The criminal case relied upon by the trial judge to establish part of the defendant's criminal history, the defendant was denied his right to counsel and the prosecutor misrepresented his criminal record. Two of the defendant's criminal convictions were unconstitutional under *Gideon v. Wainwriqht*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

In *Gideon*, the defendant also requested assistance of counsel and the trial judge indicated, "[i]t was not the practice of the County to appoint counsel for indigent defendants except in murder and rape cases." 372 U.S. at 338. Gideon proceeded to represent himself, was convicted, and was sentenced to eight years in prison. The United States Supreme Court reversed Gideon's conviction stating that the right to counsel under Amendment VI of the United States Constitution is fundamental and essential to a fair trial. Thus, *Gideon* stands for the principle that, under federal law, it is unconstitutional to try a person for a felony in state court unless he has a lawyer or affirmatively waives his right to be represented. *Burgett v. Texas*, 389 U.S. 109, 114, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967).

In addition to the standards established in *Townsend* and *Gideon*, the United States Supreme Court in *United States v. Tucker, supra*, held that a trial court cannot rely on unconstitutionally invalid convictions in sentencing. In that case, the convictions impermissibly relied upon by the court involved cases in which the defendant was neither informed of his right to counsel nor represented by counsel. Although the sentence was reversed and the case remanded for resentencing, the court upheld the conviction.

The cases cited above involve federal constitutional principles and cannot, without a review of Tribal standards, be said to represent an accurate reflection of Tribal law. Although the Panel does not adopt each principle of law set forth in *Townsend*, *Gideon*, and *Tucker*, we do hold that a criminal defendant in Tribal Court has a due process right under the Indian Civil Rights Act and the Colville Tribal Civil Rights Act not to be sentenced on the basis of prior criminal convictions where the defendant was not advised of his right to counsel or was improperly denied his right to counsel. We do not believe that the defendant is denied due process when the Trial Court considers or relies on criminal convictions in which the defendant was simply unrepresented. We believe that principles of fundamental fairness reflected in the cases cited above are consistent with the language in CTC 56.02 (h) and 25 U.S.C. Sec. 1302 (8).

Appellant's counsel alleged that one or more of St. Peter's convictions reflected in the FBI computer printout were invalid, but he did not mention which convictions were misrepresented by the printout. We also note that appellant's counsel did not ask the Court to convene an evidentiary hearing prior to sentencing so that he could rebut the information contained in the PSIR and computer printout. Rather, appellant's counsel now argues that under Washington law, the Tribes were required to prove, by a preponderance of the evidence, what sentence should be imposed on the appellant. Counsel has also advanced the argument that because the computer printouts are not admissible as evidence under the Rules of Evidence, the Tribes have not proven by a preponderance that St. Peter should receive an enhanced sentence. Appellant's counsel also argues that under Washington law, a sentencing court may not refer to a computer printout of a defendant's criminal history for purposes of sentencing. Appellant's Opening Brief at 15, citing *In re Bush*, 26 Wn. App. 486, 616 P.2d 666 (1980).

We have stated that Washington law has no place in this analysis. In addition, we find that Washington statutory law with regard to sentencing diverges from CTC 2.6.02 and 2.6.07. Because there is nothing in the Tribal Code or Tribal decisional law which precludes use of a computer printout to establish a defendant's criminal history, we find that the principle established by *In re Bush*, *supra* does not apply to the cases at bar. The principles set forth in CTC 2.6.02, CTC 2.6.07, and the discretion of the trial judge, control information which may be considered at sentencing.

The federal due process right to be sentenced on the basis of accurate information has been interpreted to mean that a defendant has the right to rebut or explain allegations made at a sentencing proceeding. *United States v. Shepherd*, 739 F.2d 510, 515 (10th cir. 1984), citing *United States v. Papajohn*, 701 F.2d 760,763 (8th cir. 1983), *United States v. Aquero-Segovia*, 622 F.2d 131, 132 (5th cir. 1980). In sentencing the trial judge may consider uncorroborated hearsay evidence that the defendant had an opportunity to rebut or explain.

In *United States v. Matthews*, 773 F.2d 48 (3rd cir. 1985) the court adopted a test under federal law to evaluate whether a sentence was based on criteria violative of a defendant's due process rights. The test involves two inquiries: (1) whether misinformation of a constitutional magnitude was given to the court; and (2) whether that misinformation been given specific consideration by the sentencing judge. The federal courts have held, and the Panel agrees that factual matters considered as a basis for sentencing must have some "minimal indicium of reliability beyond mere allegation" and must "either alone or in the context of other available information, bear some rational relationship to the decision to impose a particular sentence." *Id*. at 51. The *Matthews* court held that where the defendant had an adequate opportunity to examine and correct controverted information and request an evidentiary hearing, the court did not err by considering such information at sentencing.

Similarly, in *United States v. Monaco*, 852 F.2d 1143 (9th cir. 1988), the court addressed the question of whether the trial court erred by considering a presentence report containing inaccuracies in sentencing. The court held that in order to successfully challenge a presentence report, that information must lack "[s]ome minimal indicium of reliability beyond mere allegation." Although a defendant must be given an opportunity to explain why he believes a presentence report is incorrect, the scope of the procedure for rebuttal lies within the sound discretion of the trial judge in "[b]alancing the need for

reliability with the need to permit consideration of all pertinent information." Thus, it is within the court's discretion to deny a request for an evidentiary hearing to rebut such alleged inaccuracies. *Id*. at 1148.

In *United States v. Barnhart*, 980 F.2d 219 (3rd cir. 1992), the court sentenced the defendant to 5 years imprisonment rather than long-term alcohol treatment, as recommended in the presentence report. In that case, the court held that in Pre-Guidelines cases the sentencing judge may consider a wide range of factors when imposing sentence. Citing *United States v. Tucker*, 404 U.S. 443, the court noted that "[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." A sentencing judge is not obligated to give reasons for imposing a particular sentence. Providing reasons for sentencing is salutary and not mandatory. *United States v. Crow Dog*, 537 F.2d 308 (8th cir. 1976), *cert. denied*, 430 U.S. 929 (1977)

In *Barnhart*, *supra*, the court stated that to prove a due process violation, the defendant must show that the challenged information "(1) false or unreliable, and (2) demonstrably made the basis for the sentence." (citation omitted) The defendant bears the burden to show that the information is inaccurate and that the court relied on it. 980 F.2d at 225.

The Panel believes that the cases cited above provide sufficient guidance for adopting a scope of review of trial court decisions when the defendant seeks to prove the court violated his right to due process by using inaccurate information in sentencing. We have no difficulty applying those principles to reviewing sentencing procedure under CTC 2.6.02 and CTC 2.6.07, and we hold, that when a defendant's criminal history is considered and relied upon by the trial judge to impose an enhanced criminal sentence, that information must be accurate. However, in order to successfully challenge a sentence imposed by the trial court on due process grounds, the defendant must do more that make a mere allegation that information coming directly before the court or used in the presentence report is materially false. The defendant must ask the sentencing judge for an opportunity to rebut such information and, carry the burden to show the information is both material and false. Whether the trial court provides the defendant with an opportunity to rebut such controverted information by continuing sentencing and holding a separate evidentiary hearing is within the discretion of the court. If the trial judge refuses the defendant's request to set an evidentiary hearing on the issue, that decision will be subject to appellate review as to whether the trial judge abused his or her discretion.

Applying the above standards to the cases at bar, we find that the appellant was not denied an opportunity to rebut controverted information about his criminal record. The appellant did not request an evidentiary hearing on the accuracy of information contained in the FBI computer printout and PSIR. Nor has the appellant shown that the trial judge relied on the allegedly false information in imposing the sentences. Thus, the Panel does not believe that the appellant has carried his burden in showing (1) the information coming before the Court was material and false; and (2) that the Court relied on that information in sentencing.

VI.

The appellant also challenges the Trial Court's refusal to follow the recommendations contained in the Presentence Investigation Report that St. Peter be placed on probation and undergo substance abuse treatment. The PSIR did not recommend that St. Peter be sentenced to imprisonment on any of the five charges. The issue before us then is whether the Trial Court abused its discretion in sentencing St. Peter to imprisonment rather than long-term substance abuse treatment, as recommended in the PSIR.

The federal courts have held that Presentence Investigations and Presentence Reports are intended to provide the trial court with information about the defendant which will enable the court to meaningfully exercise its sentencing authority. *United States v. McCoy*, 770 F.2d 647. A trial court does not abuse its discretion by sentencing

a defendant without the aid of a presentence investigation and report when it has sufficient information available to make a fair sentencing determination. *United States v. Latner*, 702 F.2d 947 (Fla. 1983), *cert. denied*, 464 U.S. 914, 104 S.Ct. 274, 78 L.Ed.2d 255.

Although a sentencing judge is required to carefully evaluate the information contained in a presentence report to ensure its accuracy, *in toto* adoption of information contained in presentence reports without regard to erroneous information has given rise to reversal and remand for resentencing. *United States v. Morgan*, 942 F.2d 243 (4th cir. 1991).

While sentencing judges routinely rely on the recommendations contained in presentence investigation reports, there is good reason for a prudent judge to approach such information and sentencing recommendations contained in the PSIR with deliberation. *Id*. The probation officer has broad discretion as to the information which may be included in presentence reports. Such reports may properly include hearsay which the trial judge may consider at a sentencing hearing, *United States v. Cardinal*, 782 F. 2d 34, 37 (6th cir. 1986), *cert. denied* 476 U.S. 1161, 106 S.Ct. 2282, 90 L.Ed.2d 724. Even if information contained in presentence reports is accurate, the court must weigh numerous variable and subtle factors which may properly influence his or her decision. These factors *inter alia* include a balancing of sentencing theories. In the end, discretion in sentencing must reside in the trial judge and not in the Probation Department.

In a case strikingly similar to the case at bar, a federal trial judge was held to have properly acted within his discretion by rejecting the sentencing recommendation contained in the presentence report and imposing a five year jail term. *United States v. Barnhart, supra*. In that case, the sentencing recommendation contained in the PSIR was for long-term alcohol treatment rather than incarceration. The court, observing that the defendant had been given ample opportunities to get his life together, disregarded the sentencing recommendation. The appellate court found that the trial judge, who had previously dealt with the defendant, had adequate information about the offense and the individual to meaningfully exercise his sentencing discretion.

Although there are many reasons for conducting a presentence investigation, the appellant has cited no authority in support of his argument that the Trial Court must comply with the sentencing recommendations contained in a presentence report. We are aware of no statutory requirement under Tribal law which says the trial judge must order a presentence investigation or requires the trial judge to follow the recommendations contained in a PSIR. Further, requiring the trial judge to follow sentencing recommendations of the Probation Department would, in effect, divest the Court of sentencing authority. The Panel believes this is contrary to the discretionary authority delegated to the trial judge in CTC 2.6.02 and 2.6.07.

Accordingly, we hold that the Trial Court did not err by refusing to follow the recommendations contained in the PSIR and, instead, imposing successive jail terms.

VII.

We next address whether the Trial Court abused its discretion by sentencing David St. Peter to five maximum consecutive jail terms. The appellant contends that the Trial Court abused its discretion by imposing sentences which were arbitrary and capricious and violated the prohibition against cruel and unusual punishment. The appellant advances a number of theories in support of these contentions.

The Colville Tribal Business Council has established a broad range of criminal penalties for offenders who are convicted of violating criminal statutes enumerated in the Code. These criminal misdemeanor statutes are divided into three classes, and the penalty range for a given offense is governed by the class to which the particular crime was assigned. A person convicted of "Class A" offenses "shall be sentenced to imprisonment for a period not to exceed 360 days, or a fine not to exceed $5,000, or both the jail sentence and the fine." CTC 5.7.01. "Class B"

offenses carry a maximum jail term of 180 days, or a maximum fine of $2,500, or both. CTC 5.7.02. "Class C" offenses carry a maximum penalty of 90 days imprisonment, or a maximum fine of $1,000, or both. CTC 5.7.03. The Code is silent as to whether the sentences for offenses arising from the same transaction may be imposed consecutively.

The appellant was convicted of Disorderly Conduct, CTC 5.5.04, Assault, CTC 5.1.03, and Trespass To Buildings, CTC 5.2.18 which are "Class C" offenses, and Resisting Arrest, CTC 5.4.17, a "Class B" offense. Thus, the maximum consecutive penalties for all offenses is 540 days in jail, $6,500 in fines, or both. The appellant, having received credit for 10 days of jail time served, was sentenced to a jail term of 530 days. Although the trial court imposed maximum jail sentences on the appellant, she did not impose the maximum penalty available for the offenses.

The language chosen by the Tribal Business Council in CTC 5.7.01 *et seq*. limits the Trial Court's discretion in sentencing. The various offenses enumerated in the Code have been graded into classes for purposes of sentencing. These statutes prohibit the trial judge from imposing a greater sentence for a crime than provided for the class within which the offense falls. Further, all criminal offenses set out in the Code are classified as misdemeanors, which, by definition cannot result in imprisonment for more than one year. In addition, the Congress has restricted sentencing authority of the Tribal Court by placing an upper sentencing limit of one year imprisonment and a fine of $5,000 on the court. 25 U.S.C. Sec. 1301 *et seq*.

We note that the sentences imposed upon St. Peter by the trial judge were within statutory limits. It is evident that the Tribal Council has delegated considerable latitude to the Trial Court in sentencing criminal offenders within the statutory limits set out in the Code. Because the sentences fall within statutory limits, the Appellate Panel will review only the process by which punishment is determined rather than make an unjustified incursion into the province of the sentencing judge.

VIII.

We now turn to the appellant's argument that the Tribal Court abused its sentencing discretion by arbitrarily and capriciously imposing punishment or violating the prohibition against cruel and unusual punishment. We have found no legal precedent under Tribal law to guide us in determining when a trial judge abuses his or her discretion in sentencing or when appellate intervention is required. Further, we have stated that Washington statutory law and case law concerning sentencing does not apply to this analysis. Although we are not bound to apply judicially created standards of appellate review of criminal sentencing practices under the United States Constitution, we turn to federal case law to see how these issues have been resolved.

IX.

It is a well established principle under federal law that sentences imposed within statutory limits are generally not reviewable by the appellate court. *Dorszynski v. United States, supra*; *United States v. Tucker, supra*. See also Wright, *Federal Practice and Procedure* (1986), Sentence and Judgment, Sec. 533. Subject only to the limitations imposed by the statute and Constitution, the punishment to be given a convicted offender is in the discretion of the court. *Robbins v. United States*, 345 F.2d 930 (9th cir. 1965).

Where it is shown that the trial court failed to exercise its discretion or, in exercising its discretion has manifestly or grossly abused that discretion, will the appellate court intervene. *Giblin v. United States*, 523 F.2d 42 (8th cir. 1975), *cert. denied* 424 U.S. 971, 96 S.Ct. 1470, 47 L.Ed.2d 759. The constitutional guarantee of due process continues to operate in sentencing, and circumscribes the court's discretion. *United States v. Borrero-Isaza*, 887 F.2d 1349, 1352 (9th cir. 1989). Thus, in appellate review of the judicial process by which a particular sentence

is imposed, the court's goal is to "[g]uarantee that the trial judge's discretion actually has been exercised, and that the information relied upon in sentencing is not unreliable, improper, or grossly insufficient." Appellate review of the sentencing process, as distinguished from the length of sentence, is an appropriate area of inquiry. *United States v. Hopkins*, 531 F.2d 576, 580 (D.C. cir. 1976) (citations omitted).

The federal courts have held that a defendant's due process rights may be violated when the trial court does not exercise its discretion in sentencing. *United States v. Wardlaw, supra*. This can be shown where the court maintains a rigid policy of imposing maximum sentences for certain offenses, *United States v. Johnson*, 501 F.2d 826, 830 (7th cir. 1974), *cert. denied*, 421 U.S. 949, refuses to consider mitigating and aggravating factors in making its sentencing determination, *United States v. Lopez-Gonzales*, 688 F.2d 1275, (9th cir. 1982), or mechanically imposes punishment based on the type of crime, without considering the characteristics of the offender. *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed.2d 637 (1949).

The court must individualize the sentence by considering all the circumstances of the crime and an assessment of the defendant's culpability. *United States v. Barker*, 771 F.2d 1362, 1364 (9th cir. 1985). Whatever the judge's thoughts might be as to the deterrent value of a jail sentence, he or she must reexamine and measure that view against the relevant facts and other important goals such as the offender's rehabilitation. *United States v. Foss*, 501 F.2d 522, 529 (1st cir. 1974). Having considered the crime, the surrounding circumstances, the defendant's individual characteristics, and balanced these factors with sentencing theories, the judge must decide what factors, or mix of factors, carry the day. *United States v. Wardlaw, supra*; *United States v. Foss, supra*.

While the duty of the courts to individualize sentences is clear, in *Baker, supra*, the court observed that it may be impossible to develop "a single test or standard sufficient to insure individualized sentencing." 771 F.2d at 1366. The development of any sort of rigid review standard runs a risk of becoming as mechanistic as the sentencing practices the court seeks to avoid.

X.

In conducting this limited review, we emphasize that the due process principles reflected in the cases cited above are federal constitutional standards which cannot be applied without great difficulty to Tribal law. Further, the question before us is whether the appellant's due process rights under Tribal law were contravened. We believe that such a finding must precede any determination that the appellant's due process rights were violated under the Indian Civil Rights Act, 25 U.S.C. Sec. 1302 (8). Therefore, we adopt a flexible standard of review, utilizing the above principles, to determine whether the appellant was afforded due process under Tribal law.

XI.

An examination of the record shows that while David St. Peter was given maximum jail terms for each of five sentences, additional charges of Battery and Resisting Arrest were dismissed as part of a plea bargain agreement. Appellant's Opening Brief, Page 1. In addition, the Presentence Investigation Report indicates that St. Peter has an extensive background of prior offenses and a history of alcohol-related incidents with the Tribes. Further, St. Peter has undergone alcohol treatment on four separate occasions.

The record does not show that the trial judge stated her reasons for the sentences she imposed, and we do not believe she was required to do so. It is clear that the trial judge was made aware of the appellant's criminal history and that she considered, at least, Tribal convictions in sentencing. In response to the appellant's objections to use of a United States Government computer printout showing his criminal history, the trial judge indicated that she would not rely on state convictions reflected in the printout, but would refer to the printout for a record of Tribal convictions.

The fact that the PSIR was before the court and contained a recommendation to place St. Peter on 18 months probation, with involvement in adult vocational rehabilitation and alcohol programs indicates that the trial judge considered rehabilitation along with deterrence in sentencing. We believe the Court was not bound to follow the recommendations of the Probation Department in sentencing. We believe that a trial judge would fail to exercise discretion if she were required to impose sentencing consistent with such recommendations. In view of St. Peter's past criminal involvement, including alcohol-related offenses after undergoing alcohol treatment on four separate occasions, and the dismissed Battery and Resisting Arrest charges, we find the trial judge did not abuse her discretion by rejecting the Probation Department's recommendations for sentencing.

From the preceding discussion, it is clear that the trial judge balanced the value of deterrence in sentencing with St. Peter's likelihood of alcohol rehabilitation and adult educational training as part of probation. It is equally clear that the trial judge determined that rehabilitation was not an appropriate sentencing goal in this instance. In light of St. Peter's past alcohol treatment and continued criminal conduct, we believe the trial judge did not abuse her discretion in reaching that conclusion. From this and the information before the Court, we conclude that the trial judge did not mechanically sentence St. Peter. We hold that the trial judge had sufficient information to meaningfully exercise her sentencing discretion and that she exercised her discretion by sufficiently individualizing sentencing so that the punishment fit not only the offenses, but the individual.

XII.

We are not aware of any provision under Tribal law that requires a trial judge to make a finding that a defendant would derive no benefit from rehabilitation before imposing a maximum jail sentence. From our reading of the Code it is clear that the Tribal Business Council delegated broad sentencing discretion to the trial judge, and imposed no such restrictions on the Tribal Court.

The appellant invites the Panel to adopt a similar sentencing standard as did the Congress in enacting the Federal Youth Corrections Act, 18 U.S.C. Sec. 5005, *et seq*., which has significantly restricted the sentencing authority of federal trial court judges. Under that statute the trial court must make a finding that a youthful offender would derive "no benefit" from rehabilitation before sentencing such offenders under other applicable penal statutes. *Dorszynski v. United States*, 424 U.S. at 442. See also *United States v. Wardlaw*, 576 F.2d at 936-37.

We believe that placing a "no benefit" requirement on the Trial Court before it can sentence offenders to a maximum jail term would amount to a legislative act by the Court and an impermissible incursion in to the province of the trial judge. This practice and would seriously impair the meaningful exercise of the trial judge's sentencing discretion by, in effect, requiring exhaustion of rehabilitative measures before deterrent sentencing could be considered.

We do not accept the appellant's argument that the Trial Court erred by not adopting sentencing standards. The Tribal Business Council has adopted sentencing standards by enacting statutes which limit the punishment which may be imposed for specific offenses. We consider the sentencing limitations found in CTC 5.7.01, 5.7.02 and 5.7.03 to be a reflection of legislative intent to restrict the Trial Court's sentencing discretion. Although the Tribal Business Council has delegated the Trial Court considerable discretion in sentencing, that discretion is circumscribed by the language in the sentencing statutes. *Id*. The appellant has not challenged the sentencing statutes as being an unlawful delegation of authority to the Court. We believe that imposition of additional sentencing standards by the Panel on the Trial Court, acting within the scope of the Tribal Constitution and the boundaries of its statutorily delegated authority, is a legislative function which should be left to the Tribal Business Council, and not the Appellate Panel.

XIII.

The appellant relies on *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th cir. 1988) as controlling in this case. *Randall* stands for the principle that once a tribe has adopted certain procedures, the tribal court must, as a matter of due process follow those procedures. In *Randall*, the Court stated:

> "Where the tribal court procedures under scrutiny differ significantly from those commonly employed in Anglo-Saxon society...courts weigh the individual right to fair treatment against the magnitude of the tribal interest in employing those procedures." (citation omitted)

Id. at 900. However, where tribal court procedures parallel those found in Anglo-Saxon society, the court will not engage in a complex weighing of interests. In that latter instance, the court will "[h]ave no problem of forcing an alien culture, with strange procedures on these tribes." *Id*. (citation omitted)

Thus, where the Yakima Nation had adopted certain procedures governing an appellant's perfection of her right to appeal, and the tribal court deprived the appellant of that right by failing to comply with established court procedure, the Ninth Circuit Court of Appeals had no difficulty applying principles of federal constitutional law and finding that a litigant had been denied due process. *Id* at 901. We do not believe that *Randall* is applicable to this case for the reason that the Colville Confederated Tribes have not adopted detailed sentencing procedures such as found in the Federal Rules of Criminal Procedure, and we have not found that the Trial Court abused its discretion in sentencing. We do not find that the procedures followed by the Tribal Court parallel those found in Anglo-Saxon society. The Panel rejects the appellant's view that by adopting procedures similar to those used by the federal or state courts, the Tribes have somehow come within the full reach of the Bill of Rights. This view, which would expand the application of *Randall* to an area where the Tribal Business Council has delegated considerable latitude to the Tribal Court, runs counter to the clearly enunciated purpose of ICRA, which affords constitutional protection to litigants while fostering tribal self government and cultural autonomy. We view the Tribal Business Council's delegation of broad discretion to the Tribal Court as a statement of policy that the Tribal judge is aware of Tribal norms and is in a position to apply the law consistent with those values.

The Panel also rejects the notion that the doctrine set out in *Randall*, with its harsh result, should apply where the Tribal Court has adopted procedures designed to provide consistency and accountability in Court proceedings. Even if the Court should follow the Federal Rules of Evidence or the Business Council should adopt specific court rules which parallel the federal criminal rules, this does not mean that the Tribal culture, tradition and autonomy has been abandoned. Nor does it mean that the Tribal Court has taken on such an Anglo-Saxon character that the Bill of Rights should be applied. Following this illogical rule would discourage the Tribal Business Council and the Tribal Court from adopting written, uniform procedures, including those based upon Tribal tradition and cultural standards, or other measures which could improve operation of the Court.

This does not mean that we believe the reasoning in *Randall* should not be applied in an appropriate case in which the Panel finds that established procedural rules have been violated and the prejudice shown is of a nature where no balancing of tribal and individual interests is required. This is not the nature of the case before us. The Panel finds that neither the Colville Confederated Tribes nor the Tribal Court have adopted procedures which, under the rationale of *Randall*, bring the instant matter under the federal review standards of the Bill of Rights.

XIV.

The appellant argues that the sentences imposed by the Trial Court constitute cruel and unusual punishment in violation of the Colville Tribal Civil Rights Act, CTC 56.02 (g) and the Indian Civil Rights Act. 25 U.S.C. Sec.

1302 (7). We again turn to a review of federal law, though not binding on this Court, to see how the federal courts have addressed this issue.

Sentences that are extremely disproportionate to the offenses have sometimes been held to violate the constitutional prohibition against cruel and unusual punishment. *United States v. Wardlaw*, 852 F.2d at 937. (citations omitted). The inquiry to be made is "[w]ere the sentences were so arbitrary and shocking to the sense of justice as to constitute cruel and unusual punishment." *United States v. Hayes*, 589 F.2d 811 (5th cir. 1979), *reh. denied* 591 F.2d 1343, *cert. denied* 444 U.S. 847, 100 S.Ct. 93, 62 L.Ed.2d 60. To prevail on such a challenge, the Appellant must show that the Court's action amounted to an arbitrary and capricious action rising to a gross abuse of discretion. *United. States. v. Small*, 636 F.2d 126 (5th cir. 1981).

We reiterate the principle that under federal law a sentence within the statutory maximum is only subject to review on appeal for manifest abuse of discretion. *United States v. Johnson*, 507 F.2d at 830-31 (citing *United States v. Tucker*, 404 U.S. at 447). "Only where the trial judge has failed to exercise his discretion, or in exercising his discretion has manifestly or grossly abused that discretion will the appellate court intervene." *Giblin v. United States*, 523 F.2d at 42.

We have found that the Trial Court imposed sentences on St. Peter that were within statutory limits. Under federal law we do not believe that those sentences were "so arbitrary and shocking to a sense of justice" as to violate the prohibition against cruel and unusual punishment or that the trial judge "manifestly or grossly abused her discretion" by imposing the sentences. Similarly, we have found no support for the appellant's argument under Tribal law.

XV.

Finally, the appellant contends that the Trial Court erred by imposing consecutive rather than concurrent jail sentences, as required under Washington sentencing law. The Panel has rejected Appellant's argument, based upon the Principles Of Construction, *supra*., that State sentencing law should be applied in order to give meaning to the term "sentence." The Panel likewise declines to apply State sentencing law with regard to concurrent sentencing practices.

The appellant has cited no authority under Tribal law which requires the Trial Court to impose concurrent sentences. However, Appellant advances the theory that consecutive sentencing in the instant cases has violated his right to due process and his right to be free from cruel and unusual punishment under the Colville Tribal Civil Rights Act, CTC 56.02 (g), (h), and the Indian Civil Rights Act, 25 U.S.C. 1302 (7), (8).

The Colville Tribal Code and the Tribal Constitution are silent with regard to whether the Trial Court should impose concurrent or consecutive sentences. In addition, the Panel is not aware of any action by Congress which has divested the Tribal Court of authority to impose consecutive sentences. Accordingly, the Panel concludes that the decision to impose concurrent or consecutive jail sentences is within the discretion of the trial judge. Our review will, therefore, be based on whether the trial judge abused her discretion.

Because there is no Tribal common law authority to draw upon for guidance, we again examine federal sentencing law to see how the federal courts have resolved this issue. We reiterate that federal sentencing law is not binding on the Tribal Court.

Absent statutory direction to impose concurrent or consecutive sentences, federal courts generally are invested with power to choose the manner in which sentences will be served. See Wright & Miller, *Federal Practice and Proc.*, Sentence and Judgment, Sec. 32.08 [1] [c] (1991). The inherent authority of the court to select how multiple sentences will be served assumes that sentencing is for distinct offenses. Only if a statute is ambiguous regarding whether a criminal act warrants separate sentences will the "rule of lenity" be applied, *id*. citing *United*

States v. Zuleta-Molina, 840 F.2d 157, 159 (1st cir. 1988). Absent such ambiguity, the trial judge may impose consecutive separate sentences for the offenses committed.

In *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct.180, 76 L.Ed. 306 (1932), the United States Supreme Court adopted the principle that individual prohibited acts arising from a continuous course of conduct give rise to separate punishments. However, if the course of action which the individual acts comprise is the thing prohibited, only a single penalty may be imposed. *Id*. at 302. For multiple punishments, each offense requires proof of a different element.

The *Blockburger* doctrine was upheld in *Gore v. United States*, 357 U.S. 386, 78 S.Ct.1280, 2 L.Ed.2d 1405 (1957). In that case the Court distinguished between offenses for which Congress has not explicitly stated what the unit of offense is and a course of conduct involving violation of separate statutes. *Id*. at 391. In the former, where there is lack of definition by the Congress, the court will apply the rule of lenity to favor the defendant.

Congress has since placed controls on sentencing *inter alia* by establishing guidelines for federal courts to follow in imposing consecutive or concurrent sentences. 18 U.S.C. Sec. 3584. Thus, restrictions on the court's sentencing authority involving multiple offenses is the result of a legislative act, and not court action.

While there has been federal legislation enacted to limit sentencing authority of the federal courts, no similar federal sentencing restrictions have been placed on tribal courts. In that regard, the relevant limitations on tribal court sentencing appear in the Indian Civil Rights Act. The Act provides that no Indian tribe shall "subject any person for the same offense to be twice put in jeopardy." 25 U.S.C. 1302 (3), or "impose **for conviction of any one offense** any penalty or punishments greater than imprisonment for a term of one year or a fine of $5,000 or both." 25 U.S.C. Sec. 1302 (8). (emphasis added)

The language in 25 U.S.C. Sec. 1302 (8) does not contain any indication that Congress intended that tribes refrain from imposing concurrent sentences for multiple offenses. The Act only limits the sentence which may be imposed for any one offense. Further, no restrictions on the Court's authority to impose consecutive sentences have been enacted by the Tribal Business Council and none appear in the Tribal Constitution.

From our discussion of the above authority, we find that nothing in the Tribal Code, the Tribal Constitution, ICRA, or CTCRA prohibits the Tribal Court from imposing consecutive sentences on a defendant convicted of multiple offenses. We also find that the Tribal Court practice of consecutive sentencing is consistent with pre-guidelines standards followed by the federal courts. However, the rule of lenity set forth in *Gore, supra*, is not binding on the Tribal Court. We believe it is significant that the offenses adjudicated by the Tribal Court are misdemeanors, and adoption of the rule of lenity would unduly interfere with the Court's discretion. Any decision to adopt that rule is a legislative function. Further, federal sentencing guidelines are not binding on the Tribal Court.

The Panel also finds that the decision to impose concurrent or consecutive jail sentences on an offender convicted of multiple offenses is left to the discretion of the Trial Court. Further, we find that the Tribal Court did not abuse its discretion by imposing consecutive jail terms in the instant cases.

The judgments and sentences are Affirmed.

Alvie D. CLEPARTY, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP93-15221/15222, 2 CTCR 55, 21 ILR 6004

2 CCAR 19

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Argued October 8, 1993. Decided November 3, 1993.
Before Chief Judge Nelson, Judge Bonga and Judge Collins

NELSON, C.J.

This matter came before the Appellate Panel consisting of David Bonga, Brian Collins and Dennis L. Nelson, for hearing on the appeal of Alvie D. Cleparty on denial of Judge Elizabeth Fry to recuse herself from all further proceedings. Representing the appellant, Alvie Cleparty, was public defender J. Rasmussen and representing the appellee, Colville Confederated Tribes was prosecutor Lin Sonnenberg.

On April 15, 1993, Frank LaFountaine, attorney for the appellant, moved the Trial Court for an order "re-assigning the ... case to (a) judge other than Associate Judge Elizabeth Fry..". Alleged grounds for the motion were contained in an affidavit of prejudice prepared and signed by Mr. LaFountaine.[1]

The same day the appellant noted the motion to recuse for hearing. Judge Fry, after hearing the testimony of the appellant, the arguments of counsel and reviewing the files and records, entered Findings of Fact, Conclusions of Law, and an Order denying the motion to recuse.

The Order was immediately appealed as provided by Colville Tribal Code (CTC) 1.5.04.

The matter came on regularly before the Appellate Panel on October 8, 1993.

The appellant began the proceedings by withdrawing all but two issues on appeal. The issues remaining were 1) whether the affidavit of prejudice contained sufficient facts to mandate the recusal of Judge Fry and 2) whether Judge Fry exceeded her authority by holding a hearing on the Motion to Recuse.

SUFFICIENCY OF THE AFFIDAVIT OF PREJUDICE

The affidavit of prejudice contained in pertinent part, the following:

> "That the defendant cannot have a fair and impartial trial by reason of the interest or prejudice of Associate Judge Elizabeth Fry;
> That Judge Fry is known to be hostile to the defendant;
> That Judge Fry has a history of imposing excessive sentences on criminal defendants;
> That the defendant could receive a sentence of 360 days in jail and/or $5,000.00 for each offense, if convicted;
> That Judge Fry will impose an excessive sentence on the defendant if convicted and has imposed excessive sentences on the defendant in the past;

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[1] The affidavit of prejudice should be signed by the person who is attesting to personal knowledge of the facts reported. This is most often a party to the action and not his attorney or spokesperson.

> That Judge Fry refuses to recognize any standards in sentencing criminal defendants;
> That the Court has failed to set any standards for sentencing defendants;
> That the defendant is afraid of Judge Fry; and
> That the defendant by and through his/her legal counsel requests that another judge be assigned to this case."

The Panel examined the affidavit of prejudice and finds it does not contain sufficient statements of fact from which Judge Fry could make an informed decision regarding recusal.

AUTHORITY TO HOLD HEARING ON AFFIDAVIT OF PREJUDICE

The appellant contends that the provisions of CTC 1.5.04 mandate a judge to issue the appropriate order of recusal on the sole basis of what is contained in the information within the four corners of the affidavit. He points to that portion of CTC 1.5.04 which states that "the judge shall pass on the adequacy of the affidavit of prejudice and enter the appropriate order." The appellant construes this clause to narrowly.

Should an affidavit of prejudice contain serious allegations and very little fact, as in the instant case, due process and judicial economy require the judge to consider whatever evidence can be offered for or against recusal. This can most appropriately be done at a hearing. *St. Peter v. Colville Confederated Tribes*, AP92-15400/507-10, [1 CTCR 75, 2 CCAR 2, 20 ILR 6108] (1993). Judge Fry did not exceed her authority by hearing the defendant's testimony and the argument of counsel on the affidavit of prejudice.

Finally, it has not passed unnoticed that the appellant has assumed inconsistent positions; to wit: despite treating the affidavit of prejudice as a motion to recuse and <u>noting it for hearing</u> he now argues that Judge Fry exceeded her authority by holding a hearing on the affidavit of prejudice. Under most legal theories the appellant would now be estopped from pursuing this argument. Nevertheless, the issue was ripe for determination and the Appellate Panel chose to consider it.

For the foregoing reasons, the order of denial to recuse is Affirmed.

Danny Joe STENSGAR, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP92-15068, 1 CTCR 76, 20 ILR 6151

2 CCAR 20

[Frank LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Tim Liesenfelder, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 92-15068]

Arguments heard May 28, 1993. Decided November 10, 1993.
Before Chief Judge Baker, Judge Bonga and Judge Chenois

BAKER, C.J.

This matter came on for oral argument on the 28th day of May, 1993, with Plaintiff/Appellee appearing by Deputy Prosecuting Attorney Timothy A. Liesenfelder and Defendant/Appellant being represented by Public Defender Frank S. LaFountaine. Dave Bonga, Edythe Chenois and Rebecca Baker presided.

Defendant has appealed his sentence and requested dismissal of his conviction for Driving While Under the Influence of Intoxicating Liquors and/or Drugs.

PROCEDURAL HISTORY

On April 22, 1992, the appellant entered a plea of guilty to the charge of Driving While Intoxicated. The Trial Court ordered a presentence investigation and set Appellant's sentencing date and time for June 29, 1992, at 1:30 p.m. Appellant signed a Consent to Release Information and Promise to Appear, acknowledging the sentencing date and time and agreeing to appear as ordered. The sentencing date was later rescheduled by the court administrator, apparently due to court docket congestion and administrative concerns surrounding the hiring of a new chief judge for the Colville Tribal Court.

Appellant was sentenced on July 10, 1992. Although no objection was interposed prior to this date, at the sentencing hearing Appellant's counsel objected to the fact that the sentencing date had not been scheduled by June 22, 1992, as required by CTC 2.4.04.

The Appellate Court met via telephonic conference call on October 16, 1992, and, without oral argument or briefing, summarily ruled that the Tribes had lost jurisdiction over the defendant, based upon CTC 2.4.04, and dismissed the case, with prejudice. Appellee then moved the Court to vacate the order and set the matter for oral argument pursuant CTC 1.9.05. Finding that it had deprived the appellant of the opportunity for oral argument, and concluding that oral argument was required by CTC 1.9.05, the Appellate Panel vacated the previous order of dismissal, and the matter was set for oral argument May 28, 1993.

QUESTION PRESENTED

The sole question on this appeal is whether CTC 2.4.04 mandates dismissal, with prejudice, of a criminal charge if a sentencing date occurs more than sixty (60) days after the entry of a plea of guilty.

SUMMARY OF DECISION

While we do not approve of the court's failure to follow the sixty-day sentencing rule, under the facts of this case it resulted in no prejudice to the defendant and was in part done to accommodate Defendant's request to have time to complete inpatient alcohol treatment; therefore, the sentencing of Defendant more than sixty (60) days after the entry of his plea violated neither his speedy trial rights nor his due process rights. We, therefore, affirm the Trial Court's denial of Defendant's Motion to Dismiss and remand to the Trial Court for imposition of the sentence already given.

ANALYSIS

Appellant argues that the defendant must be freed from the obligations of his sentence because the Tribal Court imposed that sentence outside the sixty (60) days contemplated under Section 2.2.04 of the Colville Tribal Code. That section reads:

> CTC 2.4.04 Sentencing
> Upon a plea of "guilty," the judge may impose sentence at once or at a later date not to exceed sixty (60) days at his discretion.

Without citing any authority, Defendant argues that this code section is jurisdictional, i.e., that failure to comply with the sixty-day "deadline" mandates dismissal, with prejudice, of the criminal charges of which Appellant has been found guilty.

Appellant's companion argument is a due process one, under a Section of the Indian Civil Rights Act of 1968, 25 USC §1302(a), and the analogous section of the Colville Tribal Civil Rights Act, CTC 56.02(h). Appellant goes on to cite *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988), for the general proposition that tribal courts must follow their own court procedures and that, when the court deviates from such procedures, a defendant's due process rights may have been violated.

As Appellee points out in its brief, however, the Tribal Code does not expressly mandate dismissal if a defendant is sentenced beyond the sixty (60) day sentencing deadline, and there is no Tribal case law to this effect. Since this is a criminal case, then, we look to the Applicable Law section of the Colville Tribal Code Chapter entitled "Rules of Court," Section 4.1.11, which reads:

> In all cases the court shall apply, in the following order of priority unless superseded by a specific section of the Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law.

The appellee cites two Tribal Code provisions having to do with principles of construction, CTC 1.1.07(f) and (h), which we feel have limited, if any, application to this analysis. The appellee goes on to cite CTC section 1.5.05, a section entitled "Means to Carry Jurisdiction into Effect," which provides:

> When jurisdiction is vested in the court, all the means necessary to carry into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding is not specified in this code, **any suitable process or mode of proceeding may be adopted which appears most conformable to the spirit of Tribal law**.
> (Emphasis supplied.)

While we disfavor frequent reliance on this code section, it does have application to the instant case, inasmuch as CTC 2.4.04 is silent as to the remedy or consequence of failure to comply with the sixty-day deadline for sentencing. Without more, however, we would be uncomfortable in relying solely on CTC 1.5.05, so we turn to Section 4.1.11 to examine what other law to which the Appellate Court can refer.

Neither party cites any other "applicable laws of the Colville Confederated Tribes, tribal case law, state common law [or] federal statutes" in support of the party's position. CTC 4.1.11. Therefore, we proceed to analysis of the federal common law (case law) as we have been encouraged to do in Appellee's response brief.

RIGHT TO "SPEEDY SENTENCING"

Federal case law has taken up the question of the significance and consequences of a delay in sentencing in the context of whether such a delay amounts to a violation of the speedy trial protections of the Sixth Amendment of the United States Constitution. In some cases, delay has been found to constitute a violation, but the federal courts have set out an analytical framework for determining, on a case-by-case basis, whether a particular delay in sentencing rises to the level of an unconstitutional deprivation of rights. *Beavers v. Haubert*, 19g U.S. 77, 49 L.Ed. 950, 25 S.Ct. 573 (1905); *Franket v. Woodrough*, 7 F.2d 796 (8th Cir. 1925). The court in *Pollard v. United States*, 352 U.S. 354, 1 L.Ed.2d 393, 77 S.Ct. 481 (1957), stated that such a delay depends upon the circumstances. "The delay must not be purposeful or oppressive." (352 U.S. at 361.)

In Pollard, *supra*, the court had given a questionable period of "probation" in 1952, and in 1954 the trial judge sentenced him on the same matter. In footnote 8 of the *Pollard* decision, the court pointed out a factor which is applicable to the instant case:

> We note that petitioner made no motion to secure a prompt proper sentence, often considered important in questions involving the speedy trial clause. (Citations omitted.)

In denying the defendant's motion for dismissal due to the two year delay, the Supreme Court stated, 352 U.S. at 362, as follows:

> Error in the course of a prosecution resulting in conviction calls for correction of the error, not the release of the accused. (Citations omitted.)

In 1972, the Supreme Court had an opportunity, once again, to analyze the issue and further define the nature of the Sixth Amendment protections of a speedy trial as applied to "speedy sentence" in the case of *Barker v. Wingo*, 407 U.S. 514, 522, 33 L.Ed.2d 101, 112, 92 S.Ct. 2182 (1972). There, the court stated:

> [A]s we recognized in *Beavers v. Haubert, [supra]*, any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case: "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." (Citations omitted.)

The court went on to say:

> The amorphous quality of the right atso leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. (407 U.S. at 522, 33 L.Ed.2d at 112; citations omitted.)

The Supreme Court was resolving a conflict in decisions of the Second and Eighth Circuit Courts of Appeal. Whereas the Second Circuit had adopted a less strict interpretation of the rule, the Sixth Circuit had adopted a "demand/waiver rule" whereby a defendant must have made a demand for a speedy trial, or it was deemed waived. In *Barker*, the court resolved this conflict between the circuits by laying out the following analysis:

> Under this [Sixth Circuit] rigid approach, a prior demand is a necessary condition to the consideration of the speedy trial right. This essentially was the approach the Sixth Circuit took below. Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this court's pronouncements on waiver of constitutional rights. The court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege. ... We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. **This does not mean, however, that the defendant has no responsibility to assert his right**. We think the better rute is that the defendant's assertion of or failure to assert his right to a speedy trial is **one of the factors** to be considered in an inquiry into the deprivation of the right ....
>
> We, therefore, reject both of the inflexible approaches--the fixed time period because it goes further than the Constitution requires; the demand-waiver rule because it is insensitive to a right which we have deemed fundamental. **The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed** ....

> **A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right**.
> (432 U.S. at 529-530; emphasis supplied.)

The *Barker* court went on to enumerate four factors to be examined on an *ad hoc* basis in any determination of Sixth Amendment speedy trial rights. These four factors are:

1. The length of delay;
2. The reason for the delay, i.e, whether the government or the defendant caused the delay;[2]
3. Whether or not the defendant asserted his right[3]; and
4. Prejudice to the defendant, including three such interests:
    a. Prevention of oppressive pretrial incarceration;
    b. Minimization of anxiety and concern of the accused; and
    c. Limitation of the possibility that the defense will be impaired.

In analyzing the factors enumerated in *Barker v. Wingo*, supra, in the context of the case at bar, we find that, under the limited facts of this case, the Tribal Court's sentencing of Defendant on July 10, 1992, rather than on June 22 or June 29, 1992, was not a denial of Defendant's speedy trial/sentencing rights under the Sixth Amendment, nor under the analogous provisions of the Indian Civil Rights Act, 25 U.S.C. § 1302(8), nor the Colville Tribal Civil Rights Act, CTC 56.02(f).

First, the length of delay was no more than eighteen days, or even less (eleven days) if it is taken into account that defendant himself requested a sentencing date of June 29, rather than June 22, to accommodate his inpatient alcohol schedule. Second, the cause for the delay was court congestion and/or administrative problems within the Court itself, arising out of a hiring of a new chief judge. While we do not and would not in all circumstances justify violation of established Code sections on this basis, it is to be noted that the delay was not caused by the prosecuting attorney's office directly, and in fact a portion of the delay, from June 22 to June 29, was caused by a request from the defendant. Given his Consent to Release and Promise to Appear, signed April 22, 1992, and acknowledging the sentencing date, we find that the defendant waived his "speedy sentencing" rights, at a minimum, to June 29. We do not find unreasonable, under the circumstances, the additional eleven-day delay caused by the court administrator.

The third factor, whether or not the defendant asserted his right, here militates against the appellant as well. Appellant certainly did not raise any objection to the setting of the sentencing date for June 29, which was outside the sixty (60) days. At sentencing, however, he argued that the sentencing date should have been set on or prior to June 22. At no time prior to July 10 did he raise any argument as to violation of CTC 2.4.04. "We emphasize that failure to assert the right will make it difficult for a defendant to prove he was denied a speedy [sentencing] ..." *Barker v. Wingo*, *supra*, 432 U.S. at 532.

As for the fourth factor, prejudice to the defendant, under the facts of the instant case, we find none. Defendant was not incarcerated pretrial and, we note, is still at large on his personal recognizance. Therefore, to

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[2] "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." 432 U.S. at 531.

[3] "The defendant's assertion of his speedy trial right ... is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." 432U.S. at 531.

dismiss the case would not serve the purpose of preventing oppressive pretrial incarceration. Second, although no doubt Appellant may have suffered some anxiety and concern due to the eleven- or eighteen-day delay in sentencing, we find this to be *de minimis* under the circumstances of this case. Third, since the delay involved in the instant case was post-plea, it cannot be argued that it limited the possibility that the defense would be impaired.

RIGHT TO DUE PROCESS

We further find no violation of Appellant's due process rights under 25 U.S.C. 1302(8) or CTC 56.02(h). Although we could envision a case in which a defendant's due process rights might be violated by the Court's ignoring a Code section involving timing and deadlines, we find that this case does not rise to the level enunciated in *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988), for several reasons. First, CTC 2.4.04 has no parallel in state or federal law in terms of a strict deadline for sentencing after the entry of a plea, at least insofar as any such parallel was made known to this Appellate Panel. Thus, a necessary element in the analysis in *Randall*, namely, where Tribal Court procedures "parallel those found 'in Anglo-Saxon society,'" 841 F.2d 897, 901, does not exist in the instant case. Moreover, Ms. Randall's fact situation was such that she suffered dire prejudice at the hands of the Yakima Nation Tribal Court in denying her request that her appeal be heard without payment of the filing fee, simply because the Tribal Court judge took longer than the deadline imposed on Ms. Randall to rule on her *in forma pauperis* motion, which had been filed within the statutory time limits under Tribal Code. Such an action on the part of the Tribal Court was seen, by the Ninth Circuit Court of Appeals, as arbitrary and capricious and in violation of Ms. Randall's due process rights. Such facts and circumstances do not exist in the instant case.

SUMMARY AND ORDER

Although we do not approve of the routine violation of time deadlines set by the Colville Tribal Business Council to process cases in the Colville Tribal Court, nevertheless we cannot find that the provisions of CTC 2.4.04 are jurisdictional, therefore requiring dismissal, with prejudice, of underlying criminal charges when the sixty-day deadline for sentencing a criminal defendant is not met by the Court. While we can envision a case where dismissal might be the appropriate remedy, the case at bar is not that case. The Tribal Code is silent on this issue, and there has been to date no Tribal case law to guide us. No state common law has been brought to our attention which would bear on this issue. Therefore, using federal analysis, we conclude that (1) the length of delay was minimal; (2) the cause for delay was court congestion or other administrative problems, and not intentional on the part of the prosecuting authority; (3) the defendant did not assert his right under CTC 2.4.04 until after the sixty (60) days had run; and (4) there was no prejudice to the defendant.

We therefore affirm the Tribal Court's denial of Defendant's motion to dismiss and remand to the Tribal Court for imposition of the sentence already entered.

Theresa BESSETTE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP91-14082, 2 CTCR 01

2 CCAR 26

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Arguments heard September 10, 1993. Decided December 1, 1993.
Before Chief Judge Miles, Judge Bonga and Judge Chenois.

MILES, C.J.

This case having come before the Colville Tribal Appellate Court on September 10, 1993, for oral arguments before Judge Edythe Chenois, Judge David Bonga and Judge Wanda L. Miles. Lin Sonnenberg, Prosecutor, represented Appellee, and Jeff Rasmussen, Public Defender, represented Appellant.

The Court has reviewed arguments of counsel; the case file, number AP91-14082, and all documents therein; the cassette tape record; and applicable Colville Tribal Law. Upon review of the records this court concludes the following:

1. Affirms the conviction of the lower court;

2. Vacates the jail term of 1 day.

So Ordered.

Michael D. STEAD, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP91-14281, 2 CTCR 02, 21 ILR 6005

2 CCAR 27

[Frank S. LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 91-14281]

Arguments heard July 9, 1993. Decided December 14, 1993.
Before Chief Judge Collins, Judge Bonga and Judge Baker

COLLINS, C.J.

This criminal appeal was brought before the Appellate Panel by Michael D. Stead, a member of the Rosebud Sioux Tribe. On October 8, 1991, Stead was convicted in Colville Tribal Court, Fry, J., presiding, of Driving Without a Valid Driver's License, CTC 9.1.04, a misdemeanor offense which was committed on the Colville Indian Reservation. Following his conviction at bench trial, Stead was sentenced to a 60 day suspended jail term and a fine of $300.00.

Stead alleges that the Colville Tribal Court erred in denying his pre-trial motion to dismiss for lack of *in personam* jurisdiction. Stead also contends that because the Court lacked jurisdiction to proceed to trial, his civil rights were violated under the Indian Civil Rights Act (ICRA), 25 U.S.C. Sec. 1301-1303 and the Colville Tribal Civil Rights Act (CTCRA), CTC 56.01 *et seq*.

This case arose in the wake of *Duro v. Reina*, 495 U.S. 676, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990), during the interim period before Congress finally overturned the United States Supreme Court's holding that tribal courts lacked criminal jurisdiction over non-member Indians. This appeal raises unique issues concerning Tribal Court criminal jurisdiction over a non-member Indian following *Duro* and expiration of temporary legislation recognizing the Court's jurisdiction. We are also asked to examine the retroactive effect of permanent legislation enacted following trial.

I.

The facts and procedural history of this case are not in dispute. On August 2, 1991, Michael D. Stead, who resides in Nespelem, Washington, was cited into Tribal Court by the Colville Tribal Police for the misdemeanor offense of Driving Without a Valid Driver's License. Stead is a non-member Indian who resided on the Colville Indian Reservation for ten years prior to the offense. The offense occurred on Star Route 155 within the Colville Indian Reservation. Stead was arraigned on August 12, 1991, and was appointed a public defender on that date. A pretrial conference was held on September 23, 1991, and the case proceeded to trial on October 8, 1991.

In his pretrial motion the day of trial, Stead orally moved the Court to dismiss the case for lack of jurisdiction. Stead's motion was based on the recent expiration of the Act of November 5, 1990, P.L. 101-511, Sec. 8077, 104 Stat. 1892, amending the Indian Civil Rights Act, 25 U.S.C. Sec. 1301. The Act, by which Congress temporarily overturned the United States Supreme Court's holding in *Duro v. Reina, supra,* specifically recognized tribal court criminal jurisdiction over non-member Indians, but expired by its own terms on September 30, 1991. The appellant's motion to dismiss was denied and Stead was then brought to trial, convicted and sentenced.

On October 9, 1991, Congress extended the expiration date of P.L.101-511, Sec. 8077 (d) until October 18, 1991. P.L. 102-104, Sect. 1773, 105 Stat. 616. On October 28, 1991, P.L. 101-511, Sec. 8077 was again amended by striking out subsection (d). P.L. 102-137, 105 Stat. 646. Thus, on October 28, 1991, a federal statute was signed into law which permanently recognized tribal court criminal jurisdiction over non-member Indians.

II.

The appellant argues that on October 8, 1991, the Tribal Court lacked jurisdiction to proceed to trial in view of his status as a non-member Indian and because P.L. 101-511, Sec. 8077 had expired on September 30, 1991. The Appellant also argues that the Tribes cannot rely on either of the two later enactments to validate an action of the Tribal Court when it lacked jurisdiction. The appellant reasons that reliance on enactments following trial would violate the prohibition against *ex post facto* laws found in both the Indian Civil Rights Act, 25 U.S.C. Sec. 1302 (9), and the Colville Tribal Civil Rights Act, CTC 56.02 (i), and his right to due process and equal protection of the Tribes' laws under ICRA, 25 U.S.C. Sec. 1302 (8) and CTCRA, CTC 56.02 (h). Further, the appellant contends that because P.L. 101-511 had expired prior to trial, the Supreme Court's holding in *Duro v. Reina, supra*, reemerged as controlling law, and the Tribal Court erred by refusing to dismiss the case for lack of jurisdiction.

III.

We begin with an examination of *Duro v. Reina, supra*, and the Supreme Court's reasoning which gave rise to its holding that tribal courts lack criminal jurisdiction over non-member Indians. Duro, a member of the Torres-Martinez Band of Cahuilla Mission Indians who lived and worked on the Salt River Indian Reservation, allegedly shot and killed a member of the Gila River Indian Tribe on the Salt River Indian Reservation. Duro was tried and convicted in the Pima-Maricopa Indian Community Court for the misdemeanor crime of illegally firing a weapon on the reservation.

In holding that the tribal court lacked jurisdiction over Duro, a non-member Indian, the Supreme Court applied its view of limited tribal sovereignty announced in *Oliphant v. Suguamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), and in *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). The Court reasoned that because Indian tribes have a dependent relationship with the United States, they lack full territorial sovereignty. The Court has previously held that tribes retain those attributes of sovereignty not inconsistent with overriding interests of the United States. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). The *Duro* court, however, cited *Colville* for the view that non-member Indians, for the most part, stand on the same footing as non-Indians on the reservation. *Duro*, 495 U.S. at 687.

The Court has long held that tribes have retained the power to "control their internal relations, and to preserve their own customs and social order." *Wheeler*, 435 U.S. at 326. A corollary to that principle, which has been developed by the Court, is that tribes, by virtue of their dependent relationship, were implicitly divested of certain attributes of sovereignty by virtue of their dependent relationship. *Johnson v. McIntosh*, 8 Wheat. 543 (1823); *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831). By this reasoning, the Supreme Court has held that tribes have been divested of authority to control their external relations by Congress. *Wheeler, supra*. During recent years, the Court has taken an increasingly restrictive view of the power retained by tribes. This is reflected in the Court's opinions concerning the exercise of tribal regulatory and judicial authority. See *Oliphant v. Suguamish Indian Tribe, supra*. See also *Montana v. United States*, 450 U.S. 544, 101S. Ct. 1245, 67 L.Ed.2d 493 (1981); *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 406, 109 S. Ct. 2994, 106 L.Ed.2d 342 (1989).

It has never been disputed that tribes have the power to prescribe rules of conduct for their own members. In *Duro*, the Court held, this authority over tribal internal relations is mainly the result of consent by individual tribal

members to tribal norms reflected in laws which limit conduct. However, tribal power to punish non-Indians for criminal conduct on the reservation was held to be control over external relations, which was implicitly divested due to the dependent relationship of tribes to the United States. *Oliphant, supra*. The Court reasoned that because imposition of criminal jurisdiction is highly intrusive on personal liberty, and non-Indians could not fully participate in tribal government, they could not consent to punishment for criminal conduct under tribal law.

Following the line of reasoning set forth in *Oliphant*, the majority in *Duro* concluded that tribal criminal jurisdiction over non-member Indians is not consistent with the dependent status of tribes and does not involve internal self-governance. *Id.*, 495 U.S. at 686.Thus, the Court found that tribal power to assert criminal jurisdiction over non-member Indians was implicitly divested.

Although the majority in *Duro* acknowledged its opinion created a substantial jurisdictional void in application of criminal law within Indian country, it suggested that the problem could be resolved through application of P.L. 280, Act of August 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. Sec. 1162, 25 U.S.C. Sections 1321-1326, 28 U.S.C. Sec. 1360) or by further action of the Congress.

In his incisive dissenting opinion, Justice Brennan noted that powers of Indian tribes are "inherent powers of a limited sovereign which have never been extinguished." *Wheeler, supra*, 435 U.S. at 322. Thus, when Indian tribes accepted the protection of the United States, those powers which were not necessarily withdrawn by treaty or statute, or by implication as a necessary result of their dependent status, were retained by the tribes. *Id.* at 323. However, only Congress can determine what tribal powers involve a tribe's external relations which are inconsistent with the overriding interest of the United States.

Although Justice Brennan agreed that exercise of criminal jurisdiction over non-Indians, as the Court held in *Oliphant*, was inconsistent with the overriding national interest, he disagreed with the territorial approach to sovereignty relied upon by the majority to conclude that tribes were less than full sovereigns. Brennan succinctly pointed out that the majority relied on dictum in *Oliphant* to extend that principle to non-member Indians. In addition, the majority relied on *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 161, to transmute this dictum to law.

The notion that tribal authority to control conduct of tribal members is based on the "consensual" nature of tribal membership and ability of members to participate in government was also addressed by Justice Brennan in his dissenting opinion:

> [N]or have we ever held that participation in the political process is a prerequisite to the exercise of criminal jurisdiction by a sovereign. If such were the case, a state could not prosecute nonresidents, and this country could not prosecute aliens who violate our laws.

Duro, 495 U.S. at 707. (Brennan, J. dissenting, Marshall, J. concurring), (citation omitted.)

Justice Brennan astutely noted that Congress has consistently exempted Indian-against-Indian crimes from federal or state jurisdiction. *Id*. at 702-704 (dissenting opinion). This practice raises an inference that Congress intended that tribes would retain power over those crimes involving only Indians. It is also significant that federal statutes dealing with criminal law in Indian Country do not differentiate between Indians as members or non-members. 18 U.S.C. Sections 1152, 1153. See *United States v. Kagama*, 118 U.S. 375, 383 (1886). See also *United States v. Rogers*, 4 How. 567, 573 (1846).

The jurisdictional void created by the majority in *Duro* renders its analysis suspect. The conclusion reached by the majority should be based upon an expression of congressional intent in the exercise of its plenary power in Indian affairs. Thus, the question which must be asked is whether the Congress intended that no sovereign would have the power to prosecute an entire class of crimes in Indian country. Because it is highly unlikely Congress

intended to create such a chaotic state of affairs, serious doubt is cast upon doctrine developed by the Court which leads to that result.

IV.

Justices Brennan and Marshall were not alone in their disagreement with the Supreme Court's majority in *Duro*. Tribal governments were faced with a major dilemma in how to effectively enforce their laws. Both Congress and affected federal agencies soon became aware of the Court's holding and were required to deal with the jurisdictional morass following *Duro*. Recognizing that the Court's reasoning and holding in *Duro* strayed far beyond what it had ever expressly or impliedly intended, and in response to grave law and order concerns throughout Indian country, Congress acted. Congress enacted three statutes amending ICRA which clarified its views concerning tribal exercise of criminal jurisdiction over non-member Indians and overturned the Court in *Duro*.

The Department of Defense Appropriations Act, 1991, P.L. 101-511, Section 8070 (b), (c) and (d), was enacted on November 5, 1990. The statute amended the Indian Civil Rights Act, 25 U.S.C. Sections 1301-1303, in relevant part, to read as follows:

> Section 1301 (2) "Powers of Self-Government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies and tribunals by and through which they are executed, including courts of Indian offenses; **and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians**; (emphasis provided);
>
> Section 1301 (4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code, if that person were to commit an offense listed in that section in Indian country to which that section applies.

Section 1301 (4) was added as a new subsection to ICRA. In addition, Section 8077 (d) provided that:

> (d) The effects of subsections (b) and (c) as those subsections affect the criminal misdemeanor jurisdiction of tribal courts over non-member Indians **shall have no effect after September 30, 1991**. (emphasis provided.)

The legislative history of the Act reflected in the Conference Report on Sections 8070 (b) and (c) shows the legislation was enacted in response to an emergency situation in Indian country as a result of the holding in *Duro v. Reina*, which threw 200 years of misdemeanor criminal jurisdiction into chaos. It was clearly noted that tribes had traditionally exercised criminal jurisdiction over all Indians on their reservations and that *Duro* had altered that traditional pattern of jurisdiction. H.R. Conference Report No. 938, 101st. Cong., 1st Sess. 233 (1990).

Although P.L. 101-511 was emergency legislation enacted as a temporary solution to law and order problems in Indian country resulting from *Duro*, the legislative history reveals that Congress intended to enact more comprehensive legislation. This recognition of tribal sovereignty is consistent with the Congress's constitutionally-based plenary power over Indian affairs, and two hundred years of Federal law enacted by the Congress which recognizes jurisdiction of tribal governments over Indians in Indian country. *Id*.

Significantly, Congress was aware of past Federal policy and the practice of settling more than one tribe on a single reservation under the governance of a single tribal government. Congress also recognized that although non-member Indians are not allowed to fully participate in all aspects of tribal government, they are provided a broad array of services by the governing tribe and by the Federal government. Thus, it appears that, regardless of the

mixed jurisdictional history over non-member Indians discussed by the Court's majority in *Duro*, Congress unambiguously clarified historical federal policy.

On October 9, 1991, Congress enacted P.L. 102-104, Section 1773, 105 Stat. 616, the second temporary statute overturning the effects of the Supreme Court's holding in *Duro*. The statute was enacted during congressional debates over the nature and content of additional legislation needed to resolve jurisdictional problems created by *Duro*. The Act also extended the expiration date of Section 8077 (d) from September 30, 1991, to October 18, 1991. The Act reads as follows:

> SECTION 1. AMENDMENT.
> Section 8077 (d) of the Department of Defense Appropriations Act, 1991 (Public Law 101-511), is amended by deleting "September 30, 1991" and inserting in lieu thereof "October 18,1991."

Finally, on October 28, 1991, P.L. 102-137, 105 Stat. 646, was signed into law. The Act amended P.L. 101-511 Sect. 8077 by striking out subsection (d) and making permanent the legislative reinstatement of the power of Indian tribes to exercise criminal jurisdiction over Indians.

The Joint Explanatory Statement in H.R. Rep. 261, 102d Cong., 2d Sess. (reprinted in 1991 U.S. Code Cong. & Ad. News 379), which accompanied H.R. 972, sets out the clear intent of Congress in enacting P.L. 102-137. Significantly, the Act was not a delegation of power to tribes, but "[c]larifies and reaffirms the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians on their reservations." *Id*. at 3. Moveover, the Congress expressly recognized it has the authority through its plenary power over Indian affairs to correct the Supreme Court's misinterpretation of congressional intent concerning tribal sovereignty. Thus, this legislative reinstatement of tribal authority was a recognition of a crucial element of tribal sovereignty which was never divested.

In light of the foregoing judicial and legislative background, we now turn to the specific issues presented on this appeal.

V.

Stead contends his conviction cannot stand because both statutes are *ex post facto* laws under ICRA, 25 U.S.C. Sec. 1302 (9) and CTCRA, CTC 56.02 (i). The prohibition is rooted in the United States Constitution. U.S. Const. Article I, Sec. 9, cl. 3; Article I, Sec. 10, cl. 1. The ban forbids the Congress and states from enacting any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 964, 67 L.Ed.2d 17, 22 (1981), citing *Cummings v. Missouri*, 4 Wall 277, 325-326, 18 L. Ed. 356 (1867).

The prohibition is designed to give fair warning of legislative acts to the public which can be relied upon. *Dobbert v. Florida*, 432 U.S. 282, 298, 97 S. Ct. 2290, 53 L.Ed.2d 344 (1977). The ban constitutionally prohibits Congress and states from enacting arbitrary and potentially vindictive legislation after the fact. *Mallory v. South Carolina*, 237 U.S. 180, 183, 35 S.Ct. 507, 59 L.Ed. 905 (1915); *Fletcher v. Peck*, 6 Cranch 87, 138, 3 L.Ed. 162 (1810).

In *Calder v. Bull*, 3 Dall 386, 396, 1 L.Ed 648 (1798), Justice Chase explained the reach of the *ex post facto* prohibition:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence,

> and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Collins v. Youngblood, 497 U.S. 37, 41, 110 S. Ct. 2715, 111 L.Ed.2d 30 (1990).

The federal courts have also held that any procedural change in how a criminal case is adjudicated may violate the prohibition if it deprives the defendant of substantial protections of law which were in effect when the crime was committed. *Duncan v. Missouri*, 152 U.S. 377, 382-83, 14 S.Ct. 570, 38 L.Ed. 485 (1894). The prohibition may also be violated if a law arbitrarily infringes upon "substantial personal rights" of the accused. *Mallory v. South Carolina*, 237 U.S. at 183. A later enacted law which deprives one charged with a crime of any defense available according to the law at the time when the act was committed, is prohibited. *Beazell v. Ohio*, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925).

The United States Supreme Court has held that an *ex post facto* law, by its lack of fair warning that certain conduct is criminal, violates the due process clause of the Fifth Amendment. *Marks v. United States*, 480 U.S. 188, 191, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977).

Although the *ex post facto* prohibition was made applicable to states through the Fourteenth Amendment, *United States v. Harris*, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L. Ed. 989 (1954), this is not the case with tribes. See *Talton v. Mayes*, 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed. 196 (1896). The prohibition was made binding upon the Colville Confederated Tribes through the Indian Civil Rights Act, 25 U.S.C. Sec. 1302 (9) and through the Colville Tribal Civil Rights Act, CTC 56.02 (i).

Two elements must be present for a criminal law to be classified as an *ex post facto* law. The law must be retrospective, i.e., applicable to events occurring before its enactment, and it must disadvantage the offender. *Weaver v. Graham*, 450 U.S. at 29. Thus, both elements must be present in order to find that P.L. 102-104 and P.L. 102-137 violate the prohibition.

We first note that both ICRA amendments were enacted after the date when the offense was committed. However, neither was enacted during the intervening period between when the offense was committed and trial. Therefore, the Trial Court did not rely on either amendment as a source of jurisdiction over Stead. Further, neither of the 1991 amendments have been used to enhance the punishment imposed on Stead or to deprive him of a substantial personal right.

By its express terms, P.L. 102-104 extended the expiration date of the statute by which Congress recognized tribal court jurisdiction over Stead. Therefore, we believe the law was retrospective. Although Congress did not expressly say so, we have no question that the effects of P.L. 102-137 related back to October 19, 1991. The 1990 Amendment to ICRA by P.L. 101-511, Sec. 8077 (a), clearly shows that Congress "recognized and affirmed" the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians. See ICRA, 25 U.S.C. Sec. 1301 (2).

Both the 1990 and 1991 amendments to ICRA enacted in response to *Duro* are jurisdictional, not penal. However, they have the effect of altering the rights of non-member Indian criminal defendants from what the Supreme Court found them to be. Therefore, for purposes of this analysis, we will assume without deciding that the ICRA amendments are of such a character to fall within the purview of an *ex post facto*.

The 1991 ICRA amendments are retrospective in that they extend the jurisdiction of tribal courts over non-member Indians from the expiration date of P.L. 101-511 forward. However, in this case the Tribal Court brought Stead to trial prior to when P.L. 102-104 or P.L. 102-137 became effective. Therefore, the retrospective nature of the 1991 amendments were not relied upon by the Tribal Court as a basis for proceeding to trial.

In addition, neither of the 1991 ICRA amendments disadvantage the Appellant by imposing greater punishment for the offense with which Stead was charged than at the time it was committed. Therefore, neither P.L.

102-104 nor P.L. 102-137 makes more onerous the punishment for a crime committed before its enactment. *Weaver v. Graham*, 450 U.S. at 30-31. The amendments did not deprive Stead of substantial protections of law in effect at the time the crime was committed. *Duncan v. Missouri*, *supra*. Likewise, neither arbitrarily infringed upon Stead's substantial personal rights. *Mallory v. South Carolina*, *supra*. Nor did the amendments deprive Stead of a defense available according to the law in effect when the offense was committed. *Beazell v. Ohio, supra*.

On the date of his offense, Stead had notice that he was prohibited by CTC 9.1.04 from operating a motor vehicle on the Colville Indian Reservation without a valid driver's license. He was also on notice that the Congress had enacted P.L. 101-511 and that the Colville Tribal Court could exercise criminal jurisdiction over him for prohibited conduct on the reservation.

From the foregoing, the Panel finds the *ex post facto* prohibition does not apply to P.L. 102-104 or P.L. 102-137, which were neither enacted prior to Stead's trial nor relied upon by the Court as a source of jurisdiction.

VI.

We also believe that from the legislative history of P.L. 101-511, P.L. 102-104 and P.L. 102-137, there can be no question Congress recognized that tribal courts have always possessed inherent authority to exercise misdemeanor criminal jurisdiction over all Indians. This inherent authority was retained by tribes despite their dependent relationship with the United States. Further, the inherent jurisdictional authority of tribes is not a power delegated to tribes by the Congress. Further, the Congress made it abundantly clear that tribes have never been expressly or impliedly divested of such authority. See H.R. Conf. Rep. No. 938, 101st Cong., 1st Sess., 233. See also 137 Cong. Rec. E2165-04 (statement by Rep. Geo. Miller of California); 137 Cong. Rec. H2988-02 (Report on H.R. 972).

Regardless of the conclusions reached by the Court based upon its analysis of a mixed history concerning tribal court jurisdiction in *Duro*, the legislative history of the ICRA amendments makes it clear that the Court misinterpreted the Congress' intent with regard to the reach of tribal court jurisdiction over Indians within Indian country. As the legislative history reveals, that view is supported by many years of federal legislation dealing with jurisdiction in Indian country, H.R. Conf. Rep. No. 938, *supra*, and the fact that Congress did not distinguish between Indians based on tribal membership. See 10 Stat. 270, ch. 30 (codified at 18 U.S.C. Sec. 1152). See also *United States v. Rogers, supra*. This view is consistent with the dissenting opinion in *Duro, supra*.

We are not alone in reaching the conclusion that tribal courts have inherent authority to exercise criminal jurisdiction over all Indians on their reservations regardless of the holding in *Duro, supra*. In *Mousseaux v. U.S. Commissioner of Indian Affairs, et al.*, 806 F. Supp. 1433, 20 ILR 3015 (1992), the Federal District Court for the District of South Dakota also addressed the retroactive effect of the same amendments to ICRA on tribal court misdemeanor jurisdiction over non-member Indians.

That case was a civil lawsuit brought by a member of the Oglala Sioux Tribe against the Commissioner of Indian Affairs, the Chief Judge of the Rosebud Sioux Tribe, the Tribal Prosecutor and others. Mousseaux was arrested by Bureau of Indian Affairs officers and charged with a misdemeanor under tribal law on February 25, 1990, and held in the Rosebud Tribal Jail until April 24, 1990. The Supreme Court decided *Duro* on May 29, 1990. In his action for damages, Mousseaux alleged *inter alia* that he was denied due process. A threshold issue to his due process claim was whether the Rosebud Sioux Tribe had criminal jurisdiction over Mousseaux during the time he was arrested and held on tribal charges.

In determining whether the United States and the Tribe had criminal jurisdiction to arrest and hold Mousseaux, the Court found that the effect of *Duro* was retroactive. However, that did not end the analysis. After engaging in a lengthy summary of the legislative history of P.L. 101-511, P.L. 102-104 and P.L. 102-137, the Court

reached the following conclusions about the clear intent of Congress in enacting these amendments to ICRA, Sect. 1301.

> (1) the amendments were intended to nullify *Duro*, (2) the amendments were not a new delegation of power to tribal courts from Congress, and (3) the amendments were a recognition of the inherent criminal jurisdiction of tribal courts over nonmember Indians, **which jurisdiction had always existed and which continued uninterrupted, despite the *Duro* decision**.

(emphasis provided.) *Mousseaux*, 806 F. Supp.1433, , 20 ILR 3015, 3020 (citations omitted). See S. Rep. No. 168, 102 Cong., 1st Sess. (1991)

The Court also found, in nullifying *Duro* and reinstating tribal court jurisdiction over non-member Indians, that it was Congress's intent to form an unbroken line of criminal jurisdiction extending back into history as if *Duro* had never happened. *Id*. Accordingly, the Court held that the tribe had misdemeanor jurisdiction over Mousseaux.

Based on the foregoing, the Panel holds that the Tribal Court had inherent authority to exercise misdemeanor criminal jurisdiction over Stead on October 8, 1991, when he was brought to trial.

VII.

The Appellant also argues that under the common law doctrine of abatement as applicable to criminal prosecutions, the Tribal Court lacked jurisdiction to bring his case to trial. Under this theory, in criminal prosecutions which have not reached final disposition before the relevant criminal statute was repealed or expired, the defendant's criminal liability is extinguished. *United States v. Tynen*, 11 Wall 88, 20 L.Ed 153 (1870).

In order to avoid operation of the abatement doctrine, many state legislatures have enacted savings statutes which preserve criminal liability and authority of the court to impose penalties for offenses committed prior to repeal or expiration of the criminal statute. *Bell v. Maryland*, 378 U.S. 226, 84 S.Ct. 1814, 12 L. Ed.2d 822 (1964).

A broad savings statute of this type has been enacted by the Congress. The general federal savings statute provides as follows:

> Expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute unless the temporary statute shall expressly so provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

1 U.S.C. Sec. 109. The statute was enacted to abolish the common law presumption that repeal of criminal statutes results in abatement of pending prosecutions. *Warden, Lewisburq Penitentiary v. Marrero*, 417 U.S. 653, 41L.Ed.2d 383, 94 S.Ct. 2532 (1974).

Our inquiry is whether 1 U.S.C. Sec. 109 preserved the Tribal Court's jurisdiction over Stead commenced under P.L. 101-511, Sec. 8077, and his criminal liability arise from CTC 9.1.04. The relevant language in the 1990 amendment to ICRA for purposes of this analysis is:

> The effects of subsections (b) and (c) as those subsections affect the criminal misdemeanor jurisdiction of tribal courts over non-member Indians shall have no effect after September 30, 1991.

P.L. 101-511, Sect. 8077 (d), 25 U.S.C. Sec. 1301 (4). Specifically, application of the savings statute depends on whether Section 8077 (d), as stated above, can be read as expressly releasing or extinguishing any penalty, liability or forfeiture after September 30, 1991. See *Barker v. Chesapeake & Ohio R.R.*, 959 F.2d 1361, 1366 (6th cir. 1992).

The Panel agrees with the Tribes' view that, by any reasonable reading, the sunset provision of Section 8077 (d) does not expressly provide that criminal liability in pending prosecutions based on the statute will be

abated at expiration of the statute. Although P.L. 101-511 is a jurisdictional statute, a similar result was reached in *Barker*.

The fact that the Colville Tribal Code contains no savings statute does not change the analysis. The statute in question here is a federal jurisdictional statute, and we look to principles of federal law to determine whether 1 U.S.C. Sec. 109 prevents abatement of Stead's prosecution which otherwise might have occurred due to the sunset provision in P.L. 101-511, Sec. 8077 (d). We find that 1 U.S.C. Sec. 109 provided for the continued prosecution of Stead after September 30, 1991.

VIII.

The appellant's argument that his right to due process and equal protection of the Tribes' laws under ICRA, 25 U.S.C. Sec. 1302 (8) and CTCRA, CTC 56.02 (h), appear to turn on two points. The first is whether the 1991 ICRA amendments violate the *ex post facto* prohibition and; secondly, whether the Tribal Court retained jurisdiction to proceed to trial. Although the briefing on these points has been, at best, scantly developed, we will address the obvious due process and equal protection issues raised in the appellant's core arguments.

The due process clauses of ICRA and CTCRA ensure that all persons coming before the Court will be treated fairly. Thus, when a court proceeds to trial without jurisdiction over the defendant or the case, the defendant's due process rights have been violated. A criminal defendant is also denied due process when convicted of violating a criminal statute, enacted after the offense, which gives rise to enhanced punishment or was for conduct not prohibited when the act was committed. *Weaver v. Graham, supra*. In addition, when the court departs from its established procedural rules to deprive a criminal defendant of a vested right, the defendant's right to due process is implicated. *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th cir. 1988).

We have found that the Tribal Court retained jurisdiction to bring Stead to trial following expiration of P.L. 101-511. On the date of the offense, Stead was on notice that the Tribal Court could properly exercise criminal jurisdiction over him and that his conduct was prohibited by tribal law. We have concluded that neither P.L. 102-104 nor 102-137 were *ex post facto* laws and there has been no issue raised which would show that the Tribal Court departed from existing procedure. Therefore, we conclude that Stead's due process rights were not violated.

The Appellant's equal protection argument may well be based on his contention that the Tribal Court lacked jurisdiction to bring him to trial. In *Duro v. Reina, supra*, the Court found that the defendant was denied equal protection of the Tribe's laws because the Tribal Court lacked jurisdiction by virtue of his status as a non-member Indian. Because we have found the Tribal Court properly exercised its jurisdiction over Stead by bringing him to trial, he was not denied equal protection of the Tribes' laws.

We do not accept the argument that Stead was denied equal protection of the Tribes' laws based upon his interpretation of CTC 1.3.01 and CTC 1.13.01, which state, in relevant part, that "criminal jurisdiction of the tribal court shall not extend to trial of non-Indians." Stead is a member of the Rosebud Sioux Tribe and the statute was never amended to exempt non-member Indians from tribal court jurisdiction following *Duro*.

For the reasons stated above, the judgment against the Appellant is Affirmed.

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Sylvester SAM, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP93-15379/80, AP93-15414/15, 2 CTCR 04, 21 ILR 6040

2 CCAR 37

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 92-15379, 92-15380, 92-15414, 92-15415]

Argued October 8, 1993. Decided March 8, 1994.
Before Chief Judge Collins, Judge Bonga and Judge Nelson

COLLINS, C.J.

These criminal appeals were brought before the Appellate Panel, consisting of Judges David Bonga, Dennis Nelson, and Brian Collins for review of sentencing. On October 8, 1993 during oral argument in Cases AP92-15379 and AP92-15380, the Panel granted the appellant's motion, without objection, to consolidate AP92-15414 and AP92-15415 for purposes of appeal.

We have been asked to review the sentencing procedure and sentences imposed by the Tribal Court in these cases to determine whether the appellant's civil rights were violated under the Indian Civil Rights Act (ICRA), 25 U.S.C. 1301-1303 and the Colville Tribal Civil Rights Act (CTCRA), CTC 56.02 *et seq.* Specifically, the appellant alleges that he was denied due process of law in sentencing pursuant to ICRA, 25 U.S.C. 1302 (8) and CTCRA, CTC 56.02(h). The appellant also alleges that the sentences imposed are excessive and violate his right to be free from cruel and unusual punishment pursuant to ICRA, 25 U.S.C. Sec. 1302 (7) and CTCRA, CTC 56.02 (g).

The appellant asks the Panel to reverse each of the judgments against him or, in the alternative, remand each case for resentencing.

I.

The procedural history of the above cases is as follows: In AP92-15379 and AP92-15380, Sam was convicted at bench trial, on March 4, 1993, Fry, J., presiding, of Driving While Intoxicated, CTC 9.1.01 and Driving While License Suspended, CTC 9.1.05. The Court ordered a presentence investigation and on April 26, 1993 Sam was sentenced to a jail term of 360 days, with credit for four days served, and a fine of $2,500.

In cases AP92-15414 and AP92-15415, Sam was convicted at bench trial on January 15, 1993, Fry, J., presiding, of Driving While Intoxicated, CTC 9.1.01 and Driving While License Suspended, CTC 9.1.05. The Court ordered a presentence investigation and on March 8, 1993, Sam was sentenced to a jail term of 360 days, with credit for 55 days served, to be served concurrently with any current incarceration. The court also imposed a fine of $2,500 which was conditionally suspended. The appellant preserved the same issues for appeal as in AP92-15379 and AP92-15380.

Our review of the record at sentencing in cases AP92-15379 and AP92-15380 reveals that Sam's counsel objected to the validity of some of the criminal convictions shown in the Presentence Investigation Report (PSIR) and the sentencing judge's finding that Sam had eight previous DWI convictions. Although counsel admitted that Sam had been previously convicted of five DWI's, he argued that at least some of the convictions were constitutionally invalid because Sam was not represented by counsel. The record does not show which of Sam's past convictions were challenged for purposes of sentencing.

The record also shows that the sentencing judge closely questioned the appellant's counsel about the basis for his argument that Washington law should apply to sentencing in the Tribal Court. Counsel advanced the theory that because the term "sentence" is not defined in the Colville Tribal Law And Order Code, the Principles Of Construction, CTC 1.1.07(e), direct the Court to adopt Washington sentencing law to give meaning to the term. Counsel also argued that before Sam's past convictions can be used in sentencing, the Tribes must show by a preponderance of the evidence that such convictions are valid and furnish the Court with certified copies of the judgments. The Washington Supreme Court case of *State v. Ammons*, 105 Wn.2d 175 (1986) was cited in support of the above arguments. Sam moved to continue sentencing until the sentencing judge had an opportunity to review the case.

The Court also asked Appellant's counsel to explain *Ammons* in view of his argument that unrepresented convictions are constitutionally infirm when used to enhance sentences in Tribal Court. Upon further inquiry to clarify Counsel's specific objection use of Sam's criminal history in sentencing, the sentencing judge asked Counsel whether he was referring to convictions in which the appellant was denied the right to counsel or was simply unrepresented. Appellant's counsel explained that under Washington law any criminal conviction of an unrepresented indigent defendant is deemed constitutionally invalid for use in future sentencing. However, Counsel was unable to provide the Court with specific authority extending that rule to the Tribal Court. The sentencing judge then found that Washington law does not apply to sentencing in the Tribal Court, denied Counsel's motion to continue, and proceeded with sentencing.

After the Tribal Prosecutor presented a lengthy recitation of Sam's criminal history, the Court found that he had 8 previous DWI convictions, one conviction for Driving While License Suspended, and one conviction for Possession of a Controlled Substance. In light of the above criminal history, the Court found it unnecessary to consider any further DWI convictions, including those during 1986 through 1988, for purposes of sentencing. The Court then followed the Tribes' recommendation in sentencing and, for both the DWI and Driving While Suspended, imposed a jail term of 360 days, with credit for 4 days served, and a fine of $2,500.

We have recently addressed many of the issues raised on this appeal in *David L. St. Peter v. Colville Confederated Tribes*, 20 I.L.R. 6108, [AP93-15400/507-510, 1 CTCR 75, 2 CCAR 2], (1993). Therefore, our review of the issues raised in the instant cases will be discussed in view of our opinion in *St. Peter*.

II.

We have held that the Principles of Construction, CTC 1.1.07(e), do not require that the Tribal Court adopt Washington sentencing law in order to give meaning to the term "sentence." Therefore, we hold that the Tribal Court did not err in rejecting that application of the Principles of Construction. We also hold that the Court did not err in refusing to follow the principles set forth in *Ammons*, which construes the rights of a criminal defendant in sentencing under Washington law.

We have also held that where a violation of civil rights is alleged in criminal sentencing, our inquiry does not lead us to apply Washington law. Because the civil rights of a criminal defendant appearing before the Tribal Court is grounded in ICRA, 25 U.S.C. Sec. 1301-1303, and CTCRA, CTC 56.01 *et seq.*, our frame of reference for this analysis is the Constitution of the Colville Confederated Tribes, tribal statutes, Tribal Court procedure, and ICRA. As we said in *St. Peter, supra*, the origin of a defendant's federal civil rights in Tribal Court is statutory, presumably arising from the Indian Commerce Clause of the United States Constitution, Article I, Sec.8, Cl. 3. By adopting ICRA, the Congress selectively incorporated certain provisions of the Bill of Rights with knowledge that other provisions based upon tribal law would be used to define the guarantees arising under ICRA. Although some of those protections appear to be the same as those provided by the Bill of Rights, we believe ICRA must be applied

against a backdrop which includes the tribal Constitution, tribal statutes, tribal court procedures, all of which are the product of a tribal system which has maintained its ties with custom and tradition.

To place ICRA in perspective for this analysis, we note that the Act was enacted to provide those appearing before tribal courts with certain protections from the Bill of Rights while fostering tribal self-government, and not to impose the full Bill of Rights on tribes. Therefore, when applying common law principles based upon the Bill of Rights to civil rights issues arising from ICRA and tribal law, we do so with considerable care. Federal common law doctrine which interprets duties and protections flowing from the United States Constitution and the Bill of Rights did not include in its development, and is not rooted in tribal law, custom and tradition. Therefore, we will examine how the federal courts have handled similar constitutionally-based issues, but because the origins of tribal law differ, any parallels between federal common law and tribal law must be drawn with caution. Accordingly, we will narrowly adopt such common law interpretations when we are fully satisfied they are consistent with tribal law.

III.

A sentencing judge has broad discretion in the information which may be considered in sentencing. CTC 2.6.07. Tribal sentencing procedure does not require that the court apply rules of evidence to restrict the information it considers at sentencing. Because the Tribal Business Council gave broad discretion to the trial judge to determine what information about the defendant it may consider in criminal proceedings, it is inconceivable that a sentencing judge would be bound by rules of evidence to limit information which may be considered at sentencing. See CTC 2.6.02. We therefore reject Appellant's argument that a sentencing judge is restricted by rules of evidence in sentencing.

We have held that a criminal defendant has a due process right to be sentenced on the basis of accurate information. *St. Peter*, at 6111. In order to prevail on a due process challenge, the defendant must show that misinformation of a constitutional magnitude was given to the court and that such information was given specific consideration by the sentencing judge. *Id*. The defendant must show that the information relied upon by a sentencing judge lacks "some minimal indicum of reliability beyond mere allegation." See *United States v. Matthews*, 773 F.2d 48, 51 (3rd Cir. 1985). See also *United States v. Monaco*, 852 F.2d 1143, 1149 (9th Cir. 1988).

We are not convinced that information considered by the sentencing judge concerning Sam's criminal history "lacks some minimal indicium of reliability beyond mere allegation", or that the Court's consideration of such information raises questions of a constitutional magnitude requiring intervention by the Panel. *Id*. We reject the principle advanced by the appellant that the Tribes must show by a preponderance that information used in sentencing is accurate before such information may be relied upon by a sentencing judge. That principle represents an inaccurate statement of both federal and tribal law. It is the defendant that bears the burden of showing that inaccurate information was relied upon in sentencing. *United States v. Tooker*, 747 F.2d 975, 978-80 (5th Cir. 1984), *cert. denied*, 471 U.S. 1021, 105 S.Ct. 2032, 85 L.Ed.2d 314 (1985). From our review of the record at sentencing, we hold information relied upon by the Tribal Court in sentencing was inaccurate or unreliable.

IV.

We next turn our attention to whether the Trial Court erred in denying the appellant's motion to continue sentencing. Although the defendant may request the court to convene a separate evidentiary hearing in order to rebut information contained in a PSIR, the defendant does not have an absolute right to such a hearing. A sentencing judge's denial of a request for an evidentiary hearing for that purpose is subject to review for abuse of discretion. See *St. Peter*, 20 I.L.R. at 6112, citing *United States v. Monaco*, 852 F.2d 1143, 1148 (9th Cir. 1988). In that regard, we must determine whether the trial judge's decision to proceed with sentencing abridged the Appellant's due process

right to rebut information used in sentencing. See *St. Peter* at 6111, citing *United States v. Shepherd*, 739 F.2d 510, 515 (10th Cir. 1984); *United States v. Papajohn*, 701 F.2d 760, 763 (8th Cir. 1983); *United States v. Aquero-Segovia*, 622 F.2d 131, 132 (5th Cir. 1980). See also *United States v. Matthews*, 773 F.2d 48 (3d Cir. 1985).

The record shows that the appellant's counsel asked to continue sentencing in order to give the sentencing judge an opportunity to review *State v. Ammons*, *supra*, and consider whether Washington law should apply to sentencing in Tribal Court. Thus, Appellant's request to continue sentencing was to clarify what law should govern the information used and the procedure to be followed should govern the information used and the procedure to be followed in sentencing. The appellant did not ask the Court to convene a separate evidentiary hearing to rebut information in his criminal history used in sentencing.

Although application of Washington law would likely change what information could be considered in sentencing, Appellant's counsel was unable to provide the Court with persuasive authority to support the argument that State law should control sentencing in Tribal Court. After rejecting Counsel's argument that based on the Principles of Construction, CTC 1.1.07 (e), Washington law should apply to sentencing in Tribal Court, the Court proceeded with sentencing. Although the appellant was decidedly opposed to use of his criminal history in sentencing, he attempted to avoid use of past convictions by advancing a procedural argument as to what substantive criminal sentencing law should control rather than challenging the accuracy of specific criminal convictions. We note that the record below provides additional support for that conclusion. In response to Appellant's objection to the Court's use of his entire criminal history in sentencing, the sentencing judge asked Appellant's counsel to explain which of the appellant's convictions were constitutionally invalid and to explain why. It appears to the Panel that Appellant's counsel was unable to provide the sentencing judge with specific information about each of Appellant's convictions, other than lack of representation, which would lead the Court to conclude that they were constitutionally invalid.

We have previously held that, as a matter of due process, a criminal sentence may not be based upon prior unrepresented convictions where the defendant was not advised of his right to counsel or was improperly denied his right to counsel. *St. Peter* at 6111 (citations omitted). A criminal defendant's right to due process is not violated simply because uncounseled criminal convictions are used by the court in sentencing. *Id*. It is the Appellant's burden to bring to the sentencing court's attention the additional, specific grounds why uncounseled convictions were unconstitutionally obtained and should not be used in sentencing. Where the defendant had an opportunity to examine and correct controverted information in sentencing, and request an evidentiary hearing, but failed to do so, the error is counsel's and not the court's. See *United States v. Barnhart*, 980 F.2d 219, 226 (3rd Cir. 1992), citing *United States v. Matthews*, 773 F.2d 48, 51 (1975).

In view of our holding in *St. Peter*, we find that the Tribal Court did not error in using uncounseled criminal convictions in sentencing. The appellant has made no showing that the criminal convictions relied upon by the sentencing judge were improperly obtained pursuant to tribal law. The appellant has not shown, for example, in the convictions used in sentencing that the Court failed to inform him of his right to counsel or improperly denied his right to counsel.

From our review of the record, the Panel holds that the sentencing judge's denial of Appellant's motion to continue sentencing did not deprive him of a fair opportunity to rebut or explain the information being considered by the Court for imposing sentence. Appellant did not request an evidentiary hearing to prove the information contained in the PSIR concerning his criminal history was inaccurate. Rather, Appellant advanced a procedural argument, based upon state law, that certain criminal convictions referenced in the PSIR were constitutionally invalid because he was unrepresented. Moreover, the appellant has not shown that he was denied a fair opportunity to review

information contained in the PSIR or other information brought before the Court. Accordingly, we also hold that the appellant did not carry his burden of rebutting the accuracy of information considered by the Court in sentencing.

V.

We next address the appellant's argument that the sentences imposed by the Tribal Court are excessive and violate the prohibition against cruel and unusual punishment. ICRA, 25 U.S.C. Sec. 1302 (7), CTCRA, CTC 56.02 (g). Our review on this issue will focus on whether the punishment imposed by the Tribal Court was so disproportionate for the crimes involved that it is shocking to the sense of justice. *St. Peter* at 6115.

A criminal sentence imposed within statutory limits is generally not reviewable by an appellate court. *Id*. at 6613 (citations omitted). A particular sentence imposed within the limitations imposed by statute and the Constitution is within the discretion of the court. However, the Panel will review the sentencing process to ensure that the court has exercised its discretion, *United States v. Wardlaw*, 853 F.2d 932 (lst Cir. 1978), and that the court has not manifestly or grossly abused its discretion. *Giblin v. United States*, 523 F.2d 1349 (8th Cir. 1975), cert. denied 424 U.S. 971, 96 S.Ct. 1470, 47 L.Ed.2d 759.

The misdemeanor offenses of Driving While Intoxicated and Driving While License Suspended each carry a maximum sentence of 360 days in jail and a fine of $2,500. In cases AP92-15379 and AP92-15380 Sam was sentenced to a jail term of 360 days, with credit for 4 days served, and a fine of $2,500 for both offenses. In cases AP92-15414 and AP92-15415 Sam was sentenced to a jail term of 360 days, with credit for 55 days served, and a fine of $2,500, which was conditionally suspended, with the sentence to run consecutive to any other incarceration. Thus, Sam received far less than the maximum sentences for the four cases on this appeal, which is 1,440 days in jail and $10,000 in fines.

It is clear that the sentences imposed for the four cases falls well within the statutory limits prescribed by the Tribal Business Council in CTC 9.2.01(b) and ICRA 25 U.S.C. Sec. 1302(7). Moreover, from Sam's lengthy criminal history and repeated involvement with alcohol treatment, we do not believe that imposition of two consecutive 360 day jail terms and a fine of $2,500 represents a failure of the trial judge to exercise discretion or a manifest or gross abuse of sentencing discretion. See *United States v. Small*, 636 F.2d 126 (5th Cir. 1981). Further, because repeated efforts to rehabilitate the appellant through substance abuse treatment were unsuccessful, it cannot be said that the trial judge, by imposing jail terms, failed to individualize sentencing to the extent that the punishment was arbitrarily and capriciously imposed. In fact, the record from sentencing shows that the trial judge was satisfied there was sufficient information available to meaningfully exercise her sentencing discretion without considering any additional criminal convictions the appellant might have had between 1986 and 1988.

Given the appellant's lengthy criminal history, failed attempts at rehabilitation, and the statutory penalties for the offenses involved, we do not find the sentences imposed by the trial judge to be so arbitrary and shocking to the sense of justice as to constitute cruel and unusual punishment. *St. Peter* at 6115, (citations omitted). Rather, we find that the trial judge acted well within her sentencing discretion in these cases.

VI.

We find that the remaining issues raised in these appeals have been squarely addressed in *St. Peter, supra*, and those principles are applicable here. For the reasons stated above the Judgments and Sentences of the Tribal Court are Affirmed.

William COLEMAN, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP92-14144, 3 CTCR 18

2 CCAR 43

[Frank S. LaFountaine, Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Conference call January 25, 1993. Decided March 10, 1994.
Before Chief Judge Chenois, Judge Bonga and Judge Collins

Chenois, C.J.

This matter came before the Appellate Panel of Judge David Bonga, Judge Brian Collins and Chief Judge Edythe Chenois, by telephonic conference call on January 25, 1993.

After reviewing the file and records the Panel decided to proceed as the file was sufficiently complete to reach a decision to uphold the ruling of the Trial Court.

DISCUSSION

It is the belief of the Panel that the trial judge has great discretion in determining the sentence of a defendant, provided that the trial judge does not exceed the statutorial punishment limits of the statute in question.

After reviewing the record and listening to the tape of the Change of Plea hearing of December 2, 1992, the Panel finds that the trial judge did not solely rely upon the oral presentation by the prosecuting attorney of the appellant's state and federal criminal record in deciding the Trial Court's sentence. The Panel believes that the trial judge has sufficient information from the records of the Colville Tribe on which to base her decision in this matter.

The Appellate Court does not believe that the trial judge incorrectly determined the appropriate time the defendant was to be credited for time already served. Appellant's attorney incorrectly relied upon Washington law for support of Appellant's position. Under the Colville Tribal Code (CTC), the applicable law for this action is found at CTC 4.1.11 which states:

> In all cases the Court shall apply in the following order of priority unless superseded by a specific section of the Law and Order Code, any applicable law of the Colville Confederated Tribes, tribal case law, state common laws, federal statutes, federal common law, and international law.

The CTC does not recognize general state criminal statutes as being applicable to this action. Thus Appellant's reliance upon RCW 9.94A.400 is inappropriate for this matter.

The Trial Court's decision in this matter is Affirmed.

In Re the Welfare of B.B.D.
R. M., Appellant/Mother,
Case No. AP93-J93-12023, 2 CTCR 03
2 CCAR 44

[Stephen L. Palmberg, Attorney at Law, Grand Coulee WA, counsel for Appellant/Mother.
Steven Aycock, Legal Services, Colville Confederated Tribes, Nespelem WA, counsel for the minor.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Argued April 8, 1994. Decided April 19, 1994.
Before Chief Judge Bonga, Judge Collins and Judge Nelson

BONGA, C.J.

The Appellate Panel of Judge Brian Collins, Judge Dennis Nelson and Chief Judge David Bonga convened on March [sic] 8, 1994 at the Colville Tribal Courthouse to hear oral arguments on this appeal. The Panel also considered a Motion to Dismiss filed by Tribal Children and Family Services (CFS). The Panel decided to reserve a ruling on the Motion to Dismiss until after oral arguments were heard on the matter.

Present at the hearing were Stephen Palmberg, attorney for Appellant/Mother; Lynn [sic] Sonnenberg, attorney for Appellee/Tribal Office of Children and Family Services; and Steven Aycock, spokesman for the minor child.

After reviewing the file, hearing oral argument and considering the applicable law the Appellate Court denies the CFS Motion to Dismiss.

In addition the Panel upholds the Children's Court decision not to issue Findings of Fact and Conclusions of Law following the August 20, 1993 dispositional hearing.

The Appellant's appeal is hereby Denied.

DISCUSSION

I. Did the Trial Court err by denying appellant's motion to make and enter Findings of Fact and Conclusions of Law following a hearing on disposition?

The Appellate Panel holds that the Colville Tribal Code (CTC) does not require a judge at a disposition hearing under CTC Chapter 12.7 to issue Findings of Fact and Conclusions of Law.

The Panel believes that the extensive record in this case firmly supports the Children's Court discretionary decision of not issuing Findings and Conclusions. The Appellate Panel however does believe, in the interest of justice, that cases where the record is insufficient or questionable as to supporting a disposition, the Children's Court needs to issue Findings of Fact and Conclusions of Law so that all parties to the case will have notice of the Court's actions. Where there is substantial evidence, such as in this case, failure to issue Findings of Fact and Conclusions of Law is harmless.

The Appellate Panel took notice of Appellant's limited appeal which was limited to a lack of the Children's Court to issue Findings of Fact and Conclusions of Law. The representative for the minor also took notice of the limited scope of the appeal and commented that all other issues which might have been appealed were waived. The counsel for the minor argued that where a party to an appeal fails to raise an issue in their assignments of error or argue the issue in their briefs, that issue is found to be waived. The Appellate Panel finds that position to be well taken. Therefore the Panel believes that issues not raised in a brief and which are not supported by an argument are deemed abandoned, unless failure to review the issue not properly presented would result in manifest injustice.

In Re The Welfare of S. M.-C.
E. M. P., Appellant.
Case No. AP94-003, 2 CTCR 06, 24 ILR 6128
2 CCAR 45

[Stephen L. Palmberg, Attorney at Law, Grand Coulee WA, counsel for Appellant/Grandmother.
Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for father.
R. John Sloan Jr., Attorney at Law, Omak WA, counsel for minor.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Children & Family Services.
Juvenile Court Case Number J91-10013]

Argued April 22, 1994. Decided September 6, 1994.
Before Chief Judge Miles, Judge Bonga and Judge Collins

MILES, C.J.

This matter came before the Colville Tribal Court of Appeals for oral arguments on April 22, 1994. The Tribes were represented by Lin Sonnenberg, the Appellant was represented by Stephen L. Palmberg and the minor child was represented by R. John Sloan Jr.

The Court after reviewing the arguments of counsel, the record, and applicable law, made the following findings and decision in this matter.

FINDINGS OF FACT

A review hearing for said minor was held on January 21, 1994. The Juvenile Court heard testimony from James Tall, Clinical Supervisor for the Excelsior Group Home, and Elizabeth McCartney, caseworker for the Colville Tribal Child Welfare Services. The Juvenile Court entered the following findings of fact:

> 1. The interest and welfare of S. M-C. Would be best served by continuing the Court's jurisdiction over her and that the welfare of S. M-C. is in danger if she is not supervised by the Court; and
> 2. S. M-C. will be 18 years of age on January 25, 1994.[4]

The Juvenile Court concluded by stating it could not retain jurisdiction because said minor child attained her 18th birthday on January 25, 1994 and ordered the case to be dismissed.

A Motion for Stay was filed by Stephen Palmberg, counsel for E. P., grandmother of the minor. The Juvenile Court denied the Motion on February 1, 1994.

A Notice of Appeal was filed on January 24, 1994 by Stephen Palmberg, counsel for Appellant. The appeal was based on CTC 12.5.01, 12.2.12 and 12.2.11.

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[4] Findings and Conclusions Re Dismissal, initialed by Judge Howard E. Stewart on 1/28/94.

CONCLUSIONS OF LAW

The Court of Appeals reviewed the purpose and construction of CTC 12.1.01:

> "It is the purpose of this Juvenile Code to secure for each child coming before the Tribal Juvenile Court such care, guidance, and control, preferably in his own home, as will serve his welfare and the best interests of the Colville Confederated Tribes; to preserve and strengthen family ties whenever possible; to preserve and strengthen the child's cultural and ethnic identity wherever possible; to secure for any child removed from his home that care, guidance, and control as nearly equivalent as that which he should have been given by his parents to help him develop into a responsible, well-adjusted adult; to improve any conditions or home environment which may be contributing to his delinquency; and at the same time, to protect the peace and security of the community and its individual residents from juvenile violence or law-breaking. To this end, this Code shall be liberally construed."

The intent of this section indicates the Colville Confederated Tribes mandates the Juvenile Court to secure **for each child such care, guidance and control** as will serve his welfare and the best interests of the Colville Confederated Tribes. The final objective of Juvenile Court is to help him develop into a responsible, well-adjudged adult, to protect the peace and security of the community and its individual residents from juvenile violence or law-breaking. Lastly, this Code **shall** be liberally construed.

CTC 12.1.01 specifically mandates that the Juvenile Court has certain responsibilities for children under its jurisdiction. This Court finds the Juvenile Court erred in its interpretation of this section. According to Findings of Fact #1, issued on January 28, 1994, the Court finds that" "The interest and welfare of S. M-C. would be best served by continuing the court's jurisdiction over her and that the welfare of S. M-C. **is in danger if she is not supervised** by the Court. (our emphasis)

This Court reviewed CTC 12.2.11(c) which includes in its definition of the term "minor" defines a minor as "(A) person eighteen (18) years of age or older who is under the continuing jurisdiction of the Juvenile Court." This Court finds the Juvenile Court erred by dismissing this action based solely on the fact that the said minor reached her eighteenth (18th) birthday on January 25, 1994. The Juvenile Court had the authority to continue jurisdiction according to CTC 12.2.11(c). This Court realizes CTC 12.2.11(c), by definition, may be for an indefinite period of time after minor reaches his/her eighteenth (18th) birthday. This Court concludes that a reasonable amount of time should be established for the Court to determine whether it should retain jurisdiction over children after reaching the age of majority, consistent with the continuing grant of jurisdiction under CTC 12.1.01. The Court may retain jurisdiction under that section or utilize CTC 13.4.16.[5] However, it appears that the petitioner has not petitioned the Court for child custody under CTC 13.4.16.

It is Therefore Ordered that this matter shall be remanded to the Juvenile Court for a hearing to redetermine what would be in the best interest of said minor to retain jurisdiction and take other steps in accordance with CTC 12.1.01.

Francis LOUIE Jr., Appellant,

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[5] Child Custody - Powers and Duties of Custodian - Supervision by Appropriate Agency When Necessary. (1) Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health care, and religious training, unless the Court after hearing, finds, upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical, mental, or emotional health would be endangered. (2) If both parents or all contestants agree to the order, or if the Court finds that in the absence of the order the child's physical, mental, or emotional health would be endangered, the Court may order an appropriate agency which regularly deals with children to exercise continuing supervision over the case to assure that the custodial or visitation terms of the decree are carried out. Such order may be modified by the Court at any time upon petition by any party.

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP93-16188, 2 CTCR 05

2 CCAR 47

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Argued May 13, 1994. Decided October 28, 1994.
Before Chief Judge Bonga, Judge Collins and Judge Baker

BONGA, C.J.

The Appellate Panel of Chief Judge David Bonga, Judge Brian Collins and Judge Rebecca Baker convened for Oral Arguments in this matter on May 13, 1994 at the Colville Tribes Appellate Courtroom. In attendance were Jeff Rasmussen, attorney for Appellant, and Lin Sonnenberg, attorney for Appellee.

After a thorough review of the file and consideration of oral arguments the Appellate Panel has decided to Reverse the Judgment and Sentence of September 3, 1993 against defendant Louie, and hereby Dismisses the charge.

DISCUSSION

1. Due Process Concerns

The facts of this case illustrate that specific details stated in the Complaint are essential for adequate notice to a criminal defendant. Without specificity a defendant's right to due process is endangered. In this case the Complaint states that:

> On or about the 25th day of April, 1993 and about the time of 2100 hours...the defendant did the following specific acts: struck Avis Villegas; at the following location: HUD #1136, Malott, Washington....

The Affidavit of Probable Cause states:

> On 25 April 1993 at approximately 18:59 hours, Tribal Officer D. Garvais was dispatched to possible criminal activity in progress at the residence of Avis Villegas, HUD No. 1136, Malott, Washington...Officer Garvais made contact with Ms. Villegas at HUD No. 188.

At trial Officer Garvais testified that he was dispatched on April 25, 1993 for an assault in progress at Malott HUD 1136. The officer further testified that he contacted Ms. Villegas, who was at the home of her nephew at Malott HUD house 188. Ms. Villegas told him that the defendant Louie had hit her and that defendant Louie was in her home at HUD 1136, Malott. Officer Garvais further testified that he was informed "later on" by Ms. Villegas that the battery had occurred in a car returning from the Nespelem rodeo.

The evidence at trial was to the effect that an altercation between Louie and Ms. Villegas occurred during a trip from Nespelem. No evidence was presented at trial as to the amount of time that was required to travel from the Nespelem rodeo to Malott. However, judicial notice can be taken of the fact that the time must have been considerable as the distance from Nespelem to Malott is know to be over 50 miles. The altercation in the vehicle and the alleged incident of the Complaint and Affidavit, which purportedly occurred in Malott, were not continuous, therefore, involved separate events. We conclude that the facts adduced at trial concerning the events which

occurred in Malott will not support a conviction as to the offense alleged in the Complaint, as the following analysis will demonstrate.

The Colville Business Council was clear and direct regarding formal requirements of criminal complaints at CTC 2.2.01(2) Contents which states:

> 2.2.01(2) Contents. The Complaint shall be in writing and shall set forth:
>
> a. the name of the Court;
> b. the title of the action and the name of the offense charged;
> c. the name of the person charged; and
> d. the offense charged, in the language of the statute, together with a **statement as to the time, place**, person, and property involved to enable the defendant to understand the character of the offense charged.
>
> (Emphasis supplied)

The Panel reads CTC 2.2.01 as a directive by the Tribal Council to provide specific details of an offense charged in the complaint itself, so that a defendant will have an opportunity to formulate a defense.

In this case the insufficiency of the Complaint could not have given the defendant adequate notice of the crime he supposedly committed. In effect the defendant would have been required to prepare for two trials in order to present an effective defense.

The Complaint filed herein charged one time and place of occurrence, while the proof offered at trial dealt with an entirely different time and place. We conclude that this discrepancy falls far short of the Tribes' requirements of stating clearly in the Complaint the time and place of the offense as provided in CTC 2.2.01(2) and accordingly violates the due process requirements of CTC 56.02(f) by failing to give proper notice to defendant for the offense charged. *Auburn v. Brooks*, 19 Wn.2d 623 (1992), 41 Am.Jur.2d *Indictments and Information*, 269; 75 Am.Jur.2d *Trials*, 551.

2. Proof of Self-Defense

The defendant in this case has been charged with a violation of CTC 5.1.04, Battery. This code section provides:

> BATTERY - Any person who shall willfully strike another person or otherwise inflict bodily injury, or who shall by offering violence cause another to harm himself, shall be guilty of Battery.

A willful act is an act done knowingly, and purposely without justifiable cause. *Black's Law Dictionary,* 5th Edition. Thus, in this case, it had to be proven beyond a reasonable doubt that defendant Louie did willfully strike the victim without a justifiable excuse.

The law of self-defense justifies an act done in reasonable belief of immediate danger, and if an injury was done by defendant in justifiable self-defense, he can never be punished criminally nor held responsible for damages in a civil action. *Silas v. Bowen*, 277 F.Supp. 314 (1967). The concept of self-defense sweeps broadly across the common law. Elementary tort and criminal law dictates that one may take reasonable steps to defend his person and property against attack. *Acanfora v. Board of Education of Montgomery County*, 359 F.Supp 857 (1973).

Although proof of the non-existence of all affirmative defenses has never been constitutionally required and the long accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by defendant, *Patterson v. New York*, 432 U.S. 197, 210 (1977), this Court finds greater merit in the line of cases which follow the well established reasoning that when a defendant presents evidence in support of

self-defense, the absence of self-defense must be proved beyond a reasonable doubt by the government. *U.S. v Alvarez*, 755 F.2d 830 (1985).

The evidence presented at trial raised questions as to the sufficiency of evidence to prove beyond a reasonable doubt that the defendant was not acting in self-defense; indeed, the record indicates that the victim testified that Louie acted in self-defense. Furthermore, neither the defendant nor the victim could recall who struck the first blow. Evidence was not presented which clearly indicated that Defendant was not protecting himself.

CONCLUSION

We conclude that the evidence in this case did not justify a conviction of the offense charged in the Complaint. We further note that the inadequacy of the complaint cannot be cured by "bootstrapping" the deficient complaint with the allegations in the probable cause affidavit. The charge must, therefore, be dismissed. *CCT v. Stensgar*, 1 CTCR 66 [Trial Court, 1993], *Auburn v. Brooks*, 119 Wn.2d 623 91992). Moreover the insufficient proof of the alleged Battery in light of Defendant's claim of self-defense supports the setting aside of the Trial Court's sentence and judgment, since the Tribes must prove the absence of self-defense beyond a reasonable doubt. *U.S. v. Alavarez, supra.*

The Tribal Court's conviction of Defendant should, therefore, be Reversed and the charge of Battery as alleged in the Complaint Dismissed.

It is So Ordered.

COLVILLE CONFEDERATED TRIBES, Appellant/Appellee,

vs.

Nadene Y. NAFF, Appellee/Appellant.

Case Number APCvF93-12001/02/03, 2 CTCR 08, 22 ILR 6032

2 CCAR 50

[Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellant/Appellee.
R. John Sloan, Attorney at Law, Omak WA, counsel for Appellee/Appellant.
Trial Court Case Number CvF93-12001, CvF93-12002, CvF93-12003]

Arguments heard April 8, 1994. Decided January 26, 1995.
Before Chief Judge Bonga, Judge Collins and Judge Miles.

BONGA, C.J.

This matter came before the Appellate Panel of Chief Judge David Bonga, Judge Brian Collins and Judge Wanda Miles for oral argument on April 8, 1994. After reviewing the file and hearing arguments the Panel has decided to Affirm the decision of the Trial Court to:

1. Dismiss with prejudice all three counts in this matter against defendant Naff.
2. Deny Defendant's request for attorney fees.
3. Dismiss Defendant's counterclaim.

CASE SUMMARY

This civil action for damages was initiated by the Tribe with an allegation that Nadene Naff had violated the Fish and Wildlife Code, CTC Title 7. Specifically, under Chapter 7.8 it was alleged that Nadene Naff had destroyed elk belonging to the Tribe without any justification.

August 2, 1993, defendant Naff filed with the Court an Amended Answer to add affirmative defense and counterclaim. The counterclaim, among other things, alleged that Defendant should recover $24,202.44 due to the damage caused to her property and expenses incurred by the elk that came on to her property destroying fences, eating hay and straw, causing injury to her animals and other property damage and loss, including emotional distress. Further, she sought reasonable attorney's fees.

This matter having come on before the Court for trial on August 11, 1993 and October 12, 1993, the Trial Court held that Mrs. Naff's shooting of the three elk was justified because the animals posed a severe immediate threat to life or property.

The Court found that the attorney's fees of $4,562.00 were reasonable. However, the Court concluded that it was without legal authority to grant that relief. Both the Tribes and Nadene Naff appealed.

DISCUSSION

Standard of Review

The first issue raised is what standard of review should be applied to asserted error in findings of fact, issues of law, and mixed issues of fact and law.

It is argued by the Tribes that the Appellate Court should examine the case *de novo* because the Trial Court's findings and conclusions contain omissions, contradictory findings, clear error, misstatement and misinterpretation of CTC 7.8.08, Wild Animals Depredations. The Tribes ask the Panel to review the record below *de novo*.

Upon examining the Colville Tribal Code (CTC) 1.9.05 the Appellate Panel is directed to:

> Within 45 days from the date of written Notice of Appeal, the Appellate court shall convene for the first time...to hear the case on appeal...At this initial hearing the Appellate Court shall review the record and hear oral arguments...to determine whether or not the facts and/or laws as presented in the appealed case warrant a limited appeal on issues of law and/or facts, whether a new trial should be granted, or whether the appeal should be denied...

In this case, as it does in most every case, the Appellate Panel as directed by CTC 1.9.05 reviewed the entire record which included the tapes of the oral testimony and written records contained in the case file.

The Tribes' opening brief alleged clear error in many of the Trial Court's Findings. Even though the decisions of the United State Supreme Court concerning appellate review are not binding, the Colville Tribal Court of Appeals often looks to the decisions for guidance. The United States Supreme Court has held that findings of fact of a trial court are best examined under a deferential, clearly erroneous standard. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781 (1982). The Tribes' Appellate Court finds that view to be persuasive and adopts the position that findings of fact by the trial court are examined under a deferential, clearly erroneous standard.

The Panel also finds sound reasoning in the position that questions of law are reviewed under the non-deferential, *de novo* standard. *United States v. McConney*, 726 F.2d 1195 (9th Cir. 1984).

The Panel finds that this case is not an appeal that is restricted to a question of fact or a question of law. The Panel views this case as one which involves a mixed question of fact and law. The Appellate Court agrees with the Tribes position that it is not fairly possible to adequately review the intertwined record of fact and law under two different standards. The Appellate Court does believe that it is possible and required of the Court's review to reach a fair and complete decision that is supported by the record, even if that review includes an intermingling of two or more different standards that have been adopted by foreign jurisdictions.

It is the belief of the Panel that the appropriate standard of review for a mixed question may be determined by reference to the principles which underlie the established rules of standard of review jurisprudence; when the concerns of judicial administration favor the trial judge, his determination should be subject to clearly erroneous review, and when the concerns of judicial administration favor the appellate court, the district judges determination should be subject to *de novo* review *U.S. v. McConnev*, 728 F.2d 1195 (1984), *cert den.* 105 S.Ct. 100.

Findings of Facts

As to the alleged Error of Finding No. 4 concerning Mr. Naff's contact with Tribal Fish and Game during the preceding summer of the time period in question the Panel believes there is evidence in the record to support this finding. The Panel does agree with the Tribe's counsel that the materiality of the finding is questionable, but the Panel believes that there was sufficient evidence to support this finding.

Finding No, 6 regarding whether there were "herds" or "herd" is not an error of such magnitude that the Trial court should be corrected. The Panel believes that the Plaintiff's issue with Finding No, 6 relates more to semantics than materiality of the finding.

Findings No. 7 and No. 14 were not appealed by Plaintiff. It is the position of the Panel that the Panel will not review findings which were not raised in Plaintiff's appeal.

The Panel found that Finding No. 8 regarding fencing and defendant Naff's efforts to chase elk from the haystack is supported in the evidence by the tape recording of the trial. The Panel does not feel that it is significant that the findings stated that defendant Naff placed dead animals around the stacks instead of reciting that the defendant had trailed blood and guts of one cow around one haystack. The Panel believes that the relevancy of alleged error in Finding 9 is not that elk had destroyed pastures, but rather that the defendant constantly attempted to

thwart the elk from feeding at the hay stack. That is, the Finding is significant as to Naff's state of mind that elk were present, and consuming forage in the pasture.

The plaintiff's emphasis on the word immediately is misconstrued as to Finding No. 11. The Panel believes that immediately should be interpreted in the context in which it was used. Here usage of the term "immediately" followed by the phrase "on a nightly basis" indicates the time frame that Fish & Wildlife personnel responded.

Usage of "immediately" referring to when the elk returned to the hay stacks following hazing might have meant minutes, hours, but in view of the other findings, probably does not indicate days, When the finding is read in context, it is not clearly erroneous.

Plaintiff argues that the record does not support Finding No. 12 that states that elk consumed large amounts of hay each night. The Panel disagrees with the plaintiff and holds that the record can be interpreted that the hazing methods used by Fish and Wildlife were unsuccessful and that the elk did return and continued to consume large amounts of hay each night.

Finding that the elk consumed a large amount of hay "every night", as opposed to "almost every night" is no basis for reversal. The relevance here goes to Naff's state of mind which, the record indicates, was impacted by a sequence of events, culminating in shooting the elk. The distinction of "every night" from "almost every night" would not have changed Naff's perceptions that she experienced an immediate and substantial threat on the night she shot the elk. In addition, the presence of the elk along with other factors (apparent lack of responsiveness by Fish & Wildlife personnel, weather, frustration, fatigue, concern over her livelihood, etc) probably contributed to her gunning down the elk.

Finding No. 13 is supported by the record. Plaintiff's statements and interpretation that elk were the sole subject of "when large numbers of the animals created a problem they were snared and removed" is misplaced. The record indicates the statements were made in reference to depredation control involving other species of animals and not solely elk.

The Appellate Panel does not believe that Finding No. 15 is misleading. The Panel reads Finding 15 as not being restricted to the testimony of Officer Quill as indicated by Plaintiff's Opening Brief.

Findings No. 17 and 18 regarding the testimony of Fish and Wildlife Biologist Maureen Murphy and the difficulty that Fish and Wildlife was experiencing in obtaining supplies was supported by the record. The Panel does not agree that Findings 17 and 18 are meritless.

Support for Finding No. 23 regarding Mr. Katich's ranching experiences and past history of elk problems was clearly found in the record. The Panel does not agree with Plaintiff's contention that Finding 23 is not supported by the evidence.

The Plaintiff also contends that Finding No. 24 is not supported by the evidence on record. Plaintiff again makes objection to the reference of herds rather than only one elk herd. The Panel does not give much weight to the argument as the Panel views semantics as the major basis to this argument.

Plaintiff's objection to Finding No. 25 is misplaced, as the Finding does not indicate that the defendant expected a total demise of her herd of cattle. The Finding should be read as indicating that loss of her hay would lead to a loss of cattle which would adversely impact her financial investment in such a manner that the defendant would have a negative cash flow. The economic loss would amount to a total demise of the value of her herd and failure of her ranching operation. The Panel feels the record does support the Trial Judge's conclusion by way of reasonable inference from the evidence.

Finding No. 27 does comport with the evidence in the record. Plaintiff argues that the Trial Judge's Finding indicated that there was a distinct sequence of events. Finding No. 27 does not indicate that there was a definite

timeline of events. The Finding identifies numerous facts which are supported by the record. The Panel rejects Plaintiff's interpretation of Finding No. 27.

Plaintiff contends that Finding No. 28 is contrary to the evidence. The Panel does not agree. The record supports the Finding that the elk had either eaten or destroyed large amounts of Defendant's hay which was intended to be used as feed for Defendant's cattle. See also discussion concerning Finding No. 20, *supra*.

The Panel believes that Finding No. 29 is supported by the record of Defendant's testimony. The Panel finds that Plaintiff's position is incorrect as to Finding No. 29.

It appears to the Panel that Finding No. 30 is discussing the situation immediately following the shooting of the elk. Plaintiff asserts that Finding No. 30 refers to events of the days following the shooting and is clearly erroneous because the Finding overlooks testimony of witnesses who continued to haze after the night of January 3, 1993. The Panel believes that the Plaintiff is "blowing smoke" to support the position that Finding No. 30 is further evidence of the Trial Judge's overwhelming inaccuracy which would support the Appellate Panel overruling the Trial Court's decision. The Panel disagrees with Plaintiff's position.

Finding No, 31 is supported by the evidence. The Panel interprets the Finding to be correct as Officer Finley is an employee of the Fish and Wildlife Department who received Defendant's report after midnight which could be said as the beginning of the following business day.

The Panel finds that Finding No. 32 is supported by the evidence on record. The Panel believes that Plaintiff's concern with the Finding is over the use of the word "immediately". It appears that the Plaintiff would have the Panel interpret "immediately" in a literal sense, without allowing the trial judge judicial license in writing the Trial Court's opinion.

The Panel does not agree that Finding No. 34 is not supported by the record. As indicated by the Plaintiff a Declaration of Fees and Costs was submitted to the Court. The Panel follows the widely held rule that an Appellate Court will not second guess a Trial Court's finding of reasonableness which is within the sound discretion of the court.

It is the opinion of the Panel that Findings No. 19, 21 and 33 were clearly erroneous. However, the Panel finds that the errors, if committed, were harmless as they were not of such magnitude that the Trial Court's decision should be overturned.

Plaintiff also contends that Finding No. 20 which identified 75 tons of hay eaten or destroyed by the elk is not supported by the record. The Panel does not believe that the testimony need be dissected and examined with a microscope to determine an exact figure. However the Panel agrees with the Plaintiff that the record fails to support the exact figure of 75 tons. The Panel holds that the record supports the findings of the Trial Judge which indicate that a substantial amount of hay was lost to elk depredation. Having reviewed the entire record, we conclude that the error was harmless as that variance in the amount of hay destroyed would not substantially affect the totality of circumstances which lead to the actions of Naff.

The Appellate Court finds merit in the rule that a Trial Court's Findings of Fact are presumed to be correct and should not be set aside unless clearly erroneous. *Lowden v. Hanson*, 134 F.2d 348 (5th Cir. 1943). Findings of Fact by the Trial Judge shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the Trial Court to judge the credibility of witnesses, and therefore, the Findings of Fact are presumptively correct. *J. A. Jones Construction Co. v. Englert Engineering Co.* , 438 F.2d 3 (6th Cir. 1971). We adopt the view that when the Trial Court's findings are clearly erroneous, if we are convinced after reviewing the entire record, the error would not affect the outcome of the case, the error is harmless.

The Panel therefore rejects the Plaintiff's allegations that the above Findings except for Findings 19, 20, 21 and 33 are not supported by a preponderance of the evidence. As to Findings 19, 20, 21 and 33 the Appellate Panel finds that the alleged errors were not of such magnitude that the Trial Court's judgement should be overturned.

CONCLUSIONS OF LAW

The Appellate Panel does not agree with Plaintiff's allegations that the Trial Court should have made findings and conclusions regarding each animal killed. The findings made by the Court are applicable to each animal shot for purposes of this case. It would be unreasonable to force the Trial Court to make such findings and conclusions in this case where all three animals were located in the same vicinity and shot within the same questioned occurrence. If the shooting had occurred at different locations or at different time periods then there would have been a need to make independent findings and conclusions for each animal shot. That was not the case in this instance.

In the case below there has been a violation of CCT Code, Chapter 7.8 with the killing of three elk by the defendant. The defendant has created a complex case by pleading a defense of necessity which forces the Court to examine the defendant's circumstances at the time of the killing and determine whether or not the defendant was faced with circumstances of such duress that the defendant had to take the challenged actions in order to preserve her life and/or property.

The mixed question of exigency is rooted in constitutional principles and policies. Like many such mixed questions of fact and law, its resolution requires us to consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests. In particular, its resolution requires that we strike a balance between two sometimes conflicting societal values. *United States v. McConney*, 728 F.2d 1195 (1984).

In the case below the plaintiff argues that by following the rules of construction provided by Tribal law, it is clear that the one exception wherein a property owner may injure or kill a depredating wild animal must be a situation of necessity, i.e., wherein, if the depredating wild animal is not injured or killed immediately, the resulting harm to life or property will be severe. The Panel accepts the plaintiff's position and the general rule stated at 35 Am. Jur. 2d Fish & Game S. 37 (1967), that a "statute forbidding the killing of game under penalty does not apply to a killing which is necessary for the defense of person or **property** (emphasis added)."

The Constitution of the Colville Confederated Tribes states in the Preamble:

> We, the people of the Colville Reservation in the State of Washington, in order to form a recognized representative council to handle our Reservation affairs, and in order to **improve the economic condition of ourselves** and our posterity, do hereby establish this Constitution and By-Laws. (emphasis added)

In Article I - Purpose the Colville Tribes Constitution declares:

> The object and purpose shall be to **promote and protect the interests of the Colville Indians**... (emphasis added)

The Appellate Panel agrees with the plaintiff that the Tribal Code must be construed as a whole to give effect to all parts in a logical, consistent manner. It is the opinion of the Appellate Panel that the Trial Court's interpretation of CTC 7.8.08(a) is consistent with the goals and purposes of the Colville Tribe. Defendant's actions were to protect herself by insuring the continued growth of her economic condition, which as a Tribal member would promote the interests of the Colville Tribe.

Findings of fact may be sufficient if they permit a clear understanding of basis of trial court's decision... *Featherstone v Barash*, 345 F.2d 246 (10th Cir. 1965). The Appellate Panel holds that the Trial Court did not err in

its findings of fact and conclusions of law that the elk were an immediate threat to the defendant and defendant's property and that the killing was done to prevent severe and immediate threat to life and property of the defendant. The destruction of the animals was done in direct response to the severe, immediate threat to life and property and that the defendant took every reasonable step necessary to alleviate the severe immediate threat to life and property presented by the elk before the elk were killed.

DEFENDANT NAFF'S APPEAL OF CONCLUSIONS OF LAW 6 & 7

Defendant's appeal of the Trial Court's Conclusion of Law 6 must also fail. Sovereign immunity precludes bringing suit against and/or recovering attorney's fees from the Confederated Tribes of the Colville Reservation, unless there is an express waiver. The Sovereign Immunity statute found at CTC 1.1.08 states:

> Except as required by federal law, or the Constitution of the Colville Confederated Tribes, or as specifically waived by a resolution or ordinance of the Council specifically referring to such, the Colville Confederated Tribes shall be immune from suit in any civil action, and their officers and employees immune from suit for any liability arising from the performance of their official duties.

The language of the statute states clearly that Plaintiffs are protected from being sued without their consent. *Stone v. Somday*, 10 ILR 6039 (1983); *Colville Business Council v. George*, Tribal Appellate Court, Case No. APCV84-402 [1 CTCR 19, 1 CCAR 15, 11 ILR 6049].

The law is well-established that for any action to be brought against a tribe there must be an express and unequivocal waiver of sovereign immunity. *Fluent v. Salamanca Indian Leasee Authority*, 928 F.2d 542 (2nd Cir. 1991), *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). A waiver of plaintiff's sovereign immunity is valid only if it is clearly expressed in a resolution or ordinance passed by the Tribal Business Council. CTC 1.1.06.

The defendant has presented no argument based in law to support her position that the Court hearing the evidence on the alleged Fish and Wildlife violations had any authority to award attorney fees. The Tribes' sovereign immunity protects Plaintiffs from an award of attorney's fees and costs, and without an express waiver, the Court has no authority to award such fees and costs. *Fitzgerald v. United States Civil Service Comm'n*, 554 F.2d 1186 (D.C. Cir. 1977). The Trial Court properly found that it was without authority to award attorney's fees pursuant to CTC 7.11.07(c).

Defendant Naff's Counterclaim

At the beginning of trial, the Tribe argued to strike the counterclaim of Naff who had advanced the theory of "taking". Mrs. Naff contended at the hearing that she had sustained over $20,000.00 in loss as a result of the activity of the elk. In effect, the private property of the defendant that was damaged or destroyed, i.e. the private property by way of hay, water, labor and the like, constituted a taking without just compensation. Defendant Naff stated that this action was a clear taking of private property without just compensation.

Defendant Naff argues that Article V of the Constitution and Bylaws of the Colville Tribes, which were written in response to the Indian Reorganization Act of 1934, 25 U.S.C. 461-479, requires the legal authority under which the Court operates and the laws that the Business Council enacts to be "subject to limitations imposed by the Constitution and statutes of the United States. Naff argues that the Tribes' (legislative and) rule making authority is subject to limitations imposed by the Constitution of the United States and Amendment V is specifically set out in the Tribal Constitution.

Defendant argues that Article V of the Constitution and By-Laws of the Colville Tribes of the Colville Reservation consents to suit and authorizes Defendant's counterclaims. The Appellate Court does not agree and

holds that Article V, Section 1 of the Tribes's Constitution is to be interpreted as restricting the Tribes' sovereignty to any limitations which are explicitly waived by statutes to the Constitution of the United States.

Acceptance of the argument presented by defendant Naff would fly in the face of the established basic principle of Federal Indian law that a tribe may not be sued unless the tribe has specifically consented to such a suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977). The language found in Article V, Section 1 does not explicitly waive the Tribes' immunity from suit.

The language of Article V, Section 1 of the Tribes' Constitution authorizes the Business Council to have the power to waive the Tribes' immunity to suit. The language does not explicitly state that the Tribes' sovereign immunity is waived. Without the specific waiver of immunity from suit the action for a "taking" must fail.

In discussing the ramifications of the Indian Reorganization Act, 25 U.S.C. 461-479, Felix S. Cohen's Handbook of Federal Indian Law, 1982 Edition states at page 326:

> Those tribes electing to form section 17 business corporations received a charter drafted by the Bureau of Indian Affairs. These charters often contain a clause allowing the corporation to sue or be sued. Some courts have held this language to be a waiver of the immunity of the tribal corporation. But this waiver is limited to actions involving the business activities of the section 17 corporation...This should not broaden the consent provision, because congressional authority for the consent to suit is clearly predicated on the existence of two different organizations and is limited to business transactions. **Any action against the tribe acting in a governmental capacity is beyond the scope of the waiver and should be barred.** (emphasis added)

Indian Tribes consistently have been recognized, first by the European nations, later by the United States, as "distinct, independent political communities" *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty. *United States v. Wheeler*, 435 U.S. 313, 323-24.

Regulation and protection of reservation property are essential functions for a tribe. A primary purpose of creating reservations as enclaves where tribes retained sovereignty was to assure Indians sufficient control so that they could use their reservations to become economically self-sustanining...Protection of a tribe's resources is an internal affair over which a tribe's legislative jurisdiction necessarily extends. *Cohen*, *supra*, p.25.

The Colville Tribal Council was within its power to establish a Law & Order Code which regulated hunting and fishing on the Reservation. Likewise the Tribal Council was within its power to establish exceptions to the general rules and regulations, while maintaining appropriate control over Tribal resources.

The United States Supreme Court has held that Indian tribes enjoy sovereign immunity from suit similar to that of the United States. *Santa Clara Pueblo, supra., Puvallup Tribe, supra., United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940). This immunity extends to counterclaims such as defendant Naff's counterclaim for a "taking". *Id.*

The Appellate Court rules that the Trial Court correctly applied the law when it denied hearing the counterclaim, as the Tribes have not waived their sovereign immunity and have not granted authority to a court hearing evidence on a fish and wildlife infraction to entertain a counterclaim. Indian Tribes, like other sovereigns, cannot be sued without an "unequivocally expressed" waiver of sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, (1978)

The sovereign immunity of the Colville Tribes governs here. Sovereign immunity bars any suit of the Tribes without their consent and bars an award of attorney's fees and costs against the Tribes. The law is well-settled that only an express and unequivocal resolution of the Tribes will serve to waive the immunity. Thus, this Court

affirms the decision the Trial Court on the issue of the counterclaim and attorney's fees and costs, as the decision of the Trial Court is well-founded under the law.

It is so Ordered this 22nd day of January, 1995 that the decision of the Trial Court in this matter is Affirmed.

Fred CONDON, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP94-026, 2 CTCR 07, 22 ILR 6038

2 CCAR 58

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Wayne Svaren, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 94-17035]

Argued January 13, 1995. Decided February 22, 1995.
Before Chief Judge Bonga, Judge McGeoghegan and Judge Miles

BONGA, C.J.

The Appellate Panel of Chief Judge David Bonga, Judge Wanda Miles and Judge Earl McGeoghegan convened for Oral Arguments in this matter on January 13, 1995 at the Colville Tribes Appellate Courtroom. In attendance were Jeff Rasmussen attorney for the Appellant and Wayne Svaren, attorney for Appellee.

After a thorough review of the file and consideration of oral arguments the Appellate Panel has decided to Reverse the Judgment and Sentence, in Case No. 94-17035, against Defendant [Condon], and hereby Dismisses the charge of Driving While Suspended.

FACTS

On or about the 21st day of January 1994, Defendant was stopped within the Colville Reservation boundaries for driving a vehicle with only one headlight. Upon further investigation the stopping officer was informed that Defendant's driver's license was suspended. The defendant was cited for driving a vehicle while his license was suspended. On April 28,1994, this matter proceeded to a judge trial, Judge Stewart presiding.

At trial, over Defendant's objection, the prosecution introduced a CCDR of a Fred Condon, and Defendant was convicted based upon that CCDR which showed at a Mr. Condon's license was suspended.

DISCUSSION

In *LaCourse v CCT*, [AP90-13208], 1 [CTCR] 51, [1 CCAR 46] (1991), the Appellate Court adopted Washington state caselaw regarding admissibility of a CCDR, *State v. Monson,* 113 Wn.2d 833 (1989), and this Court held that "without the certified copy of the defendant's driving record, the evidence fails to support a conviction and the conviction should be reversed and the case dismissed."

The Appellate Panel finds sound reasoning in the defendant's position that the prosecution must have a properly admitted CCDR to support the conviction, and if the CCDR was not properly admitted, the case should be reversed. *Washington v. Markley*, 34 Wn.2d 766 (1949).

The court records for this case support the defendant's position that there was insufficient evidence at trial which directly tied the CCDR offered as evidence as being the CCDR for defendant Fred Condon. The prosecutor's attempt to utilize information from the defendant's arraignment is an attempt to "bootstrap" the required evidence needed for a conviction. The Appellate Panel firmly believes that it is the Tribes' burden to present sufficient and appropriate evidence during a criminal trial to obtain a conviction for a crime where the defendant is facing incarceration and substantial fines. The Appellate Panel holds that the Tribal prosecutor must meet the requirements delineated at Colville Tribal Code (CTC) 2.6.03 which states:

The Court shall require the charge to be proved beyond a reasonable doubt.

The Panel rules that the Tribes' have failed to meet that requirement in this case.

The Panel's position on the arraignment information is that the information is subject to "use immunity" which protects a defendant's right to remain silent so that "no person shall be compelled in any criminal case to be a witness against himself." In this case use immunity applies as the Panel does not believe that a defendant should choose between answering the Court's bail information questions, thereby admitting essential parts of the prosecution's proof, or remaining silent and risking being denied bail.

Defendant Fred Condon's conviction and sentence for Case Number 94-17035 is vacated and the charge of Driving While License Suspended or Revoked is dismissed with prejudice.

James WILEY, Appellant, AP93-16237
Phyllis CARDEN, Appellant, AP94-001,
Travis MICHEL, Appellant, AP94-006,
Christopher MONAGHAN, Appellant, AP94-007,
John SAXA, Appellant, AP94-008,
Sylvester SAM, Appellant, AP94-009, AP94-010,
Steven CHARLEY, Appellant, AP94-015
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
2 CTCR 09, 22 ILR 6059
2 CCAR 60

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Andrea Geiger, Office of the Reservation Attorney, Colville Confederated Tribes, Nespelem WA, *amicus curia*e.
Trial Court Case Numbers: 93-16237, 92-15387 (001), 93-16277 (006), 94-17001 (007), 93-16263 (008), 92-15414/15 (009), 92-15379/80 (010), 93-16174 to 16177 (015)]

Arguments heard June 24, 1994. Decided March 27, 1995.
Before Presiding Justice Collins, Justice Bonga and Justice Nelson

COLLINS, P.J.

These eight consolidated criminal appeals have come before the Appellate Panel of [Justice] David Bonga, [Justice] Dennis Nelson, and [Presiding Justice] Brian Collins for review of the appellants' convictions of Driving While Under The Influence Of Intoxicating Liquor Or Drugs (DWI) pursuant to CTC 9.1.01[6], incorporating by reference the Washington state DWI statute, RCW 46.61.502[7]. Although each of these cases are procedurally distinct, the appellants have either been found guilty or have entered guilty pleas to DWI. Those who have entered guilty pleas have reserved their right to appeal common issues of law under the statutory due process provisions of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. Sec. 1302(8) and the Colville Tribal Civil Rights Act (CTCRA), CTC 56.02(b).

In each instance, the appellants contend the trial judge erred by failing to grant their motions to dismiss. They allege that CTC 9.1.01 is an unlawful delegation of Tribal legislative power by the Tribal Business Council to

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6 CTC 9.1.01 provides as follows:

> The substantive provisions of the following parts of the Revised Code of Washington **as presently constituted or hereafter amended** are incorporated herein as provisions of this Code and shall apply to all persons subject to the jurisdiction of the Colville Tribal Court: (emphasis provided)
> RCW Chapters 46.04, 46.37, 46.44, 46.48, 46.61, and RCW 46.20.343, 46.52.010, 46.52.020, 46.52.030, 46.52.035, 46.52.040.

7 RCW 46.61.502 provides as follows:

> A person is guilty of driving while under the influence of intoxicating liquor or any drug if he drives a vehicle within this state while:
> (1) He has 0.10 grams or more of alcohol per two hundred ten liters of breath, as shown by analysis of his breath, blood, or other bodily substance made under RCW 46.61.506 as now or hereafter amended; or
> (2) He is under the influence of or affected by intoxicating liquor or any drug; or
> (3) He is under the combined influence of or affected by intoxicating liquor and any drug.
> The fact that any person charged with a violation of this section is or has been entitled to use such drug under the laws of this state shall not constitute a defense against any charge of violating this section.

the Washington State Legislature. The appellants contend that the Colville Business Council exceeded its authority under the Constitution of the Confederated Tribes (hereinafter "Tribal Constitution"), Article II, sec. 1[8], and Article V, sec. l(a).[9] The appellants argue because the Tribal statute is unconstitutional, the Tribal Court was without jurisdiction to try them or accept their guilty pleas. The appellants also contend that incorporation of the state DWI statute under CTC 9.1.01 does not provide adequate notice of prohibited criminal conduct, and therefore infringes upon their right to due process under ICRA and CTCRA.

I. PROCEDURAL HISTORY

The first of these consolidated cases brought before the Panel on appeal was *James Wiley v. Colville Confederated Tribes*; however, the issues on appeal were initially addressed before the Trial Court in *Colville Confederated Tribes v. Stephen Charley*. For purposes of clarity, which will become apparent, our discussion will begin with *Charley*.

In Case Nos. 93-16174 through 93-16177, Stephen Charley pled guilty to DWI and Driving Without A Valid License, and was found guilty at jury trial of Refusing to Cooperate With A Police Officer and Possession Of Drug Paraphernalia. Although Charley has appealed all four convictions, the only contentions stated in his Notice Of Appeal, briefing, and oral argument concern the DWI conviction in Case No. 93-16174.

With regard to the DWI charge, Charley moved the Trial Court for dismissal supported by a Memorandum Of Law, which has been incorporated by reference in the instant appeal. After full briefing by the defendant, the Tribal prosecutor, and the Office of the Reservation Attorney, representing the Tribal Business Council as *Amicus Curiae*, the trial judge denied Charley's motion to dismiss. Subsequently, Charley entered a plea of guilty to DWI, and, without objection, reserved his right to appeal jurisdictional and due process issues.[10]

In *Colville Confederated Tribes v. James Wiley*, Case Nos. 93-16237 to 39, Wiley entered pleas of guilty to DWI, Driving Without A Valid Operator's License and Resisting Arrest, with reservation of rights to appeal on "constitutional" grounds."[11] (Quotations ours). Similarly, in *Colville Confederated Tribes v. Phyllis Carden*, Case No. 92-15387; *Colville Confederated Tribes v. Christopher Monaghan*, Case No. 94-17001; *Colville Confederated Tribes v. John Saxa*, Case No. 93-16263, each of the defendants entered pleas of guilty to DWI with reservation of rights. In *Colville Confederated Tribes v. Travis Michel*, Case No. 93-16277, the defendant has raised identical issues on appeal from his conviction of DWI at jury trial.

Also consolidated for appeal are *Colville Confederated Tribes v. Sylvester Sam*, Case Nos. 92-15414, 92-15415, involving convictions at bench trial of Driving With A Suspended License and DWI, and *Colville*

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[8] The Constitution Of The Confederated Tribes, Art. II, sec. 1 provides:

> The governing body of the Confederated tribes of the Colville Reservation shall be a council known as the Colville Business Council.

[9] The Constitution Of The Confederated Tribes Of The Colville Reservation, Art. V, sec. l(a) provides:

> The Business Council shall have the following powers, subject to any limitations imposed by the Statutes or the Constitution of the United States, and subject to all express restrictions upon such powers contained in this Constitution and attached By-Laws:
> (a) To confer with the Commissioner of Indian Affairs or his representatives and recommend regarding the uses and disposition of tribal property; to protect and preserve the Tribal property, wildlife and natural resources of the Confederated Tribes, to cultivate Indian Arts, crafts, and culture; to administer charity, to protect [the] health, security, and general welfare of the Confederated Tribes.

[10] See, Defendant's Statement On Plea Of Guilty and Memorandum Of Law, Case No. 93-16174.

[11] See, Defendant's Statement On Plea Of Guilty and Memorandum Of Law In Support Of Plea Of Guilty.

Confederated Tribes v. Sylvester Sam, Case Nos. 92-15379, 92-15280 involving convictions of DWI and Driving With A Suspended License. Those cases have been before the Appellate Panel previously when we affirmed the Judgment and Sentence against Sam in all four cases.[12] Following remand to the Trial Court, Sam filed his Motion For Relief From Judgment in each case, arguing that the Court lacked jurisdiction, as set forth in *Charley* and *Wiley*. The Trial Court denied Sam's request for relief and he has appealed.[13]

II. ISSUES TO BE ADDRESSED

A. Delegation of Legislative Authority

The common thread running through these appeals is whether the Colville Business Council acted beyond its constitutional authority by enacting CTC 9.1.01 which, *inter alia*, incorporates RCW 46.61.502, the Washington statute which prohibits Driving Under The Influence Of Intoxicating Liquor Or Drugs, along with future amendments, as Tribal law.

The appellants do not challenge the facts below; however they contend the Trial Court found that CTC 9.1.01 resulted in a delegation of legislative authority to the State. See, discussion *Infra*. Nor do they challenge the Colville Business Council's authority to incorporate current State law as Tribal law. However, the appellants argue that adoption of prospective amendments to State DWI law, without corresponding Tribal legislation, amounts to an unlawful delegation of Business Council's legislative authority to the Washington State Legislature. The appellants believe under CTC 9.1.01, incorporation of future amendments to the State DWI statute is an abdication of the Business Council's authority under Articles II and V of the Tribal Constitution.

B. Notice

The appellants also argue that Business Council's adoption of prospective State DWI law does not provide them with adequate notice of what conduct is prohibited under Tribal law. Without proper notice, the appellant's contend their right to due process was violated under ICRA, 25 U.S.C. Sec. 1302(8) and CTCRA, CTC 56.02 (b) .

C. Limited Review

Finally, the appellants argue that the Tribes and Amicus are foreclosed from arguing that CTC 9.1.01 did not delegate authority to the State. Appellant's contend that the Tribal Court found CTC 9.1.01 was a delegation of authority to the State legislature, and because the Confederated Tribes has not filed a cross appeal on the issue, both the Tribes and Amicus are now precluded from doing so. Therefore, the appellants urge that the Appellate Panel engage in a limited review of issues on appeal.

III. STANDARD OF REVIEW

The Appellate Panel is directed to review the record below to determine the nature of the appeal. CTC 1.9.05.[14] Although the Court of Appeals will defer to the Trial Court's findings of fact, we engage in *de novo* review

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[12] *[Sam v. Colville Confederated Tribes]*, Case Nos. AP92-15379, AP92-15980; AP92-15414, AP92-15415, [2 CTCR 04, 2 CCAR 37] 21 ILR 6040 (1994)

[13] Although Sam has appealed all four convictions on the ground that the Court lacked jurisdiction, he has advanced no legal theory or persuasive argument that the Tribal Court lacked jurisdiction or erred in denying his Motion For Relief from Judgment concerning his two convictions for Driving With A Suspended License.

[14] CTC 1.9.05 provides, in relevant part:

of when the assignments of error involve issues of law. *Colville Confederated Tribes v. Naff*, APCvF 93-12001-12003, [2 CTCR 08, 2 CCAR 50, 22 ILR 6032] (1995).

The appellants have presented questions on this appeal bearing directly on the limits of the Business Council's constitutionally-based legislative authority and whether their statutory due process rights have been violated under both Tribal and federal law. The Trial Court's analysis and conclusions concerning constitutional limitations placed upon the Business Council, and whether they have been exceeded, require that the Court of Appeals examine the statute in light of the powers vested in the Business Council by the Tribal Constitution, and the specific limitations alleged to have been exceeded.

Moreover, because the appellants contend that enactment of CTC 9.1.01 resulted in an abdication of the Business Council's legislative authority, the Panel must determine whether a transfer of law making power has occurred. In addition, we must determine whether the incorporation by reference of future amendments to the State DWI statute under CTC 9.1.01 provided notice of what conduct was prohibited consistent with the appellants' due process rights.

The conclusions reached by the Trial Court as to whether CTC 9.1.01 resulted in a transfer of power, and if so, whether the Business Council exceeded its constitutionally-based authority, as well as the effect on the appellants' due process guarantees are issues of law falling within the purview of appellate review. When we are called upon to interpret the Tribal Constitution and whether Tribal legislative authority has been exceeded, the Appellate Panel concludes that review of the record below should be *de novo*. Federal courts have reached a similar conclusion with regard to appellate review of district court rulings on questions of federal constitutional law. *United States v. Savinovich*, 845 F.2d 834, 839 (9th Cir.), *cert. denied*, 488 U.S. 943 (1988).

IV. DISCUSSION

A. Scope of Review

The appellants argue that the Tribes and Amicus are precluded from asserting that CTC 9.1.01 did not result in a delegation of legislative authority to the Washington State Legislature. They contend that the Trial Court entered a finding that CTC 9.1.01 resulted in a delegation of authority, and because the appellee did not cross-appeal, neither the appellee nor Amicus may now assert that the statute did not delegate Tribal legislative authority to the State.

The Panel rejects the appellants' contention that the Tribes, Amicus, or the Court of Appeals is so restricted. Our review must, in part, focus on the effect of enacting CTC 9.1.01. This means, in the first instance, that a determination must be made whether the statute resulted in the transfer of any authority to the State.

In addition, the question whether a delegation occurred has been brought before the Panel by the appellants, who have incorporated by reference their briefing from the proceedings below.[15] The appellants' assertion that through the representative form of government adopted by the Confederated Tribes, the Colville Business Council was not authorized to delegate its legislative authority, begs the question whether a transfer of power occurred.

Under the particular circumstances of this case we reject the appellants' contention that, "[F]ailure of appellee to assign errors waives presentation of those errors in the appeal." Appellants' Reply Brief at 2, citing 5

[T]he Appellate Court shall review the record and hear oral arguments of counsel to determine whether or not the facts and/or laws presented in the appealed case warrant a limited appeal on issues of law and/or facts, whether a new trial should be granted, or whether the appeal should be denied.

[15] Defendant Stephen Charley's trial Memorandum Of Law in *Colville Confederated Tribes v. Stephen Charley*, which was incorporated by reference and made part of the record on appeal by Appellant James Wiley's Memorandum Of Law at 1.

Am. Jur. 2d sec. 653. Rather, CTC 1.9.05 provides the discretion to examine the entire record below. See, Standard Of Review, *supra*.

The Panel notes that, for those cases other than their DWI convictions, the appellants have not briefed the various legal issues raised in their Notices Of Appeal. Accordingly, the Panel holds that those appeals been waived by the appellants.

B. Delegation of Legislative Authority

The appellants contend that the Colville Business Council, through enactment of CTC 9.1.01, which *inter alia* incorporates by reference current and future versions of the Washington DWI statute, has delegated its law making authority to the Washington State Legislature. They argue that the delegation of legislative power is unlawful.

A review of the prohibition against unlawful delegation of legislative authority shows that the doctrine was originally based upon the law of agency. The principle has long been applied to prohibit the transfer of power within the federal government. *Shankland v. Washington*, 5 Pet. 390, 395 (1831). The delegation doctrine is applied to federal constitutional law in support of the view that each of the tripartite branches of government is the sole repository of power flowing from the United States Constitution.

Generally, the power constitutionally delegated to the legislative, executive and judicial branches of government may not be transferred between branches of government or to other governments. Schwartz, *Administrative Law, 2d*, 35 (1984). As stated by Justice Harlan, "That Congress cannot delegate legislative power...is a principle universally recognized as vital to the integrity and maintenance of a system of government ordained by the Constitution", *Field v. Clark*, 143 U.S. 649, 692 (1892).

The obvious difficulty in applying the above principles of law to the instant cases is that the United States Constitution is not binding on the Confederated Tribes. *Talton v. Mayes*, 435 U.S. 376 (1896). Tribal law was not ordained by nor did it emerge from the United States Constitution, but has its origins in deep history, long before the Constitution was written. From its earliest decisions concerning Indian tribes, the United States Supreme Court has recognized that tribes are recognized as domestically dependent sovereigns, and that dealings between the federal government and tribes is much like dealing with a foreign government. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

1. Limitations Imposed By the Tribal Constitution

The *Constitution Of The Confederated Tribes Of The Colville Reservation*, Article II, sec. 1 provides that the Colville Business Council shall be the governing body of the Confederated Tribes. Thus, the Confederated Tribes has delegated to the Business Council the power to govern its affairs. It is clear that the Confederated Tribes provided for the election of the members of the Colville Business Council. See, *Constitution of the Confederated Tribes*, Article III and Amendments VI, VII. In that regard, the appellants' contention that the Tribal Constitution has provided for a representative form of government is correct.

The powers and duties of the Colville Business Council are enumerated in Article V. Those powers include the following, "[T]o protect health, security, and general welfare of the Confederated Tribes." Art. V., sec. l(a). The powers delegated to the Colville Business Council are quite broad and include implied authority to carry out its duties and responsibilities under the Tribal Constitution. Those implied powers necessarily include the authority to enact legislation to protect the security and general welfare of the people.

The Tribal Constitution also contains express restrictions on the exercise of power by the Colville Business Council, which include limitations imposed by the United States Constitution, Statutes of the United States, and

those imposed by the Constitution and Bylaws. Article V, sec. 7. The appellants have not directed the Court's attention to, nor has the Court found, any provision of the Tribal Constitution which would expressly limit the Colville Business Council's authority to incorporate by reference laws of another jurisdiction as Tribal law.

2. Limitations Imposed by the United States Constitution

Our inquiry as to what limitations have been imposed upon the Colville Business Council by the United States Constitution must begin with a discussion of long-standing principles of Indian law. Indian tribes have enjoyed the power of self-government long before the Constitution of the United States. *Talton v. Mayes, supra*. Although *Talton* is generally cited for the proposition that the Bill Of Rights does not apply to Tribes, the court also recognized that the powers of Indian sovereigns do not arise from the United States Constitution. That principle is entirely consistent with prior holdings of the United States Supreme Court. See, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *United States v. Kagama*, 118 U.S. 375 (1886).

There is very limited reference to Indian tribes in the United States Constitution. The Indian Commerce Clause provides: "The Congress shall have Power...To Regulate Commerce...with the Indian Tribes." U.S. Const., art. 1, sec. 8, cl. 3. While the Clause has been interpreted as providing the Congress with plenary power over Indian affairs, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), there is nothing the Indian Commerce Clause which, in itself, could conceivably be construed as expressly limiting the legislative authority of the Colville Business Council. Therefore, any federal constitutional limitations upon the Business Council's legislative authority must arise indirectly, from the Congress' exercise of plenary power over Indian affairs.

In historical dealings between the United States and Indian tribes it has long been recognized that:

> [Indians] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

United States v. Kagama, supra at 381.

The United States Supreme Court has also recognized that because inherent power of the tribal sovereign does not flow from a delegation of power from the United States, the limits of tribal powers are not easily defined. *United States v. Wheeler*, 435 U.S. 313 (1978). See also, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 303 (1978). Any congressionally imposed limitations on the tribal sovereign's powers of self-governance must be clearly indicated. *Kimball v. Callahan*, 590 F.2d 68 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979).

3. Limitations on Tribal Legislative Authority Arising Under Federal Statutes

Although the Congress has enacted legislation limiting tribal sovereignty, intrusions upon tribal authority to make and interpret its own laws have been minimal. For example, the Indian Civil Rights Act, 25 U.S.C. Sec. 1301-1303, was enacted for the dual purpose of affording protections similar to certain provisions of the Bill Of Rights, while promoting tribal self-governance and cultural autonomy. See C*olville Confederated Tribes v. Sam, supra*, n.7; *St. Peter v. Colville Confederated Tribes*, [AP93-15400, 15507-10, 1 CTCR 75, 2 CCAR 2], 20 ILR 6108 (1993). The appellants have cited no acts of the Congress which would limit the Confederated Tribes' authority to make their own laws and be governed by them, with the exception of ICRA. The Court has found no authority which addresses the question whether Tribal authority has somehow been constrained to the extent that the Tribal legislature may not incorporate by reference laws of another jurisdiction as Tribal law. The Confederated Tribes has

adopted a civil rights act which is similar to ICRA. CTC 56.01 *et seq*. Therefore, unless the ICRA or CTCRA constrains the Colville Business Council from prospectively adopting Washington law as Tribal law, the appellants' rights have not been offended.

4. Limitations On Tribal Legislative Authority Arising From Other Sources

The appellants contend that limitations placed upon the legislative authority of various states by their respective constitutions should also apply to the Confederated Tribes. The appellants concede the Tribal Constitution contains no express limitation on the Colville Business Council's authority to adopt future amendments to State statutes as Tribal law. Nor have the appellants pointed to any such constitutional limitation concerning the Business Council's authority to delegate its authority. Rather, they rely on case law interpreting the constitutional limitations placed on various state legislative bodies and secondary authority which sets forth the broad general rule that legislatures may not delegate their power to adopt future laws.[16] They argue that since the Business Council has adopted certain State statutes as Tribal law, the Tribal Court should follow decisions of Washington courts in applying the State statutes.

The appellants refer us to 16 Am. Jur.2d Con. Law 343 for the general principle that states may not delegate any of its legislative authority to the federal government. Defendant's trial court Memorandum Of Law, at 2. *Charley, supra*. The appellants also urge us to adopt *State v. Douqall*, 89 Wn.2d 118, 122-23 (1977), and other authority, which held that the Washington State Legislature is prohibited from incorporating future federal rules, regulations, or statutes because doing so is an unconstitutional delegation of legislative power.[17] However, the appellants' point us to no specific authority which says State law should circumscribe the legislative authority of the Colville Business Council.

We again emphasize that the power of the Confederated Tribes to govern does not derive from the Constitution of the United States or the State of Washington. *Santa Clara Pueblo v. Martinez, supra*. Rather, the power of the tribal sovereign to govern arises from the inherent sovereignty of the tribe, which predates the United States Constitution and the State of Washington. Hence, the foundations of Tribal law are not shaped from legal doctrine developed by state and federal courts defining the limits of legislative power under their respective constitutions.

The principle of inherent tribal sovereignty and powers of self-government are recognized by the Congress, and is reflected in the Indian Civil Rights Act. The legislative history of the Act makes it clear that Congress intended that certain principles embodied in the Bill of Rights to protect the interests of litigants appearing in the Tribal Court. However, Congress made it equally clear those principles should be applied with minimal intrusion upon tribal sovereignty, leaving intact the tribal sovereign's authority make its own laws and govern its affairs consistent with cultural autonomy. Because Congress emphasized personal rights against a backdrop of tribal self-governance and cultural autonomy when it enacted ICRA, it appears Congress recognized that deep historical knowledge of tribal ways, the tribes and their courts have something to offer the dominant culture and its tripartite government. Therefore, this Court does not, without close examination, adopt common law legal doctrine flowing from the Bill of Rights as defining limitations of Tribal sovereign power without first analyzing whether it is consistent with clearly established principles of tribal policy.

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[16] Defendant Stephen Charley's trial Memorandum Of Law in *Colville Confederated Tribes v. Stephen Charley*, which was incorporated by reference and made part of the record on appeal by Appellant James Wiley's Memorandum Of Law at 1.

[17] Appellants' trial court Memorandum Of Law at 3, *Colville Confederated Tribes v. Stephen Charley*.

We note that while CTC 9.1.01 incorporates certain State statutes as Tribal law, it does not direct the Tribal Court to apply Washington case law with regard to application of the incorporated statutes. There is also no indication that, by incorporating State statutes as Tribal law, the Business Council intended the Tribal Court to adopt and apply state and federal constitutional standards. Although the Tribal Court may adopt Washington case law with regard to application of statutes incorporated as Tribal law, it is not required to do so. If the Tribal Court were required to do so the result would be to incorporate State constitutional principles which may be at odds with the protections provided under ICRA and CTCRA. Therefore, the Panel rejects the appellants' argument that principles of State case law should be controlling to define the Business Council's authority with regard to the delegation question.

5. The Delegation Doctrine Under Federal Law

The Tribes and Amicus point out that while incorporation of future laws may be considered an unlawful delegation of legislative power under state law, the practice is not prohibited under federal law. The United States Congress has long incorporated substantive law from other jurisdictions. The Tribes direct our attention to the Assimilated Crimes Act, 18 U.S.C. Sec. 13, which the Congress has adopted state criminal law within federal enclaves, including Indian County, as federal law. Significantly, the Assimilated Crimes Act adopts both contemporaneous and prospective versions of state law as federal criminal law.

Issues of unlawful delegation and notice similar to those raised in the instant appeals were also been raised in a challenge to the constitutionality of the Assimilated Crimes Act. *United States v. Sharpnack*, 355 U.S. 286, 78 S.Ct. 291, 2 L.Ed.2d 282 (1958). Although the Supreme Court in *Sharpnack* addressed due process guarantees arising from the United States Constitution, and the power of the Congress arising from Article I, sec. 8 and Article IV, sec. 3, that case is germane due to the similarity of the issues to those now before the Court.

In its discussion of the Assimilative Crimes Act, the *Sharpnack* court noted that the Act had been amended a number of times since first enacted in 1825. The amendments were to update the federal law, to the extent reasonably possible, with changes in state laws. However, in 1848, Congress adopted the present language which assimilates retrospective, contemporaneous, or prospective state laws as federal law. *Id*. at 292. The Act was intended to provide conformity between the law applicable to federal enclaves and the states within which they are located.

The *Sharpnack* court had no difficulty with Congress' practice of assimilating state laws by reference. The court found assimilated law under the Act to be "as definite and ascertainable as are the state laws themselves." *Id*. at 288. In response to contentions that the Act amounted to an unlawful delegation of federal legislative power to the states, the Court responded as follows:

> Rather than being a delegation by Congress of its legislative authority to the States, it is a **deliberate continuing adoption by Congress for federal enclaves** of such unpre-empted offenses as shall have been already put in effect by the respective States for their own government. (Emphasis provided).

The Court also noted that Congress retained the power to exclude state law from operation of the Act. *Id*. at 288.

The sovereignty of tribal governments has long been viewed as comparable to that of sovereign nations, not as states of the Union. *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1939); *Sekaquaptewa v. MacDonald*, 619 F.2d 801 (9th Cir. 1980); *Chemehuevi Tribe v. California*, 757 F.2d 1047, 1050-51 (9th Cir. 1985); *Evans v. McKay*, 869 F.2d 1341, 1345 (9th Cir. 1989).

The Panel agrees with Amicus that because of the Confederated Tribes' sovereign status, its incorporation of Washington state DWI law by CTC 9.1.01 is analogous to the federal government's practice of adopting state law

as federal law. We maintain the view that unless the Congress has expressly limited the tribal sovereign's authority to govern its internal affairs, the Tribal Business Council has at least as much authority as the Congress with regard to the exercise of its legislative authority. Thus, if the Congress may incorporate by reference contemporary and prospective state laws without violating the delegation doctrine, the Business Council may do the same.

6. Adequate Notice Under Federal Law

The courts have repeatedly held that federal legislation which prospectively incorporates criminal laws of other jurisdictions does not give rise to defective notice as to what conduct is prohibited. See, *Sharpnack, supra*. In *United States v. Lee*, 937 F.2d 1388, 1394 (9th Cir. 1991), the court held that foreign regulations printed in Taiwanese provided adequate notice of prohibited conduct under the Lacey Act.[18] See also, *United States v. 594,464 Pounds Of Salmon, More Or Less*, 871 F.2d 824 (9th Cir. 1989). Significantly, violation of tribal fish and wildlife laws, which are varied and numerous, also give rise to violation of the Lacey Act. 16 U.S.C. Sec. 3372(a) (1).

From the above, we note that under federal law prospective incorporation of state criminal statutes does not offend the United States Constitution as an unlawful delegation of legislative authority to the state. *Sharpnack, supra*. Nor does the Congress impermissibly delegate its authority to a foreign nation when incorporating foreign laws into a federal criminal statute. *United States v. Lee, supra*. The courts have held that due process guarantees are not offended by the practice. This is so even when the foreign law consists of regulations written in a foreign language. *Id*. Moreover, inclusion of tribal laws into a federal criminal statutory scheme is specifically authorized by 16 U.S.C. Sec. 3372(a) (1), and the practice of doing so has been upheld by the federal courts. *United States v. Big Eagle*, 881 F.2d 539 (8th Cir.), *cert. denied*, 493 U.S. 1084; *United States v. Sohappy*, 770 F.2d 816 (9th Cir.), *cert. denied*, 477 U.S. 906.

C. TRIBAL LEGISLATION

1. Delegation of Legislative Authority

The Colville Business Council adopted CTC 9.1.01 incorporating RCW 46.61.502, "as presently constituted or hereafter amended" as a continuing adoption of State DWI law. Through CTC 9.1.03, the criminal laws incorporated by CTC 9.1.01 were established as prohibited acts under Tribal Law.[19] The language of CTC 9.1.01 shows the clear intent of the Business Council was to adopt a standard of prohibited conduct consistent with prohibitions enumerated in incorporated State motor vehicle statutes which would apply on the reservation.[20] In addition, the language of CTC 9.1.01, when read together with CTC 9.1.02, *Infra.*, clearly shows that, absent further legislative action by the Business Council, the Council intended CTC 9.1.01 to act as a continuing incorporation of State statutes as Tribal law.

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[18] The court concluded that, under the facts in *Lee*, the Lacey Act's incorporation of foreign law gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. *Id*. at 1394; See also, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*. 455 U.S. 489, 498, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982); *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972).

[19] CTC 9.1.03 provides as follows: "It is unlawful for any person to operate, drive or move a motor vehicle on the roads of the Colville Indian Reservation in violation of any of the requirements of Chapter 9.1.01 or to do any act forbidden or fail to perform any act required by Chapter 9.1.01."

[20] We note that while CTC 9.1.01 incorporated by reference certain state statutes, it did not incorporate state common law interpretations of relevant state statutes by the Washington courts, nor did it incorporate the Washington State Constitution as tribal law. Thus, the Tribal Court will be called upon to apply the incorporated statutes in light of statutory due process principles and other protections arising from the Indian Civil Rights Act and the Colville Tribal Civil Rights Act.

Although the Business Council has currently adopted the same standards of criminal conduct as utilized under State law for DWI offenses, there is nothing in the Code which indicates that Tribal law making authority was abdicated, or transferred to the State. Other sections of the Code read *in pari materia* with CTC 9.1.01 are revealing in that regard. Chapter 9 of the Code also contains the following sections which are relevant to our inquiry:

> Amendments, additions or deletions to or from such provisions by the State of Washington after enactment of this Code shall become a part hereof for all purposes **unless the Council by ordinance or resolution specifically provides otherwise** (Emphasis provided)

CTC 9.1.02.

> Any of the provisions or portions of the provisions of the Revised Code of Washington which, by their nature, would not apply to the Colville Confederated Tribes, Reservation, or Tribal Court, or the incorporation of which would undermine the underlying principles and purposes of this Code, or which are inconsistent with the provisions of this Title or this Code are not incorporated herein.

CTC 9.1.07

When CTC 9.1.02 and CTC 9.1.07 are read together with CTC 9.1.01, we are lead to the conclusion the Business Council remained very much in control of its constitutionally based power to make laws. The adoption of future laws provision of CTC 9.1.02 incorporates State law "unless the Council by ordinance or resolution specifically provides otherwise."

Our conclusion that CTC 9.1.01 did not delegate legislative authority to the State of Washington is further supported by CTC 1.1.05, which provides as follows:

> The adoption of any law, code or other document by reference into this Law and Order Code **shall in no way constitute a waiver or cession of any sovereign power of the Colville Confederated Tribes to the jurisdiction whose law or code is adopted** or in any way diminish such sovereign power, but shall result in the law or code thus adopted becoming the law of the Colville Confederated Tribes. (Emphasis provided)

The above code sections clearly show that the Tribal Business Council retained the power to revise, alter, and revoke its incorporation of Washington DWI law as Tribal law. Thus, in reading the chapters contained within Title 9 together with CTC 1.1.05, the Business Council only intended that CTC 9.1.01 would serve as an ongoing, deliberate incorporation of State law, and not a delegation of legislative authority.

We also note that CTC 9.1.07 provides a defense to a DWI charge in Tribal Court upon showing that incorporation of all or part of RCW 46.61.502 would "undermine the underlying principles and purposes of this Code, or are inconsistent with the provisions of this Title." The intent of 9.1.07 is that the Tribal Court has been provided with the authority to determine whether the offending provision is not incorporated by reference into the Code.

While the Business Council defined criminal conduct under Tribal law as being the same as State law, for purposes of DWI, it is also significant to note that the penalty provisions under Tribal Law differ.[21] The Business

[21] CTC 9.1.02(b) provides: "Punishment for violations of this Title shall be as follows: Driving under the influence of intoxicating liquor or any drug...shall be punishable by imprisonment for a period not to exceed 360 days, or a fine not to exceed $2,500, or both the imprisonment and the fine."

Council expressly provided the Court with sentencing discretion needed to individualize punishment, along with sentencing alternatives, in conformance with tribal standards. A statement of the Court's sentencing discretion is also found in CTC 9.2.01(d), which provides:

> In addition to any other penalties imposed on a person convicted of a traffic offense, the Court may prohibit or set restrictions on the operation of a vehicle by such person on any road within the jurisdiction of the Colville Confederated Tribes for a period not to exceed one year, or may utilize the provisions for the suspension or revocation of driver's licenses under the laws of the jurisdiction issuing such license.

From the above provisions of the Colville Tribal Law and Order Code, and our discussion of the delegation doctrine under federal law, it appears to the Panel that the Business Council's ongoing adoption of State DWI law is not an unlawful delegation to the Washington State legislature. The Panel concludes that CTC 9.1.01 rationally and uniformly provides a standard of conduct designed to protect residents of the Reservation. Adoption of State DWI law affords persons on the Reservation with the same level of protection from offenders as throughout the State, and allows for uniform enforcement standards.

The United States has long recognized that tribes are similar to foreign sovereigns and are not subject to the constitutional constraints which limit sovereign powers of federal and state governments. No convincing evidence has been presented in any of these consolidated cases that the Confederated Tribes are similarly constrained, either through its Constitution or by acts of Congress.

The appellants have provided no persuasive authority that the Business Council is limited in its legislative authority to delegate its power to any greater extent Congress is constrained under the United States Constitution. We need not quantify the Business Council's power to delegate its legislative authority because we hold, based upon the discussion above, including the reasoning set forth in *Sharpnack, supra*, and from the clear statutory language in Titles 1 and 9, that CTC 9.1.01 does not unlawfully delegate legislative authority to the State of Washington.

2. Notice

The appellants challenge to CTC 9.1.01 as providing inadequate notice of what conduct is prohibited under Tribal law has been addressed and rejected by the federal courts in cases involving the Assimilated Crimes Act, *Sharpnack, supra*, and the Lacey Act, *United States v. Lee, supra*. It has consistently been held that a continuing incorporation of law from another jurisdiction provides sufficient notice for due process purposes under federal constitutional standards. Although the appellants are guaranteed statutory due process under ICRA and CTCRA, no argument has been advanced that they are entitled to greater notice than under federal constitutional standards.

By statutorily incorporating enumerated state criminal statutes, as amended, the Business Council avoided the need for revising the Code each time applicable State law is amended. In doing so, the Business Council also avoided the burden of giving additional notice when State law is amended and provided uniform laws for those driving on and off the Reservation.

In our view, CTC 9.1.01, incorporating RCW 46.61.502, provides sufficient notice to those driving a motor vehicle on the Reservation that they are prohibited, by Tribal law, from driving while under the influence of alcohol to the same extent as they are while driving off the Reservation under the State statute. The Panel concludes that the statutory scheme satisfies due process guarantees under ICRA and CTCRA. Such notice provides a person of reasonable intelligence an opportunity to know the circumstances under which driving a motor vehicle on the Reservation is unlawful, just as it is throughout the State of Washington. In addition, incorporation of the State DWI statute provides a person with a sufficient description of prohibited conduct to prepare a defense. *United States v. Gordon*, 641 F.2d 1281, 1284 (9th Cir.), *cert. denied*, 454 U.S. 859.

Although the Colville Business Council may amend motor vehicle laws on the Reservation, it appears to the Panel that the statutory scheme it has adopted is designed to avoid the very notice problems about which the appellants complain.

While the Colville Business Council's authority to delegate is not co-extensive with that of the United States Congress, we hold that the Council's authority is, unless specifically pre-empted, no less restrictive than that of the Congress with regard to incorporating laws of other jurisdictions. Thus, CTC 9.1.01, incorporating RCW 49.61.502, is a valid exercise of Tribal legislative authority, not an unlawful delegation. The appellants were not deprived of their right to due process since they were provided with adequate notice of prohibited conduct under Tribal law.

For the reasons stated above, the decisions of the Tribal Court are Affirmed.