Henry PAKOOTAS, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case No. AP94-023, 2 CTCR 35, 24 ILR 6113
4 CCAR 1

[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 93-16273]

Argued July 29, 1995. Decided March 24, 1997.
Before Presiding Justice Miles, Justice Bonga and Justice McGeoghegan

Unanimous Panel

BACKGROUND

On August 12, 1993, Henry L. Pakootas appeared before the Colville Confederated Tribal Court. Mr. Pakootas was initially charged with Attempted Criminal Homicide. The Tribes made a Motion to Reduce The Charge To Assault, the Court granted the Motion.

Mr. Pakootas entered a guilty plea to the offense of Assault and was sentenced to: (1) $1,000.00 fine with $750.00 suspended conditionally, and the balance payable by February 12, 1994; (2) Ninety (90) days jail with thirty (30) days suspended; fifty-eight (58) days credit for time served, with him serving the remainder of the jail time immediately. Conditions of the suspensions were: (1) file an alcohol and substance abuse evaluation from TCCS by October 12,1993, and follow recommendations for one year, (2) file progress reports from TCCS on November 12, 1993; February 12, 1994; May 12, 1994; and final compliance report due prior to the Pre-Dismissal Hearing on July 25, 1994. (3) If the defendant is cited for any offenses in any court, he may be brought before this Court to show cause; and (4) $5.00 court costs.

On August 24, 1994, a Show Cause Hearing was set to determine whether the appellant violated the conditions of the suspended portion of the August 12, 1993 Trial Court Order. Mr. Pakootas testified he had pled guilty to Simple Assault in the Federal Court and served a ninety (90) day jail term. He further stated that the federal conviction was only for threatening to beat up Ben Marchand Jr. and this stemmed from the same incident as the Tribal Court matter. On cross examination, Mr. Pakootas further testified that the federal conviction was not related to having a firearm.

The prosecution moved to continue the hearing in order to obtain evidence to contradict Mr. Pakootas' statement regarding the federal matter, the Court denied the prosecution's request.

Following the testimony of Mr. Pakootas, Appellant moved the Court to credit his tribal jail sentence with time he served while in federal custody. The Court denied the motion and reinstated the suspended $750.00 fine, to be paid by August 24, 1995 and imposed a thirty (30) day jail term to be served on weekends. The appellant appeals the Order of August 24, 1994.

CONCLUSION

In *U. S. v. Wheeler*, 435 U.S. 313 (1978), the Supreme Court stated, "When an Indian Tribe criminally punishes a Tribal member for a violation of Tribal Law, the tribe acts as an independent sovereign."

Being an independent sovereign, the Tribal Court has the inherent power to administer appropriate punishment for any violation of Tribal law. This Court must determine if the Trial Court acted accordingly as prescribed by Tribal law and did not abuse it's discretion.

Upon review of applicable Tribal laws, this Court finds its Tribal Code and Tribal statutory laws are silent on this matter. Therefore, this Court must rely on CCT 1.5.05 which states:

> "When jurisdiction is vested in the court, all the means necessary to carry into effect are also governing; and in the exercise of this jurisdiction, if the course of proceedings 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."

It is the opinion of the Court that in order to maintain independence as a sovereign nation; the Tribal Court must strive to protect Tribal interest. In this instance the Tribal Court determined it was not in the best interest of the Tribes to give the defendant double credit for time served while in federal custody. The appellant has not shown any abuse of discretion by the Tribal Court, nor does this Court find any.

For the reasons stated above, the decision of the Tribal Court is Affirmed.

COLVILLE CONFEDERATED TRIBES, Appellants,

vs.

Terrance LARAMIE, Appellee.

Case Number AP97-005, AP97-006, 2 CTCR 65

4 CCAR 2

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

Decided April 8, 1997.
Before Chief Justice Dupris

This matter came before the Chief Justice of the Colville Tribal Court of Appeals upon a Writ of Mandamus filed by the appellant on March 19, 1997 requesting the Court of Appeals to direct the Trial Court to enter a Stay of Proceedings pending the final determination of the appeals filed herein on March 17 and 19, 1997.

The Trial Court denied the Stay of Proceedings based on the finding that the Order upon which the appeal is based is not a "final Order," and, therefore, an appeal was not "perfected."

In reviewing the relevant law in this matter, this Court finds the issue of whether or not an appeal has been perfected, including whether or not the order being appealed is a "final order", is generally within the review of the Court of Appeals and not the Trial Court. *See, Inchelium Water District v. Williamson*, APCV91-11159, [1 CTCR 68, 1 CCAR 68], and *In Re the Welfare of R.W.W.*, APJ91-10008/09/10, [1 CTCR 55, 1 CCAR 49], and *Friedlander-Curry v CCT*, APCV88-8195, [1 CTCR 64, 3 CTCR13, 1 CCAR 64].

The appellant also filed a Motion to Amend the Writ of Mandamus to include the second denial of the Motion to Stay occurring about March 18, 1997. Because of our ruling, such an amendment is not necessary, and was not dealt with in this matter.

Based on the foregoing, now therefore,

It is Ordered, Adjudged and Decreed that the petitioner/appellant's request for a Writ of Mandamus is granted and the Trial Court is directed to enter a Stay of Proceedings pending the final determination of the Court of Appeals in this matter.

Lin SONNENBERG, Appellant,

vs.

The Honorable E. FRY, Appellee.

Case No. AP93-15505/15506, 2 CTCR 36, 24 ILR 6172

4 CCAR 3

[Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Andrea Geiger, Office of the Reservation Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Argued August 26, 1994. Decided April 17, 1997.
Before Presiding Justice Miles, Justice Bonga and Justice Collins

MILES, P.J.

BACKGROUND

On August 9, 1993, a judge trial of the *Colville Confederated Tribes v. Roger Everybodytalksabout* was scheduled. Prior to the commencement of the trial, the prosecutor, Lin Sonnenberg, made a Motion to Dismiss based on insufficient evidence to prove the charges beyond a reasonable doubt. The prosecutor also informed the Court she had released five (5) individual witnesses from their subpoenas. Subsequently, Judge Stewart denied the Motion to Dismiss and then adjourned the proceedings.

It was within a matter of minutes that Judge Fry brought the case back into Court on the same cases as stated above. The prosecutor gave the Court the same information she had presented to Judge Stewart at the prior hearing. The Trial Court continued the judge trial to be scheduled as soon as possible and sanctioned the prosecutor $50.00 per person for each of the five (5) witnesses she had released from subpoenas, payable by September 19, 1993.

On August 19,1993, Judge Fry issued an Order Sua Sponte Reducing Terms. The sanctions were reduced to $25.00 per person for a total of $125.00 payable by September 19, 1993.

On September 3, 1993, the prosecutor filed a Motion for an Order Staying Execution of Order of Terms. Judge Fry signed the Order Staying Execution on September 9, 1993.

On September 10,1993, Judge Stewart signed an Order of Dismissal with Prejudice, and his findings of the denied Motion from August 19, 1993 hearing. The reason for the denial of the motion can be found in paragraph 4 of the Findings, which states “Prosecuting Attorney knew the Court had denied the Motion in the case in December of 1992. The Court feels by waiting to the last day she was expecting the Court to rubber stamp her motion, and this Court cannot nor will not do this.”

DISCUSSION

This Court does not dispute the Trial Court’s inherent power to impose sanctions or terms it deems appropriate at the time of a contemptuous act. The criteria is set forth in CTC § 1.6.07 and CTC § 1.12.03. It is the opinion of this Court that this could have been avoided if the prosecutor had presented some type of evidentiary material, either by oral or written testimony, to Judge Stewart at the time of the trial on August 19, 1993. This would have substantiated the rationale and basis for the prosecutor’s Motion to Dismiss.

Any person who practices before any court system should not assume or anticipate an automatic ruling on any motion. This Court concurs with Judge Stewart’s September 10, 1993 Findings, specifically Paragraph 4. It is the opinion of this Court that Judge Stewart could have used the remedies found in CTC § 1.6.07, 1.12.03, or 1.13.03(1). However, he did not exercise any of these options.

Therefore, it is the conclusion of this Court if the original presiding judge declines to pursue any corrective

measures for contemptuous behavior, such as sanctions as prescribed by law, it is improper for another trial judge to initiate further court proceedings which interfere with another trial judge's judicial responsibilities. By conducting the second hearing, the second judge abused her discretion by rendering sanctions without the proper authority to do so. It is clear from the record that Judge Stewart was never removed from hearing this matter, and there is no Court order authorizing another judge to proceed on his behalf.

ORDER

The Colville Court of Appeals, therefore, reverses the decision of the Trial Court, vacates the Order of Terms dated August 19,1993 and remands to the Trial Court for closure.

Floyd HOFFMAN, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP95-023, 2 CTCR 37, 22 ILR 6127, 24 ILR 6163

4 CCAR 4

[Maureen Rosette, Dana C. Madsen Law Office, Spokane WA, counsel for Appellant.
Steve Suagee, Office of the Reservation Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number CV95-15009]

Arguments heard July 26, 1996. Decided May 5, 1997
Before Presiding Justice LaFountaine, Justice Nelson and Justice Fry

LaFOUNTAINE, P.J.

This matter came before this Appellate panel of Presiding Justice Frank S. LaFountaine, Justice Elizabeth Fry, and Justice Dennis Nelson of the Colville Tribal Court of Appeals, created by the Tenth Amendment[1] (Article VIII-Judiciary) of the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation for Oral Arguments on July 26, 1996. After reviewing the records and files herein, and hearing the Oral Arguments, this Appellate Panel of the Colville Court of Appeals has decided to Affirm the decision of the Trial Court as to the following findings and/or conclusions, that:

1. The appellant, Floyd L, Hoffman, has failed to introduce clear and convincing proof that he is entitled to an increase in blood quantum based upon factual proof of additional Indian blood;

2. The appellant, Floyd L. Hoffman, has neither argued nor presented any tribal, state or federal statute or case law which requires the Tribes in either 1907 or 1937 to afford due process of law to its members in exercising the Tribes' powers of self-government through adoption and reductions of blood quantum conferred through adoption;

3. Appellant, Floyd L. Hoffman, has not pled or raised any customs of the Colville Confederated Tribes related to rights conferred through adoption and blood quantum established through adoption as needed to warrant a hearing pursuant to CTC § 3.4.04 to determine a custom followed by the Colville Confederated Tribes defining rights and status conferred through an adoption in 1907 and defining what rights, if any, are protected during a reduction in blood quantum taking place in 1937; and

4. Appellant's petition for blood degree correction is denied.

Brief Statement of Procedural History

On January 12, 1995, the appellant, Floyd L. Hoffman, and other Petitioners[2] filed a Petition for Blood Degree Correction with the Tribal Court, pursuant to Amendment IX of the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation and pursuant to the Colville [Tribal] Membership Code, CTC §§ 36.7.01 through 36.7.09. Petitioners were Floyd L. Hoffman, a Colville Tribal member; and his children, Wanda J. Hoffman Bloom, Terry. L. Hoffman, Stacie L. Hoffman, and Earl Hoffman; and the children of Earl Hoffman: Shawna Hoffman, Sandra Hoffman, Floyd Hoffman, Edith Hoffman and Gilbert Hoffman. Additionally, Petitioners filed a motion with the Trial Court for an order placing the petitioners' names on an April 7, 1995 claims monies distribution list.[3]

On February 1, 1995, the respondent, the Confederated Tribes of the Colville Reservation (hereinafter "Tribes") filed an answer to the petition, and on February 2, 1995, Petitioners filed a request for a trial hearing date.

A hearing was held on April 4, 1995 before Chief Judge Mary T. Wynne of the Trial Court. Present at the hearing were the appellant, Floyd L, Hoffman, and the petitioner, Wanda Hoffman Bloom, and the Tribes was represented by Steve Suagee of the Reservation Attorney's Office.

Petitioners introduced numerous exhibits and called one witness, Wanda Bloom, daughter of Appellant, Floyd L. Hoffman, to testify. The Tribes introduced six (6) documents and called Audrey Sellars, Director of the Enrollment Department to testify. Both the Tribes and the petitioners agreed that in 1907 Joseph and Annie Etue Ferguson were adopted into the Colville Confederated Tribes as possessing ½ each Indian blood quantum, and recognized by the BIA as such.

After the trial, on April 20, 1995, the Court requested briefing on whether the adoption of Annie Etue Ferguson into the Colville Tribe in 1907 as possessing one-half degree Indian blood vested her with a blood degree which could not be reduced regardless of her factual blood degree. Both Petitioners and the Tribes filed more evidence with their post-trial briefs.

On September 7, 1995, the Trial Court issued a thirty-three (33) page Memorandum Opinion denying the appellant's blood correction, and dismissing the other petitioners from the cause of action on the ground that they lacked standing.

On September 14, 1995, Floyd L. Hoffman filed a Notice of Appeal with the Colville Tribal Court of Appeals.

Constitutional Amendments Dealing With Tribal Membership

On May 20, 1949, the tribal members of the Confederated Tribes of the Colville Reservation approved Amendment III[4] of the Colville Tribal Constitution by a referendum vote, and Amendment III was later approved by the Commissioner of Indian Affairs on April 14, 1950. Amendment Ill amended the Tribal Constitution to add Article VII, *Membership of the Confederated Tribes of the Colville Reservation.*

Article VII created a new provision governing membership in the Tribes. Article VII recognized as tribal members the following persons:

(a) All persons of Indian blood whose names appear as members of the Tribes on the official census of Indians of the Colville Reservation as of January 1, 1937;

(b) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Tribes maintaining a permanent residence on the Colville Indian Reservation; and

(c) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Tribes maintaining residence elsewhere in the continental United States provided that the parent or

guardian of the child indicate a willingness to maintain tribal relations and to participate in tribal affairs.

Article VII (Amendment III) also provided that the Business Council of the Tribes has the power to prescribe rules and regulations governing future membership in the Tribes, including adoption of the members and loss of membership, provided:

> (a) That such rules and regulations shall be subject to the approval of the Secretary of the Interior;
> (b) That no person shall be adopted who possesses less than one-fourth degree Indian blood;
> (c) That any member who takes up permanent residence or is enrolled with a tribe, band or community of foreign Indians shall lose his membership in the Colville Tribes.

On May 9, 1959, the tribal members of the Confederated Tribes of the Colville Reservation approved Amendment V[5] of the Colville Tribal Constitution by a referendum vote, and Amendment V was later approved by the Acting Commissioner of Indian Affairs on July 2, 1959.

Amendment V amended Article VII, *Membership of the Confederated Tribes of the Coville Reservation* of the Tribal Constitution and By-Laws. Amendment V added to Article VII a new Section 3, which provided that after July 1, 1959, no person shall be admitted to tribal membership unless such person possessed at least one-fourth (1/4) degree blood of the tribes, constituting the Confederated Tribes of the Colville Reservation.

On March 22, 1988, the tribal members of the Confederated Tribes of the Colville Reservation approved Amendment IX[6] of the Colville Tribal Constitution by a referendum vote, and Amendment IX was later approved by the Secretary of the Interior on May 19, 1988.

Amendment IX amended Article VII, *Membership of the Confederated Tribes of the Colville Reservation* of the Tribal Constitution and By-Laws. Amendment IX added to Article VII a new Section 4, which provided the following:

> (1) that all Indian blood identified and stated as being possessed by all persons whose names appear as members of the Confederated Tribes of the Colville Reservation on the official census of the Indians of the Colville Reservation of January 1, 1937, shall be considered Indian blood of the Tribes, which constitute the Confederated Tribes of the Colville Reservation;
> (2) that no tribal member's blood degree will be decreased as a result of Amendment IX;
> (3) that pursuant to procedure which shall be adopted by the Colville Business Council, any
> > (a) applicant for membership, or
> > (b) Tribal member who is listed on the official census of the Indians of the Colville Reservation of January 1, 1937, or
> > (c) Tribal member descended from a tribal member whose name appears on the official census of the Indians of the Colville Reservation of January 1, 1937, may petition the Tribes, to officially recognize for enrollment purposes that a tribal member whose name appears on the official census of the Indians of the Colville Reservation of January 1, 1937, possesses Indian blood that is not listed on the official census of the Indians of the Colville Reservation of January 1, 1937, and such Indian blood, when properly authenticated by clear and convincing proof, shall be recognized as blood of the Colville Tribes.

Standard of Review - Clearly Erroneous

Appellant asserts that *de novo* review is justified because this case involves "review of documents not witness credibility" as "in" *Kinslow v. Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma,* 15 Indian L. Rptr. 6007, 6009-10 (CB. Pot. Sup. Ct., Feb. 17, 1988). Opening Brief at page 17. The Court is not rejecting the appellant's assertion of law, but the Court does not believe a *de novo* review is required in this appeal.

The Tribes argued in their Response Brief that "a panel of this Court of Appeals has expressly adopted a

'deferential, clearly erroneous standard of review for factual determinations made by the trial court, as articulated in *Pullman-Standard v. Swint,* 456 U.S. 273, 102 S.Ct. 1781 (1982).' *Colville Confederated Tribes v. Nadene Naff,* Case No. AP93-12001-03, at 2, [2 CTCR 08, 2 CCAR 50, 22 ILR 6032] (Colv. Ct. App., Decision of January 22, 1995)."

Because the Appellate Panel in *Colville Confederated Tribes v. Nadene Naff* adopted its "clearly erroneous" standard from the United States Supreme Court's 1982 *Pullman-Standard* decision, it is instructive to review subsequent refinements in that standard at the federal level. First, the *Pullman-Standard* decision based this standard of review on Federal Rules of Civil Procedure (hereinafter FRCP), Rule 52(a), which in 1982 provided that district courts' "findings of fact 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 the witnesses." In 1985, FRCP 52 (a) was revised into its present wording to provide that trial court "findings of fact, whether based on oral or documentary evidence, 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 the witnesses." The Advisory Committee Notes to the 1985 Amendment state that the amendment was intended to clarify and standardize application of the "clearly erroneous"standard. The basic purpose was to ensure that an appellate court would not disregard the standard when trial court factfinding was based on documentary evidence rather than the court's opportunity to evaluate the demeanor credibility of a witness. The Advisory Committee Notes also state that the Supreme Court had "not clearly resolved this issue" in the *Pullman-Standard* decision.

Supreme Court decisions subsequent to *Pullman-Standard* [but prior to the effective date of the 1985 amendment of FRCP 52(a)] do in fact clarify that the clearly erroneous standard must be uniformly deferential to trial court factual findings, regardless whether the evidence on which they are based is documentary or oral:

> ... This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. If the district court's account of the evidence is plausible in light of the record in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous [citations omitted].
>
> This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Anderson v. City of Bessemer City; North Carolina, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511-12 (1985). Followed in *RCI Northeast Services Division v. Boston Edison Co.*, 822 F. 2d 199, 202 (1st Cir. 1987) ("It is by now settled beyond peradventure that findings of fact do not forfeit 'clearly erroneous' deference merely because they stem from a paper record.")

Appellate courts are also admonished when reviewing a mixed question of law and fact to confine *de novo* review to the purely legal aspects of the question, and to strictly avoid engaging in fact-finding while considering how the law applies to facts found by the trial court. In *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709, 713-14, 106 S.Ct. 1527, 1529-30 (1986), the United States Supreme Court reversed the Ninth Circuit for making factual findings on a matter that the district court had not addressed due to its differing view of the law. The Ninth Circuit had justified doing so on the basis of *United States v. McConney,* 728 F.2d 1195 (9th Cir. 1984), which the Colville Tribal Appellate Court adopted in *Colville Confederated Tribes v. Nadene Naff* as setting the appropriate standard of review for mixed fact/law questions. *Naff* at page 2.

Finally, the Supreme Court has articulated the policy behind the broad deference to trial court factual

findings:

> ... The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is a correct one; requiring them to persuade three more judges at the appellate level is requiring too much ... [T]he trial on the merits should be the 'main event'.., rather than a 'tryout' on the road. [Citations omitted.]

Anderson v. Bessemer City, 470 U.S. at 574-75, 105 S.Ct. at 1512 (also quoted in *lcicle Seafoods*, 475 U.S. at 714, 106 S.Ct. at 1530). In accord with this policy are the Advisory Committee Notes on the 1985 Amendment of FRCP 52(a):

> ... To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of the litigants, multiply the appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

Although the federal law discussed above is not binding on this Court, it derives from the reasoning of the *Pullman-Standard* decision that the Colville Tribal Appellate Panel found to be "persuasive" and adopted in *Colville Confederated Tribes v. Nadene Naff*.

Under The Tribal Constitution And Membership Code, the Blood Correction Cause of Action is Limited To A Factual Inquiry In Which A Petitioner Must Prove By Clear And Convincing Evidence That He Possesses A Greater Degree Of Colviile Blood Than The Tribes Recognizes.

As stated above, in 1949, the Colville Tribal membership approved Amendment III of the Tribal Constitution by a referendum vote. Amendment III established the 1937 census roll as the base roll of the Tribes, and also established a minimum one-quarter Indian blood degree as one of the requirements for Tribal membership for persons born after January 1, 1937. In 1959, the Tribal membership by referendum approved Amendment V, which restricted the blood degree requirement to one-quarter degree **Colville** Indian blood.

In 1988, the membership by referendum approved Amendment IX. Amendment IX provides that all Indian blood possessed by any person listed as a Tribal member on the 1937 base roll of the Tribes "shall be considered Indian blood of the Tribes which constitute the Confederated Tribes of the Colville Reservation."

Thus, one effect of Amendment IX was to treat the non-Colville Indian blood of the 1937 base enrollees (and only such enrollees) as Colville blood for purposes of compliance with the 1/4 degree Colville blood requirement of Amendment V. A second effect of Amendment IX was to preserve all blood degree as a matter of Tribal constitutional law, regardless of the actual degree of Colville Indian blood possessed. Amendment IX also provides a way for a Tribal member, or applicant for membership, to establish by "clear and convincing proof" and in accordance with "procedures ... [to be] ... adopted by the Colville Business Council" that a person listed on the 1937 roll as a Tribal member possessed more Colville Indian blood than is shown on the Tribal roll.

As the evidence record in this appeal shows, and as the Trial Court clearly found, all Tribal census rolls prior to and including the 1937 roll were riddled with inconsistencies regarding blood degree. Mem. Op. at pages 21-22. Amendment IX in effect resolved those inconsistencies by-- (1) preserving the blood degrees of 1937 enrollees as minimum blood degrees (regardless of the actual blood degree) and (2) providing a way to prove with clear and convincing evidence that a person actually possessed a higher degree of Colville blood.

In the present case on appeal, it is undisputed that Appellant, Floyd L. Hoffman, is listed on the 1937 roll as

a Colville Tribal member with a blood degree of 5/32. He claims to possess a higher blood degree, and Amendment IX provides that he must prove it with "clear and convincing proof."

The Colville Membership Code,[7] CTC Title 36, provides the "procedures" referred to in Amendment IX by which a person such as the appellant must prove that he possesses more Colville blood than is listed on the roll. The Colville Membership Code's procedures for blood degree corrections are found at CTC §§ 36.7.01 through 36.7.09. The introductory provision states that the purpose of the procedures is "to provide for a fair and unbiased examination of all blood degree corrections requested by the Tribes or by any other person." CTC § 36.7.

The form of action to correct blood degree is a civil complaint in Colville Tribal Court in accordance with standard civil procedures except where specifically modified by the Colville Membership Code. CTC § 36.7.02. This provision does not make any substantive law applicable to this cause of action. The substantive law applicable to this cause of action is set forth in CTC § 36.7.03 (newly codified at Colville Tribal Law and Order Code, Title 8, § 8-1-242, Standard of Proof), which provides that:

> "In all actions for blood degree corrections the plaintiff shall be required to prove by clear and convincing evidence, that a blood degree other than that which is listed on the Roll for the person whose blood degree is at issue, is the correct blood degree and what the precise blood degree to be listed on the roll should be. There shall be a presumption, rebuttable by the plaintiff, that the blood degree listed on the roll is correct."

Adopting language from Amendment IX, the plain language of tribal law thus states that "all" blood correction actions must be based on clear and convincing factual proof. In accord is CTC § 36.1.02 that all means matters to be proved under the Membership Code must be with clear and convincing evidence.

The Trial Court correctly noted that the clear and convincing standard is an "onerous burden because it requires that the petitioner produce evidence ... so clear and convincing that the opposition's evidence is plainly outweighed." Mem. Op. at page 11, citing *Kinslow v. Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma*, 15 ILR 6007, (C.B. Pot. Sup. Ct., Feb. 17, 1988) and *General Motors Acceptance Corp. v. Bitah,* 16 ILR 6002, (Nav. Sup. Ct., August 11, 1988). The Trial Court also noted that federal case law formulations of the clear and convincing evidence standard are not binding on the Trial Court, but acknowledged that the federal cases state "essentially the same" standard as the "plainly outweigh" formulation in the tribal court decisions. Mem. Op. at page 12, n. 9.

Federal cases are not binding on this Tribal Court system, but an examination of the two cited cases from other tribal courts discloses that those courts did not have occasion to address factors set forth in the federal court decisions, which are relevant to the present appeal. It is appropriate to consider some of the factors regarding clear and convincing proof that are discussed in the federal decisions.

First, clear and convincing evidence must convince the trier of fact that the truth of the proponent's assertion is "highly probable." *Colorado v. New Mexico,* 104 S.Ct. 2433, 2437-38 (1984) (interstate water allocation under the Court's original jurisdiction, in which the Court itself is the factfinder). Second, the evidence must cause the factfinder to be convinced "immediately" or "without hesitation." *Cruzan v. Director, Missouri Dept. Of Health,* 110 S.Ct. 2841, 2855 n. 11 (1990); *Colorado v. New Mexico,* 104 S.Ct. At 2437-38 (1984). Third, the underlying policy reason for use of the clear and convincing evidence standard in civil litigation, as opposed to a preponderance standard, is to reflect a preference that the risk of erroneous factual determination be allocated primarily, though not exclusively, to the party who bears the burden of proof, in this case Appellant. *Colorado v. New Mexico,* 104 S.Ct. At 2437-38 (1984).

Because the clear and convincing standard of proof is established in a tribal constitutional amendment

approved by the tribal membership, the policy reasons in support of allocating the risk of erroneous factual determination to Appellant apply with special force in this case. It is not easy to establish entitlement to a blood degree correction because the membership intended for it not to be easy. There is thus a strong Tribal interest in preserving the 1937 roll as the starting point for all membership matters, and accordingly a statutory presumption that the blood degrees on the roll are correct.

Appellant Has Failed To Prove His Burden By Clear And Convincing Evidence That He Is Entitled To An Increase In Blood Quantum Based Upon Factual Proof.

After reviewing the evidence of the appellant presented to the Trial Court, it is clear to this Appellate Panel that the appellant has failed to prove by clear and convincing evidence that he is entitled to a blood degree correction based upon factual proof.

For most of the proceedings before the Colville Tribal Court and the Colville Tribal Court of Appeals, the appellant was without legal counsel admitted to practice before the Colville Tribal Court. The appellant attempted to represent himself, though he had the help of the other petitioners, whom the Trial Court eventually found to have no standing to bring the original lawsuit. The case of the appellant suffered from the lack of a sufficient record to meet his burden of proof.

As a preliminary matter, Tribes attached an affidavit of Audrey Sellars to their Response Brief and cited to the affidavit in their Response brief. The Trial Court in its Order dated April 20, 1995 requested only that the parties brief the issue of adoption. All additional evidence, whether documentary or testimonial, was stricken from the parties' briefs and was not considered by the Trial Court in rendering its decision. This Appellate Panel adopts this course of action taken by the Trial Court.

As stated earlier in this opinion, Appellant has the burden of proving "by clear and convincing evidence, that a blood degree other than that which is listed on the 1937 Roll for the person whose blood degree is at issue, is the correct blood degree and what the precise blood degree to be listed on the roll should be." CTC § 36.7.03. See also Constitution, Amendment IX, Art. VII, 4(2)(c), which requires proof "by clear and convincing proof."

This is a heavy burden because it requires that the appellant produce evidence that clearly convinces the Trial Court, that is, evidence so clear and convincing that the opposition's evidence is plainly outweighed. *Kinslow v. Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma,* 15 ILR 6007, 6009 (C.B. Pot. Sup. Ct. 1988); *General Motors Acceptance Corp. v. Bitah,* 16 ILR 6002, 6003 (Nav. Sup. Ct. 1988). This burden of proof is a very difficult level of proof to establish for any blood correction because: (1) people who are required to establish this high level of proof are not the custodians of the only available official records in existence that constitute "proof," or admissible evidence, of blood degree. Usually, such records are in the custody of either the Tribes or the United States; and (2) the records in existence related to Indian blood degree are usually historical documents containing contradictory information with little or no admissible evidence on the methods used to collect data for each type of historical document. However, difficult this standard may be, it is the burden established by Tribal law and the Tribal Constitution which must be met in the Colville Tribal Court before a trial court can increase a blood degree.

To reach a conclusion on an issue, a trial court must review all of the substantial credible evidence before it. Substantial credible evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion. The credibility and weight to be given the evidence is not a function of the number of witnesses called by the parties or the number of documents submitted into evidence, but rather, the substance of the evidence itself and the intangible factors which may properly be considered by the trier of fact. *Kinslow v. Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma,* 15 ILR 6007, 6009 (C.B. Pot. Sup. Ct.). In other words, the evidence may be inherently weak and conflicting, yet it may still be considered substantial.

It is well-established that if the evidence is conflicting, it is within the province of the fact-finder to determine the weight and credibility to be afforded the evidence. *Kinslow v. Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma,* 15 ILR 6007, 6009 (CB. Pot. Sup. Ct.).

In the matter before the Trial Court and this Appellate Panel, the Enrollment Office conceded there is no simple formula for evaluating evidence supporting claims for blood degree corrections.[8] The Trial Court agreed in its Memorandum Opinion. Preferred evidence consists of individualized statements or documents given in some sort of context that enables the Trial Court to evaluate the reliability of the information, such as individual history cards, testimony from probate proceedings, and affidavits for allotments or services.

The law provides a framework for weighing such evidence. Affidavits about old events or persons long deceased are frequently helpful when such affidavits were made at or near the time the event occurred, but this Appellate Panel is always wary of the motives behind recent affidavits. For instance, a 1910 statement about the ancestry of someone living in 1910 is generally more credible than a 1995 affidavit about the same person, unless the later affidavit is based on old documents that were not available to the person making the 1910 affidavit.[9] This is because statements are more reliable when made contemporaneous with an event. The longer the passage of time, the less reliable the information unless substantially supported by other evidence.

Testimony or written statements by a person familiar with the facts, or personally acquainted to a person making a statement, are given more weight than testimony or statements by people who are not familiar with the facts or the person making the statement. Sworn statements are given more weight than unsworn statements. Likewise, the more formal the setting is when the statement is made, the more weight the law gives to the statement. For instance, a statement made in a probate proceeding will be given more weight than a statement casually given by that same person or another in a less formal setting. This is because statements made during probate proceedings are made in open court by a sworn witness which is subject to cross-examination and impeachment, and subject to criminal penalties if the witness fails to tell the truth.

This Appellate Panel of the Court of Appeals adopts the above rules for Enrollment appeals and has applied the above rules to the findings of the Trial Court in this appeal. The evidence and weight given to each piece of evidence by the Trial Court is discussed below. We affirm the findings and conclusions of the Trial Court.

This Court adopts the finding of the Trial Court that

> "Perhaps because the parties decided not to introduce testimony on each document, many of the documents admitted into evidence, submitted by both parties, have little weight under the legal principles discussed above [in the Trial Court's Memorandum Opinion]."

The constitutionally mandated starting point of this appeal is the 1937 Census. The evidence showed and the parties admitted that the appellant, Floyd Hoffman, is listed on the 1937 Census as possessing 5/32 Indian blood; Floyd Hoffman's mother, Helen Ferguson, is listed on the 1937 Census as possessing 5/16 Indian blood; Floyd Hoffman's father, Clarence Hoffman, possesses no Indian blood on the 1937 Census; Floyd Hoffman's grandparents, Joseph and Annie Ferguson, are listed on the 1937 Census as: Joseph Ferguson ½ Indian blood and Annie Etue Ferguson 1/4 Indian blood.

At trial, Appellant argued that his blood degree should be increased because Annie Ferguson possessed at least ½ Indian blood. In support of this argument, the appellant introduced the following evidence:

First, Appellant introduced "Delayed Death Certificate" from the 1935 Census showing that Joseph and Annie Ferguson possessed 21/32 Indian blood when they died. Under the law as set forth above and adopted by this Appellate Panel, the death certificates, without more, received little weight by the Trial Court because no evidence

was introduced to indicate that the information upon which the death certificates were based was given in a formal setting, subject to cross examination and impeachment, or was given by a person personally acquainted with the Hoffmans.

Second, the petitioner admitted into evidence four (4) fee patent applications, two applications were dated 1928 and two applications were undated, all of which listed Helen Ferguson and Esther Mason Ferguson as possessing 5/8 Indian blood. No evidence was introduced that these patent applications were sworn applications made in a formal setting or subject to cross examination and impeachment. Though the applications were personally made by Helen and Esther Ferguson, no evidence was introduced that information contained in the applications was verified by the BIA and that the information provided was accurate.

Third, evidence was admitted showing that Esther Ferguson McClung, natural and full sister of Helen Ferguson Hoffman, Appellant's mother, is an enrolled member of the Colville Confederated Tribes possessing 5/16 Indian blood, while Helen Ferguson Hoffman is listed as possessing only 3/8 Indian blood. In 1983, the children of Esther Ferguson Mason successfully changed Esther Mason's blood degree to 5/8 Indian blood. This allowed the children, first cousins to Floyd Hoffman, to enroll in the Colville Confederated Tribes as possessing 5/16 Indian blood. Applying the above legal framework, this inconsistent information provides little weight in light of the fact that Esther Ferguson McClung is the only child of Joseph and Annie Ferguson listed on the 1937 Census as possessing 5/8th Indian blood.

Fourth, Appellant admitted into evidence a 1981 BIA letter stating that if there are "conflicting degrees of Indian blood" between natural brothers and sisters then the record should be changed to reflect the same level for all brothers and sisters. This evidence neither weighs in favor nor against Appellant since policy does not indicate whether the blood degree should be increased or decreased or which blood degree should be preferred in a case, such as in this appeal, where multiple degrees are listed.

Fifth, the appellant relied on a BIA letter dated February 21, 1910, showing that Joseph and Annie Ferguson were adopted into the Colville Confederated Tribes as each possessing ½ degree Indian blood. Under the law as set forth above, the letter, without more, received little weight by the Trial Court because no evidence was introduced to indicate that the information upon which the letter was based was given in a formal setting, subject to cross examination and impeachment, or was by a person personally acquainted with the Hoffmans.

Sixth, Appellant submitted Census records from 1899, 1903, 1904, 1907, 1908, 1912-13, 1913, 1924, 1924, 1930, 1933, 1935, 1937, and 1939 that showed: (1) Floyd Hoffman's blood degree fluctuated from 3/16 to 5/32 to 1/8; (2) Helen Ferguson Hoffman's blood degree fluctuated from ½ to 3/8 to 5/16 to 5/32; (3) Esther Ferguson Mason's (natural sister of Helen Ferguson Hoffman) blood degree fluctuated from 5/8 to ½ to 5/16; (4) Mabel Ferguson McClung's (natural sister of Helen Ferguson Hoffman) blood degree fluctuated from ½ to 5/16; and (5) Annie Etue Ferguson's blood degree fluctuated from 21/32 to ½ to "less" than ½ to 1/4 to 1/8.

The Trial Court noted that these records are contradictory on their face. Under the law as set forth above, such contradictory evidence received little weight by the Trial Court because no evidence was introduced to indicate that the information contained in the census records were given in a formal setting, subject to cross examination and impeachment, or was given by a person personally acquainted with the Hoffmans.

Finally, Appellant submitted a school record indicating that Annie Etue Ferguson possessed ½ degree Indian blood. Again, Appellant has failed to provide supporting evidence to indicate that the information upon which the school records were based was given in a formal setting, subject to cross examination and impeachment, or was given by a person personally acquainted with the Hoffmans.

To summarize Appellant's evidence, it is inconsistent. It does not provide a record that supports a finding of any one specific blood quantum by clear and convincing evidence. This Appellate Panel affirms Court's finding that it "does not find a clear weight of this [Appellant's] evidence supporting any specific blood quantum."

The Tribes, on the other hand, argue that the appellant's evidence, listed above, fails to prove by clear and convincing evidence that the blood degree listed on the 1937 Census for Floyd Hoffman is incorrect. In support of this argument, the Tribes introduced the following evidence that consistently supports a finding that Annie Etue Ferguson's actual Indian blood degree, as established through heredity, was 1/8th:

First of all, the Tribes admitted into evidence a marked sworn and witnessed affidavit dated March 27, 1905 made by Cora Desautel Etue, Annie Etue Ferguson's mother, and witnessed by the U.S. Indian Agent at the Colville Agency, Miles, Washington. Though the purpose of the affidavit when made is not clear from the evidence, the affidavit purports to show a historical and genealogical record of Cora Desautel Etue, her husband and children. The document indicates that Cora Ferguson herself only possessed 1/4 Indian blood and Annie Etue Ferguson only possessed 1/8 Indian blood. Applying the legal analysis set forth above, this affidavit received considerable weight by the Trial Court. It is obvious from the face of the document that the document was made in a formal setting because it was witnessed and sworn to. In addition, the statement contained first hand information from Cora Desautel Etue who was intimately familiar with the facts concerning her family.

In analyzing the Tribes' evidence, the Trial Court reviewed the appellant's exhibits of official Colville "Individual History Cards" for Annie Etue Ferguson, Helen Ferguson, Mabel McClung and Esther Ferguson which shows that their blood degree quantum was consistent with Cora Etue's 1905 statement. No evidence was introduced on the setting in which a "Individual History Card" is compiled. However, the Trial Court was aware, from previous blood degree correction cases, that the "Individual History Card" is one of the main ways for the Enrollment Office and the BIA to accurately reflect biographical information for each member. For this reason these cards received considerable weight by the Trial Court.

Finally, the Tribes introduced into evidence a 1968 letter from the BIA approving Colville Business Council Resolution 1968-50 requesting a decrease of Annie Etue Fergusons blood degree from 1/4 to 1/8. From this investigation and recommendation by the BIA, the Enrollment Office did decrease Annie Etue Ferguson's Indian blood on the 1937 Census from 1/4 to 1/8. However, because of the Enrollment's Office interpretation of Amendment IX as stipulated to by the parties, the Enrollment Office increased Annie Etue Ferguson's Indian blood on the 1937 Census to 1/4 after Amendment IX was passed. As testified to by Audrey Sellars's at the Trial Court Hearing, this letter represents official action taken by the Enrollment Office in investigating and correctly representing the blood degree of Annie Etue Ferguson. For this reason, this letter received considerable weight by the Court.

From the above, the appellant has failed to meet his burden of proving by clear and convincing evidence that Floyd Hoffman's Indian blood on the 1937 Census should be increased to a specific blood degree which has been established as factually correct by clear and convincing evidence. Though Appellant had several documents admitted into evidence, he relied on only a few of the documents. Appellant failed to show the Trial Court the importance of each document at the Trial Court hearing. Many of the documents used by the appellant to make his case were contradictory. Appellant failed to explain the contradictions. In short, Appellant failed to clearly convince the Trial Court that the 1937 Census reflects a lower blood degree than actually exists. Appellant's evidence was not so clear and convincing that the evidence supporting the 1937 Census was plainly outweighed. The above findings and conclusions are affirmed by this Appellate Panel.

The Appellant Has Neither Argued Nor Presented To The Trial Court A Tribal, State Or Federal Statute Or Case Law Which Requires The Tribes In Either 1907 Or 1937 To Afford Due Process Of Law To Its Members In Exercising The Tribes' Power Of Self-Government Through Adoption And Reductions Of Blood Degrees Conferred Through Adoption.

The appellant argued that since Joseph and Annie Etue Ferguson were adopted into the Tribes as ½ blood

quantum each, this amount is a vested right and cannot later be changed.

At the Trial Court hearing, the appellant entered into evidence a BIA letter dated February 10, 1910 which summarizes the unanimous Adoption July 8, 1907, by the Colville Business Council, that they [Joseph and Annie Ferguson] be enrolled with the Colville tribe. The BIA letter continued that the evidence clearly establishes that "both Joseph and his wife [Annie] are ½ blood Indians recognized by the tribe."

The Tribes stipulated to the entry of this document into evidence and Ms. Sellars, Tribal Enrollment Office, confirmed that Joseph and Annie Etue Ferguson were adopted into the Tribes as each possessing ½ degree Indian blood. The Trial Court found that there was substantial credible evidence that Joseph and Annie Ferguson were conferred ½ Colville Indian blood by adoption in 1907.

A dispositive issue in this appeal is, what effect does the adoption into the Colville Tribes of Annie and Joseph Ferguson have with each having ½ Indian blood quantum? The Trial Court asked the question "If this adoption vests with the [Appellant] a property right, then can the Tribes later lower the blood degree amount conferred by adoption based upon heredity findings and use] the process that was invoked here?"

Appellant has shown that adoption into the Tribes did occur in 1907, which conferred a blood degree of ½ by the Tribes. However, Appellant has presented no tribal, state or federal law defining what legal protections for the legal rights conferred existed in 1907 when Joseph and Annie Etue Ferguson were adopted into the Tribes.

Under modem principles of tribal sovereignty, Indian tribes define their own membership. Under the existing Colville Tribal Code, adoption into the Tribes is a final, discretionary act by the Council, not a right, and the Council's decision is nonappealable. CTC § 36.5.01; see also CTC § 36.5.05 (decisions of Business Council final and no appeal of any kind to any tribunal or other agency for any reason shall be allowed from a denial of adoption by the Business Council).

The Trial Court and this Appellate Panel are limited in the relief that they can provide. In this matter, the Trial Court and this Appellate Panel can only grant such relief as the law passed by the Colville Business Council allows. The appellant has failed to present any tribal, state or federal law which would have prohibited the Tribes, in exercising their right to define their membership, in 1937, to decrease Annie Etue Ferguson's ½ Indian blood degree conferred through adoption in 1907.

In addition, the appellant has not argued nor presented any law that would have required the Tribes to afford Annie Etue Ferguson due process of the law before decreasing her blood degree from ½ Indian blood when she was adopted in 1907, to 1/4 listed on the 1937 Census. That is, no evidence was presented by the appellant to the Trial Court that notice and a hearing were required prior to the Tribes decreasing Annie Etue Ferguson's blood degree on the 1937 Census.

This Appellate Panel of the Court of Appeals reserves judgment on the Tribes' argument[10] that "The Only Cause of Action Below [Trial Court] Was A Petition For Blood Degree Correction, And Because Such Action Is Limited To A Factual Inquiry, This Court Has No Subject Matter Jurisdiction Over Appellant's Legal Claims." Any statement on this argument would constitute *obiter dictum*, because of our previous ruling in this appeal.

This Appellate Panel of the Court of Appeal reserves judgment on the Tribes' argument[11] that "The Waiver Of Sovereign Immunity Establishing Jurisdiction Over A Blood Correction Limits The Action To A Factual Inquiry." Any statement on this argument would constitute *obiter dictum*, because of our previous ruling in this appeal.

This Appellate Panel of the Court of Appeals reserves judgment on the Tribes' argument,[12] "An Equal Protection Claims Must Be Brought Pursuant To The Colville Civil Rights Act,[13] Title 56, And Because Such A

Claim Was Not Pleaded or Adjudicated Below, It Cannot Be Considered On Appeal." Any statement on this argument would constitute *obiter dictum*, because of our previous ruling in this appeal.

Petitioner Has Failed To Affirmatively Plead Or Prove That, Under Custom Law: (1) Annie Etue Ferguson Has A Vested Right To The ½ Blood Degree She Received Through The 1907 Adoption; And (2) The ½ Blood Degree Received Through The 1907 Adoption Was Reduced Illegally, To Warrant The Trial Court To Conduct A Custom Hearing on This Issue.

The Trial Court stated in its Memorandum Opinion that "[I]f there were no written laws pertaining to the tribal adoption in 1907, 'custom law' is the relevant inquiry. Unlike Anglo statutory laws on adoption, Indian law is deeply rooted in the customs and traditions of the Tribes, which is woven into ones lifestyle and beliefs." *In Re P.,* J82-3021, 5-6 (Colv. Tr. Ct. 1983); *In Re: J.J.S.,* 11 ILR at 6031-32. Traditionally, "custom" is unwritten law. *In Re P.,* J82-3021 at pages 5-6. The Trial Court could have requested a "custom hearing" when "any doubt arises as to the customs of the Tribes... "CTC § 3.4.04[14]. Also, see § 56.07 of Colville Tribal Civil Rights Act. However, the burden of proof is on the appellant in this blood degree correction action to invoke CTC § 3.4.04. Since the appellant has the burden of proof, he must affirmatively plead that a custom of the Tribes controls the law on an issue pertinent to his blood degree correction action in order for the Trial Court to request a customs hearing. This has not been done in this action. In the appellant's petition and subsequent pleadings, no specific allegations have been made regarding the applicability of custom law pertaining to adoption or blood corrections. Therefore, this Appellate Panel will affirm the decision of the Trial Court for not ordering a customs hearing.

After reviewing the records and files herein, and being fully advised in the premises, the Court orders as follows,

It Is Ordered that:

The decision of the Trial Court is affirmed, and the appeal is denied and dismissed.

It Is Further Ordered that:

Reasonable costs and reasonable representative fees are awarded to the prevailing party pursuant to CTC § 36.7.07 and CTC § 36.7.09.

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COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Terrance LARAMIE, Appellee.

Case Number AP97-005, AP97-006, 2 CTCR 49, 2 CTCR 66, 24 ILR 6181, 7 NALD 7013

4 CCAR 22

[Leslie Kuntz, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Trial Court Case Number 96-19258, 96-19259]

Initial hearing held May 16, 1997. Decided June 26, 1997.
Before Chief Justice Dupris, Justice Nelson and Justice Stewart

PER CURIAM
NELSON, J.

We are asked to consider whether a trial court judge can order a prosecutor to go forward with prosecution of a criminal case after the prosecution has moved to dismiss and the defendant has no objection to a dismissal. We are of the opinion that a decision to prosecute or not to prosecute lies in almost all circumstances within the discretion of the prosecutor and accordingly remand this matter to the Trial Court to enter an order of dismissal.

INTRODUCTION

The facts of this case are straight forward. Former Police Chief John Goss was the only witness to observe the defendant, Terrence Laramie, allegedly driving while intoxicated and driving without a valid operator's license.

Prior to the date of trial, Chief Goss moved several hundred miles from the Reservation and shortly before the trial the Tribes made the decision to dismiss the case against Mr. Laramie rather than incur the expense of transporting and housing Chief Goss for trial.

A day or two before the time set for trial, the Tribes moved to dismiss on the grounds stated - to which the defendant expressed no opposition. Nevertheless, the Trial Court denied the motion and ordered the matter be reset for trial and the Tribes subpoena Chief Goss to testify. Not surprisingly, the Tribes took umbrage and appealed.

OPINION

The United States Supreme Court[15] considered a similar issue in *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), in which it held that agencies are generally free to set their own enforcement agendas. The court held:

> "... an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." 470 U.S. at 831

Discretion with respect to enforcement decisions is generally desirable because a decision not to enforce a law or regulation often involves a complicated balancing of a number of factors which are peculiarly within the expertise of the prosecuting agency. There must be an assessment whether a violation has occurred and what resources are best spent on a particular violation or another. Decisions must be made whether going forward with prosecution fits the agency's overall policies and whether there are sufficient resources to undertake the action at all. *Shell Oil v. Environmental Protection Agency*, 950 F.2d 741 (C.A.D.C. 1991).

Thus an enforcement agency is "far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Chaney* at 831-832.

In a case concerning a selective prosecution, the U.S. Supreme Court held "as long as the prosecutor has probable cause to believe the accused committed an offense defined by statute, the decision whether or not to prosecute...generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

For the reasons stated the Panel is of the opinion that the facts of this case make it one that falls within the discretion of the prosecution whether to dismiss or go forward and It is Therefore Ordered that the appeal of the Colville Confederated Tribes is Granted and this action is Remanded to the Trial Court to enter an Order Granting the Tribes' Motion to Dismiss.

Dayton BACHAND, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP94-028, 2 CTCR 50, 24 ILR 6179, 7 NALD 7013

4 CCAR 23

[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 94-17308, 94-17309]

Arguments heard April 12, 1996. Decided July 9, 1997.
Before Chief Justice Dupris, Justice Bonga and Justice Miles

PER CURIAM
DUPRIS, C.J.

SUMMARY OF PROCEDURES

On November 4, 1994 the Appellant filed a timely Notice of Appeal with the Colville Court of Appeals pursuant to CTC § 1.9.03. The initial hearing pursuant to CTC § 1.9.05 was held on January 9, 1995, at which time Rebecca Baker, Justice Pro-Tem, was designated as the Presiding Justice. After the Briefing Schedule was entered into the record, Presiding Justice Baker signed an Order recusing her from the case in April of 1995. In June of 1995 Chief Justice Dupris assumed the duties of Presiding Justice in this matter. Oral arguments were heard on April 12, 1996.

SUMMARY OF COURT OF APPEALS RULING

For the reasons stated below, the Court of Appeals holds that the appellant was adequately and appropriately informed of his essential rights prior to his entering of his guilty pleas. Further, he was adequately and appropriately informed of the nature of the charges against him, to which he voluntarily and knowingly waived his rights, knowing the potential penalties he faced. Based on its holding, the Court of Appeals affirms the Trial Court's decision and remands the matter to the Trial Court for disposition consistent with this order.

FACTS

The record shows the following salient facts in this matter. On July 10, 1994 the appellant was charged by

citation complaint for the charges of Possession of a Controlled Substance, Less than 40 [Grams], and Possession of Drug Paraphernalia. The citation states the appellant, a male Indian[16] resident of Usk, Washington, committed the cited offenses on July 10, 1994 at the Nespelem Celebration Grounds.

The appellant was arraigned on the charges on July 24, 1994. The record shows the trial judge read the rights of the defendants in the courtroom collectively, and just once[17]. He then would ask each individual if he understood the rights. The record shows when the appellant came before the Court he indicated he understood his rights and entered a guilty plea to both charges. The judge asked him very specific questions about his understanding of the consequences of entering a guilty plea.[18] The appellant answered each of the questions, corrected one statement in the police report read into the record to support the charges, and agreed to the remainder of the facts alleged in the report.[19]

At the same hearing the judge ordered a pre-sentence investigation, and set the matter for sentencing at a later date. After the guilty pleas were accepted, but before the sentence was entered, the appellant requested appointment of the public defender as legal counsel; this request was granted.

The appellant was represented at the sentencing on September 22, 1994. The record does not indicate the appellant requested to withdraw his guilty plea at the sentencing; nor does it show the appellant challenged the validity of the citation complaint or taking of the guilty pleas at the arraignment at any time before or during the sentencing before this appeal was filed.

ISSUES PRESENTED

The appellant has raised four issues for the Court of Appeals: (1) Whether the Trial Court erred by not making a specific finding on record that the appellant was "Indian," thereby depriving the Court of personal jurisdiction over the appellant; (2) Whether the Trial Court erred in accepting the guilty plea because the record is silent regarding what controlled substance and paraphernalia the appellant possessed in order to constitute the crimes charged; (3) Whether the Trial Court erred in accepting the guilty plea because the appellant was not fully informed of the charges, his rights, and the consequences of his guilty pleas; and (4) Whether due process was violated because the citation complaint does not state with specificity what substance and what paraphernalia formed the basis of the charges against the appellant.

I. Did the Trial Court err by not making a specific finding on record that the appellant was "Indian," thereby depriving the Court of personal jurisdiction over the appellant?

The appellant argues the Trial Court erred in not establishing on the record that the appellant was an "Indian." The cases cited to this Court by the appellant support the rules that tribal courts do not have criminal jurisdiction over non-Indians and the federal court may proceed against Indians criminally.[20] This is not disputed by the appellee. The real issue raised by the appellant is the sufficiency of the record to support an initial finding by the Trial Court that it has personal jurisdiction over the appellant.

The record shows the citation complaint has a section which identifies, as one of the elements of the citation, the "race" of the person being charged. The record further shows the letter "I", commonly understood to stand for "Indian" when indicating race, is on the citation in question in this matter. It has not been disputed.

Appellee argues that the persuasive rule for the Court to adopt is found in *U.S. v. Buckley*, 689 F.2d 893, 897 (9th Cir., 1982): when a challenge to a charging document is first raised after a finding of guilt, a court will

should construe the document liberally in favor of the charging document's validity. See also, *State v. Kjorsvik*, 117 Wn2d 93, 812 P2d 86 (1991). We agree.

The record indicates the citation complaint states the appellant is an Indian; the record further indicates the appellant signed the citation complaint, promising to appear for the arraignment on July 24, 1994, and did appear. The record does not indicate that the appellant, nor his attorney at any time before the entry of the judgment and sentence contested the citation complaint's allegation that he was an Indian. There is nothing in the record that would divest the Trial Court of personal jurisdiction over the appellant. We so hold.

II. Did the Trial Court err in accepting the guilty plea because the record is silent regarding <u>what</u> controlled substance and paraphernalia the appellant possessed in order to constitute the crimes charged?

The appellant argues the Trial Court informed the appellant of the statutory language constituting the two crimes charged, but did not inform the appellant of the exact actions of the appellant that formed the violations charged. In support of his argument, the appellant cites the Court to *U.S. v. Boykin*, 395 U.S. 238 (1969), *State v. Barton*, 93 Wn2d 301, 609 P2d 1353 (1980), and *Quileute Indian Tribe v. LeClair*, 20 ILR 6154 (1993). He also directs the Court to CTC § 2.4.01, which states, *inter alia*, the Trial Court must inform defendants of their right to counsel.[21]

Appellee argues the two possession charges are stated in plain language and require no special explanation for a person of ordinary intelligence to comprehend, i.e. Possession of a Controlled Substance, Less Than 40 [Grams], and Possession of Drug Paraphernalia. The appellee further argues the record is clear the appellant was informed of all of the precise facts supporting the specific elements of the crimes charged when the police report was read into the record. We agree.

We also agree with the appellee that *LeClair*, *supra*, is distinguishable from the facts in this matter. In *LeClair* the charging document listed the state statutes violated, and added "Driving While Intoxicated (Suspended)," with nothing more. In this case the very nature of the charges require more specificity in their citation. In reviewing the citation and the facts stated on record from the police report, the Court finds the appellant had adequate notice of the specific actions he committed to be charged.

III. Did the Trial Court err in accepting the guilty plea because the appellant was not fully informed of the charges, his rights, and the consequences of his guilty pleas?

The appellant cites CTC §§ 2.4.01 and 2.4.02 in support of his argument that his guilty pleas could not be considered voluntary in this instance. He reasons that (1) mere citation of the charges found in the statutory language is not sufficient to inform him of the nature of the charges; (2) merely asking him if he knew he was entering the plea without the advise of an attorney; and (3) reading the possible penalties are all insufficient to meet the standards of due process found in the Civil Rights Statute at CTC § 56.02 *et seq.* Again the appellant cites us to *Boykin, Barton* and *LeClair, supra.*

The appellee avers the record is replete with evidence the appellant knew the nature of the charges, of his right to counsel, and of the consequences of pleading guilty. The appellee cites to the record with specificity on when the Court told the appellant of these rights and consequences.

It appears the appellant is asking this Court to hold that unless the words used by the Trial Court regarding the reading of the rights and taking of the guilty pleas say exactly what is cited in the federal cases, they are insufficient. We disagree with his reasoning. *Boykin* holds that the act of accepting a guilty plea must make sure [the defendant] has a full understanding of what the plea connotes and of its consequences." *Id* at 1710.

In this case, the defendant was told of his right to an attorney, and after he entered a guilty plea, he was asked if he understood he was doing so without first talking to an attorney. Common sense dictates this gives the

appellant notice of his right to counsel. This practice would meet the *Boykin* standard. Further, the appellant was told with specificity of the maximum penalty each charge carried for which he could be liable. This certainly passes due process muster for informing the appellant of the consequences of pleading guilty to the charges. We hold for the appellee on this issue.[22]

IV. Was due process violated because the citation complaint does not state with specificity what substance and what paraphernalia formed the basis of the charges against the appellant?

This issue is very similar to that found in Part II, above. It again goes to the sufficiency of the charging document. The appellant alleges his due process rights were violated because the citation did not state with specificity each element of the offenses charged. In support of his arguments the appellant directs this Court to CTC § 2.2.01, to a published Trial Court decision, *CCT v. Gary Stensgar*, 1 CTCR 66 (1993), and to an appellate decision, *Francis Louie v CCT*, [AP93-16188, 2 CTCR 05, 2 CCAR 47], 21 ILR 6136, [7 NALD 7013] (1994). These authorities, asserts the appellant, state the citation complaint must state the "description of the offense charged" with specificity.

The appellee responds that *Stensgar* states the citation must set forth the "essential elements," and the citation in question does this by putting the appellant on notice he is charged with possessing less than 40 grams of a controlled substance, and possession of drug paraphernalia. Further, the appellee argues the appellant has misread *Louie.*

Upon the review of the record and the authorities presented in this case, we now hold the appellant was given sufficient notice of what substance and paraphernalia formed the basis of the charges against him.

Louie is distinguishable from this case. It stands for the proposition that the complaint must provide specific details of an offense charged so a defendant would have the opportunity to formulate a defense. *Id* at 6136. The concern in *Louie*, however, was that the charging document stated the wrong place where the alleged crime took place, thereby giving the defendant inadequate notice of an essential element of the charge against him. *Id*.

In this case, in order to formulate a defense to the charge, the defendant would have to know the nature of the charges (Possession of Less Than 40 Grams and Possession of Drug Paraphernalia), the time of the offense (July 10, 1994 at 0059 hours), the person charged (Dayton Bachand), and the character of the property involved (drugs and drug paraphernalia). See Citation Complaint, Court entry #2.

Also, although not controlling on this Court's decision because it is from the Trial Court, *Stensgar* is met in this case, too, in that all of the "essential elements" of the charge are present on the charging document.[23] Further, the appellant was fully informed of the nature of the charges when he was read the police report at the taking of the guilty plea.

For the reasons stated above, this Court now Affirms the Trial Court's decision in this matter, Dismisses this appeal, and Remands this case to the Trial Court for disposition consistent with this opinion order.

Mark G. BROWN, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP94-029, 2 CTCR 51, 24 ILR 6245

4 CCAR 28

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Leslie Kuntz, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 92-15491, 92-15492]

Arguments heard August 18, 1995. Decided July 18, 1997.
Before Presiding Justice McGeoghegan, Justice Bonga and Justice Miles

McGEOGHEGAN, P.J.

PER CURIAM

This matter came on regularly before the Colville Confederated Tribes Court of Appeals panel of Presiding Justice Earl L. McGeoghegan, Justice David Bonga, and Justice Wanda Miles.

INTRODUCTION

In this case, the appellant, Mark Brown appeals the action of the Court at a Show Cause Hearing held more than one year after his original sentence. The Court reinstated part of his jail sentence and reimposed the full fine from convictions of Driving Under the Influence and Driving While License Suspended. Mr. Brown asserts the Court lost jurisdiction a year after sentencing where no Pre-Dismissal Hearing was scheduled and, the Court abused its discretion by imposing jail and fines when Mr. Brown failed to pay his fine as ordered. We disagree that the Court lost jurisdiction over the appellant but, find that reinstatement of suspended jail and suspended fine was error.

PROCEEDINGS

On April 12, 1993, Mark Brown received a combined sentenced for convictions of Driving Under the Influence and Driving While License Suspended. He was fined $750.00 with $250.00 suspended and to serve 60 days in jail with 58 days suspended and credit for two days served on condition he have no driving or alcohol related violations for a period of one year, i.e. until April 12, 1994. The remaining $500.00 of his fine was to be paid by August 12, 1993. No Pre-Dismissal Hearing was scheduled by the Court. On October 20, 1994, at a Show Cause Hearing, the Court reinstated the original $750.00 fine allowing six months to pay and reimposed eight of the 58 suspended days jail. Appeal of that decision was timely filed and the sentence was stayed pending appeal.

ISSUES

The issues before the Appellate Panel are: 1) Whether the Trial Court lost jurisdiction over the appellant where no Pre-Dismissal hearing or Show Cause hearing was scheduled prior to one year having elapsed from the date of sentencing and, 2) Whether the Court abused its discretion when the original fine and suspended jail were reimposed at a Show Cause hearing.

1. The Court did not lose jurisdiction when a Pre-dismissal hearing was not scheduled at sentencing and a Show Cause hearing was set more than one year after sentencing.

The appellant asks the Court to interpret CTC 2.4.05 to limit the Court's jurisdiction over convicted persons to one year from the date of sentencing. The Court has not previously construed CTC 2.4,05 which states:

Pre-dismissal Hearing

a) At the sentencing, the judge shall set the time and date for the pre-dismissal hearing by court order.
b) The pre-dismissal hearing shall be scheduled for not less than two weeks prior to the termination date of the conditions imposed in the sentence.
c) It will be the defendant's responsibility to submit written proof to the Court showing he/she has complied with conditions set forth in the sentencing order. The written proof must be signed by:

1) the program counselor assigned to the defendant;
2) the defendant's immediate supervisor, if community' service were ordered;
3) any other person directly associated with a program used by the defendant to comply with the Court order, or
4) the defendant's probation officer.

If more than one program is being used, written proof must be submitted for each, except if the defendant is on probation, his/her probation officer may verify compliance with the other programs involved. d) If the defendant files proof of compliance with the terms of his sentence as set out in c) above he does not have to appear at the pre-dismissal hearing. e) The prosecutor and/or defense counsel may move to strike the pre-dismissal hearing and close the case if the defendant has submitted proof of compliance. This motion must be filed no later than 3 days prior to the hearing. f) If the defendant has not complied with the sentence or has failed to submit written proof to the court as described in c) above, a show cause hearing shall be scheduled within ten (10) days of the pre-dismissal hearing for the purpose of determining if the suspended fine and/or jail term should be reinstated or modified. g) If the defendant fails to appear without good cause and has failed to provide written proof to the Court of his/her compliance with the sentence, the Court may issue a bench warrant for the defendant to be brought before the Court.

The language of the statute is clear in requiring that a Pre-Dismissal hearing be set at the sentencing and, a Show Cause hearing related to such a Pre-Dismissal hearing be held within 10 days of the Pre-Dismissal hearing. Notwithstanding the requirements of the statute, failure of the Court to set a Pre-Dismissal hearing and related Show Cause hearing does not divest the Court of all reasonable means to enforce and give effect to its criminal sentencing orders where the Business Council has not specifically expressed such a termination of the Court's jurisdiction. CTC 1.5.05, Means to Carry, Jurisdiction Into Effect, provides guidance to the Court in exercising its jurisdiction and states "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 comfortable to the spirit of Tribal Law." There is no restriction expressed in CTC 2.4.05 that would limit the Court's ability to schedule a Show Cause hearing at any other time or for any other reasons related to the convicted person's sentence and, the Court in doing so would be acting to the spirit of Tribal Law. We will not diminish the Court's authority in criminal sentencing matters absent legislative action.

2. The Court below erred when it reinstated the appellant's original fine and reimposed part of the appellant's suspended jail sentence.

Sentencing places a burden upon both the Tribes and the convicted person to see that the terms and conditions of sentencing are complied with and completed as outlined in the sentencing order. If a convicted person needs relief from the Court in order to meet a term of sentencing he may make reasonable requests to include additional time for payment of fines and the Tribes may take similar action including Show Cause hearings to enforce provisions of a sentence not fully completed by the defendant. Failure of the Tribes to pursue fine payments does not excuse a convicted person from paying the fine. Where the defendant has failed to complete his sentence as prescribed, the Court may reinstate or impose any part of the suspended sentence where the defendant has violated a

condition of suspension. In this case, the appellant's suspended fine and jail sentence were conditioned upon the appellant not having any driving or alcohol related violations for one year from the sentencing date. The court record reveals that at the Show Cause hearing the Tribe's case file showed no violations reported or entered for a period in excess of one year from the appellant's sentencing. We do not assume that payment of the $500.00 fine by the due date was a condition of suspending a portion of the fine and jail where the record of judgment and sentencing is clear. Since the conditions suspending parts of the sentence were completed by the appellant, those suspended provisions of jail and fine should not have been acted upon by the Court in dealing with the appellant's failure to complete his sentence. The only issue of the appellant's sentence left before the Court at the Show Cause hearing was why he had not paid the $500.00 owing on his fine by August 12, 1993.

CONCLUSION AND ORDER REMANDING

Based upon the foregoing, we hold that the Court's jurisdiction over a criminal defendant does not expire for failure of a trial court to schedule a Pre-Dismissal hearing at sentencing or to hold a Show Cause hearing related to a Pre-Dismissal hearing under CTC 2.4.05 within one year of the date of sentencing. This case is remanded to the Court below to address payment of the fine due and owing from Mr. Brown. The fine can be satisfied by the appellant through completion of community service or credit for jail time served in accordance with provisions of the CTC.

In Re the Contempt of Wippel
(In Re the Welfare of A.T.)
Dana WIPPEL, Appellant.
Case Number AP97-010, 2 CTCR 52, 24 ILR 6249
4 CCAR 31

[Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Steven D. Aycock, Legal Services, Colville Confederated Tribes, Nespelem WA, counsel for the minor.
Theodore J. Schott, Nordstrom Nees & Janecek, Spokane WA, counsel for Trial Court/Appellee.
Juvenile Court Case Number J94-13069]

Initial hearing held July 18, 1997. Decided July 31, 1997.
Before Chief Justice Dupris, Justice Nelson and Justice Bonga

PER CURIAM
NELSON, J.

The Appellate Panel, having convened on July 18, 1997, for the initial hearing in the above referenced matter and having reviewed the files herein and the comments of those attorneys present, remands this matter to the Trial Court for the purpose of completing the record[24] regarding its Order of Review Hearing, entered March 17, 1997.

In matters of direct contempt the Trial Court must have personal knowledge of all the essential elements of the offense and be in position to evaluate the circumstances which evoked the contemptuous behavior. *Nielson v. Nielson*, 38 Wn.App 586, 687 P.2d 877 (Wash.App. 1984). See CTC 1.2.11, Applicable Law.

The record before the Appellate Panel shows Ms. Wippel, with several others, appeared so late for a hearing that it could not be held because of other matters scheduled. Ms. Wippel was summarily sanctioned with a fine of Twenty Five Dollars ($25.00). The record is devoid of any inquiry into the "circumstances which evoked the contemptuous behavior" for which Ms. Wippel was sanctioned. The Trial Court must, at a minimum, inquire whether there was an explanation excusing or mitigating her late appearance for the hearing.

Therefore, It is Ordered this matter be remanded to the Trial Court for action consistent with the foregoing.

Billie MARTIN, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP95-029, 2 CTCR 53, 24 ILR 6246

4 CCAR 32

[Jeffrey 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 95-18200]

Arguments heard July 26, 1996. Decided August 4, 1997.
Before Presiding Justice Fry, Justice LaFountaine and Justice Stewart

FRY, P.J. for the majority.

This matter came before the Court on a Notice of Appeal filed November 21, 1995. Oral arguments were heard on July 26, 1996. The appellee was represented by Lin Sonnenberg of the Tribal Prosecutor's Office (hereinafter the Tribe), and the appellant was represented by Jeffrey Rasmussen of the Tribal Public Defender's Office (hereinafter the Public Defender).

The Court, having reviewed the records and files herein, and being fully advised in the premises, finds good cause to affirm the decision of the Trial Court, now, therefore, the memorandum opinion issues as follows:

I. FACTS

The appellant pled guilty to the charge of Battery on September 19, 1995, against her 12-year old daughter. She was sentenced on November 20, 1995 at the Omak Satellite Court.

Prior to the Sentencing hearing, the public defender and the Tribe were provided copies of the Pre-Sentence Investigation Report (hereinafter PSI report) filed by the Colville Tribal Probation and Parole Department (hereinafter the Department). The PSI report, which is file-stamped October 23, 1995, includes language on the first page that says, “See attached police report (attachment A)”. The Department attached a copy of the police report to the Court's PSI report, but did not attach copies of the police report to the public defender and Tribe's PSI reports. The public defender and Tribe had each previously received a copy of the police report. The public defender and the Tribe claimed on appeal that they did not know that the Court had received and considered the police report prior to the Sentencing hearing.

At the Sentencing hearing, upon being asked whether there was an objection to the PSI report, defendant's counsel stated that the defendant disagreed with the police report in several respects; that she was not rude to the probation office secretary, that much of the family history was inaccurate and not what she reported, that the defendant felt there was not a Battery, and that the police took it a lot more seriously than she had ever admitted to. The public defender further stated that the defendant's daughter had threatened to run away, but that she had not actually run away as reported in the PSI report. Additionally, the public defender stated that the defendant's daughter had admitted lying on the police report.

The defendant added that her daughter had gone to counseling and it was not in the police report, and she admitted taking her anger out on her daughter after her boyfriend ran off. The defendant informed the Court her daughter would be twelve in January and that maybe she should have asked her to come to Court, except that it hadn't occurred to her to ask her. She said Joan Wak Wak was teaching her how to cope with her daughter.

The judge then requested the Tribe's recommendation. The Tribe corrected the history of offenses on the

PSI report. The Tribe recommended a fine of $1,000.00 with $500.00 suspended, community service in the interest of justice to pay off the fine, 90 days in jail with 89 days suspended, credit for one day served, $5.00 court costs, and other conditions.

The public defender then called the defendant to testify. The defendant related to the Court that she was involved in alcohol counseling, mental health testing, anger management, and attending meetings. She was also attending parenting skills training, and that she had no income since July, except for welfare. She had been unable to work for 10-15 years because of her diabetes. She couldn't do community service to pay her fine because she was afraid she would black out in front of other people. The defendant did not have her alcohol evaluation with her. She admitted being intoxicated at the time of the incident.

The public defender recommended a $500.00 fine with $400.00 suspended and a payment plan to begin in February 1996. He also recommended jail time, counseling, and court costs.

The judge stated that she had reviewed the PSI report, and the police report. This was the first time that either party was aware that the Court had received the police report.

The judge further stated that she had listened to the parties, and the testimony. She stated she agreed with the defendant that a fine was not appropriate.

In rendering sentence, the judge said the police report showed that the Battery had been egregious in that (1) the child was 12-years old, (2) she had required medical attention, (3) the defendant was intoxicated, and (4) the defendant was the mother of the child and in a position of trust with her. In the defendant's favor was the lack of a significant prior offense history, which included one prior Battery. The judge then sentenced the defendant to no fine, 90 days in jail with 75 days suspended, credit for one day served and conditions.

The public defender moved to postpone the jail time to allow time to arrange childcare.

The judge inquired as to how much time the defendant needed, and the public defender responded that the defendant needed until December 4th.

The Tribe had no objection.

The judge then found good cause to grant the motion to extend the jail time to December 4, 1995.

The public defender noted for exception the Judgment and Sentence regarding information not properly before the court record.

The public defender noted for exception again, stating that there was no serious injury to the minor.

II. ISSUE

1. Was the Trial Court required to hold an additional evidentiary hearing to allow the appellant to have additional evidence regarding the police report because the appellant claimed surprise regarding the Trial Court's possession of the police report at sentencing?

III. DISCUSSION

Parties' Arguments

The appellant proffers numerous arguments in this appeal, (1) that the defendant found the police report to be erroneous, but did not pursue discussion or testimony regarding it because she did not think the Court had a copy of it, (2) the defendant should have been given an opportunity to rebut the police report information, (3) the defendant has a right to know what information the Court is considering prior to sentencing, (4) the use of the police report by the Court violated the defendant's right to challenge inaccurate information, (5) the defendant should have been given a fact-finding hearing regarding disputed facts which the Court relied upon for the sentencing, (6) “due process and fundamental fairness require the Court to either conduct such an evidentiary hearing, or to disregard the

disputed information,"[25] (7) that the defendant has the right "not to be sentenced based upon unsubstantiated hearsay,"[26] (8) the Trial Court abused its discretion in sentencing the defendant to 90 days in jail with 75 days suspended, and (9) the defendant did not request an evidentiary hearing at the time of sentencing due to surprise.

The appellee argues as follows, (1) the Trial Court has broad discretion "in determining what information it will consider from the prosecution for sentencing a defendant"[27] under *CCT v. St. Peter*, (2) *St. Peter* also notes that probation officers have broad discretion regarding the information they include in Pre-Sentence Investigation reports, (3) which may properly include hearsay, (4) inclusion of the police reports in the PSI report was wholly proper as "was the Trial Court's review of the same,"[28] (5) the appellant should have requested an evidentiary hearing and in failing to do so, forfeited her right to claim a violation of due process, (6) the burden to request an evidentiary hearing is on the defendant, (7) the defendant was aware she could have requested a hearing and could have called witnesses, (8) the Court should not consider extrinsic case law since there is pertinent tribal case law, (9) the Appellate Court should "examine the extent to which the record shows the Trial Court based its sentence on the police reports"[29] (10) custom and tradition do not appear in the applicable law section of the Tribal code pertaining to rules of Court,"[30] and (11) When a sentence falls within the Tribal Code guidelines, the Appellate Court will only review the process by which punishment is determined to see if it is "shocking to the sense of justice"[31] as a severe abuse of discretion.

ANALYSIS

The appellant argues that she was unaware until sentencing that the trial judge had received a copy of the police report. Appellant argues, therefore, that it was a denial of due process to not have been allowed to provide additional information to the Trial Court at a further evidentiary hearing regarding the police report.

This Court finds it difficult to accept the appellant's argument that she was surprised during sentencing when she realized that the Trial Court had access to the police report. This Court's view is based upon a review of the Pre-Sentence Investigation report file-stamped October 23, 1995. The first paragraph of the PSI report is preceded by the statement "See attached police report (attachment A)."[32] This Court assumes that the appellant read the statement and understood its meaning.

The appellant claims her copy of the PSI report did not include Attachment A, the police report. Therefore, appellant concluded, the Trial Court probably did not receive a copy either. The appellant did not go any farther, though the appellant did not actually *know*, one way or the other, whether the Court received a copy of the police report. However, the appellant relied on the view that because she did not receive a copy of the police report, then the Trial Court must not have received one either.

The question of this Court then becomes, when the appellant received her copy of the PSI report with the words that the police report was attached, did she have an obligation to determine if the Trial Court's PSI report included Attachment A? This Court concludes that the appellant did have such an obligation, because the appellant was the only party who knew that Attachment was not included on her PSI report. Therefore, only she could gain the knowledge needed to completely prepare for the sentencing hearing by answering the question: Would the Trial Court be rendering sentence after viewing the police report?

Yet, the appellant failed to meet her obligation of determining whether the Trial Court received a copy of the police report, though she had approximately thirty days in which to do so prior to sentencing. Therefore, the appellant cannot now claim it is a violation of her constitutional rights to deny her an additional evidentiary hearing, claiming she has been denied the ability to completely prepare for the sentencing hearing.

By failing to meet her obligation, the appellant has waived her right to claim violation of due process.

The Court therefore finds an additional evidentiary hearing in this case is not required.

The Court finds that it need not address the other arguments of the appellant in order to arrive at a decision in this matter.

The Court thus finds good cause to affirm the Judgment and Sentence of the lower court, and remands this matter to the Trial Court for action consistent with this opinion.

Justice Frank LaFountaine will issue a dissenting opinion.

Justice LaFountaine dissenting.

The Colville Tribal Civil Rights Act requires the Colville Tribal Court to provide criminal defendants due process of law. This is solemn obligation, which must be vigorously enforced by the Trial Court at every stage of criminal proceedings.

The Colville Tribal Civil Rights Act, Title 56.02 of the Colville Code reads in part:

> "The Confederated Tribes of the Colville Reservation in exercising powers of self-government shall not -
> ***
> (h) 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[.]"
> CTC 56.02(h).

Because criminal defendants must be provided due process of law, the sentencing of Trial Courts must only be based upon accurate information. The United Supreme Court requires that Trial Courts only use accurate information in sentencing criminal defendants.

In *Townsend v. Burke*, 334 U.S. 736 (1948), the United States Supreme Court held that there is a due process right to be sentenced only on the basis of accurate information. In that case, the judge in sentencing a defendant unrepresented by counsel recited his prior criminal record and in doing so treated as convictions three earlier charges which had been either been dismissed or resulted in a finding of not guilty. The Supreme Court concluded:

> "We believe that on the record before us, it is evident that this uncounselled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted. Consequently, on this record we conclude that, while disadvantaged by the lack of counsel, this petitioner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design is inconsistent with due process of law, and such a conviction cannot stand."

In this case the Trial Court used the police report generated by Tribal Police Officer Cory J. Orr to making findings that the Battery had been egregious in that (1) the child was 12-years old, (2) she had required medical attention, (3) the defendant [Appellant] was intoxicated, and (4) the defendant [Appellant] was the mother of the

child and in position of trust with her.

Both counsel for the appellant and counsel for the Tribes were not aware that the Trial Court had received a copy of the police report and was relying on its factual representations in sentencing the appellant.

Police reports constitute hearsay and are not admissible for evidentiary purposes. This is because police reports are inherently unreliable for reasons which will not be repeated in this dissent.

The use of police reports by Trial Courts at sentencing hearings without the assent of the defendants and their counsel is highly suspect, and Trial Courts have the burden of showing that the defendants were accorded due process of law at sentencing hearings.

In this case, the Court Trial should have not used the police report of Officer Orr in sentencing the appellant without ensuring due process of law was accorded the appellant. The sentencing of the appellant must be based on accurate information, and the Trial Court did not ensure that accurate information was used.

I respectfully dissent.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Melvin MEUSY, et al., Appellees.

Case Number AP96-016, AP96-018, AP96-019, AP96-020, 2 CTCR 54, 24 ILR 6248

4 CCAR 37

[Jeffrey 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 numbers 96-19071 (016); 95-18216 (018); 96-19219/220 (019); 96-19202-205 (020)]

Hearing held July 18, 1997. Decided August 26, 1997.
Before Chief Justice Dupris, Justice Fry and Justice Miles

DUPRIS, C.J.

This matter came before the Colville Tribal Court of Appeals for oral arguments on July 18, 1997. The Court of Appeals was informed on record by Jeffrey Rasmussen, counsel for all of the appellees except Melvin Meusy, that Lin Sonnenberg, counsel for the appellant, would not be present because she hurt her back. Mr. Rasmussen had no arguments to present beyond the arguments presented in the briefs.

The Court of Appeals found it was inappropriate for Ms. Sonnenberg to send a message through Mr. Rasmussen instead of sending someone from her office, but no sanctions were ordered.

The Court found further that neither party briefed whether the appeals filed by Patricia Ankney, AP96-018, and Leslie Moses, AP96-019, were properly before the Court in that the Trial Court ruled in both cases to deny the motions for deferred prosecution partly on Section 3 of the Deferred Prosecution Ordinance, which was held to be constitutional by the Trial Court. At the Initial hearing held on December 20, 1996, as well as the status hearing held on March 21, 1997, the parties were instructed by the Court of Appeals to address this issue. This Court finds the parties have waived this issue, and that the appeals in the *Ankney*, AP96-018, and the *Leslie Moses*, AP96-019, cases should be dismissed, with orders to remand to [the] Trial Court.

The Court found further that at the last hearing on March 21, 996, Mr. Rasmussen was going to assist Mr. Melvin Meusy in seeking appointment of the public defender's office in this matter, and that it was the understanding of this Court that Mr. Rasmussen would be representing Mr. Meusy, but that no actions were taken by either Mr. Meusy or Mr. Rasmussen for appointment of counsel, so Mr. Meusy is *pro se* and did not appear at this hearing.

The Court found further the briefs filed herein were inadequate in addressing the issue of whether the new deferred prosecution statute was unconstitutional, and that the Court should invite the Tribal Reservation Attorney's Office and the Trial Court to file amicus briefs on the issue, now therefore

It is Ordered, Adjudged and Decreed that:

1. *Patricia Ankney v. CCT*, AP96-018, is hereby dismissed from the Court of Appeals, and the case is remanded to the Trial Court for disposition.

2. *Leslie Moses v. CCT*, AP96-019, is hereby dismissed from the Court of Appeals, and the case is remanded to the Trial Court for disposition.

3. The Court of Appeals invites the Tribes' Reservation Attorney's Office, in their capacity as Attorneys General, to submit an amicus brief on the issue of whether the Tribes' Deferred Prosecution law is unconstitutional based on the doctrine of separation of powers. If the Reservation Attorney's Office wishes to file such a brief, it shall file one original and three copies, with cases cited attached, no later than October 10, 1997.

4. The Court of Appeals invites the Tribal Trial Court to submit an amicus brief on the issue of whether the Tribes' Deferred Prosecution law is unconstitutional based on the doctrine of separation of powers. If the Trial Court wishes to file such a brief, it shall file one original and three copies, with cases cited attached, no later than October 10, 1997.

5. There will be no further oral arguments set in this matter.

Theresa M. POULEY, et al., Appellants,

vs.

COLVILLE CONFEDERATED TRIBES, Appellees.

Case Number AP96-009, AP96-013, AP96-014, AP96-021, 2 CTCR 39, 25 ILR 6024

4 CCAR 38

[Theresa M. Pouley and Mark Pouley, Attorneys at Law, Arlington Washington, counsel for Appellants.
Steve Suagee, Office of the Reservation Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellees.
Trial Court Case Number CV94-14286]

Arguments heard June 20, 1997. Decided November 21, 1997.
Before Presiding Justice Bonga, Justice Chenois and Justice Nelson

BONGA, P.J.

The Appellate Panel of Justice Edythe Chenois, Justice Dennis Nelson, and Presiding Justice David Bonga convened for Oral Arguments on June 20, 1997. All parties were present and represented by counsel.

This case presents critical issues about the Colville Tribes' constitutionally based requirements for blood degree corrections and enrollment denials. The justices after reviewing the file and information submitted to the Court finds merit in Appellant's position, that the central question of this action is what is the proper blood quantum of Victor Frank Desautel under the law of the Colville Confederated Tribes, and that in the interests of justice the decision of the Trial Court is Reversed and this matter is Remanded for a new hearing to determine if the action by the 1967 BIA correction of Victor Frank Desautel's blood quantum from ½ to 5/8 was valid, and, whether Mr. Victor J. Desautel's legal residence was on the reservation at the time in question.

FACTS

Felix Desautel was an enrolled member of the Tribes. He died prior to compilation of the 1937 Census Roll of the Tribes, the Base Roll, and, therefore, his name is not on that roll.

Victor Frank Desautel, son of Felix Desautel, is typewritten on the 1937 Census Roll as being ½ degree of Indian blood. In 1967 his blood degree was altered in handwriting on the 1937 roll to 5/8 degree by action of the BIA in response to a request for a blood degree revision of an indirect ancestor, Myrtle Peone.

Victor Frank Desautel's mother, Mary Paul, in 1968 had a properly executed blood degree increase which ordered her corrected from 1/2 to 4/4 and the blood degree of her descendants corrected "accordingly".

At the time of the birth of each of Victor J. (Skip) Desautel's daughters, Theresa M. Pouley, Deborah Desautel, and Sandra Lynn Desautel, Skip Desautel, the son of Victor Frank Desautel, was working outside the boundaries of the Colville Indian Reservation and living with his family in rented homes outside the Colville Indian Reservation. He testified that he could not find work to support his family on the Reservation. He further testified that he and his family regularly returned to the Reservation, especially on week-ends, and stayed with his parents in

Inchelium on the Reservation. He and his family received mail at his home off the Reservation and he also received mail at his parents home on the Reservation.

DISCUSSION

STANDARD OF REVIEW ON APPEAL

The Court of Appeals has jurisdiction to review all issues of law and/or fact in blood degree correction actions. CTC 36.7.09; CTC 1.9.02A. The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law. *Wiley v. CCT*, [AP93-16237, 2 CTCR 09, 2 CCAR 60], 22 ILR 6059, 6060 (Colv. Ct. App. 1995). When the issues are mixed questions of law and fact then the standard of review remains *de novo* when the "administration of justice favors the appellate court". *CCT v. Naff*, [APCvF93-12001 to 003, 2 CTCR 08, 2 CCAR 50], 22 ILR 6032, 6033 (Colv. Ct. App. 1995), citing, *U.S. v McConney*, 728 F.2d 1195 (9th Cir. 1984).

Under *McConney*, the administration of justice favors the appellate court and results in *de novo* review when: 1) there is an important legal issue involved; 2) the collaborative process provided by 3 judges minimizes the chances of judicial error; and, 3) the precedential value of the decision is important. *U.S. v McConney*, 728 F.2d 1201. Under this standard *de novo* review is favored when the application of the law to the facts will require the exercise of judgment about the value underlying the legal principles. The record before the Court in this case is replete with evidence which substantiates the constitutional nature of the issue, the importance of the precedential effect, and the necessary value judgments inherent in selecting which evidence should be preferred in enrollment cases. The Appellate Panel finds that all of the factors are present and thereby formulate a mixed question of law and fact that favor *de novo* review.

WEIGHT OF THE EVIDENCE

In *Hoffman v. Colville Tribes*, AP95-023 [2 CTCR 37, 4 CCAR 4, 22 ILR 6127, 24 ILR 6163], (Colv. Ct. App, 1997) and *Gorr v. Colville Tribes*, No. CV 94-14394 (Colv. Tr. Ct., 12-13-96) the petitioners were asking the Court to accept pre-1937 census records and adopt a blood degree that was contrary to that shown on the 1937 base census record. In such cases there is a presumption that the blood degree listed on the 1937 census is correct, and it is not improper to give lessor weight to other census records that present information which is contrary. In this case all of the census records admitted into evidence were wholly consistent with regard to the petitioners family base roll ancestor whose blood degree on the 1937 census, under Tribal law, is presumed to be correct. To flatly reject the information recorded in the census records would "assail the Tribes decision to adopt the 1937 Roll as its base roll. Doing so would seriously erode the fundamental constitutional standards adopted by the people concerning protection of the integrity of Tribal membership, and the constitutionally delegated regulatory authority of the Colville Business Council to regulate Tribal membership. *Gorr* at 10.

In *Gorr* the Court noted that it must consider the historical facts and well established Tribal policy, noting information contained in pre-1937 census record would have been known and presumably utilized in preparation of the 1937 census. When the pre-1937 records are consistent with the 1937 census the Panel believes the pre-1937 records should be given great weight.

MEMBERSHIP ENROLLMENT

The Colville Constitution as originally adopted in 1938, did not address the question of membership. In 1949, by Amendment III, the Tribe adopted a membership section which provides that Colville membership shall consist of "all persons of Indian blood whose names appear as members of the Confederated Tribes on the official census of the Indians of the Colville Reservation as of January 1, 1937," and descendants of tribal members possessing 1/4 or more Indian blood who meet other requirements regarding residency and maintaining tribal

relations. Amendment V, adopted in 1959, added a proviso which requires that persons admitted to membership after July 1, 1959 must possess at least 1/4 degree blood of the tribes which constitute the Confederated Tribes of the Colville Reservation.

At a special election held on March 26, 1988 Constitutional Amendment IX was approved by voters of the Colville Confederated Tribes. The amendment did two things. First, the amendment provided that all "Indian blood" identified on the 1937 roll was to be considered Indian blood of the tribes which constitute the Confederated Tribes of the Colville Reservation regardless of whether it was in fact Indian blood of a member tribe or some other tribe. In other words the amendment effectively repealed the requirement adopted in Amendment V that persons must possess 1/4 degree blood of the tribes which constitute the Confederated Tribes of the Colville Reservation.

Second, the amendment nullified numerous corrections that had been made to the roll and approved by the Bureau. *May 18, 1988 Memo from Office of Solicitor to Area Dir., PAO, BIA.*

The clear language and policy of Amendment IX, Section 4(1) protects against all blood decreases. The unrefuted legislative history states that all BIA corrections on the roll were to be reversed.

> Mainly, we wanted to assure the membership that no changes could be made to their Colville blood degree, without due process. *Memorandum of CCT Councilmen, Feb. 5, 1988.* To the extent the amendment is interpreted to nullify corrections to the 1937 roll that have been made over the years, it would not appear that this action would abrogate or modify any legal right or entitlement of any tribal member or violate the due process or equal protection provisions of the Indian Civil Rights Act. *Memorandum from Office of Regional Solicitor to Portland Area Director, PAO, BIA, May 18, 1988. The* amendment specifically provides that no tribal member's blood degree will be decreased as a result of the amendment...the intent is to negate all subsequent changes and retum to the original calculations of Indian blood identified on the 1937 roll. *Documentation, Telephone Call or Personal Visit from Colville Tribes; Colville Agency; BIA P.A. 0., to Vernon Peterson, Solicitor's Office, 1-22-88.*

Therefore, the starting point of any inquiry regarding enrollment is the 1937 Census that was adopted by the Colville Tribes' as the base roll for the Tribes, when the Commissioner of Indian Affairs approved Amendment III to the Colville Tribes Constitution on April 14, 1952. The Trial Court was therefore in error to begin the inquiry of enrollment for the petitioners with an examination of their relative, Felix Desautel, who was not listed on the 1937 Census roll. The inquiry needs to be started with, Victor Frank Desautel, the direct relative of the petitioners who is listed on the 1937 Census Roll.

The presumption is that under Tribal law the blood degrees listed for persons appearing on the 1937 Roll is correct:

> In all actions for blood degree corrections the plaintiff shall be required to prove by clear and convincing evidence, that a blood degree other than that which is listed on the Roll for the person whose blood degree is at issue, is the correct blood degree and what the precise blood degree to be listed on the roll should be. There shall be a presumption, refutable by the plaintiff, that the blood degree listed on the roll is correct. *Colville Tribal Code* (CTC) 36. 7. 03.

As stated above, Amendment IX specifically protects a Tribal member's blood degree as listed on the official census on January 1, 1937, from being decreased. However, to increase blood degree one must follow procedures which have been promulgated by the Colville Business Council. Constitution, Article VII(2)(a)-(c). Thus, to increase the blood quantum of a person to be eligible for enrollment the Business Council adopted CTC 36

et seq.

CTC 36.01.01 states:

> The Colville Tribal Constitution provides for the terms upon which membership in the Confederated Tribes of the Colville Reservation (hereinafter Tribes) will be granted, forfeited, or denied, and empowers the Colville Business Council to regulate tribal membership. Accordingly, the Colville Business Council finds it in the best interest of all members and potential members to provide specific written rules and regulations governing the procedure to be used in determining membership.

The introduction to CTC 36.7, *Blood Degree Corrections,* states:

> The following procedure shall be used in making corrections (increases or decreases) of all degrees presently listed on the roll of the Tribes. This procedure is established to provide for a fair and unbiased examination of all blood degree corrections requested by the Tribes or by any other person.

Therefore, a Court in this case will need to begin the inquiry with Victor Frank Desautel's 1937 Census Roll blood degree listing of 1/2, as Amendment IX to the Constitution and Title 36 of the Colville Tribal Code require a party prosecuting a blood correction begin analysis of blood quantmn with the 1937 rolls and presumes the degree listed on the 1937 roll is correct. There is no indication in the record that the 1967 handwritten change of blood degree for Victor Frank Desautel on the 1937 Census Roll from ½ to 5/8 was performed within the Constitutional requirements for enrollment or that basic due process was provided to the family.

The argument of the appellants is that if a person's blood degree is increased on the base roll, Amendment IX to the Constitution of the Confederated Tribes of the Colville Reservation requires a consistent increase of the blood degree of all the person's descendants. The appellants argue that since Victor Frank Desautel's mother, Mary Paul, had a properly executed blood degree increase from ½ to 4/4, her descendants, starting with Victor Frank Desautel's 1/2 degree of blood, should receive a proportional increase in their blood degree. Though persuasive, the Panel does not agree, as Amendment IX protects what is listed on the 1937 base roll from decreases in blood degree and does not mandate that the descendants, of one listed on the base roll who has received an increase in blood degree, are entitled to an automatic increase in their blood degree.

CTC 36.7.03 states:

> Standard of Proof. In all actions for blood correction the plaintiff shall be required to prove by clear and convincing evidence, that a blood degree other than that which is listed on the Roll for the person whose blood degree is at issue, is the correct blood degree and what the precise blood degree to be listed on the roll should be. There shall be a presumption, rebuttable by the plaintiff, that the blood degree listed on the roll is correct.

The appellants are therefore entitled to prove by clear and convincing evidence, pursuant to Amendment IX and CTC 36 *et seq.*, a blood degree correction for their direct ancestor, Victor Frank Desautel, which may directly affect their ability to meet the enrollment requirements to become members of the Confederated Tribes.

DOCUMENTATION

Hoffman set forth the standard that sworn statements are given more weight than unswom statements and as a general rule this is correct. In other words, the standard of proof should remain as set forth in *Hoffman*, but the Trial Court is cautioned to review each document for "circumstantial guarantees of trustworthiness" and not necessarily take the contents of each document at face value.

It is the opinion of this panel that where unsworn evidence shows unusual consistency, it should be given greater weight than inconsistent, unsworn evidence. As was pointed out at oral argument, Victor Frank Desautel was consistently shown, without deviation, to be ½ Indian on every census record admitted. While censuses are admittedly generally unreliable from year to year, where there is a conclusive consistency regarding an individual, they should be entitled to greater weight.

The Panel also believes that the Tardy Book, which is unswom, is a census document. The Tardy Book is unique to the Tribes and has been a preferred document for enrollment purposes. The Panel believes that the Tardy Book qualifies as a traditional Tribal document and should be accorded greater weight than a regular census role - which is in accord with the Tribal Court's position that census rolls, whether prepared in 1937 or earlier, are inherently unreliable as sources of factually accurate blood degrees.

RESIDENCY

Amendment III, Article VII, Section 1, as is reiterated in CTC 36.3.01(3) requires the member parent "maintained a permanent residence on the Colville Indian Reservation at the time of the applicant's birth." CTC 36.2.12 defines a "permanent residence" as a true, fixed, permanent home to which one has intention of return whenever absent therefrom." By its very definition, as a matter of law, residence under this definition necessarily includes an "examination of a person's intent to reside combined with manifestations of that intent. *Yellowhair v. Office of Navajo & Hopi Indian Relocation*, 22 ILR 3120 (D. Ariz. 1995).

The record contains conflicting evidence regarding whether Skip Desautel "permanently resided" on the Reservation at the birth of his first three daughters. Therefore, on remand, the Trial Court must make further findings to clarify this issue. This Court has reviewed the evidence on the record below, balanced that evidence in light of Tribal custom and tradition and traditional rules of evidence and has reached the conclusion that file decision of the Trial Court is Reversed and the case is Remanded so that the Trial Court can determine if the 1967 BIA correction of Victor Frank Desautel's blood quantum from 1/2 to 5/8 was valid, and, whether Mr. Victor J. Desautel's legal residence was on the reservation at the time in question.

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Darla CARDEN, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP96-017, 2 CTCR 40, 25 ILR 6037

4 CCAR 44

[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 93-16698, 93-16699, 93-16700, 93-16701]

Decided November 21, 1997.
Before Presiding Justice Miles, Justice Fry and Justice McGeoghegan

MILES, P.J.

This matter came before the Court of Appeals on March 21, 1997 for a Motion to Dismiss Appellant's appeal based on an untimely filing. The appellant was represented by Jeff Rasmussen, Tribal Public Defender's Office. Wayne Svaren, Tribal Prosecutor's Office for the appellee.

The Court has reviewed the record on appeal, applicable Tribal Law, and after hearing oral arguments of counsel, this Court Grants Appellee's Motion to Dismiss based on the following conclusions.

The Trial Court entered and filed its Order from the Show Cause hearing in *CCT v. Carden* on August 21, 1996. According to the Court Clerk's certificate of service the appellant was served by interoffice mail on August 23, 1996. The appellant filed her Notice of Appeal on September 5, 1996.

Tribal statutory law requires written notice of appeal to be filed within ten (10) days from entry of Judgment, CTC 1.9.03. In computing any period of time prescribed by Tribal law, the day of the act or event from which the designated period of time begins, shall not be counted or included, unless it is a Saturday or Sunday or legal holiday in which case it runs until the next day. CTC 1.11.5. The Colville Court of Appeals has addressed the issue of untimeliness based on these statutory requirements. *Stanger [sic] v. Stanger [sic]*, 1 CTCR 40, [1 CCAR 28], (1989), *Waters v. CCT*, [AP85-7231/32], 1 CTCR 21, [1 CCAR 21] (1985); and *Waters v. CCT*, [AP85-7231/32], 1 CTCR 22, [1 CCAR 22] (1985). Based on this case law, which precedent has already been established, this Court concludes the appellant's appeal was filed fifteen (15) days after Entry of Judgment and therefore untimely.

The Trial Court has held that interoffice mail is normal procedure and adequate service. See: *e.g., CCT v. Louie*, 1 CTCR 9 (1994) and 1 CTCR 10 (1994). This Court also finds that defense counsel is familiar with the Tribal Court's business practices for rendering service for Tribal programs associated with the Tribal Court system. The mere absence of any individual does not constitute an excusable exception. Delegation of responsibility within any Tribal structure is essential in order to maintain it's integrity, while preserving the constitutional right to due process for the individuals they represent. Perhaps initiating some type of tickler system may provide further assistance in calculating these statutory time lines.

For the reasons stated above, this Court Grants Appellee's Motion to Dismiss.

Henry PAKOOTAS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP97-015, 2 CTCR 41, 25 ILR 6024
4 CCAR 45

[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 93-16273]

Initial Hearing held July 18, 1997. Decided December 5, 1997.
Before Chief Justice Dupris, Justice Bonga and Justice Nelson

PER CURIAM
NELSON, A.J.

This matter came before the Court of Appeals on July 18, 1997, for Initial Hearing. The appellant, by and through his attorney, Jeffrey Rasmussen, stated his appeal was partially based upon the Trial Court's failure to make Findings of Fact and Conclusions of Law in its Order of April 24, 1997, in which it declined to modify the sentence of the defendant.

Although there is nothing in the record regarding the issue of tradition and culture as it affects sentencing, the appellant requested the Appellate Panel to take judicial notice that tradition and culture does not recognize jail service and that the appellant should not be sentenced to jail.

The Panel declined to take judicial notice as requested and determined the appeal should be dismissed and the matter remanded to allow the appellant to develop his theory regarding tradition and culture and for the Trial Court to enter its Findings of Fact and Conclusions of Law, should they be so requested in writing.

ORDER

It is Ordered that the appeal of the appellant is Dismissed and the matter Remanded to the Trial Court for appropriate action.

Danny Joe STENSGAR, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case No. AP94-022, 2 CTCR 42, 25 ILR 6023, 8 NALD 7001
4 CCAR 45

[Dianna Caley, 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 92-15068]

Argued July 21, 1995. Decided January 13, 1998.
Before Chief Justice Baker, Justice Bonga and Justice Chenois

BONGA, J.

This matter came on for oral argument on the 28th day of May, 1993, with Appellee appearing by Prosecuting Attorney Lin Sonnenberg and Appellant being represented by Public Defender Dianna Caley. David

Bonga, Edythe Chenois and Rebecca Baker presided.

PROCEDURAL HISTORY

On March 4, 1992, Mr. Stensgar was arrested on the charges of Driving While Intoxicated. On April 22, 1992, Mr. Stensgar plead guilty to the charged offense. Mr. Stensgar's sentencing date was set for July 29, 1992. The defendant moved to dismiss the conviction on the grounds that the Court had violated the defendant's right to speedy sentencing. The Motion was denied and the defendant was sentenced on July 10, 1992. The defendant timely filed an appeal, on July 17, 1992, of the Trial Court's order denying his motion to dismiss.

The Appellate Court met on this matter via telephonic conference call on October 16, 1992. Without oral argument or briefing, the Court summarily ruled that the Tribes had lost jurisdiction over the defendant, based on CTC 2.4.04, and dismissed the case, with prejudice, through an Order received by the Trial Court on October 27, 1992. Appellee then moved the Court to vacate the order and set the matter for oral argument pursuant to 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 on April 19, 1993, vacated the previous Order of Dismissal, and set the matter for briefing and oral argument. On November 19, 1993, the Appellate Court issued its opinion upholding the Trial Court's denial of the motion to dismiss and remanding the matter to the Trial Court for further proceedings.

In 1994, the matter came before the Trial Court on a hearing for the appellant to show cause regarding alleged violations of his sentence. At said hearing, the appellant moved the Trial Court to dismiss the case, asserting that the Trial Court was bound by the Appellate Court's vacated Order of Dismissal of October 27, 1992 The Trial Court denied the appellant's motion. Appellant then filed this appeal.

QUESTIONS PRESENTED

The initial question before the Appellate Panel is whether the Appellate Court had jurisdiction to rehear the October 1992 appeal after the mandate had been delivered to the lower court on October 27, 1992.

The second question was whether the Trial Court erred in failing to dismiss the charges against the defendant.

SUMMARY OF DECISION

The Appellate Panel concludes that the issuance of its Order on April 19, 1993, was not a rehearing of the October 27,1992, telephonic session held by this Appellate Panel. The facts show that the Appellate Panel had overlooked the requirements of Colville Tribal Code (CTC) section 1.9.05 when it issued its Order of Dismissal of October 27, 1992. That section pertains to appeals with requirements which call for the Appellate Court to set a case for hearing within 45 days of the date of the written appeal. At that hearing, the Court is to review the record and hear oral arguments of the parties. In the 1992 appeal, the Court did not hold the mandated hearing, and the Court did not hear oral or written arguments of the parties before issuing the October 27, 1992 Order. This decision was void.

The mistake was brought to the attention of this Court by the Appellee through its motion to vacate and set for oral argument. This Court had jurisdiction to review and reverse its void decision and ultimately agreed with appellee, setting the appeal for briefing and oral argument. In 1994 the matter again came before the Trial Court which denied the defendant's Motion to Dismiss the case. The defendant's assertion in this appeal that the Appellate Court had no authority to hear the case following the October 27, 1992, Order, which therefore invalidated the Trial Court's actions after the date is without authority. The Trial Court's decision to deny the Motion to Dismiss is

Affirmed.

ANALYSIS

The Colville Tribal Code has no specific provision dealing with the Court's power to reexamine its earlier mistaken actions. However, the Code does have a provision at CTC section 1.5.05, 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 seem to have application to the instant case, inasmuch as the CTC is silent as to an error committed by the Appellate Panel. Without more, we turn to Section 4.1.11 to examine what other law to which the Appellate Court can refer.

> 4.1.11 Applicable Law
> 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 appellant fails to cite any "laws" of the Colville Confederated Tribes, tribal case law, state common law [or] Federal statutes" in support of a position which is applicable to this particular case. The appellant relies upon decisions issued by various courts located in differing states for support of his position. Upon review the Appellate Court finds that each case is distinguishable from the present situation. However there is a common denominator which is also found in the federal cases that is revealed in an analysis of the federal common law (case law).

While a mandate once issued by our Court will not be recalled except for good cause shown, an appellate court has power to set aside at any time a mandate that was procured by fraud, or to act to prevent an injustice, or to preserve the integrity of the judicial process. *Coleman v. Turpen*, 827 F.2d 667 (10th Cir. 1987), *Greater Boston Television Corp. v. F.C.C.,* 463 F.2d 268 (D.C. Cir. 1971) *cert. denied* 406 U.S. 950, 92 S.Ct. 2042 (1972). The federal courts have also ruled that an appellate court has the power to vacate its own judgment *sua sponte*, even after a mandate issues. *Wolfel v. Bates*, 749 F.2d 7 (6th Cir. 1984).

A court may correct formal inaccuracies or clerical errors and rectify mistakes of fact reviewable at common law by writs of "*error coram nobis*," or "*coram vobis*." Such writs were available to bring before the court pronounced judgment errors in matters of fact which had not been put in issue or passed on **and were material to the validity and regularity of the legal proceeding itself** (emphasis added). *Hiawassee Lumber Co., et al. v. United States*, 64 F.2d 417 (1933).

Thus the Appellate Panel in this case holds that it has inherent authority to correct inaccurate interpretation of Court procedures in order to preserve the integrity of the judicial process and to prevent injustice.

Did the Trial Court err in failing to dismiss the charges against the defendant?

As stated above, the Appellate Court's actions of October 27,1992 were invalid, since the clear mandate established by CTC 1.9.05 was not heeded by the Court. The October 27, 1992, order was based on a false premise of the Court and enforcement of that Order would undermine the legal system and thwart justice.

It is the opinion of the Appellate Panel that a recall of a mandate is an inherent power of the Court of Appeals reserved for special circumstances which should be "sparingly exercised." See *Greater Boston Television Corp., Ibid.* Alleged erroneous ruling of law are generally not held to be sufficiently unconscionable to justify reopening a judgment **not void when issued** (emphasis added). *Hines v. Royal Indemnity*, 253 F.2d 111 (6th Cir. 1958); *Iverson v. Commissioner of Internal Revenue*, 257 F.2d 408 (8th Cir. 1958). As noted above the Appellate Court holds that the decision of October 27, 1992, was void, and that the Court retained jurisdiction and correctly vacated the action. Therefore the Trial Court did not err by refusing to dismiss the charges against the defendant.

It is Hereby Ordered that the defendant's appeal is Dismissed.

Laurie WATT, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP96-023, 2 CTCR 43, 25 ILR 6027, 8 NALD 7001

4 CCAR 48

[Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Leslie Kuntz, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 96-19406]

Arguments heard September 19, 1997. Decided January 21, 1998.
Before Chief Justice Dupris, Justice Bonga and Justice Stewart.

DUPRIS, C.J.

SUMMARY OF PROCEEDINGS

On November 21, 1996 the appellant, Laurie Watt, entered a guilty plea to the charge of Driving Without a Valid License. The Court entered a sentence of jail and fine, with some of the sentence suspended on conditions.[33] The appellant filed this appeal from the Judgment and Sentence entered on November 21, 1996. The Court of Appeals met on March 21, 1997 for the Initial Hearing; a briefing schedule was ordered on April 4, 1997. Oral Arguments were heard on September 19, 1997. The Court of Appeals found at the Oral Arguments that the Appeal should be dismissed.

FACTS

The appellant entered a guilty plea to the charge of Driving Without A Valid License. The prosecutor's office made a recommendation of a fine of $500.00 with $200.00 suspended and sixty (60) days in jail with fifty-five (55) days suspended. The appellant's attorney recommended the appellant be allowed to work community service hours in lieu of the jail time because of extenuating circumstances regarding the care of the appellant's young child. The Trial Court did not accept these recommendations. The Trial Court did not enter specific findings on the record regarding the basis of its rulings. However, the record on appeal includes information taken at the sentencing.

ISSUE

The appellant argues that the Trial Court abused its discretion by not allowing the her to serve her jail term through community service contrary to Tribal custom and tradition.

DISCUSSION

Did the Trial Court abuse its discretion by not substituting community service in lieu of jail time, contrary to Tribal custom and tradition?

The Court of Appeals must review two things in this appeal: (1) whether there is a custom or tradition regarding the use of community service in lieu of jail time; and (2) whether the Trial Court abused its discretion in failing to allow the appellant community service in lieu of jail time.

As to the first question, there is nothing on record to support the appellant's argument regarding custom and tradition. Appellant cites no authorities regarding the nature of punishment prior to the statutory law of the Tribes.[34] At best the appellant has supported her arguments with suppositions of what she believes custom and tradition is regarding punishment. She has failed to meet even a minimum burden of showing what **is** custom and tradition. We so hold.

Next we decide whether the Trial Court abused its discretion by failing to allow community service in lieu of jail time in this case. In reviewing for an abuse of discretion it is not the Appellate Panel's duty to decide *de novo* the sentence of the appellant. We cannot substitute what we would have ordered in lieu of what the trial judge ordered just because we may have ruled differently.

The record must show a clear abuse of discretion between the facts of the case and the sentence entered by the trial judge. We must be shown that the record does not support the trial judge's findings. We cannot find that in this case. As the appellee has pointed out, the record before the trial judge at the time of the sentencing shows numerous similar offenses by the appellant. *See*, for example, Appellee's Amended Response Brief at pp 1-3 (filed June 24, 1997).

The record also shows that the sentence is well within the statutory limits for the offense charged. *See*, CTC §§ 3-3-4[35] and 3-3-40.[36] The appellant has not met her burden on this issue either.

We hold that this appeal shall be dismissed and this matter remanded to the Trial Court for disposition consistent with this ruling.

It is so Ordered.

STEWART, J concurring.

The Colville Tribal Court started in the early 1940's as a Court of Justice. There was only one judge for years on end. Albert Orr was a quiet, soft-spoken man, and treated every one who came to his court with dignity and respect. The officers were expected to tell the truth and the defendants knew they could not pull anything on the Judge, because everyone know what was going on within the Reservation.

There weren't many jury trials. The first time I was in Court as a officer was 1962. The person on trial asked for a jury and was able to pick his own jury. So, he called for friends from Idaho, Yakima, Spokane, and maybe a couple of local people. The standard reading went something like this: "you can be represented by a tribal member as long as it is not an attorney." There was no Court of Appeals until into the 1970's, as I remember it.

As the times changed so did the Court. The Colville Tribal Court took the lead, in many ways, being one of the bigger reservations in the State. The laws were changing, and the Court was closed down and only started again after the Tribes saw what was happening with our people. Both Okanogan and Ferry County courts were swamped with cases. The sheriff didn't have money to send full-time officers to take care of the Reservation, so the Tribal Council took back jurisdiction over tribal members from any tribe.

In 1971 I was working for Highway Safety on a grant from the Department of Transportation out of

Washington D.C. This Reservation in the mid-1970's had the highest fatality rate of any place in Washington State between Omak and Coulee Dam. I was keeping record at the time, and decided we should have some kind of driver's license for the five hundred (500) Tribal employees who drove Tribal vehicles. Fifty percent of our drivers did not have any kind of a state driver's license. There were five program directors who did not have a license. I started a program to teach people to drive, and made every employee who drove have a Tribal license. The first year the Tribes saved $1,000.00 on insurance.

By this time we had one full-time judge, Frank LaFountaine, and needed a part-time judge to fill in while Judge LaFountaine was on vacation. I was asked to fill in as judge for a couple of weeks. By then we had lawyers and a public defender, and we were starting to be a real Indian court, a Court of Law.

This brings us up to date to the case in question. The Court of Appeals started out having a few cases a year. I remember when we had five appeals cases in one year and that seemed to be a lot. I could see every one needed to have the right to appeal, though.

The public defender we have at this time is a compassionate person, well able to make sure the people he represents are protected under the law. I wouldn't have it any other way. Just a few years ago if we had twenty-five cases a week we thought we had a full caseload. Now it is not unusual to have twenty-five cases in one day. The whole Court staff, and the Police Department, Prosecutor's Office, Probation Office, as well as the Public Defender's Office (and maybe a few departments I have forgotten to give credit to) are all over-worked.

Quite often the public defender will get stuck in a pattern, take the easy way out, and file any number of cases saying "arbitrary and capricious," yet when the Court of Appeals says "enough!" he can write really in-depth on an issue. He can write something to be proud of.

This case is one of his new ideas, well worth thinking over. From what I remember, the Tribes did not have jails to hold people in who violated the law. He is right. It reminded me of when I first worked in Law and Order as a new Game Warden and officer. The Fish and Game Committee sat me down and said: "You are new to the job, but we have had Tribal police for hundreds of years before the white man came. We didn't have much law breakers, but we did have some. The worst thing that would happen in the old days was, a young buck would ride his horse through the camp too fast. Some of the Elders would call him out and say, 'Don't do that again.' It usually worked, but some times he would do it again. The same Elders would call some of the other young men and say, 'Take him out back of the camps and beat him up.' If he did it again, the Elders would tell the young people to take him out and kill him."

Our old laws like those I was told about do not work because the world is changing. We still must protect our people from the ones who do not obey the law, or accept it as the Tribes write it up. The Colville Tribes has one of the leading Courts. We have to set the standards, not only for our own people, but because we have laid the foundation for the smaller tribes to use as guidelines for their courts.

We, as the Court of Appeals' Justices for this Tribe, cannot control what the federal courts, or the state courts, or the county courts do. We are responsible to this Tribe to set standards for the cases to build on from where we are now. If the standard for a cement foundation is one bucket of water, three shovels of sand, and a shovel of cement is working and has worked for years, we cannot be led down the path of change by putting too much water or sand, and a half a shovel of cement to keep our foundation from crumbling.

A law without a penalty is only advice. The penalty of the law is the cement of the foundation. Contempt of court comes in many forms, *eg*. not wearing a dress coat, or a tie, or not speaking loud enough to be heard. Other examples include not following a court order to pay a fine, even if it is community service, or not obtaining a driver's license, or driving without a license. This all falls within contempt for the Court.

The Probation Department reported that defendant Watt did not comply with past court orders; the officers arrested her several years ago for no valid license. The Trial Court gave her a fair and just sentence, and yet a case

that should not have been filed in the Court of Appeals has cost the Tribes thousands of dollars at this time.

The briefs from the Prosecutor's Office listed most of the reasons. No insurance for an unlicensed driver is high on the priority list. I feel if we let a chosen few get away with disregarding Court orders, we are not putting our finger in the leak that could wash out the dam of violations and erodes away the hard-earned foundations that have been laid for years. I did not mean this to be this long. Please forgive my rambling and simple way of putting things on paper. I feel we can only uphold the Trial Court's decision. Let the majority rule in this case.

In Re The Welfare of L. J.
L. J., Minor/Appellant.
Case Number AP97-013, 2 CTCR 44, 25 ILR 6067
4 CCAR 52

[Julie Gaffney, Legal Services, Colville Confederated Tribes, Nespelem WA, counsel for the minor/Appellant.
Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for mother.
Stephen L. Palmberg, Attorney at Law, Grand Coulee Washington, counsel for father.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Children & Family Services.
Juvenile Court Case Number J97-16005]

Arguments heard January 16, 1998. Decided January 27, 1998.
Before Chief Justice Dupris, Justice McGeoghegan, Justice Miles

DUPRIS, C.J.

This matter came before the Court of Appeals for Oral Arguments on January 16, 1998 before the Honorables Anita Dupris, Earl McGeoghegan and Wanda L. Miles. The appellant was represented by Julie Gaffney. Lin Sonnenberg appeared for the Colville Tribes. Ms. Gaffney and Ms. Sonnenberg both submitted briefs and participated in oral argument. Stephen L. Palmberg appeared for the father and Jeff Rasmussen appeared for the mother, but neither counsel participated in the oral argument.

The Court, after reviewing the record and hearing arguments of counsel, finds for the appellant. It is clear from the record and law that the Colville Tribal Court has exclusive jurisdiction over juvenile minor-in-need-of-care matters. The Court of Appeals remands this matter to the Trial Court to amend it's conclusions of law to reflect this fact.

The Appeal is Affirmed.

Ronald CIRCLE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP96-003, 2 CTCR 62

4 CCAR 53

[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 95-18100]

Arguments heard January 16, 1998. Decided February 20, 1998.
Before Presiding Justice Fry, Justice Chenois and Justice Bonga

FRY, P.J.

This matter came regularly before this Court on appellee Tribe's motion granting appeal and oral arguments on January 16, 1998 before Presiding Justice Elizabeth Fry, Justice Edythe Chenois and Justice David Bonga. Present were Lin Sonnenberg, for the appellee, and Jeff Rasmussen, for the appellant.

The Court, having reviewed the record and files herein, heard the arguments of the parties, and being fully advised in the premises, found good cause to grant the motion in that the defendant had completed his sentence and the issues in this case are moot, however, the Court considers there to be a significant remaining issue upon which it is appropriate to issue dictum, now, therefore

It is Ordered that:

1. The appeal herein is dismissed, and

2. That the Prosecutor's Office is advised to consider all possible avenues in providing the defendant with a copy of the NCIC prior to sentencing, including but not limited to, blacking out any confidential non-conviction information prior to releasing it to the defendant.

It is so Ordered.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Frederick CLARK, Appellee.

Case No. AP94-024, 2 CTCR 45, 25 ILR 6066, 8 NALD 7006

4 CCAR 53

[Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 93-16048]

Arguments heard April 18, 1997. Decided March 19, 1998.
Before Presiding Justice Miles, Justice Bonga and Justice McGeoghegan

Unanimous Panel

This matter came before the Colville Court of Appeals on April 18, 1997 for oral arguments. The appellant was represented by Lin Sonnenberg, Tribal Prosecutor and representing the appellee was Jeff Rasmussen, Public

Defender.

The Court has reviewed the record, applicable law, and arguments of counsel, the Court now makes the following:

FINDINGS OF FACT

1) Frederick Clark, appellee, was charged with the criminal offense of Assault, codified at CTC 5.1.03.[37]

2) The appellee entered a not guilty plea and requested a jury trial.

3) Prior to trial, appellee's counsel submitted a standard jury instruction which stated, "words alone are not sufficient to sustain a conviction for the crime of Assault."

4) The appellant objected to the pre-offered instruction on the grounds that words alone are sufficient to sustain a conviction under CTC 5.1.03.

5) A hearing on a Motion to Dismiss was held on May 13, 1994. The Trial Court ordered a joint briefing schedule to address this matter. Both parties submitted Memorandums of Law.

6) Oral arguments were heard on July 6, 1994. The Trial Court reserved ruling on the merits.

7) On July 13, 1994, the Trial Court issued an Order Regarding Elements of Assault. The Court found in favor of appellee, by concluding that mere words alone are not sufficient to sustain a conviction of Assault under CTC 5.1.03. Also, the Court overruled the appellant's objections to this ruling. The Court further ordered the appellee to draft a jury instruction consistent with the Order issued July 13, 1994, and to file and serve on the opposing counsel within a minimum of seven (7) days prior to trial.

8) The appellee filed the Court ordered jury instruction on July 29, 1994.

9) The appellant filed a Motion and Affidavit for Dismissal with Prejudice on August 3, 1994. The appellant's basis for said Motion was the inability to prove beyond a reasonable doubt the elements of Assault set forth in the jury instruction of July 29, 1994. The appellee did not object to this Motion.

10) On August 3, 1994, the Trial Court issued an Order Dismissing the Charge With Prejudice.

11) The appellant filed a Notice of Appeal on August 12, 1994.

12) A Motion to Dismiss was filed by the appellee on September 1, 1994.

13) The Appellate Court denied the Motion on June 21, 1996. The Court ordered the parties to submit a briefing schedule on the merits of this matter.

DISCUSSION

The Appellate Court finds the Colville Tribal Court did not violate the separation of powers under the Colville Confederated Tribes Constitution by clarifying the elements of Assault, CTC 5.1.03. Further, the Appellate Court affirms the Trial Court's decision.

CTC 5.1.03 states:

> "Any person who shall threaten bodily injury to another person through unlawful force or violence shall be guilty of Assault."

The Trial Court held that this statute clearly required more than mere words to constitute an Assault. The Court stated:

> "[T}herefore the Court is compelled to the conclusion that the plain meaning of the terms contained in this statute requires that the words be accompanied in some way with an action as a criminal element of this statutory crime."

Further CTC 1.1.07(e) states:

> "Whenever the meaning of a term used in this Code is not clear on it's 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."

The Trial Court's decision is consistent with the interpretation of "Assault" given by the State of Washington.[38]

Based on the foregoing conclusions, this Court finds the Trial Court did not contravene a reasonable interpretation of the offense of Assault. Therefore, this Court now Affirms the Trial Court's decision in this matter, and Dismisses this appeal.

Angela CLARK, Appellant,
vs.
Ronald FRIEDLANDER, Appellee.
Case Number AP97-019, 2 CTCR 47, 25 ILR 6154
4 CCAR 55

[Angela Clark, Appellant, Pro se.
Ronald Friedlander, Appellee, Pro se.
Trial Court Case Number CV97-17066]

Arguments heard December 19, 1997. Decided April 9, 1998.
Before Presiding Justice Nelson, Justice Bonga and Justice Chenois

PER CURIAM
NELSON, P.J.

This matter came on for oral argument on the 19th day of December, 1997, with the appellant/respondent Angela Clark appearing without counsel or spokesperson. The appellee/petitioner Ronald Friedlander did not appear. Neither of the parties filed briefs.

Ms. Clark has appealed the default judgment entered against her which awarded custody of the parties' five year old son to Mr. Friedlander.

PROCEDURAL HISTORY

Mr. Friedlander's Petition for Custody and Proposed Parenting Plan were personally served upon Ms. Clark on April 24, 1997.

On May 16, 1997, Mr. Friedlander, by and through his attorney, Theodore Schott, filed a Motion and Affidavit for Default Judgment on the grounds that Ms. Clark had failed to file an answer to the Petition. A hearing was held that day on the Motion for Default and on a Motion for a Temporary Restraining Order. Ms. Clark was represented by Jeffery Rasmussen, the Tribes' Public Defender. Although instructed by the Court to file a Notice of Appearance, Mr. Rasmussen failed to do so and did not actively represent Ms. Clark again.[39]

Ms. Clark filed an Answer on May 22, 1997, (twenty six days after service of the Petition). The Answer was non-responsive in that it admitted or denied the statements of the Proposed Parenting Plan rather than the Petition. An Answer to the Petition was not filed.

On June 17, 1997, a hearing was held on the Motion for Default Judgment. Both parties appeared for the

hearing. Mr. Friedlander was represented by Theodore Schott. Ms. Clark was not represented by counsel or spokesperson. After hearing the testimony of Ms. Clark and hearing the arguments of Mr. Schott, the Court held she had failed to show good cause why the Court should permit her to file a late Answer.

Accordingly, the Court found Ms. Clark in default. The Court then entered an order granting custody to Mr. Friedlander and approved the Proposed Parenting Plan presented by Mr. Friedlander as the Permanent Parenting Plan.

QUESTIONS PRESENTED

The sole question on this appeal is whether the Trial Court abused its discretion in granting default and default judgment against the pro se appellant/respondent after she appeared, had filed a late but unresponsive Answer, and without receiving evidence on the Petition.

ABUSE OF DISCRETION

This court considered the term "abuse of discretion" in *Tommy Waters v. Colville Confederated Tribes*, AP84-7231/7232, [1 CTCR 20, 1 CCAR 18] (1984). For the purpose of that case, the Court adopted the definition contained in *Black's Law Dictionary*, Revised Fourth Edition, West Publishing Company, 1968, p. 25. which states:

> "'Abuse of discretion' is synonymous with a failure to exercise sound, reasonable, and legal discretion... And it does not imply intentional wrong or bad faith, nor misconduct, nor any reflection on the judge but means the clearly erroneous conclusion and judgment - One is that clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing; an improvident exercise of discretion; or error of law".

A further, but limited, review of abuse of judicial discretion reveals the following explanation:

> From an acquaintance with the more impressive judicial utterances on the subject of abuse of discretion, it will be deduced that there are two conditions which must exist to warrant an appellate court in nullifying a ruling of the trial court made in the exercise of a conceded discretion. The first is that the judicial action must have been clearly unreasonable in light of the accompanying and surrounding circumstances and the second condition is that the ruling must have resulted prejudicially to the rights of the party complaining" *Smith v. Smith*, 17 N.J. 128, 85 A.2d 523, 524 (1951)

Clearly Unreasonable

The Appellate Court, in its review capacity, does not substitute its judgment for that of the Trial Court's, but examines the record and the Trial Court's decision for indications of rationality and fairness to insure the Trial Court's action was proper. *Johnson v. United States*, 398 A.2d 354 (D.C. App. 1979).

Ms. Clark, the appellant herein, was without counsel for almost all of the proceedings. She twice appeared at hearings and filed a response to what she thought was required.

Her testimony at the hearing on June 17, 1997, was that she has a grade school education and has difficulty reading. She also stated she had gone to two other attorneys, but neither could represent her because of conflicts of interest. The assistance of the attorney who did help her was minimal and non-effective.

When asked by the Court what good cause she could offer in excuse of filing a late Answer, Ms. Clark replied "I don't know". "I don't know what I am saying or what I am doing."

The Court stated it must apply the law even handedly and that by law it could not deny the Motion for

Default.

The Court, however, went beyond granting the Motion for Default. It also entered an order granting custody of the parties' minor child to the Mr. Friedlander - without benefit of testimony or other evidence. Judgment was apparently granted upon the pleadings which consisted of a verified petition and proposed parenting plan.

The Colville Tribal Codes do not address default judgments nor how they should be entered. The Domestic Code, however, does require the Court to determine custody in accordance with the best interests of the child and, secondarily, upon the traditions and customs of the Colville Indian people. The Court is also required to consider additional relevant factors. CTC 5-1-108

CHILD CUSTODY - RELEVANT FACTORS IN AWARDING CUSTODY

There is nothing in the record indicating that the Court complied with the requirements of CTC 5-1-108. In light of these requirements and the circumstances surrounding the issues in this matter the Appellate Panel finds the entry of the default judgment granting custody of the parties' minor child to Mr. Friedlander was an error of law and an abuse of discretion.

RULING PREJUDICIAL TO THE RIGHTS OF A PARTY

Depriving Ms. Clark of a just opportunity to vie for the custody of her child by granting a default judgment to Mr. Friedlander without a determination of facts required by law was clearly prejudicial to her rights.

For the above stated reasons the appeal of Ms. Clark is granted. The Trial Court's Order Granting Custody and the Order Adopting Parenting Plan are vacated. The matter is remanded to the Trial Court for further proceedings consistent with the foregoing.

Alan SMITH, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP97-008 *(miscited as AP95-022)*, 2 CTCR 67, 25 ILR 6156, 8 NALD 7005

4 CCAR 58

[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 94-17024 to 94-17031]

Arguments heard January 16, 1998. Decided May 7, 1998.
Before Chief Justice Dupris, Justice Chenois and Justice Nelson

DUPRIS, C.J.

PER CURIAM

SUMMARY

We are asked once again to address the applicability of custom and tradition in the context of a defendant's sentence. At a sentence modification hearing the appellant raised the issue that a custom or tradition may apply regarding converting jail time into community service, and asked the Trial Court for an evidentiary hearing to

determine if such a custom or tradition did exist. The Trial Court denied the request, indicating the appellant did not raise it in a timely fashion and did not support the allegation of the existence of a custom or tradition with more than an assumption or inference of its existence. For reasons stated below we affirm the Trial Court.

SUMMARY OF RELEVANT FACTS

On May 1, 1995 the Trial Court entered an order entitled "Order Setting Show Cause/Motion Hearing and for Briefing Schedule." Specifically the Court stated that the appellant's arguments regarding the potential use of marijuana in a religious ceremony that gave the appellant a false positive in a drug test needed to be supported by evidence of tradition and custom. The Court directed the appellant to file with the Court the name of the expert on Indian custom the appellant would use at the show cause hearing, *see file entry #10*.

On July 21, 1995 the Trial Court entered an order entitled "Order Bifurcating and Establishing Procedure for Show Cause Hearing." In the order the Court, *sua sponte,* established a procedure to address the question of custom and tradition regarding any religious or ceremonial use of marijuana.[41]

On August 3, 1995 the defendant filed a Motion to Modify Issues along with a Joint Stipulation of Facts regarding the drug violations alleged, stating the defendant did not knowingly ingest marijuana, but it could have been mixed in with what he received at a sweat. Both the defendant and the Tribes jointly stipulated that (1) a custom and tradition evidentiary hearing was not necessary; and (2) the only issues left were regarding the penalty to be imposed and the defendant's motion for a sentence modification. *See file entry #15 and attachment.* The Court denied the motion to modify. It held that the stipulation of facts contained some conclusions of law. Finally, the Court held that the bifurcated hearings ordered on July 21, 1995 would continue. *See file entry #16*.

On August 7, 1995 a Show Cause hearing was held on the issues herein. The Order was entered on August 25, 1995. The Court found: (1) the Tribes did not wish to proceed on the issue of alleged marijuana use; (2) the defendant failed to appear for thirty (30) days of jail time; and (3) the defendant committed another offense. The Court entered an order reinstating ten (10) days of jail time and added it to the thirty (30) the defendant did not complete, for a total of forty (40) days of jail time to be served on weekends.[42]

The matter was appealed by the defendant and subsequently dismissed by the Court of Appeals upon the motion of both parties to dismiss it without reaching the merits of the case. The appellant went before Judge Collins on December 12, 1996 for a status hearing regarding his criminal case. Both the appellant and appellee recommended a modification of the appellant's sentence to allow the forty (40) days of jail time owing to be converted to community service hours.

At the status hearing the appellant argued that the Trial Court should consider custom and tradition in making its decision. The Court held, *inter alia,* that it "....specifically rejects the assertions of counsel that later modification of a jail term in criminal proceedings to community service is consistent with tribal custom and tradition." *See Order Denying Motion to Convert Jail Time to Community Service; Order of Confinement, March 5, 1997, file entry #33.*

The appellant filed a timely appeal from the last-referenced order, and argues (1) the Trial Court erred in refusing to have an evidentiary hearing on custom and tradition when requested at the status hearing; and (2) the Trial Court abused its discretion by failing to convert the appellant's jail time to community service.

The appellee's position is that (1) the appellant's assertion of custom and tradition regarding community service in lieu of jail time is untimely, and should have been raised at the initial sentencing hearing; and (2) based on the record before the Trial Court, the Judge did not abuse his discretion in ordering the appellant to serve forty (40) days in jail.

ISSUES

I. Did the Trial Court abuse its discretion by failing to convert the appellant's jail time to community service?

We will address this issue first in that it is readily disposed of based on prior case law. The appellant must prove the trial judge clearly abused his discretion based on a review of the facts of the case and the decision made. This review by the Court of Appeals cannot be *de novo*. *Laurie Watt v. CCT*, AP96-023, [2 CTCR 43, 4 CCAR 48, 25 ILR 6027, 8 NALD 7001], (January 21, 1998) at p. 3. The appellant has not met his burden on this issue. The facts in the record amply support the trial judge's decision and, even if both parties would have it differently, it was within the judge's discretion to order the appellant to finish out his jail term plus an additional amount for failing to comply with the conditions of the initial judgment and sentence. We hold for the appellee on this issue.

II. Did the Trial Court err in refusing to have an evidentiary hearing on custom and tradition when requested at the status hearing?

The question of the applicability of custom and tradition in criminal cases has been recently addressed by the Court of Appeals in *Laurie Watt v. CCT*, AP96-023, [2 CTCR 43, 25 ILR 6027, 8 NALD 7001], (January 21, 1998). In the *Watt* case the appellant argued the Court of Appeals should already have a knowledge of custom and tradition law regarding whether it applied to converting jail time to community service. Appellant's arguments in the *Watt* case were similar to those in this case.

The Court of Appeals in the *Watt* decision held the appellant failed to meet a minimum burden of showing what custom or tradition was that was being asserted. The appellant in the *Watt* case didn't cite any authority regarding the nature of punishment prior to the statutory law of the Tribes. *Id at p. 3*.

In *Gerald Seymour v. CCT*, AP94-004, [2 CTCR 12,3 CCAR 11, 23 ILR 6008] (November 17, 1995) p. 13, the Court of Appeals held that a motion must be accompanied by some factual basis in support of the motion (the motion being reviewed was a motion to determine the competency of the defendant). This is the same reasoning used in *Watt, supra*.

In the instant case the record shows the trial judge was willing to address custom and tradition at a show cause hearing on the issue of use of marijuana. The record also shows the appellant alleged facts that could have supported such a finding. That is, he alleged (1) he participated in a traditional sweat with others; (2) the others brought a mixture of something to smoke in the sweat; (3) the appellant did not know what was in the mixture, which could have contained marijuana; and (4) it would not have been traditional to ask what was in the mixture.

At the status hearing the appellant did no more than assert that a custom or tradition would affect whether the appellant should be allowed to do community service work in lieu of jail time ordered. This is what the appellant did in the *Watt* case, *supra*, at the Court of Appeals level.

If we were to hold for the appellant we would be guaranteeing a "fishing expedition" every time someone said "custom and tradition" in Court. The person asserting custom and tradition should have an initial burden of producing some evidence that may support the claim, i.e. affidavits, articles, etc., so the trial judge could base his decision to call a panel of Tribal elders or members on something more credible than just someone's assumption that it should be a tradition or custom.

We believe that incorporating our customs into our written law is very important. It is what will set us apart from the state and federal courts. Our courts must approach this carefully, however. Customs and traditions are viable, living doctrines that grow with the community and the time. They are not static, frozen in the past of tepees and buckskin clothing.

A good analysis of the applicability of custom and tradition in a case must be able to trace a current practice

back to its roots in our society. It will not necessarily have the same complexion, but it should have the same foundation. Our customs and traditions define our uniqueness not only from the non-Indian society, but from other Indian tribes, too. To define a custom or tradition in our current Tribal Court system is an important task which should not be taken lightly by the courts or the parties.

The appellant argues there may be a custom of community service instead of confinement, but does so without any factual support for this claim. Such a claim is no more valid at the trial level than it is at the appellate level.

We hold that the appellant has not met a minimum burden of raising the custom and tradition issue at the trial level, and find for the appellee. Because the issue of custom and tradition was not sufficiently developed at the trial level, we will not address whether it is appropriate to raise it at a status hearing, or whether it should have been raised at the initial sentencing hearing.[44]

Based on the foregoing, now, therefore

It is Ordered, Adjudged and Decreed that the Trial Court Order dated August 25, 1995 is hereby Affirmed, this Appeal is Dismissed and the case is Remanded to the Trial Court for further actions consistent with this Opinion Order.

Adam AMUNDSON, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP97-018, 2 CTCR 68, 25 ILR 6178

4 CCAR 62

[Brent Leonhard and Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Frank LaFountaine and Leslie Kuntz, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 96-19194]

Arguments heard February 20, 1998 and May 15, 1998. Decided May 28, 1998.
Before Chief Justice Dupris, Justice Bonga and Justice Stewart.

DUPRIS, C.J.

The Appellate Panel initially convened on February 20, 1998 for Oral Argument in this matter. After reviewing the file and finding that the appellee's response was that the appellee conceded each of the arguments set out in the appellant's Opening brief, the Appellate Panel requested supplemental briefs as it felt it was incumbent on both parties to present all the law, pro and con, on the issue before the Court. The Panel requested further briefing on the issue of burdens of production and proof. Oral arguments on the issue of burdens of production and proof were held before the Panel on May 15, 1998. The Appellate Panel after reviewing the file and information submitted to the Court finds merit in Appellant's position and has decided that in the interests of justice the defendant's conviction is vacated and the matter is Remanded to the Trial Court for Dismissal.

STATEMENT OF FACTS

Appellant was charged with conspiracy to distribute a controlled substance. The allegation of facts was that, on April 26, 1996 Appellant attempted to purchase a controlled substance from an undercover police officer. The Affidavit of Probable Cause stated that on April 26, 1996 at about 6:30 PM, Tribal Police Services, with the assistance of Tribal Conservation Officers and Okanagan County Deputy Sheriffs, executed a search warrant upon a residence within the boundaries of the Colville Reservation. Upon entry, all persons in the house were placed in custody.

While the search was being executed a telephone call was taken wherein the male caller said he wanted to come over and buy some cocaine. The search team hid itself when the defendant, an Indian, arrived at the residence with his brother. The two brothers entered the house and contacted Tribal Police Services Detective D. Garvais, who identified himself as "Jose". The defendant told "Jose" that he wanted to buy $100.00 worth of cocaine, a controlled substance, on credit and would pay for it on his payday.

"Jose" stated that he wanted to make sure that the defendant's brother was not a Narc. "Jose" asked the brother to go outside, which the brother did. After the brother went outside "Jose" gave the defendant a baggie containing a white, powdery substance, which appears similar to cocaine. The defendant took the baggie. The defendant was placed under arrest by Tribal Police Services by Lt. M. Whitney and ultimately transported to the Okanagan County Jail for booking on conspiracy to commit an offense.

Appellant, *pro se*, moved to dismiss the matter, and the Court ordered the motion to dismiss set for a hearing.[45] On November 20, 1998, the Office of Public Defender was appointed to represent the appellant by the Trial Court. On December 6, 1996, Jeff Rasmussen, Public Defender filed a Notice of Appearance in behalf of the

appellant with the Trial Court. On January 14, 1997 a Change of Plea Hearing was held but the appellant failed to appear for that hearing. The Trial Court issued a bench warrant for the appellant. A second Change of Plea Hearing was held on February 8, 1997, and the appellant pled guilty to the charge, and, through counsel, appellant stipulated to the Affidavit of Probable Cause. On May 13, 1997 a Sentencing Hearing was held before Trial Court and the Judgment and Sentence was entered on May 27, 1997. The appellant filed a Notice of Appeal on June 5, 1997.[46]

DISCUSSION OF LAW

I. Entry of a guilty plea does not waive the right to appeal when there is a lack of factual basis for the plea.

The issue appealed is whether the Trial Court should have accepted the appellant's guilty plea if there was not a factual basis for the plea. Tribal caselaw on point is *Condon v. CCT*, [AP92-15313], 1 CTCR 71, [1 CCAR 70, 20 ILR 6107], (1993) which states that the Tribes have a procedure for acceptance of guilty pleas, and that procedure complies with due process of law. The Tribal Court procedure for accepting a guilty plea must include a finding that there is a factual basis for all of the elements of the offense, see Colville Tribal Judge's Bench Book, Acceptance of Guilty Plea, requirements, *Condon, supra.*

Other jurisdictions consistently hold that appeals based upon a lack of factual basis for the plea is not waived by a plea of guilty. A plea of guilty does not waive an issue that the plea should not be accepted. *McCartney v. United States*, 394 U.S. 459, 89 S.Ct. 1166 (1969). "In general, a plea of guilty waives all nonjurisdictional defects, but does not bar appeal of claims that the applicable statute is unconstitutional or that the indictment fails to state an offense. *See* C. Wright, 1 *Federal Practice and Procedure* Sec. 175 at 379-80 (1969); *United States v. Gotches*, 547 F.2d 80, 82 (8th Cir. 1977); *Mercado v. Rockafeller*, 502 F.2d 666, 672 (2d Cir. 1974), *cert. den.* 420 U.S. 925, 95 S.Ct. 1120, 43 L.Ed. 2d 394 (1975); *Coleman v. Brunett*, 155 U.S.App.D.C. 302, 309, 477 F.2d 1187, 1194 (1973); *United States v. Sepe*, 474 F.2d 784, 788 (5th Cir. 1973) (quoting *United States v. Cox*, 464 F.2d 937, 941 (6th Cir. 1972), *aff'd* 486 F.2d 1044 (5th Cir. 1973) (*en banc*)...." *United States v. Broncheau*, 597 F.2d 1260, 1262, n.1.

In a case similar to that at bar, *U.S. v. Barboa*, 777 F.2d 1420 (10th Cir. 1985) defendant pled guilty to conspiracy to damage and destroy by explosives a building used in an activity affecting interstate commerce. The defendant later appealed, alleging that the facts of his case were insufficient to constitute the charge to which he had pled guilty, alleging the co-conspirator was a government official. The Appellate Court wrote that "If Barboa pled guilty to something which was not a crime he is not now precluded from raising this jurisdictional defect, which goes 'to the very power of the State to bring the defendant into court to answer the charge brought against him.' *Blackledge v. Perry*." Like Appellant, Barboa admitted to the facts alleged and later argued that those facts did not constitute the charge. This Court holds that admission to certain facts does not waive alleging those facts do not constitute the charged offense.

II. An agreement between two persons, where one is an undercover police officer, for sale of drugs is not a conspiracy.

The tribal conspiracy statute, CTC 5.4.03 (now 3-1-122) states:

> Any two or more persons who shall conspire to commit an offense enumerated in this Code against the Tribe or any human being, one or more of whom shall do an act to effect the object of the conspiracy, shall each be guilty of Conspiracy to Commit an Offense.

Conspiracy is an agreement between individuals to commit a crime. This Court finds merit in the discussion by the court in *Barboa, supra*. which wrote, "A conspiracy is an agreement between two or more people to commit an unlawful act, and there is no real agreement when one 'conspires' to break the law only with

government agents or informants. The elements of the offense are not satisfied unless one conspires with at least one true co-conspirator." In this matter the alleged co-conspirator is clearly identified in the pleadings and in appellant's statement on plea of guilty as a tribal police officer.

III. Agreement to buy drugs is not conspiracy to transfer drugs.

Appellant in the captioned matter agreed to buy drugs from an undercover officer. Rather than charge appellant with conspiracy to possess drugs or attempted possession, appellant was charged with conspiracy to transfer drugs. The Appellate Panel finds merit with the federal court's statement in *U.S. v. McIntyre*, 836 F.2d 467 (10th Cir. 1990): "proof of the existence of a buyer-seller relationship, without more, is inadequate to tie the buyer to a larger conspiracy...In order for the government to establish a case of conspiracy against the defendant, it must sufficiently prove that the defendant had a common purpose with his co-conspirators to possess and distribute cocaine."

There is no allegation that appellant had such a common purpose in this case. The facts show that the appellant was a common drug buyer and not a conspirator to transfer drugs. It is the position of the Court of Appeals that the facts alleged and admitted to, were not a basis to find appellant had conspired to transfer drugs.

IV. Burdens of production and proof.

The Appellate Panel agrees with the position of the Tribes, citing *State v. Garcia*, 45 Wn.App. 132 (1986); *State v. Vasquez*, 66 Wn. App. 573 (1992), that the party seeking review has the burden of perfecting the record so that the Court of Appeals has before it all the evidence relevant to the assignment of error. Normally such a failure of perfecting the record at the Trial Court level would result in the Court of Appeals refusing to hear the issue. However, there are exceptions to this rule.

In *Bachand v. CCT*, AP94-028, [2 CTCR 50, 4 CCAR 23, 24 ILR 6179, 7 NALD 7013], (July 8, 1997) the Court of Appeals, in a footnote, commented that issues of importance that were not raised at the Trial Court level may be heard for the first time at the Court of Appeals level, but this was not the favored approach.

In *Hughes v. Foster Wheeler Co.*, 932 P.2d 784, 787, ft.4 (Alaska 1997) the court commented that a Supreme Court will review issues not raised below if the alleged error is likely to result in a miscarriage of justice. *Tenala v. Fowler*, 921 P.2d 1114, 1124 (Alaska 1996) held that the Supreme Court will review issues not raised below where they involve plain error. Plain error occurs when there is an obvious mistake that creates a high likelihood that injustice has resulted.

The Panel agrees with appellant's position that if a defendant has made a *prima facie* case and the appellee fails to file a brief or concedes the issue, the relief sought would be summarily granted without extended review. *Wailes v. Rocky Mountain Pre-Mix Concrete*, 783 P.2d 1138, 1138-39, n.1.

In the case at bar the appellant has presented uncontroverted facts that Officer Garvais, acting undercover, sold drugs to the appellant, which formed the basis for the charge herein. The appellee, in developing its case in briefs submitted, has not presented this Court with authorities to controvert the law or facts presented on this issue. The arguments of appellee on burdens of productions do not support a finding that the appellant has not met his burden.

The Court holds that the appellant has the first burden of production; here he has met the burden to show plain error, based on the uncontroverted case law submitted on conspiracy, and the uncontroverted facts herein. The Court further finds that it should consider the issue even if it has not been developed first at the Trial level, because, as a matter of law, under the facts herein, the appellant could not be found guilty of a conspiracy, and to not consider the case would result in a serious miscarriage of justice.

The guilty plea is hereby Vacated and the matter is Remanded to the Trial Court for dismissal consistent

with the Panel's decision.

Thomas WATERS IV, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case No. AP96-006, 2 CTCR 69, 25 ILR 6202
4 CCAR 65

[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 95-18319]

Arguments heard November 15, 1996. Decided June 19, 1998.
Before Presiding Justice McGeoghegan, Justice Chenois and Justice Nelson

McGEOGHEGAN, P.J.

PER CURIAM

This matter came before the Colville Confederated Tribes Court of Appeals panel of Presiding Justice Earl L. McGeoghegan, Justice Edythe Chenois and Justice Dennis Nelson.

INTRODUCTION

In this case, the appellant, Thomas Waters IV, appeals the sentence imposed by the Court for his Battery conviction. The appellant argues that the Court was hostile to him, failed to properly credit him for jail time served and should have dismissed his case because the prosecutor was late for the sentencing hearing. We disagree.

PROCEEDINGS

On February 26, 1996, Thomas Waters IV was sentenced on a conviction of Battery. He was fined $2500.00 with $1500.00 suspended and ordered to serve 360 days in jail with 270 days suspended and credit for nine (9) days served with the remaining 81 days to be served immediately. The appellant timely appealed his sentence.

ISSUES

The issues before the Appellate Panel are: 1) Whether the appellant's case should have been dismissed by the Court when the prosecutor arrived late to the sentencing hearing, 2) Whether the Court failed to be neutral and detached in sentencing the appellant, and, 3) Whether the Court abused its discretion by failing to credit the appellant with three (3) days jail time served for a contempt of court punishment arising out of an earlier sentencing hearing of the appellant.

1. Absence of the Tribe at a sentencing hearing does not require dismissal of the case against a criminal defendant.

The appellant asks the Court to limit the Court's jurisdiction over convicted persons and require the Court to dismiss the action against him where the Tribe is not punctual for his scheduled sentencing hearing. In this case,

the prosecutor was late to the appellant's sentencing hearing and was excused for the tardiness. The delay was not unreasonable and the sentencing hearing was completed without undue delay. The Court may exercise discretion in the calendared proceedings where the defendant's rights are not substantially affected or violated. CTC 1.5.05, Means to Carry Jurisdiction Into Effect, provides guidance to the Court in exercising its jurisdiction and states "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 comfortable to the spirit of Tribal Law." There is no restriction expressed in CTC that would limit the Court's ability to delay sentencing or to schedule a hearing at any other time or for any other reasons related to the convicted persons sentence and, the Court in doing so would be acting to the spirit of Tribal Law. We will not diminish the Court's authority in criminal sentencing matters absent legislative action.

2. The Court below did not present a hostile or detached attitude toward the appellant at his sentencing hearing.

A review of the audio tapes and the record of judgment related to the appellant's sentencing hearing disclose and reflect the Court's objective determination and use of discretion in sentencing the appellant. The Court's Findings and Conclusions of Law indicate a measured determination of the sentence imposed upon the appellant. Where the record is void of clear and convincing abuse of discretion and the sentence imposed is within sentencing limits of the CTC, the Court will not disturb the sentencing of the Court below.

3. Crediting jail time is a discretionary decision of the Court.

The appellant claims that he has been deprived of his due process and equal protection rights because the Court failed to credit him with three (3) days jail he served for contempt of court at an earlier sentencing hearing. Sentencing will not be disturbed or adjusted by this Court without a clear and convincing showing of an abuse of discretion by the lower court. The recordings of the sentencing hearing reveal no such abuse of discretion and, in fact, indicate the sentencing judge contemplated the issue when he subtracted three days (imposed because the appellant was intoxicated at the earlier sentencing hearing) from the twelve (12) days reportedly served by the appellant.

CONCLUSION

Based upon the foregoing, we hold that the Court's jurisdiction over a criminal defendant does not expire for tardiness or failure of the prosecutor to attend a sentencing hearing and is within the discretion of the Court to determine want of prosecution. The Court below did not abuse its discretion nor was it hostile or biased toward the appellant at sentencing.

The judgment and sentence of the Appellant is AFFIRMED.

Descendants of Victor Frank DESAUTEL, et al., Appellants,

vs.

COLVILLE CONFEDERATED TRIBES, et al., Appellees.

Case Number AP96-009, AP96-014, AP96-021, AP98-011, 3 CTCR 17, 26 ILR 6039

4 CCAR 67

[Mark Pouley and Theresa Pouley, Attorneys at Law, Arlington Washington, counsel for the Appellants.

Steve Suagee, Office of the Reservation Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellees.
Trial Court Case Number CV94-14286]

Arguments heard October 16, 1998. Decided October 26, 1998.
Before Presiding Justice Bonga, Justice Chenois and Justice Nelson

BONGA, P.J.

This matter came before this Court for the second time for oral argument on October 16, 1998 at 1:00 p.m. The parties were present and represented by counsel.

After thorough review of the record and consideration of oral arguments by the parties, the Appellate Panel of Presiding Associate Justice David Bonga, Associate Justice Edythe Chenois and Associate Justice Dennis Nelson decided, that due to the uniqueness of this matter and the lengthy litigation involved, to issue the following Orders from the bench to put this matter to rest, with written comments to follow.

The Appellate Panel now Orders that consistent with its acceptance and recognition of the Stipulations offered by the parties on April 21, 1998, it now Orders that the official enrollment records of the Colville Confederated Tribes (Tribes) reflect that Victor Frank Desautel's blood degree be reflected as 3/4 Indian blood of the Tribes, and that the blood degree of petitioners be revised accordingly.

The Panel further Orders that per the agreed set of Stipulations of April 21, 1998 that Victor J. (Skip) Desautel maintained a residence on the Colville Reservation at all times material hereto as defined in Amendment III, Article VII, Section I and Colville Tribal Code (CTC)36.3.01(3), and as defined in CTC 36.2.12 as a "true, fixed and permanent home to which one has intention of return whenever absent therefrom."

It is further Ordered that per CTC 8-1-248 reasonable costs and representative fees are awarded to Appellants, who shall submit to the Panel for approval appropriate documentation of the amount requested.

In Re the Welfare of R.S.P.V.
R.S.P.V., Appellant
CCT CHILDREN & FAMILY SERVICES, Appellant.
AP97-001, 3 CTCR 07, 26 ILR 6039
4 CCAR 68

[Steven D. Aycock, Legal Services, Colville Confederated Tribes, Nespelem WA, counsel for the Minor/Appellant.
Jeff Rasmussen, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Mother.
Maureen Rosette, Law Office of Dana C. Madsen, Spokane Washington, counsel for Father.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Children & Family Services/ Appellant.
Juvenile Court Case Number J95-15022]

Arguments heard November 21, 1997. Decided November 5, 1998.
Before Presiding Justice Nelson, Justice Chenois and Justice Stewart

NELSON, P.J.

I. BACKGROUND

On January 8, 1997, an adjudicatory hearing was held to determine whether there was clear and convincing

evidence that R.S.P.V. was a minor-in-need-of-care as defined by the Tribal Law and Order Code.[47] Germaine to this matter is CTC 5.2.41(b) which defines a minor-in-need-of-care as one who "has been subjected to injury, sexual abuse, or negligent treatment or maltreatment by a person who is legally responsible for the minor's welfare..."

At the hearing Children and Family Services (CFS) introduced into evidence a certified copy of a Plea Agreement and Judgment in a Criminal Case[48] which showed R.S.P.V.'s father, M.V., pleaded guilty on May 8, 1996 to one count of a twelve count indictment for sexual abuse of a minor, sexual abuse, and incest.[49]

The Trial Court concluded that M.V.'s plea of guilt did not constitute clear and convincing evidence that he had sexually abused R.S.P.V. Children and Family Services and R.S.P.V. appealed the Trial Court's Conclusion of Law #2 which stated:

> "A certified copy of the judgment and sentence of the father's federal conviction of sexually abusing the subject minor, Cause No. 96CR40006, does not constitute clear, cogent, and convincing evidence that the father sexually abused the minor, on the basis that the conviction resulted from a plea of guilty rather than a trial, the father is appealing the conviction to the Eighth Circuit Court of Appeals, and a perusal of the brief prepared by the father's attorney in that appeal leads the Court to conclude, based on the Court's familiarity with the Eighth Circuit Court of Appeals, that the father may likely prevail in the appeal."

II. ISSUE

The sole issue before the Panel is whether a father's plea of guilty and conviction in a federal court for the sexual abuse of his minor child is clear and convincing evidence on which to conclude in a minor-in-need-of-care proceeding that the father sexually abused the minor child.

III. STANDARD OF REVIEW

The facts in this matter are undisputed and the issue to be determined is whether the Trial Court erred in its conclusion that a criminal conviction in federal court for sexual molestation of a minor is clear and convincing evidence that the child is a minor-in-need-of-care. The standard of review in a case concerning only questions of law is *de novo*. *Colville Confederated Tribes v. Naff*, [APCvF93-12001 TO 003], 2 CTCR 8, [2 ccar 50] (1995), 22 ILR 6032, *Wiley v. Colville Confederated Tribes, et al.*, [AP93-16237], 2 CTCR 09, [2 CCAR 60], 22 ILR 6059 (1995).

IV. APPLICABLE LAW

The Court is obligated to follow, in the following order of priority, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law. CTC 1-2-11. An analysis of applicable law follows:

Colville Confederated Tribes and tribal case law

The Court has not found an ordinance or case law of the Colville Confederated Tribes which have considered this issue. Nor has the Court been able to find case law of other tribes which have considered the issue.

Washington State common law

The Court of the State of Washington accepts pleas of guilt to criminal conduct while allowing defendants to maintain their innocence. This procedure parallels that approved in *North Carolina v. Alford*, 400 U.S. 25, 27 L.Ed.2d 162, 91 S.Ct. 160 (1970), which has given its name to these types of criminal pleas. When a defendant

maintains his innocence, the plea of guilty can only be used as an admission in subsequent civil proceedings concerning the same issue. *Safeco Insurance Company v. McGrath*, 42 Wn.App. 58, 708 P.2d 657 (1985). Thus in a subsequent civil case concerning the same issue the defendant's guilty plea can be only used against him as an admission that he committed the act to which he pleaded guilty.

M.V.'s plea was taken in federal court which considers pleas in a wholly different manner than *Alford* and the courts of Washington State. Because of this difference, more fully explained below, Washington State case law offers no instruction in the matter before us.

South Dakota common law

M.V.'s plea, however, was entered in the federal district court of South Dakota. Its case law is similar to that of Washington State. "Where a plea of guilty is admitted as substantive evidence in civil litigation involving the same occurrence it is not conclusive and may be explained." *Berlin v. Berens*, 80 N.W.2d 79, 83 (1957). In explaining this holding the Court stated that:

> "The probative import of an admission in a plea of guilty to the commission of an offense under this statute is conjectural until the allegations of the charge to which the plea was entered are established. It seems to us that since these are not shown the bare admission that he plead guilty has no probative force as substantive evidence. *Berlin* at 83.

The concern of most state courts, including Washington and South Dakota, is that the party in a civil action who has previously pleaded guilty to a criminal charge has not had a full and fair opportunity to litigate the facts. This was explained by Justice Traynor of the California Supreme Court in *Teitelbaum Furs, Inc. v. Dominion Insurance Co., Ltd.,* 58 Cal.2d 601, 375 P.2d 439, 25 Cal.Rptr. 559 (1959), *cert. denied* 372 U.S. 966 (1963) in which he wrote:

> "A plea of guilty is admissible in a subsequent civil action on the independent ground that it is an admission. It would not serve the policy underlying collateral estoppel,[50] however, to make such a plea conclusive. 'The rule is based upon the sound public policy of limiting litigation by preventing a party who has one fair trial on an issue from again drawing it into controversy.' 'This policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case.' When a plea of guilty has been entered in the prior action, no issues have been 'drawn into controversy' by a 'full presentation' of the case. It may reflect only a compromise or a belief that paying a fine is more advantageous than litigation. Considerations of fairness to civil litigants and regard for the expeditious administration of criminal justice combine to prohibit the application of collateral estoppel against a party who, having pleaded guilty to a criminal charge, seeks for the first time to litigate his cause in a civil action." at 605-606

M.V.'s plea may have been the result of a compromise wherein he pleaded guilty to just one count rather than be convicted at trial of twelve counts of sexually abusing his daughter, but we are of the opinion that he had every incentive to litigate the issue. The penalty for such a crime is "a maximum of sentence of fifteen years imprisonment, a $250,000 fine, or both, a period of supervised release of 3 years and if the defendant is found by a preponderance of the evidence to have violated a condition of supervised release, he may incarcerated for an additional term of up to two years." R.S.P.V. brief at 26. This possibility, combined with the reasonable expectation that his plea of guilty would be used against him by civil authorities to isolate him from his daughter , provided great incentive to litigate. For reasons known only to him and his attorney, he chose to plead guilty.

The appellants argue that M.V.'s plea should be conclusive and should not [sic] considered an admission in

the minor-in-need-of-care proceeding because the plea was not in a state court, but in federal court where the plea process is much more thorough and protective of a defendant's rights.

Federal common law

Defendants to criminal complaints filed in federal court may plead guilty, not guilty or *nolo contendre.*[51] Federal Rules of Criminal Procedure (FRCrP) 11(a)(1). M.V. was represented by counsel and, as a result of a plea bargain, elected to plead guilty to one count of a twelve count indictment in exchange for dismissal of the eleven counts.

The record is devoid of explanation regarding why a plea of guilty was offered rather than a plea of *nolo contendre*, but we believe it is a significant distinction. It is black letter law that a plea of *nolo contendre* in a criminal matter cannot be used against a defendant in a subsequent civil case and a "federal criminal defendant wishing to avoid both a trial and any collateral estoppel effects (in a subsequent civil trial) may ask for court permission to plead *nolo contendre*." *In Re the Matter of Raiford*, 695 F.2d 521, 523 (11th Cir. 1983).

M.V. made the strategic choice of pleading guilty rather than *nolo contendre* or going to trial. Our collective experience tells us that M.V. would rather have been found guilty of one count than twelve and that a *nolo contendre* plea was not acceptable to the prosecutor. For whatever reason, M.V. had the option of going to trial, to plead guilty or to plead *nolo contendre*. He chose to plead guilty.

The process in accepting a plea of guilty in a federal court is that the Court must personally address the defendant in open court and inform him of the charge(s) against him, the possible penalties and the rights he is giving up by entering a plea of guilty. The Court must be assured that the defendant understands all of this by reviewing "the nature of the charge, the mandatory minimum sentence; the maximum sentence; the fact that the court must consider sentencing guidelines and when they may depart from those; that the defendant has the right to plead not guilty; that he has a right to have a jury trial; the right to assistance of counsel at trial; the right to confront and cross-examine witnesses; the right against self-incrimination; that if the guilty plea is accepted that there will not be a trial; and that by pleading guilty the defendant waives the right to trial." FRCrP 11, Appellant R.S.P.V.'s brief, Page 5.

The Court must also be assured the plea is voluntary and that there is a factual basis for the plea. The entry of a guilty plea in federal court is designed to inform a defendant of the gravity of his situation and of the consequences of entering a plea of guilty. The judge hearing the plea must be thorough and fully adhere to the requisites of FRCrP 11. In the event the process is not completely followed the plea will be set aside. *McCarthy v. United States*, 394 U.S. 459, 22 L.Ed.2d 418, 89 S.Ct 1166 (1969).

There is nothing in the record to indicate that the judge accepting M.V.'s plea deviated from the requirements of FRCrP 11.

V. STANDARD OF PROOF

CTC 5-7-21 (formerly CTC 12.7.21) requires that there be clear and convincing evidence of parental neglect or abuse before a child can be adjudicated a minor-in-need-of-care. Clear and convincing evidence is such that the "proponent's assertion is highly probably" and is such as to cause the court to be convinced "without hesitation". *Hoffman v. CCT*, [AP95-023], 2 CTCR 37, [4 CCAR 4, 22 ILR 6127, 24 ILR 6163] (1997).

After reviewing the process for acceptance of guilty pleas utilized by the federal courts and knowing that a guilty plea must be allowed to be withdrawn if the process if not fully followed, we are satisfied that such a plea is clear and convincing evidence that the defendant committed the crime to which he has pleaded. Accordingly, we

hold that a certified copy of a federal court Plea Agreement and Judgment in a Criminal Case charging sexual abuse of a minor child is clear and convincing evidence that a defendant so pleading has sexually abused the minor child.

VI. DISCUSSION

In addition to the foregoing we agree with the appellants that it is not in the best interests of R.S.P.V. to litigate the issue of sexual abuse after her father had admitted to it and that a complete inquiry at hearing would not be probably considering the distance witnesses would need to travel and the limited resources of the Tribes.

Therefore, It is Ordered that:

1. The appeal of Children and Family Services and R.S.P.V. is Granted.

2. A plea of guilty in a federal court to the crime of Sexually Abusing a Minor is clear and convincing evidence of sexual abuse when collaterally applied in a minor-in-need-of-care proceeding. The Trial Court's conclusion of law holding otherwise is Reversed.

3. This matter is remanded to the Trial Court for further proceedings consistent with this opinion.

Descendants of Victor Frank DESAUTEL, et al., Appellants,

vs.

COLVILLE CONFEDERATED TRIBES, et al., Appellees.

Case Number AP96-009, AP96-014, AP96-021, AP98-011, 3 CTCR 06, 26 ILR 6039

4 CCAR 73

[Mark Pouley and Theresa Pouley, Attorneys at Law, Arlington Washington, counsel for the Appellants.
Steve Suagee, Office of the Reservation Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellees.
Trial Court Case Number CV94-14286]

Arguments heard October 16, 1998. Decided October 26, 1998. Supplemented November 2, 1998.
Before Presiding Justice Bonga, Justice Chenois and Justice Nelson

BONGA, P.J.

On October 23, 1998, the Appellate Panel of Presiding Associate Justice David Bonga, Associate Justice Edythe Chenois and Associate Justice Dennis Nelson decided, that due to the uniqueness of this matter and the lengthy litigation involved, to issue Orders from the bench to put this matter to rest, with written comments to follow.

Subsequently, the Appellate Panel discovered that an issue which had been decided was not included in the text of the written October 23, 1998 Orders. The Panel now corrects the incomplete text.

The Panel finds that there was insufficient evidence of bad faith on the part of the Tribes to support the Petitioners' request for per capita or land claim payments made pursuant to CTC 8-1-207. The Panel therefore Denies Petitioners' request for recovery under CTC 8-1-207.

It is So Ordered.

Barbara COVINGTON-GARRY, Appellant,

vs.

Joanne SANCHEZ, Appellee.

Case Number AP98-012, 3 CTCR 08

4 CCAR 73

[Barbara Covington-Garry, Appellant, pro se.
Joanne Sanchez, Appellee, pro se.
Trial Court Case Number CV95-15316]

Decided November 23, 1998.
Before Chief Justice Dupris, Justice Pascal and Justice Stewart

DUPRIS, C.J.

This matter came before the Court of Appeals pursuant to a Notice of Appeal being filed by Appellant on July 16, 1998. An issue of whether adequate notice of this appeal was given to Appellee was before the Court of Appeals Panel. After review of the record and research being conducted, the Panel makes the following:

FINDINGS OF FACT

The Court of Appeals is not a court of original jurisdiction in this matter.

Appellee was given adequate notice at the lower court, which is a court of original jurisdiction in this matter.

Appellee knew of this appeal being filed as she called the Clerk of the Court of Appeals to inquire as to the status of the appeal and indicated that she would not give her current address to the Court.

The appeal was timely filed by Appellant.

CONCLUSIONS OF LAW

Pursuant to Colville Tribal Law and Order Code § 1-1-280, the Court of Appeals has jurisdiction to hear this matter.

Appellant does not need to provide original service of process on this matter.

The appeal can go forward.

ORDER

It is Ordered, Adjudged and Decreed that Appellant may show proof of service of the Notice of Appeal and this Order by providing service by mail on the last known address of the Appellee.

It is Further Ordered that the Initial Hearing in this matter will be set for December 18, 1998 at 9:30 a.m. at the Tribal Court Building II, Agency Campus, Nespelem, Washington.