Regina JERRY, Appellant,
Lorraine Phillips HUNT, Appellant,
vs.
CCT CHILDREN'S & FAMILY SERVICES, Appellee.
AP02-010, 4 CTCR 1
7 CCAR 1

[Appellants appeared personally and without counsel.
Joni Bray, Office of Prosecuting Attorney, for Appellees.
James Edmonds and Lane Throssell, Office of Legal Services, counsel for mother.
Marla J. Big Boy, counsel for minors.
Father did not appear nor was he represented.
Trial Court case number: MI-2000-02000]

Hearing held on August 16, 2002. Decided January 15, 2003.
Before Justice Earl L. McGeoghegan, Justice Edythe Chenois and Justice Howard E. Stewart

McGeoghegan, J.

HISTORY

This matter came before the Court of Appeals pursuant to a filing of a Notice of Appeal by Appellant on June 4, 2002 and an Initial Hearing being held on August 16, 2002. Present at the hearing were: Appellants Regina Jerry and Lorraine Phillips Hunt, appearing pro se; Joni Bray, counsel for Appellee Children and Family Services; James Edmonds and Lane Throssell, counsel for Appellee, mother; Marla Big Boy, counsel for Appellee, minors. Father was not present nor was he represented.

Counsel for Children & Family Services, the minors and the mother filed a joint Motion to Dismiss this appeal. They based this motion on the premise that Ms. Hunt and Ms. Jerry were not parties to the dependency action and therefore were barred from filing an appeal in this matter and that Appellants filed the Notice well after the deadline for filing such a document. The Court requested that the parties submit briefs on the issue. Appellees filed a Memorandum of Points and Authorities in Support of Appellees Motion to Dismiss for Untimely Filing of Notice of Appeal. Appellants did not file a brief.

At the hearing on the issue, Appellants argued that they were unable to obtain a timely order in this matter. They only heard about the hearings through a third party and were never provided notice by the Court. Appellants argued that as grandmother and aunt of the minor children they should be parties to the action and should be considered in the placement preference by the Court. They filed the Notice of Appeal as soon as they obtained the Order, which was provided to them by the foster placement.

JURISDICTION

The Court of Appeals has jurisdiction to hearing this matter pursuant to CTC § 1-1-280[1], Court of Appeals, Amendment X of the Constitution of the Confederated Tribes of the Colville Reservation[2] and by Court rule[3].

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[1] A panel of three judges shall sit as the Appellate Court to hear appeals from final judgments, sentences and other final orders of the Trial Court.

[2] Amendment X, Article VIII-Judiciary. Section 1. There shall be established by the Business Council of the Confederated Tribes of the Colville Reservation a separate branch of government consisting of the Colville Tribal

DISCUSSION

The Appeal in this matter has raised questions of procedure and whether Appellants should be considered as parties in this matter. It is established principle that grandparents and aunts and uncles are extended family when considering family law issues in the Colville Tribal Court. It seems clear that the governing body of the Colville Confederated Tribes by legislative actions intended that the Indian Child Welfare Act of 1978 should apply to the acts of the Colville Confederated Tribal Court. *In Re P*, 1 CCAR 62. The Indian Child Welfare Act of 1978 defines extended family as including grandparents and aunts.[4] Being an extended family member, however, does not automatically confer party status on that person. CTC § 5-2-258 specifies who will receive notice: (a) the minor; (b) the minor's parent, guardian or custodian; (c) any person the Juvenile Court believes necessary for the proper adjudication of the hearing; and (d) any person the minor believes necessary for the proper adjudication of the hearing. The record does not reflect a request by the minor for the grandmother and/or aunt to receive notice of these hearings. Nor is there any indication that the Juvenile Court determined that the grandmother and/or aunt should be notified of these hearings by being necessary for the proper adjudication of the hearing. The Juvenile Court record does not indicate that the grandmother and/or aunt filed any petitions or motions requesting to be accepted as a party in this action, other than the document which initiated this appeal. Though they made oral requests to the Court to receive notice of future hearings, there were no formal pleadings or motions filed and the Juvenile Court did not act on the requests.

Colville Tribal Court of Appeals Interim Rule 4(c) states, in part: "The Court of Appeals will not entertain issues on appeal that have not been fully developed and ruled on by the Trial Court." The Juvenile Court did not have the opportunity to fully develop the issue of whether Appellants should be made parties to this action. There were no petitions or motions filed requesting inclusion as parties to the action, nor were arguments held on the issue. Subsequently, there is no final order in which the Court of Appeals may review to determine if there has been an abuse of discretion by the Juvenile Court in denying Appellants to be considered as placements for the minors.

ORDER

Based on the foregoing, the Court of Appeals grants the Motion to Dismiss on the grounds that the issue in this matter has not been fully developed and argued before the Juvenile Court.

It is SO ORDERED.

Jeannette MOON, Appellant,

Court of Appeals... as the Business Council may deem appropriate. It shall be the duty of all Courts established under this section to interpret and enforce the laws of the Confederated Tribes of the Colville Reservation as adopted by the governing body of the Tribes.

The Business Council shall determine the scope of the jurisdiction of these courts and the qualifications of the Judges of these Courts by statute.

[3] CTCR 4, Jurisdiction. (a) The Court of Appeals shall have jurisdiction to hear and determine appeals from Tribal Trial Court final judgments, sentences, disposition orders.

[4] 25 USC 1903 (2) "extended family member" shall be defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt...

vs.
Ronald Jay MOON, Appellee.
Case Number AP02-007, 4 CTCR 02
7 CCAR 3

[Appellant appeared pro se.
Timothy Liesenfelder, Attorney, for Appellant.
Trial Court Case Number CV-DI-2001-21258]

Argued October 18, 2002. Decided February 3, 2003.
Before Chief Justice Dupris, Justice Bonga and Justice Pouley

Dupris, C.J.

This matter came before the Court of Appeals for Oral Argument on October 18, 2002, before Chief Justice Anita Dupris, Justice David Bonga and Justice Theresa Pouley. Jeannette Moon, Appellant, appeared *pro se*. Ronald J. Moon, Appellee, appeared through counsel, Timothy Liesenfelder. A Minute Order Reversing and Remanding was issued on that date.

Procedural History

Although the Appellant herein was the Petitioner in the original Dissolution action below, both parties asked for custody of their two children, E.M. and R.M., minors. Several hearings were held by the Trial Court before and after the hearing on the Petition for Dissolution on September 17, 2001 before Judge Naff. The Appellee, Ronald J. Moon, failed to appear for the hearing on the Petition for Dissolution.

It appears the Court took some evidence on the issue of child custody at the September 17th hearing, although the record before us does not reflect whether the Judge specifically received evidence on the statutorily-required factors for considering child custody found in CTC § 5-1-108.[5] The Appellant, Jeannette Moon, was awarded custody and support of both of the children in question; the Court also divided the property and liabilities, and granted the dissolution. The Decree of Dissolution (Decree) setting out all the terms therein was issued on October 2, 2001.

On September 18, 2002 the Appellee asked Judge Naff to recuse herself from the case; she granted the Motion to Recuse on the same day. However, Judge Naff still signed the Findings of Fact, Conclusions of Law and Dissolution Decree on October 2, 2002. On October 3, 2001 the Appellee filed a Motion to Reconsider with the Trial Court. Chief Judge Aycock granted the Motion to Reconsider on October 17, 2001, vacated all the orders of the Decree

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[5] 5-1-108: **Child Custody — Relevant Factors in Awarding Custody** : The Court shall determine custody in accordance with the best interests of the child and, secondarily, the traditions and customs of the Colville Indian people. The Court shall consider all relevant factor including:

(a) The wishes of the child's parent or parents as to visitation privileges;
(b) The wishes of the child as to his custodian and as to visitation privileges;
(c) The interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may significantly affect the child's best interest;
(d) The child's adjustment to his home, school, and community;
(e) The mental and physical health of all individuals involved; and
(f) The Indian heritage of the child.

The Court shall not consider conduct of a proposed guardian that does not affect the welfare of the child.

except the actual dissolution of the marriage, and set a trial on the issues of child custody, support and visitation, and on the property and liabilities division in the original Decree.

The trial on the issues identified by the Court was held on January 15, 2002. The Court took the matter under advisement and directed the parties to seek further evaluations, the Appellant for mental health and the Appellee for alcohol. The matter was reset for March 20, 2002.[6] At the March 20, 2002 hearing the Court recognized on record that it received the required evaluations. The Judge then, without further evidence, entered his order on record, deciding custody, support, visitation, grandparents' visitation, and property and liabilities division.[7] He did not enter Findings of Fact nor Conclusions of Law. The Trial Court granted joint legal custody to both parties, physical custody of the children during the school term to the Appellee, and summers and holidays to the Appellant. Visitation was ordered between the parties as well as to the grandparents of the children. Support issues and property issues were also discussed and decided at the March 20, 2002 hearing.

The Appellant filed her Notice of Appeal herein on March 29, 2002. She challenges the custody and visitation orders as well as alleging the Order From the Motion Hearing (*i.e.* the Trial Court's decision regarding custody, support, visitation and property and liabilities issues) as not reflecting the record in the matter. The Appellant is *pro se*. The Appellee is represented by an attorney. Neither party submitted briefs in this matter. This Court, left to its own devises, has reviewed the tape recording[8] of the hearings on January 15, 2002 and March 20, 2002. We have also reviewed relevant cases from our jurisdiction and looked at cases from other jurisdictions for guidance.

At the Oral Arguments held on October 18, 2002 this Court rendered an oral decision finding the trial record to be incomplete and flawed. We further found cause to reverse and remand for a new trial. A minute order reflects this immediate decision. Below is the Opinion setting forth the legal reasoning for the opinion.

Issue **AS A MATTER OF LAW DID THE TRIAL COURT ERR IN ITS DECISIONS REGARDING CHILD CUSTODY, SUPPORT, AND VISITATION?**

Standard of Review

Questions of law are reviewed under the non-deferential, *de novo* standard. *Colville Confederated Tribes vs. Naff*, 2 CTCR 08, 22 ILR 6032 2 CCAR (1995); *Wiley, et al v. Colville Confederated Tribes,* 2 CTCR 09, 22 ILR 6059, 2 CCAR 60 (1995); *Palmer v. Millard, et al,* 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); *Pouley v. CCT*, 2 CTCR 39, 25 ILR 6024, 4 CCAR

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[6] The Trial Court designated the hearing of March 20, 2002, as well as its order issued therefrom as a "Motions Hearing." In fact the hearing was a continuance of the trial on the issues.

[7] We note that at the hearing on the Motion to Reconsider on October 17, 2001 the Appellee's attorney stated that his client was not challenging the property division nor the liabilities division of the original Decree. Chief Judge Aycock specifically addressed it in his order of March 20, 2002, however. The record does not reflect how the issues got back before the Trial Court. At the Oral Arguments on October 18, 2002 the Appellee's attorney stated that it was his recollection that the Judge raised the issues *sua sponte.*

[8] The quality of the tape recording was barely passable in this case. Specifically the attorney's questions were difficult to hear as were the answers by some of the witnesses.

38 (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.*, 3 CTCR 07, 26 ILR 6039, 4 CCAR 68, (1998).

Discussion

The Trial Court did not issue Findings of Fact and Conclusions of Law. We do not know what part of the evidence on the record the Judge relied on in making his decision. Although the standard of review dictates we give deference to the Trial Court in its findings, we have no such findings to evaluate here.

A review of the taped record shows some potential problems: The Appellee's attorney asked leading questions throughout his questioning of all the witnesses; unsworn statements were accepted into evidence in the nature of written letters, the persons writing the letters not subject to cross-examination; the Judge reviewed an alcohol evaluation of the Appellee and an mental health evaluation of the Appellant but the record does not reflect if either party got copies of the evaluations, had the opportunity to challenge them, nor whether the Judge relied on any part or parts thereof.

The statutory law of the Tribes is very clear on what factors the Trial Court must consider in its decision to award custody. *See* CTC §5-1-108, *supra* at footnote 1. It is also very clear that child support decisions must be made according to guidelines established by the Colville Business Council. *See* CTC §5-1-116.[9] Neither the orders from Judge Naff nor Chief Judge Aycock reflect a consideration of the factors required in these two code sections.

It is difficult for any trial judge to preside over emotionally-charged cases like this one when one or both of the parties are *pro se*. The *pro se* party seldom knows how to object to evidence offered; he or she seldom knows what is or isn't acceptable evidence; and he or she seldom knows how to cross-examine witnesses. For these reasons the Trial Court must be more vigilant and very specific why it ruled the way it did. In fact, CTC §5-1-105 mandates the Court to make Findings.[10]

When the trial record is incomplete the rule of law is that the matter should be remanded in order to allow the Trial Court to make a complete record. When upon a review of the record it is shown that the record is incomplete and flawed, then the rule is to reverse and remand. We so hold. Based on the foregoing, now, therefore

It is ORDERED that the rulings in this matter are REVERSED and this matter REMANDED for a new hearing.

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[9] **Child Support — Apportionment of Expense**: (a) In a proceeding for dissolution of marriage,... after considering all relevant factors but without regard to marital misconduct, the Court may order either or both parents owing a duty of support to any child of the marriage dependent upon either or both spouses to pay an amount reasonable or necessary for the support of the child in accordance with the guidelines and worksheet adopted by the Colville Business Council.

[10] **Pleadings — Findings — Decree**: ....No Decree of Dissolution shall be granted upon default or otherwise, except upon legal evidence taken in the cause by the Court who shall make and file its findings and decree upon the evidence.

Jennifer LEAF, Appellant,
vs.
COLVILLE INDIAN HOUSING AUTHORITY, Appellee.
AP01-011, 4 CTCR 03
7 CCAR 06

[Appellant appeared *pro se*.
John Vander Molen, Attorney, appeared for Appellee.
Trial Court Case Number CV-OC-2001-21121]

Oral Arguments heard March 15, 2002. Decided February 6, 2003.
Before Justice McGeoghegan, Justice Fry and Justice Nelson.

Fry, J. for the Panel.

SUMMARY

In December, 1978, the Colville Indian Housing Authority (CIHA) entered into a Mutual Help and Occupancy (MHO) agreement with Evelyn Leaf (mother of the Appellant) for Housing Unit #0188. In December 1979, Ms. Leaf received a gift deed from her mother, Louise C. Charley, for the land upon which Housing Unit #0188 was to be constructed by CIHA with federal funding. Ms. Leaf entered into a land lease with CIHA that same month. Ms. Leaf's signature was witnessed by two people.

CIHA issued and served a Notice of Termination and Eviction to Ms. Leaf regarding the house on June 10, 1986. A Writ of Eviction wa issued by the Colville Tribal Court to the Colville Tribal Police Department on October 9, 1986 to restore #188 to the possession of CIHA. On October 29, 1986, Ms. Leaf signed a HUD Housing Release of #188 to CIHA.

After termination of the MHO Agreement with Ms. Leaf, CIHA entered into a new MHO Agreement with Vanessa Leaf (daughter of Evelyn Leaf and sister of the Appellant) for #188, in August 1988.

On April 6, 2001, CIHA filed an unlawful detainer action against Vanessa Leaf regarding #188 after the termination process under the MHO had been completed. A hearing on the unlawful detainer was conducted on June 19, 2001. No appearance was made by or on behalf of Vanessa Leaf at the hearing. The Court issued a Writ of Restitution restoring possession of #188 to CIHA, as well as granting a judgment in the amount of $3974.43. This represented delinquent payments owed by Vanessa Leaf under the MHO Agreement. Attorney fees and costs were also awarded to CIHA.

The Writ gave Vanessa Leaf three (3) days to vacate the premises. If she did not vacate, the Colville Tribal Police were authorized to forcibly remove Vanessa Leaf and her possession, if necessary, and immediately turn over possession to CIHA.

On June 22, 2001, Jennifer Leaf (Appellant and sister to Vanessa Leaf) filed motions for Reconsideration and for an Order allowing her to intervene as a party to the case. She wished to pay the restitution and keep possession of the house in her family.

On June 28, 2001, a hearing was held where Jennifer Leaf was sworn in and stated that her sister, Vanessa Leaf, had abandoned *188 but would not sign it over to Appellant. Appellant did not dispute the amount of judgment at this hearing. Appellant did request additional time to pay the amount due.

The Court allowed Appellant temporary party intervention until July 6, 2001 to pay the judgment amount plus attorney's fees and costs.

On July 6, 2001, Appellant filed a request for extension of time. Appellant indicated that they needed to research other issues related to the case. CIHA was in opposition. On September

17,2 001, the Trial Court denied the extension. The Appellant filed this appeal on October 2, 2001.

ISSUE

Has the Appellant met the jurisdictional requirements of Interim Appellate Court Rule 7?

DISCUSSION

Interim Appellate Court Rule 7[11] requires service on all parties of all papers filed by a party. The party must then file proof of service with the clerk of the court. The Appellant has failed to serve the Notice of Appeal and proof of service on the opposing party. The Appellee filed a pleading stating he had not been served and asking the court to apply the ruling in *Louie v. PSIS/Stevens*, AP01-01, 3 CTCR 48, 6 CCAR 47(1). Appellant's response was to the timeliness of the filing of her brief and not to her failure to file pursuant to Interim Court Rule 7.

An appeal will be dismissed if the appellant has not properly filed proof of service within the time limits of Interim Appellate Court Rule 7. *Louie v. PSIS/Stevens*, AP01-012. *Covington-Garry v. Sanchez*, 4 CCAR 73 (Colville Confederated 11/23/1998) (Appellee allowed to file proof of service by mail).

This Court has no choice but to follow the clear language of the Court Rule and the case law.

DECISION

This Court, based on the foregoing reasoning and case law, hereby dismisses this appeal and remands this matter to the Trial Court for proceedings not inconsistent with this opinion.

It is so Ordered.

Lisa Louie ORTIZ and Mabel Lynn LOUIE, Appellants,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
AP02-005, 4 CTCR 04
7 CCAR 07

[Marla BigBoy, Spokesperson for Appellant Ortiz.
Theodore J. Schott, Spokesperson for Appellant Louie.
David Ward, Office of Prosecuting Attorney, for Appellee.
Trial Court case number CR-MD-2002-25027]

This matter came before the Court of Appeals pursuant to an Oral Argument held on August 16, 2002. Appearing were Theodore J. Schott, counsel for Appellant, Mabel Lynn Louie; Marla Big Boy, counsel for Appellant, Lisa Louie Ortiz; and David Ward, counsel for Appellee, Colville Confederated Tribes. Before Justice Earl L. McGeoghegan, Justice Elizabeth Fry and Justice David Bonga.

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[11] Filing and Service.

(b) Copies of all papers filed by any party shall, at or before the time of filing, be served by a party or person acting for the party on all other parties to the appeal or their spokesperson. Service may be personal or by mail. Personal service includes delivery of the copy to a secretary or other responsible person at the office of the spokesperson. Service by mail shall be by certified, return receipt requested.

(c) Proof of Service. Papers presented for filing shall contain an acknowledgment of service by filing an affidavit of service. The Clerk may permit papers to be filed without the acknowledgment or proof of service, but shall require the acknowledgment or proof of service to be filed within five (5) days thereafter. Failure of this section shall be cause for the Clerk to return the papers filed to the appellant and strike the matter from the Court of Appeals record for incompleteness.

McGeoghegan, J.

SUMMARY

Appellants Louie and Ortiz were charged separately with criminal offenses. Appellants entered not guilty pleas at arraignment. Pretrial and jury trial dates were scheduled. Appellants filed a Motion for Joinder of Offenses and Defendants and Consolidation for Trial on March 5, 2002. The Order Consolidating Cases for Trial was signed by Judge Aycock on March 11, 2002. Appellants then filed a Motion to Disqualify Judge and Affidavit of Prejudice on March 13, 2002. The Order Denying Motion to Disqualify Judge was signed by Judge Naff on March 18, 2002 citing that the motion was untimely filed. Appellants then filed a Notice of Appeal on March 18, 2002 alleging irregularity in the Court proceedings, abuse of discretion, decision entered is contrary to law and the evidence and substantial justice has not been done. An Initial Hearing was held on April 19, 2002. Issues to be briefed were specified, a briefing scheduled ordered and oral argument hearing date set. Briefs were filed timely. Oral Arguments were heard on August 16, 2002.

ISSUES

1. Did the trial court judge err in denying the motion to disqualify judge?
2. When is a Motion to Disqualify timely filed?
3. When is a Motion to Disqualify timely filed after consolidation of cases?
4. Did the Trial Court judge err by ruling on the Motion to Disqualify by not having a fact finding hearing prior to the decision?

STANDARD OF REVIEW

The standard of review in a case concerning only questions of law is *de novo. In Re R.S.P.V.,* AP97-001, $ CCAR 68, 3 CTCR 7, 26 ILR 6039 (11-05-1998). Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo. Palmer v. CCT*, AP94-005, 3 CCAR 27, 2 CTCR 14, 23 ILR 6094. Although the Court of Appeals will defer to the Trial Court's findings of fact, we engage in *de novo* review of when the assignments of error involve issues of law. *Wiley, et al. v. CCT*, AP93-16237, 2 CCAR 60, 2 CTCR 9, 22 ILR 6059 (03-27-1995).

DISCUSSION

Appellants argue that Judge Naff erred in denying their motion to disqualify Judge Aycock. They base their arguments on several factors. First is the timeliness issue. Appellants allege that they filed the Motion to Disqualify as soon as Judge Aycock signed the Order joining the two defendants for trial. They argue that the act of joining the cases in effect makes a new case of the two. Even if the judge has made any discretionary rulings in either case prior to this signing, which they allege he didn't, then the new order makes those rulings moot as far as CTC § 1-1-143[12] is concerned. Issues in one case which may not have been a factor in the other case, now may affect the joined cases.

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[12] Disqualification of Judge. Any party to any legal proceeding hereunder, including trials and appeals, may accomplish a change of assignment of his case from one judge to another upon filing an Affidavit of Prejudice with the Court, giving satisfactory reasons for the change. The Affidavit shall be in written form and **must be filed with the Court before any trial action whatever has been taken by the initial judge**. *Emphasis added.* The initial judge shall refer the affidavit to another judge for decision.

Such an order of the Trial Court may be appealed immediately under the procedures established in the subchapter on Appellate Proceedings of this Chapter, and all further actions in the case will be stayed pending outcome of the appeal. Only one such change will be allowed. Such an order of the Appellate Court shall not be appealable.

Second, Appellants argue that Judge Naff should have held a fact finding hearing on the motion, which she did not. Appellants cite several cases to support their position. "Any decision to disqualify a judge under the Colville Tribal Code requires a careful review of the affidavit file and a particularized inquiry into the facts alleged in each case. *CCT v. St. Peter*[13], 1 CCAR 72, 2 (1993); *CCT v. Stensgar*[14], 1 CTCR 73, 2 (1993). Should an affidavit of prejudice contain serious allegations and very little fact, due process and judicial economy require the judge to consider whatever evidence can be offered for or against recusal. *CCT v. Clearly*[15] [sic], 2 CTCR 55, 3 (1993). This can appropriately be done at a hearing. *Id.*"

Third, Appellants urge the Court of Appeals to adopt some standards that give the Trial Court direction in deciding future motions to disqualify. As this is a matter of first impression for the Court, Appellants feel that this area is ripe for guidelines to be established. Appellants offer for consideration the standards set forth by the Hoopa Valley Court[16] for determining the impartiality of a judge or arbiter. Those guidelines include disqualification: 1) in which his impartiality may be questioned; 2) where he has personal bias or prejudice; 3) where he has personal knowledge of disputed evidentiary facts; or 4) where he has served in governmental employment and participated as counsel, adviser or material witness or expressed an opinion concerning the merits of the controversy.

Appellee counters that Judge Naff did not err in entering the Order Denying the Motion to Disqualify. Appellee also argues that the Trial Court was legally correct in concluding that the Motion was untimely filed and that a fact finding hearing was not required.

Appellee asserts that Judge Aycock has taken "trial action" in that the Order Consolidating Cases for Trial was the trial action and any Affidavit of Prejudice needed to be submitted prior to the signing of this document. Appellee argues that there is no rule or law in the Tribal Court which governs Motions to Join, therefore the judge had discretion on whether to sign the Order Consolidating Cases. This discretion then qualifies as "trial action" under CTC § 1-1-143.

Appellee then states that since Judge Naff decided the Motion to Disqualify was untimely, there was no need to proceed to a fact finding hearing. Judicial notice of prior court orders was sufficient fact finding for a determination of timeliness.

Appellee counters the third part of the discussion by stating that there is a "plethora of laws, cannons and statutes" cited by Appellants. He asserts that "trial action" was not considered or discussed in any of the cases cited. Therefore, the facts in those cases "are not sufficiently similar or legally related to the facts in the case before this Court and their use as precedent is thereby diminished.[17]"

CONCLUSION

After hearing the arguments of counsel, it is clear that the major issue to be decided by

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13 Correctly cited *St. Peter v. CCT*, AP92-15400/507-510, 1 CCAR 73, 1 CTCR 72 (05/28/1993).

14 Correctly cited *Stensgar v. CCT*, AP92-15068, 1 CCAR 73, 1 CTCR 73 (05-28-1993).

15 Correctly cited *Cleparty v. CCT*, AP93-15221/222, 2 CCAR 19, 2 CTCR 55, 21 ILR 6004 (11-03-1993).

16 *Hoopa Valley Tribal Council v. Risling*, 24 Indian L. Rep. 6224 (1996). See also *Pratt v. Hoopa Valley Tribal Police*, 25 Indian L. Rep. 6206, 6207 (1998).

17 Appellee's Response Brief, page 5, line 16, filed June 20, 2002.

the Court of Appeals is when "trial action" is perfected by the Trial Court. We are not persuaded that it is perfected when an order consolidating cases is entered, even though this order is at the discretion of the trial judge. We agree with Appellant that when two or more cases are joined, there brings into consideration certain issues which may not have been an issue in one or the other of the original cases. Due process would dictate that when cases are joined, the defendants are given the opportunity to dispute issues that come into the case by the addition of another party. We hold that the Motion to Disqualify was filed in a timely manner.

The second issue is whether the Trial Court should have held a fact finding hearing on the Motion to Disqualify. The Court of Appeals in *Ortiz v. Pakootas*, AP01-007, 5 CCAR 50, 3 CTCR 36, 28 ILR 6183 (09-17-2001) held that in that case there were sufficient facts alleged that the judge should have made an inquiry into the nature of the alleged unfair treatment and lack of notice. The Court of Appeals held that the inquiry could be made by a hearing or by accepting sworn affidavits on the issue. The record in the instant case does not show that a hearing was held or that sworn affidavits were accepted. Applying basic fundamentals of due process, we hold that a fact finding should be held, whether by hearing or by sworn affidavits, to allow the parties an opportunity to put forth facts concerning their allegations in the Motion.

The third issue is whether the Court of Appeals should issue guidelines for the Trial Court to follow when considering Affidavits of Disqualification on judges. The Court of Appeals is not persuaded that guidelines are necessary for the Trial Court to determine if a judge should be disqualified or not. A look at past cases shows that when the facts have been thoroughly and properly brought before the judges, they have made correct decisions regarding whether any conflict, prejudice or the perception of such exists. We hold that the issuance of guidelines for deciding on Motions for Disqualification is one for the trial court or should be made by the legislative body of the Tribe and not this Court.

Based on the foregoing, we Reverse and Remand to the Trial Court for further proceedings consistent with this Order.

Patrick & Geraldine GABRIEL, Appellants,
vs.
Chiarpah MATHESON, Appellee.
Case No. AP03-003, 4 CTCR 05
7 CCAR 10

[John Perry, Spokesperson, appearing for Appellants.
Appellee did not appear nor was he represented.
Trial Court Case Number CV-OC-2002-22353]

Initial hearing held 04-18-03. Decided 04-18-03.
Before Presiding Justice Pouley, Justice Bonga and Justice Chenois

This matter came before the Court of Appeals pursuant to an Initial Hearing being scheduled on this case. Appellants appeared in person and through counsel, John Perry. Appellee did not appear personally nor was he represented by counsel.

Counsel for Appellants stated the issues as they viewed them.

The Court of Appeals stated that they had reviewed the record and inquired if Appellant had any objection to a remand. Appellants stated they had no objection.

It is ORDERED that:

1. Based on the record, the Trial Court erred in dismissing the complaint due to the conflicting dates on the record. The Court should have rescheduled the matter instead of dismissing it.

2. All prior orders, including the default order, are vacated and this case is remanded to the Trial Court for trial.

It is SO ORDERED.

Deborah FINLEY-JUSTUS, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case Number AP01-013, 4 CTCR 06
7 CCAR 11

[Dan Gargan, Spokesperson, appeared for Appellant.
Dawn Reynolds, Office of Prosecuting Attorney, appeared for Appellee.
Trial Court Case Number CR-2001-24083]

Oral Arguments held October 18, 2002. Decided April 18, 2003.
Before Presiding Justice Nelson, Justice Chenois and Justice Pascal

Nelson, J.

INTRODUCTION

Deborah Finley-Justus is an enrolled member of the Colville Confederated Tribes (Tribes). She is married to Tommy Justus. Ms. Finley-Justus is the mother of Anastasia Snyder whose son, Jacob, was adopted by Mr. and Mrs. Justus following his birth on July 28, 1998. Shortly thereafter, they enrolled Jacob as a member of the Tribes. He was later disenrolled because of insufficient blood quantum.

After an investigation, the Tribes criminally charged Ms. Finley-Justus with Forgery (CTC 3-1-240[18]), Conspiracy to Commit Crime (CTC 3-1-122), and Fraud (3-1-47). The Forgery charge was dismissed by Trial Court Judge Aycock prior to trial. Mr. Justus was not charged with committing any crime because he is non-Indian and not subject to the criminal jurisdiction of the Trial Court. Ms. Finley-Justus was tried by a jury which convicted her of Fraud and Conspiracy to Commit Crime. Judge Aycock vacated the conviction of Conspiracy to Commit Crime upon motion of Ms. Finley-Justus on the grounds of insufficient evidence.

Mr. Gargan, spokesperson for Ms. Finley-Justus, alleges she learned after trial and sentencing that improper contact occurred between the jury and prosecutors and that such contact tainted the proceedings. She appealed on various grounds, but briefed only the issues of the verdict being contrary to law and the weight of the evidence and misconduct of the prosecution.

The Tribes cross-appealed on the issues that the Trial Court erred in dismissing the charge of Forgery; in setting aside the verdict of Conspiracy; in refusing to sanction the Appellant; and in imposing an inadequate sentence.

We deny the appeal of the Appellant. We deny the appeals of the Tribes on the issues that the Trial Court erred in refusing to sanction the Appellant and in imposing an inadequate sentence. We affirm the Tribes' cross-appeal in that the Trial Court erred in dismissing the charge of Forgery and in setting aside the verdict of Conspiracy.

STANDARD OF REVIEW

[18] The Colville Tribe Code (CTC) was extensively revised in 2002. Consequently, code numbers and certain crimes have been changed or redefined. The numbers and crimes cited herein are those in effect prior to the revision.

The issues on appeal and cross appeal presents issues of law. Questions of law are reviewed under the non-deferential standard, *de novo* standard. *CTC v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995).

ISSUES ON APPEAL

Appellant Finley-Justus listed six separate grounds of appeal in her Notice of Appeal. These are: 1) Irregularities in the proceedings which violate the defendant's rights under the Indian Civil Rights Act and the Colville Civil Rights Act; 2) Denial of defendant's pretrial motion to exclude a witness for refusal to talk with defense counsel; 3) Denial of defendant's pretrial motion to exclude a witness acting in the triplicate capacity of attorney for a witness, complaining party, and witness for the prosecution; 4) The verdict is contrary to the law and the weight of the evidence; 5) The trial court erred in disallowing defendant's jury instructions; and 6) Misconduct of the prosecution.

The Appellant did not brief issues 1, 2, 3, and 5. Accordingly, those issues are deemed abandoned. *McCraigie v. CCT*, 1 CCAR 28, 1 CTCR 44 (1989), *CCT v. Meusy*, 4 CCAR 37, 2 CTCR 54, 24 ILR 6248 (1997).

DISCUSSION OF ISSUES OF APPEAL

Insufficient evidence to convict Defendant of Fraud

The seminal case in this Court regarding the standard of review in determining whether there was insufficient evidence to convict the appellant of fraud is *Pakootas v Colville Confederated Tribes*, 1 CCAR 65, 1 CTCR 67 (1993). *Pakootas* adopted the standard of review set forth by the United States Supreme Court, *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and the Washington State Supreme Court, *State v. Salina*, 119 Wn.2d 192, 829 P.2d 1068 (1992), which limits the review to: "(w)hether, after reviewing the evidence in a light most favorable to the prosecution, any rational trial of fact could have found the essential elements of a crime beyond a reasonable doubt." *Jackson* at 319.

Appellant was convicted of criminally obtaining $550 per capita for her adopted son and natural grandson, Jabob, by willful misrepresentation or deceit. CCT 3-1-47. The Appellant argues the evidence did not support the element of "willful misrepresentation or deceit".

The evidence showed the Appellant did not answer the question on the enrollment form whether Jacob was an adopted child, but wrote on the form that "the birth certificate was mailed to you last month". The birth certificate referred to was that issued by the State of Washington following an adoption. On its face the certificate showed Jacob to be the natural son of the Appellant and made no reference to the fact that he was adopted, a standard procedure with adoptions in Washington. A jury could easily adduce that Ms. Finley-Justus willfully misrepresented the fact that Jacob was not her natural child.

After reviewing this evidence in a light most favorable to the prosecution, the jury could have found this and other elements of the crime beyond a reasonable doubt. The conviction of Fraud is affirmed.

Misconduct of the prosecution - improper contact

The Appellant alleged, in a motion to dismiss her conviction, the prosecution had improper contact with jurors during a break and wrongfully influenced a juror by tucking in the tag on her shirt.

The improper contact occurred when some jurors, the prosecutor, and a witness for the prosecution congregated to smoke in an area immediately outside the courtroom. Although there was no conversation between jurors and the prosecution and witness, each group was

able to overhear the other's conversations. Affidavits filed by the prosecution show, after a short time, the prosecutor became aware of the inappropriateness of the situation and moved himself and the witness away. There was no evidence showing the encounter affected the jury or its decision making process in any way.

Nevertheless, direct or indirect contact or communication between a party, attorneys, or witnesses is presumed prejudicial. In cases such as this, the prosecution has the burden of showing, after notice and hearing to the defendant, that the contact was harmless to her. *Remmer v. United States*, 347 U.S. 227, 98 L.Ed.654, 74 S.Ct. 450 (1954). At hearing it became apparent that there had been an exchange of pleasantries between the attorneys and some members of the jury and that they had all been smoking in the same area. Judge Aycock found no grounds to conclude the jury had been influenced by the exchange, but made arrangements to insure separation of parties and witnesses from the jury during trial.

We agree. Case law is replete with similar examples of exchanging pleasantries and conversations not related to trial or jury deliberations, all which are improper but harmless. See *Washington v. Washington Hospital Center*, 579 A.2d 177 (D.C. 1990); *Darab v. United States*, 623 A.2d 127 (1993).

CROSS APPEAL

The Colville Confederated Tribes cross appeal on four grounds: 1) the Trial Court erred and abused its discretion to sanction Mr. Gargan for presenting a motion containing a false affidavit, for which there was no basis in law or in fact, alleging prosecutorial misconduct; 2) the Trial Court erred and abused its discretion in setting aside the jury verdict finding the appellant guilty of Conspiracy to Commit Fraud; 3) the Trial Court erred and abused its discretion in dismissing the charge of Forgery against the appellant; and 4) the Trial Court erred and abused its discretion in imposing a sentence less than the maximum.

The Trial Court abused its discretion when it failed to sanction Appellant's spokesperson for submitting an affidavit containing false information

This issue arose when Appellant filed a motion to set aside her conviction of Fraud. The motion was based upon alleged improper communications and contact (discussed above). In support of the motion Appellant's spokesperson submitted an affidavit, sworn to by an employee of his office, that the prosecutor touched a juror and tucked in a tab on her shirt. The Affiant did not have first hand knowledge of this event, but simply reported what had been told to her by another. In a counter-affidavit, the juror stated it wasn't the prosecutor who touched her and tucked in the tab, but the Defendant/Appellant.

The Tribes are outraged at the blatant falsehood and contend the Trial Court abused its discretion by not sanctioning Mr. Gargan for his unprofessional behavior. We are profoundly concerned that the Appellant's spokesperson submitted an affidavit containing false statements not based upon her first hand knowledge, but on hearsay. It suggests, at the very least, that Mr. Gargan did not verify the information, and at worst, that he was imposing a fraud upon the Court.

Abuse of discretion has been defined as a "clearly erroneous conclusion and judgment". *Waters v. CCT*, 1 CCAR 18, 1 CTCR 20 (1985). It also has been defined as not only a decision based upon whim or caprice, arbitrarily determined or from a bad motive, but also that discretion was not justly and properly exercised under the circumstances. *State ex re. Nielson v. Superior Court for Thurston County*, 7 Wn.2d, 562, 110 P.2d 645. While the members of this panel would likely impose some sanction against Mr. Gargan for unacceptable and unprofessional

conduct, we are reluctant to second guess Judge Aycock's reasoning for not doing so.

The Trial Court erred and abused its discretion in setting aside the jury verdict in finding Appellant guilty of Conspiracy to Commit Fraud.

The Trial Court vacated the jury's verdict of Guilty of Conspiracy to Commit Fraud because it concluded "there was no direct or indirect evidence of an agreement between the parties except for what can be drawn from the fact that Mr. Justus signed the application", thus there was insufficient evidence for conviction.

In order to support a conviction for Conspiracy to Commit Fraud the Tribes must prove, *inter alia*, the Appellant was one of two or more people who conspired to commit fraud against the Tribes.

The standard in reviewing whether there is sufficient evidence to sustain a conviction is whether, after reviewing the evidence most favorable to the Tribes, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, *supra*, *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

No evidence was presented at trial showing whether Mr. Justus signed the application before or after it had been completed. Judge Aycock would have been correct in vacating the judgment had Mr. Justus's signature on the application been the only evidence of his knowledge of the fraud. The evidence also showed, however, that the attorney for the Appellant and her husband, Mr. Justus, mailed a letter soon after Jacob's adoption notifying the Tribes of the adoption. The letter included the comment that Jacob was not eligible for enrollment. The letter, the signed application, and evidence of Mr. Justus's lengthy marriage to the Appellant and involvement in the tribal community were sufficient for the jury to infer that he intended Jacob be enrolled while knowing he was ineligible.

The conviction of Conspiracy to Commit Fraud should be re-instated.

The Trial Court erred and abused its discretion by dismissing the Forgery charge.

The complaint alleges the Appellant "did, with intent to defraud, falsely sign, execute, alter, or counterfeit any written instrument, to wit: the defendant ... did sign an Application for Enrollment, Confederated Tribes of the Colville Reservation, as the mother of Jacob Riley Finley-Justus....", a violation of the Colville Tribal Law and Order Code, Section 3-1-47.

The Appellant moved the Trial Court before trial to dismiss the Forgery count on the grounds, *inter alia*, that an Application for Enrollment is not a written instrument. Judge Aycock held the Application is a written instrument because it is a written application to the Tribes for a benefit, that the application itself warns that falsifying a material fact may subject the applicant to a federal crime, and that the application contains a provision that the applicant declares the information to be true. Order on Motions, Pg. 4. We agree that an Application for Enrollment is a written instrument and, as such, falls within the parameters of CTC 3-1-47.

Nevertheless, Judge Aycock dismissed the Forgery charge. He did so, in part, on the grounds that the Appellant signed her correct name on the Application and, thus, did not commit the crime of Forgery. He found persuasive the argument that Forgery consists of signing a false name and not by signing one's correct name to an untrue document. We disagree.

Although Ms. Finley-Justus signed her correct name, there is probable cause to believe she committed the crime of Forgery when she "did, with intent to defraud ... execute... any written instrument (the Enrollment Application).

The operative phrase of Forgery (CTC 3-1-47) is not that an individual did "falsely sign" but that an individual "did, with intent to defraud ... execute... any written instrument".

It was arguable before trial and is now conclusive that she signed the Application "with

intent to defraud" the Tribes by enrolling her adopted son (grandson) while knowing he was ineligible for membership.

It is undisputed that Ms. Finley-Justus executed the Application for Enrollment. The legal meaning of "execute" is "to complete; to make; to perform; to do; to follow out. *Glover v. American Mortgage Corporation*, 94 S.W.2d 1235, 1236 as stated in Black's Law Dictionary, Revised Fourth Edition, P. 676, West Publishing (1988). The execution of an enrollment application is not only the signing, but delivery of the document. C.f. *Kennedy & Parsons v. Lander Dairy & Produce Co.*, 36 Wyo. 58, 252 P. 1036, 51 A.L.R. 315. The Appellant completed and signed the application using her own name. She then delivered it to the Tribe's Enrollment Office. In the most complete sense of the word, she "executed" the Enrollment Application.

Judge Aycock also based the dismissal of the Forgery charge on the grounds that the Appellant should not have been charged with Forgery, but with Sworn Falsification (CTC 3-1-197). This section reads:

> Any person who shall with intent to mislead a public officer in the performance of an official function, make a false written statement which he does not believe to be true or submits or invites reliance on any writing which he knows to be forged, altered, or otherwise lacking in authenticity, shall be guilty of Sworn Falsification. A Sworn Falsification is a Class C offense.

Judge Aycock wrote in his Order on Motions "(e)ven if Forgery applies to the making of a false statement in a document, it does not apply to the making of a false statement in a document with the intent to mislead a public officer.... This more specific statute applies over the general statute. CTC 1-1-7(k)".

We are of the opinion the two statutes are two separate crimes. Sworn Falsification requires an intent to "mislead" while Forgery requires an intent to "defraud". To mislead is to lead astray or lead into error. Black's Law Dictionary, Revised Fourth Edition, P. 1151, West Publishing (1988). To defraud is "to make a misrepresentation of an existing material fact, knowing it to be false .... intending one to rely and under circumstances in which such person does rely to his damage." Black's Law Dictionary at 511. The difference is the degree of intent. This is reflected in the classification of the crimes. Sworn Falsification is a Class C offense, while Forgery is a Class B offense.

The Forgery charge should be reinstated.

<u>The Court erred and abused its discretion in imposing less than the maximum sentence.</u>

The Tribes contend the Trial Court abused its discretion by not imposing the maximum fine and full restitution. The Appellant was convicted of Fraud, a Class B offense, which has a maximum penalty of a fine of $2500 and 180 days in jail plus court costs. She received a fine of $1500 with $500 suspended upon conditions and of 180 days in jail to be served as follows: 30 days in jail, 90 days electronic monitoring, and 60 days suspended upon conditions. One of the conditions of the suspended sentence was that she pay restitution in the amount of $500.

The Tribes argue, without authority, that Ms. Finley-Justus's lack of remorse should be an aggravating factor. A split of authority exists whether lack of remorse should be an aggravating factor. This panel favors the position stated in *State v. Carriger*, 692 P.2d 991 (AZ 1984) which held that a defendant is guilty when convicted and if he chooses not to publicly admit his guilt, that is irrelevant to a sentencing determination. Should a defendant admit his guilt, that can be used as a mitigating factor, provided the defendant is truly remorseful. *Carriger* at 1011.

The Tribes are requesting, for the first time on appeal, they be allowed to request additional restitution. They argue that recovering the Tribe's payout of $550 into Jacob's trust

account is not sufficient and they should be allowed to seek the Tribes's costs in prosecuting Ms. Finley-Justus because she has sufficient assets to pay them.

As a general rule issues may not be raised for the first time on appeal. There are exceptions such as jurisdictional issues or where there is manifest error affecting a constitutional right. The Tribes are, in effect, asking this court to establish an additional exception. We decline the request.

They argue they should be able to appeal the restitution order of the Trial Court as insufficient without having objected to it when entered as allowed in *State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996). The reliance on *Moen* is misplaced. *Moen* stands for the proposition that an error of a sentencing court can be raised for the first time on appeal where the sentencing court has acted without statutory authority.

The sentence herein (including restitution) is within the statutory limits and falls within the discretion of the Trial Court judge. *Coleman v. CCT*, 2 CCAR 43, 3 CTCR 18 (1994). We find no error.

CONCLUSION

We hold:

1. There was sufficient evidence presented to the jury to convict the Appellant of Fraud, therefore the appeal is DENIED and the conviction of Fraud is AFFIRMED.

2. There were insufficient grounds to support an allegation of misconduct of the prosecution - improper contact, the appeal is DENIED.

3. We are not persuaded that the Trial Court judge abused his discretion in not sanctioning Appellant's spokesperson for submitting an affidavit containing false information. The appeal is DENIED.

4. The Trial Court erred in dismissing the conviction of Conspiracy to Commit Fraud. Appeal GRANTED and REMANDED to the Trial Court for reinstatement of the conviction.

5. The Trial Court erred in dismissing the charge of Forgery. The appeal GRANTED and REMANDED to the Trial Court for reinstatement of the charge of Forgery.

6. There was no abuse of discretion by the Trial Court in imposing less than the maximum sentence on the Fraud conviction. The appeal is DENIED.

This matter is remanded back to the Trial Court for imposition of procedures consistent with this Opinion.

Monica CARSON, Appellant.
vs.
Charles BARHAM, Appellee.
Case Number AP01-009, 4 CTCR 07
7 CCAR 17

[Timothy Liesenfelder, Attorney for Appellants.
Wayne Svaren, Attorney, for Appellees.
Trial Court Case Number CV-CU-2001-21269]

Oral Arguments held April 19, 2002. Decided April 22, 2003.
Before Chief Justice Dupris, Justice Bonga and Justice Pascal.

Dupris, C.J., for the panel.

SUMMARY

On July 31, 2001, Appellee filed a custody action in Superior Court, Spokane County, Washington, to establish Parentage over the parties' minor child. Appellant was served with the Summons and Petition, as well as a Parenting Plan, on August 1, 2001. Appellant filed a Petition in the Colville Tribal Court on August 16, 2001 and was issued case number, CV-CU-2001-21269, the underlying case in this appeal. Appellant filed a subsequent Amended Petition on September 6, 2001.

On September 4, 2001, Judge Steve Aycock held a telephone conference call with Commissioner Grovdahl of the Spokane County Superior Court concerning the issue of jurisdiction. No parties were present in the Colville Tribal Court. Mr. Barham, Mr. Liesenfelder and Ms. Julie A. Harrington, Mr. Barham's attorney in the Spokane case, were present in the Spokane Court. It was determined that a hearing would be held on September 6, 2001, in the Colville Tribal Court to determine jurisdiction.

On September 6, 2001, a hearing was held in the Colville Tribal Court. The presumption was that the Spokane Court had jurisdiction and the hearing was to allow the Appellant to show cause why the Colville Tribal Court should take jurisdiction. Testimony was taken that the residence of both parties was outside the exterior boundaries of the Colville Reservation at the time of the filings in both courts. Judge Aycock found that there were no extraordinary circumstances to overcome the fact that jurisdiction would remain with the Spokane County Court based on the premise that the first case commenced vested jurisdiction in the Court where the first case was filed. The Colville Tribal Court case was dismissed.

Appellant filed her appeal on that dismissal on September 17, 2001. The written order was issued on November 1, 2001. Waiver of the bond was issued on the same day.

For reasons stated below we affirm the Trial Court decision herein.

ISSUES

1. Is the "first to file" rule enunciated by the Colville Tribal Court is applicable to cases filed in the Tribal Trial Court?

2. Is the Trial Court's finding of no extraordinary circumstances in this matter clearly erroneous?

STANDARD OF REVIEW

The issues before the Court are questions of law. There are no disputed material facts involved at this stage of the case. For those reasons our review is *de novo. See: Colville*

Confederated Tribes vs. Naff, 2 CTCR 08, 22 ILR 6032 2 CCAR (1995); *Wiley, et al v. Colville Confederated Tribes,* 2 CTCR 09, 22 ILR 6059, 2 CCAR 60 (1995); *Palmer v. Millard, et al,* 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); *Pouley v. CCT*, 2 CTCR 39, 25 ILR 6024, 4 CCAR 38 (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.*, 3 CTCR 07, 26 ILR 6039, 4 CCAR 68, (1998).

DISCUSSION

ISSUE 1: Is the "first to file" rule enunciated by the Colville Tribal Court is applicable to cases filed in the Tribal Trial Court?

The Colville Tribal Law and Order Code (CTC) is silent on the issue of "first to file." Appellant argues that to not allow this case to go forward in Tribal Court would affect sovereign power of the Tribe. He cites CTC sections he interprets to prohibit the Trial Court from giving up jurisdiction to another court. CTC § 1-1-3, Preliminary Provisions/Administration of Tribal Court[19] (the Code of Federal Regulations are no longer applicable on the Reservation) and CTC 1-1-5[20] (Tribe's sovereign power not being given up when adoption of "any law, code or other document by reference into this Law and Order Code...").

Appellant further argues that CTC § 1-1-71, Concurrent Jurisdiction,[21] preempts any action in a State Court when jurisdiction of the Code is invoked. He argues that the plain meaning of the statute is that where a matter is justiciable under CTC provisions, the exercise of that jurisdiction preempts the jurisdiction of any court except where provided by Federal law. He further distinguishes CTC § 1-1-102[22] which states that the Tribal Court shall cooperate with all branches of the BIA, all federal, state, county and municipal agencies, when that cooperation is consistent with the CTC. He argues the primary responsibility of the Court is to the people of the Tribes and the "first to file" rule is simply a manner of polite accommodation, and should remain only a means by which State courts are accommodated by the Colville Tribal Court out of reciprocal respect depending on the facts of each particular case.

Appellee argues that the Code sections Appellant cites do not apply to the instant case.

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[19] 1-1-3, C.F.R. No Longer Applicable. Any provision of the Code of Federal Regulations, Title 25, Part 11, as presently constituted or hereafter constituted which deals with the subjects covered in this Code or is otherwise inconsistent with or contrary to the spirit or purpose of this Code is declared to be no longer applicable to the Reservation.

[20] 1-1-5, Adoption by Reference Not A Waiver of Sovereign Power. The adoption of any law, Code or other document by reference into this Law and Order Code shall in no way constitute a waiver or cession of any sovereign power of the Colville Confederated Tribes to the jurisdiction whose law or Code is adopted or in any way diminish such sovereign power, but shall result in the law or Code thus adopted becoming the law of the Colville Confederated Tribes.

[21] 1-1-71, Concurrent Jurisdiction. The jurisdiction invoked by this Code over any person, cause of action or subject shall be exclusive and shall preempt any jurisdiction of the United States, any state, or political subdivision thereof; except in those instances in which federal law provides otherwise. This Code does not recognize, grant or cede jurisdiction to any other political or governmental entity in which jurisdiction does not otherwise exist in law.

[22] 1-1-102, Judicial Cooperation. All judges and personnel of the Tribal Court shall cooperate with all branches of the BIA, with all federal, state, county and municipal agencies, when such cooperation is consistent with this Code, but shall ever bear in mind that their primary responsibility is to the people of the Tribes.

Neither party, at any time during the proceedings below, asserted any rule from the Code of Federal Regulations to be applicable in this matter. Neither party argued below that any law, code or other document had been adopted by reference into the Colville Tribal Law and Order Code which would apply a "first to file" rule.

The Appellee further argues the Appellant misinterprets the "Concurrent Jurisdiction" statute by unduly limiting it. The second sentence of CTC § 1-1-71 does recognize jurisdiction in another governmental entity where jurisdiction exists in law.

The issue of "first to file" rule appears to be one of first impression before this Court. Neither party cited any case law relating to this specific issue. Appellant's arguments do not rest on case law; rather she argues judicial policy, and supports her arguments in part on stating that the Tribes' sovereign powers would be compromised by allowing the case to go forward in a state court.

The Trial Court found jurisdiction under the Tribes' Domestic Relations Code, Chapter 5-1 . The Trial Court also found that the Revised Code of the State of Washington (hereinafter RCW) would give the Washington Superior Court jurisdiction over paternity actions involving these parties and the minor child in question.

In the absence of a specific tribal law, or identified custom law, the Court is directed to CTC § 2-2-102:

> In all civil cases, the court shall apply in the following order of priority, any applicable laws of the Confederated Tribes, Tribal case law, Tribal customs, state statute, state common law, federal statutes, and federal custom law, and international law.

The "first to file" rule is a matter of comity, granting jurisdiction over a given factual issue to the first court where the matter is commenced. There is no question of fact that this matter was first filed in the Spokane County Court and is a recognized rule in Washington State courts.

Appellant wants this action in Tribal Court because she feels that a proceeding in this forum would properly examine concerns such as the culture and heritage of the minor, access to resources of the Tribe by her child, and the protection of her child's pecuniary tribal interests. She feels that Washington Superior Court would not consider properly the importance of tribal custom, tribal tradition or cultural heritage. She feels it should not be just a matter of a "race to the courtroom."

The Appellant has not sustained her burden on this issue. The Trial Court did not error in recognizing the "first to file" rule. We so hold.

ISSUE 2: Is the Trial Court's finding of no extraordinary circumstances in this matter clearly erroneous?

The "first to file" rule recognizes exceptions for application if the Court finds "extraordinary circumstances" which compel keeping the case in the Court even if it was filed elsewhere first. The Trial Court in this case found no "extraordinary circumstances."

The child in this case is a member of the Colville Confederated Tribes. Appellant argues the Colville Tribal Court should hear this matter as there are concerns about tribal funds that the minor is entitled to because of his membership status. Appellant argues that the minor's protected tribal rights must be considered by the Tribal Court consistent with CTC § 2-2-174. She urges this Court to find that the Tribal Court is the proper forum for adjudicating the protected monetary interests of enrolled minor tribal members; such interests themselves being "extraordinary circumstances" that necessitate exclusive tribal jurisdiction.

Appellee concedes that there are circumstances which could overcome the "first to file" rule. In the instant case, Appellee argues that the Court should review the Trial Court's order in light of whether one court or another is the more convenient forum for resolution of the underlying issues concerning the minor child.

Appellee asserts that the State of Washington has joined the majority of other states in adopting the doctrine of *forum non conveniens. See, Werner v. Werner*, 84 Wn.2d 360, 526 P.2d 370 (1974). The doctrine contemplates the discretionary declination of jurisdiction by a court where, in the court's view, the difficulties of litigation mitigate in favor of dismissing the action in favor of the jurisdiction of a court in a more convenient forum. Among the factors that could be considered are domiciles of the parties and witnesses. In the instant matter, Appellee continues to live in Spokane County, Washington, outside the exterior boundaries of the Colville Reservation. At the time of Appellee's filing, Appellant also lived outside the boundaries, in Grant County, Washington. Appellee maintains that the minor child has his primary residence with Appellee in Spokane County, Washington.

A significant number of Appellee's witnesses are also located in Spokane. Appellee does concede that at the time of filing, Appellant did live closer to the Tribal Court than to the State Court. Appellee noted that the Washington Courts have endorsed a court's declination of jurisdiction on the basis of *forum non conveniens* even when the court declining jurisdiction was the geographically more convenient forum for the person filing in that court. *In Re, Marriage of Dunkley*, 89 Wn.2d 777, 575 P.2d 1071 (1978). The Washington Courts have held that the declination will not be disturbed upon appeal unless no reasonable person would have applied the doctrine as did the court. *In Re, Marriage of Morrison*, 26 Wash. App. 571, 613 P.2d 557 (1980).

The Colville Tribal Court looked at the following factors in the instant case: 1) where Appellant lived at the time she filed her Colville Tribal Court case; 2) whether either party lived on the Reservation prior to filing of the respective trial court matters, and specifically the domicile of the child; 3) the child's enrollment in the Confederated Tribes; 4) the existence of two half-siblings and the bond between them; 5) use of Indian Health Services by the child; 6) the child's Indian heritage; and 7) the existence of the child's Individual Indian Money (IIM) account.

The Court below noted that arguments regarding the half-siblings was a custody argument and not jurisdictional. Appellee had no objection to the Court having jurisdiction over the IIM account. The Court, noting the lack of objection to this jurisdiction, entered a holding that Appellant could bring a motion to the Tribal Court to accept a foreign Court's order to exert jurisdiction over such monies. The Court did not find that any of the factors Appellant asserted rose to such a level to be considered extraordinary circumstances which would overcome the "first to file" rule.[23]

Appellant's claim that the existence of an IIM account in the child's name in a custodial, dissolution, or paternity dispute is, itself, a sole and sufficient extraordinary circumstance justifying the Tribal Court's exercise of jurisdiction, without regard to whether a case has been filed in another court is without merit. First, Appellee cites no authority for this proposition. Second, to accept such a rule would in effect encourage forum shopping and conflicting judgments between other courts and the Colville Tribal Court. This in turn would have the effect of obliterating judicial certainty and undermining cooperation among courts.

Appellant's other arguments are also without merit. No supporting authority has been

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[23] Appellant's reliance on CTC § 2-2-174, is misplaced. This section only gives the Tribal Court authority to order Per Capita payments and/or Dividends of judgment debtors to be available for execution of judgments. In this case, there are no judgment debtors.

given, nor facts argued to show the Trial Court erred in its ruling.[24]

Based on the record below we hold the Appellant has not shown any "extraordinary circumstances" which would require the Colville Tribal Trial Court to exert jurisdiction over the matter in question contrary to the "first to file rule.

CONCLUSION

Based on the forgoing, we hold the Trial Court appropriately applied the "first to file" in this matter and did not err in finding no extraordinary circumstances exist to overcome the application of the rule. The Trial Court is hereby AFFIRMED and this appeal is DISMISSED.

[24] Appellant makes unsupported arguments of civil rights violations, including the right to a jury before one's peers, due process violations, and equal protection violations. All these arguments are not supported by the facts nor by case law. We will not address them in this opinion.

Adeline CARDEN, Appellant,
vs.
COLVILLE INDIAN HOUSING AUTHORITY, Appellee.
Case No. AP02-006, 4 CTCR 08
7 CCAR 22

[Appellant appeared *pro se*.
John VanderMolen, spokesperson for Appellee.
Trial Court Case No. CV-OC-2001-21009]

Oral Arguments held October 18, 2002. Decided May 5, 2003.
Before Chief Justice Anita Dupris, Justice Earl L. McGeoghegan and Justice Theresa Pouley

Dupris, CJ

SUMMARY

The Appellant, Adeline Carden, (Carden) appeals her eviction from the home she rents from the Appellee, Colville Indian Housing Authority (CIHA). Carden asserts she did not receive adequate notice, nor an opportunity to be heard before the eviction took place. Another issue that arose during this Appeal concerned the conflicting statutes regarding bonds to be set before an appeal is perfected. Based on the reasoning below we held that Carden's due process rights were violated before she was evicted; we also set guidelines for the Trial Court and the Court of Appeals to follow when setting bond.

FACTS

Carden had a long-standing history of irregular rent payments and a failure to maintain agreements for payments on back rent. CIHA filed an Unlawful Detainer action against the Appellant in the Trial Court on January 24, 2001 pursuant to CTC § 9-3-6 (**Unlawful Detainer**). Notices were provided pursuant to CTC § 9-3-7 (**Notice**) and CTC § 9-3-8 (**Procedures For Service of Notice**). On April 10, 2001 the Court heard evidence from both parties on the allegations in the Complaint. The parties entered a settlement on the issues before the Trial Court which was approved in an April 16, 2001 order. The Agreed Settlement Order stated, *inter alia*, that the legal action would be held in abeyance for six (6) months on the condition that Carden pay her rent on time.

The next month Carden failed to comply with the terms of the Agreed Settlement Order. CIHA filed a request for a Writ of Restitution and a hearing on the Writ took place on May 29, 2001. At this hearing the Court modified the settlement order to allow Carden to pay the rental payments by the 10th of each month instead of the original 5th of each month. The Court also admonished Carden for not complying with the payment schedule. The Order included the following language: "The Respondent, Adeline L. Carden, has requested her rent due date to be changed to the 10th of each month, and she agrees if not paid by the 11th day of the month, Ms. Adeline Carden, shall be evicted without further Court action." The Court did not state whether the Writ was granted or denied, however.

On January 23, 2002 CIHA notified the Court that Carden's last rent payment was November 9, 2001. CIHA filed a proposed Order for Writ of Restitution and Judgment for Amount Due of $48.00. Carden acknowledged she received a copy of the proposed Writ of Restitution Order on January 25, 2002 and that she expected to receive a notice of a hearing on the issue. The Court signed the proposed Order on February 13, 2002 without a hearing.

Carden alleges she was never personally served the February 13, 2002 Writ of Restitution. On February 21, 2002 a police officer apparently gave a copy of the Writ to Carden's daughter who lived across the street from the Appellant's residence. The Police Department effected the Writ of Restitution on February 26, 2002 by evicting Carden from the

residence in question. She appealed.

On appeal CIHA moved to dismiss the Appeal when Carden failed to file a bond with the Trial Court. This Court, recognizing that the question of bonds under conflicting statutory provisions needs to be addressed, found cause to deny the Motion to Dismiss.

Based on the reasoning below this Court VACATED the Writ of Restitution and REMANDED the case to the Trial Court. Further, we set guidelines regarding the setting of bonds for appeals because of the conflicting statutes.

ISSUES

I. Were the Appellant's rights to due process violated when the Judge issued a Writ of Restitution without a hearing nor any other opportunity for the Appellant to dispute the Appellee's assertion by affidavit and motion that the Appellant failed to comply with her rental payments?

I. What guidelines are necessary to meet the bond requirements for filing appeals when there are conflicting statutes on the issue?

STANDARD OF REVIEW

The issues raise questions of law. Questions of law are reviewed under the *de novo* standard. *See*, *Gorr & Stensgar v. CCT*, 3 CTCR 47, 6 CCAR 39 (2002); *Simmons v. CCT, et al.*, 6 CCAR 30, 3 CTCR 45 (2002); *Hoover v. CCT*, 6 CCAR 16, 3 CTCR 44 (2002) (The standard of review for questions of law is non-deferential to findings and conclusions of the trial court and is *de novo*); *In Re the Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998); *Pouley v. CCT*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024 (1997); *Palmer v. Millard, et al*, 3 CCAR 27, 2 CTCR 14 23 ILR 6094 (1996); *Wiley v. CCT*, *et al.*, 2 CCAR 60, 2 CTCR 9, p.6, 22 ILR 6059 (1995); and *Colville Confederated Tribes v. Naff*, 2 CCAR 50, 2 CTCR 8, 22 ILR 6032 (1995).

DISCUSSION

DUE PROCESS

The requisites for due process are fundamental and well-settled: adequate notice, opportunity to be heard, and opportunity to present evidence on one's own behalf. *See Lezard v. CCT*, 3 CCAR 4, 2 CTCR 11, 22 ILR 6135 (1995) (recognizing due process rights to include appropriate notice and the right to a hearing to present evidence and to call witnesses), *Gallaher v. Foster, et al.*, 6 CCAR 48, 3 CTCR 50 (2002) (parties must have reasonable notice prior to any substantive hearing to allow the parties time to prepare their respective cases). Further, *see* CTC § 1-5-2(h) ("Civil Rights of Persons Within Tribal Jurisdiction").[25]

CIHA argues the parties had continually revisited the terms of the rental agreement and changed them in Court, and the Judge admonished the Appellant that no further court hearings would take place before an eviction would be granted if the Appellant failed to make her rental payments as ordered. CIHA asserts this admonishment, combined with the fact that Carden received a copy of the Writ of Restitution after January 25, 2002 but well before February 13, 2003 when the Writ was signed by the Judge, supports a finding that Carden had received adequate notice.

CIHA attempts to distinguish *In re the Welfare of J.A.M., et al.*, 3 CCAR 6, 3 CTCR 14 (1995) stating in *J.A.M.* the issues were more complex and the parties numerous. In *J.A.M.* this Court found that a parent should have received more notice that her substantive rights to her children were going to be adjudicated at a hearing which changed an initial disposition order. The lack of adequate notice of a matter affecting substantive rights of a party was sufficient for

[25] "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..."

this Court to reverse and remand. In the case before us Carden's substantive rights to stay in her house are squarely before us.

CIHA also argues that the applicable statute in *J.A.M.* specifically required notice in an instance when no notice was given. In this case the notice provisions of the Landlord Tenant Relations Code are very specific, too. *See* CTC § 9-3-7 (**Notice**).[26] The Code sets out very specific procedures to follow before a Writ of Restitution is to issue. CIHA has not distinguished *J.A.M.*.

Carden acknowledges receiving a copy of the proposed Writ of Restitution CIHA filed with the Trial Court. She expected a hearing on the issues at which time she could dispute the allegations in the Affidavit that supported the proposed Writ. Instead, the Trial Court signed and issued the Writ without a hearing, and without asking Carden to respond to the allegations in the CIHA Director's Affidavit. A copy of the signed Writ was then left by a tribal policeman, not personally with Carden, but with Carden's daughter at a house across the street from Carden's house. Three days after the Trial Court issued the Writ the Colville Tribal Police Department physically removed Carden from her house.

CIHA argued a hearing on the Writ was not required under the unique facts of this case. CIHA argued that the admonishment given Carden at the May 29, 2001 hearing on the first Writ of Restitution was sufficient notice. CIHA asserts the Notice was all in one, continuing process, from May, 2001 to February, 2002, and the one written notice for the May hearing was adequate enough for any actions by the Trial Court thereafter. For authority CIHA cites CTC § 9-3-4 (**Law to be Applied**)[27] and CTC § 1-1-144 (**Means to Carry Jurisdiction Into Effect**)[28], which allows the judge to develop a process in the absence of a statutory process for matters that come before the Court. We don't agree.

The Landlord Tenant Relations Code, Chapter 9-3, has a specific, detailed procedure to apply to this case. It applies to "[a]ny action for rent due or other breach or default of a legal or rental purchase agreement...." CTC § 9-3-1, **Jurisdiction and Scope**. The Trial Court is directed to apply all the applicable provisions of Chapter 9-3 when an action regarding an unlawful detainer is brought by a landlord, CTC § 9-3-4 **Law to be Applied**, such as this action. *See* CTC § 9-3-4, **Unlawful Detainer**.[29]

Any action for failing to pay rent requires thirty (30) days notice. CTC § 9-3-7 (*see* footnote 2, *supra*). The Notice must state the renter is in default, and he must either pay the rent

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[26] **Notice**: (b) No action may be commenced in Tribal Court for a failure to pay rent when due until after having received thirty (30) days' [*sic*] notice the tenant or occupier shall remain in possession of the property contrary to the terms of the notice as follows:

(1) When such person has received notice:

(A) That he is in default in the payment of rent; and

(B) Requiring him in the alternative to pay the rent or surrender possession of the occupied property shall fail to pay the rent or surrender possession.

[27] "...In the absence of tribal law on any particular subject the Tribal Court may look to provisions in federal law or the general law of the states for guidance in fashioning a remedy."

[28] "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."

[29] "A tenant or other occupier of land shall be guilty of unlawful detainer if such person shall continue to occupy real property under any of the following situations: ...(e) [a]fter failing to pay rent."

or surrender possession of the property in question. *Id.* The Notice must be served personally, or served on any adult family member **residing on the premises** (emphasis added) or by posting on the premises along with sending it by certified mail. CTC § 9-3-7 (**Procedures for Service of Notice)**. After Notice is given to a renter that he is in default for not paying his rent, CIHA is required to file a Complaint and Summons for unlawful detainer under the general civil rules of civil procedure. CTC § 9-3-9 (**Complaint and Summons Contents**). A hearing on the Complaint must be set expeditiously, and no later than 30 days from the date the Defendant is to file an Answer to the lawsuit. CTC § 9-3-10 (**Hearing**).

In the case at hand, the Trial Court chose to deviate from the procedure outlined by the Code. The Trial Court chose to set new parameters on Carden's responsibilities to CIHA at each hearing from the time the action was filed until the last hearing. One concern of this Court is that the Trial Court signed a Writ of Restitution several months after the original Complaint was filed, and a hearing setting out the oral findings of the Trial Court. We recognize that the Trial Court has discretion to seek alternative methods to allow parties to negotiate equitable solutions to eviction. We do not believe, however, that the Trial Court can override the detailed due process protections set out in the Code before a person is physically evicted from his or her home. The Code is very specific on the time required to give notice and an opportunity to be heard before a person can be evicted from his or her home. Chapter 9-3 of the Code contemplates that a final order be issued after an Unlawful Detainer action. The Code states that the Court **shall** (emphasis added) issue a Writ of Restitution if it finds proper Notice was given and that the Defendant was in default of paying her rent. CTC § 9-3-11 (**Power of the Tribal Court**).[30]

The Trial Court should not structure a remedy which defeats the purpose of the statute. When the Trial Court holds a civil case in abeyance, without a final order, and on conditions, it puts itself in a position to have to monitor a civil case between private parties beyond the time frame considered by the statute. It does not give finality to the case.

In this case the time lapse between the initiation of the action (*i.e.* May 29, 2001) and the eviction on February 21, 2002, as well as the intervening actions of both parties, make it imperative that the Trial Court allow Carden to formally respond, on record, to the allegations raised by CIHA in the Director's Motion and Affidavit of January, 2003. The substantive rights of the parties require vigilance on the Court's part. This is the purpose of the detailed procedure of Chapter 9-3.

Based on the foregoing, we hold the Appellant was not afforded due process before she was evicted from her home and the Writ of Restitution should be vacated.

BOND REQUIREMENTS

At the beginning of this appeal the Trial Court required Carden to file a $150.00 bond. She did not do this, and CIHA moved to dismiss the Appeal. At the Initial Hearing we denied the Motion to Dismiss, reduced the bond to $48.00 (the amount Carden was alleged to have been in arrears in rent), and discussed the conflicting bond statutory laws[31] of the Tribes. We

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[30] "(a) The Tribal Court shall enter a writ of restitution if: (1) Notices are required by this Chapter have been given; and (2) The Tribal Court finds that the occupier of the real property is guilty of an act of unlawful detainer."

[31] § 1-1-283, **Notice of Appeal**: Within ten (10) days from the entry of judgment, the aggrieved party may file with the Trial Court written notice of appeal, and upon giving proper assurance to the Court, through the posting of a bond or any other way that will satisfy the judgment if affirmed, shall have the right to appeal, provided the case to be appealed meets the requirements established by this Code or by Rules of Court.

§ 1-2-78, **Stay Pending Appeal; Bonds**: If a party is granted an appeal, that party must then, in

asked the parties to brief the issue on how to resolve conflicting statutes on bonds. Carden did not brief the issue; CIHA did.

An appeal is first filed at the trial level within ten (10) days of the final judgment. CTC § 1-1-283, **Notice of Appeal**.[32] Any requests for a stay of the judgment must first be made to the Trial Court. CTC § 1-2-78, **Stay Pending Appeal; Bonds**.[33]

The right to an appeal is based on, *inter alia*, the Appellant's assurance to the Trial Court that the judgment will be satisfied, either by a bond "or any other way that will satisfy the judgment if affirmed." CTC §1-1-283, *supra.* If the party is granted an appeal, he must "make provisions for a bond," which is discretionary with the Trial Court. CTC §1-2-78, *supra*. Not all civil appeals have a monetary judgment to be satisfied. Further, sometimes, as in the case here, the bond amount set by the Trial Court does not reflect the amount of the Judgment, but an amount decided unilaterally by the Court without a hearing.[34] Thus the confusion: is the appeal perfected when the bond amount is set by the Trial Court or when the bond is posted by the appellant?

For guidelines we must first determine why a bond is necessary at all. CIHA asserts that both provisions basically provide for the same thing, that is, a bond for the purpose to satisfy the judgment of the Trial Court if it is affirmed on appeal. We agree. Whether a judgment can be satisfied at some point beyond the appeal is not a substantive issue. If there were no appeal a judgment creditor wouldn't necessarily be assured his judgment would be paid anyway. It is in this framework in which we issue guidelines for both the Trial Court and the Court of Appeals to follow in order to make sense of the bond statutes in question.

The statutes (CTC § 1-1-283 and CTC § 1-2-78) expect the issue of bonds to be handled at first at the trial level and, if challenged, subject to review at the appellate level. An appellant must ask the Trial Court to set the amount of the bond, if any, and must assure the Court of Appeals this is done in order for his appeal to be granted. Each Court, *i.e.* the Trial Court and the Court of Appeals, must make some changes to their respective practices in order to conform the practices to the law.

The Court of Appeals Clerk must add language to the Notice of Appeal which states either (1) the appellant has given the Trial Court assurance, through posting a bond or another method, that any judgment will be satisfied, if affirmed; or (2) that the appellant has asked the Trial Court for a waiver of the bond.[35] CoA Court Rule 6(d) requires "an Order Setting or Waiving Bond" be filed with the Notice of Appeal. Since an appeal is not granted or denied

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writing, request a stay of judgment pending the outcome of the appellate procedure. At that time, the appellant must also make provisions for a bond, which is discretionary with the Court.

[32] A final order must be a written order. *See*, *Leaf v. CIHA,* 6 CCAR 53, 3 CTCR 51 (2002).

[33] If an appellant is denied a stay, he may ask the Court of Appeals to review the denial. *See, CCT v. Rickard*, 6 CCAR 51, 3 CTCR 42 (2002), *CCT v. Carson*, 5 CCAR 28, 3 CTCR 26, 27 ILR 6153 (2000).

[34] CIHA claimed Carden owed $48.00 when CIHA filed its proposed Writ of Restitution on January 21, 2001. The Trial Court set the bond at three (3) times the amount of the rent Carden was paying per month ($34.00/month) plus the $48.00 judgment, *i.e.* $150.00. The bond was set without a hearing and without either party making a specific request of the amount to be paid.

[35] Note, however, that The Court of Appeals' Court Rule 6(d) states "[a]ppeals from criminal and [Minor-in-Need-of-Care] cases do not have to attach the bond order."

until the Initial Hearing,[36] the Court of Appeals will not review the issue of whether a bond is posted or even if it is needed until the Initial Hearing.

Before the case is sent to the Court of Appeals from the Trial Court, the Trial Court Clerk must deal with the preliminary bond and stay issues referred to in CTC § 1-1-283 and CTC § 1-2-78. The Trial Court Clerk must review the file to see (1) whether there is a request for a stay; (2) whether the appellant asked for a bond order, either setting a bond or asking it be waived; and (3) whether any orders dealing with the stay and bond are included in the file sent to the Court of Appeals Clerk.

Adding these extra procedural steps at the administrative stages of the case at both the Trial Court and Court of Appeals level will assist the Court of Appeals in its decision whether an appeal has been perfected. We so hold.

ORDER

Based on the foregoing Opinion, we now hold:

1. The Writ of Restitution was issued in violation of the Appellant, Adeline Carden's due process rights and should be VACATED, and this matter REMANDED to the Trial Court to (a) restore Adeline Carden's home to her; and (b) allow the Appellee, CIHA, the opportunity to comply with the Landlord and Tenant Relations Code, Chapter 9-3.
2. The bond guidelines outlined above should be immediately adopted by the Courts of the Colville Tribes.

It is SO ORDERED.

Cynthia BOYD, et al., Appellants,
vs.
COLVILLE TRIBAL CREDIT, Appellee.
Case Number AP01-006, 4 CTCR 09

7 CCAR 27

[James Edmonds, CCT Legal Services, spokesperson for Appellant.
David Shaw, Attorney, spokesperson for Appellee.
Trial Court Case Number CTC 98-28015]

Argued October 18, 2002. Decided May 19, 2003.
Before Presiding Justice Elizabeth Fry, Justice Dennis L. Nelson and Justice Howard E. Stewart

Fry, J.

This matter came regularly before the Court of Appeals, consisting of Presiding Justice Elizabeth Fry, Justice Dennis Nelson and Justice Howard Stewart, for Oral Argument on October 18, 2002. Appearing before the court was James Edmonds, Colville Tribal Legal Office, for the Appellants. Representing the Appellee was David Shaw, Office of the Reservation Attorney, Nespelem, Washington.

After thoroughly reviewing the case file and considering the arguments of counsel, the Court of Appeals agrees with the position of the appellee and hereby affirms the decision of the

[36] CTC §1-1-286, **Appellate Court Trial; Procedure**. Within forty-five (45) days from the date of the written notice of appeal, the Appellate Court shall convene for the first time.... to determine whether or not ... the appealed case warrant[s] a limited appeal on issues of law and/or facts, whether a new trial should be granted, or whether the appeal should be denied....

Trial Court.

The court, having reviewed the records and files herein, and being fully advised in the premises, sets forth the opinion in this matter as follows,

J. Fry writing the opinion.

I. FACTS

FACTS. Josephine Seylor purchased land on the Colville Indian Reservation from her cousin, Duwayne H. Butler, on August 8, 1990 with a loan from the Colville Tribal Credit Department secured by a mortgage on the property in the amount of $19,000, with interest at 8.5% in monthly installments of $187.10. Mr. Butler conveyed his interest in the property to Ms. Seylor on October 5, 1990. Ms. Seylor passed away on May 19, 1992, dying intestate. Ms. Seylor was a member of the Colville Tribe. No appraisal was conducted on the property. The Bureau of Indian Affairs, which had the responsibility for approving the loan, did approve it on March 9, 1994 through its agent, Sharon Redthunder.

Upon the death of Ms. Seylor, the Colville Tribal Credit Department filed a claim in her trust probate action, was recognized by the court therein, and released to pursue the mortgage. The probate court entered an order December 6, 1993 listing the defendants as heirs to the real property, and finding that Colville Tribal Credit had a secured claim. The appellants did not object to the validity of the mortgage at that time. Colville Tribal Credit filed a complaint in the Colville Tribal Court on April 16, 1998 to foreclose on the mortgage, with the heirs as defendants. Colville Tribal Credit sought relief only up to the amount of the mortgaged property. Meanwhile, one of the heirs continued to pay on the loan until May 1993, and then ceased making payments. The parties were unable to settle the matter. Colville Tribal Credit is seeking recovery of the unpaid principal of $16,957.08, plus interest of $11,878.32, and late fees of $335.00.

PROCEDURE. Colville Tribal Credit moved for summary judgment, and the defendants moved for partial summary judgment. Then Colville Tribal Credit then cross-motioned for partial summary judgment. The trial court granted both motions for summary judgment in favor of Colville Tribal Credit and denied the defendants motion for partial summary judgment.

The defendants appeal that decision.

II. DISCUSSION

What this court must determine, *de novo*, is whether Appellee Colville Tribal Credit's motions for summary judgment should be granted, or whether the Appellants' motion for partial summary judgment should be granted. Appellate review of a summary judgment decision requires the reviewing court to decide the motion *de novo*. *Stone v. Colville Business Council*, 3 CTCR 11, 5 CCAR 16, 26 ILR 6076 (1999). *Haven's v. C&D Plastics Inc.*, 124 Wn.2d 158, 176-177, 876 P.2d 435 (1994). A motion for summary judgment is viewed in a light most favorable to the nonmoving party.[37]

In order to decide the motions for summary judgment, this court must determine if there were issues of material fact regarding the following matters:

1) The competency of Josephine Seylor at the time of the signing of the documents.

2) The validity of the mortgage.

[37] *Stone* ar VersusLaw Page 25.

The Competency of Josephine Seylor.

Ms. Seylor was only able to obtain the loan by providing personal references and documenting her financial status.[38]

The appellants claim she was not competent because she had cancer and was taking pain medications, there were notations from the Physician's Desk Reference that some of this pain medication could potentially impair mental or physical abilities.[39] None of the affidavit signers who alleging impairment of Ms. Seylor participated in the witnessing, negotiations, or execution of the loan and mortgage documents.[40] The factual issue at hand is whether Ms. Seylor lacked the capacity to contract at the time of the execution of the documents. The facts appear to be incontroverted that there was no evidence presented of incapacity at the time of the signing of the loan and mortgage documents. Thus this court finds no incapacity in Ms. Seyler. In fact, for twenty months she regularly made her payments to Colville Tribal Credit, and fulfilled the requirements of the legal documents.

The Validity of the Mortgage.

After-acquired property. The mortgage Ms. Seylor signed obligated not only herself but also her heirs.[41] Ms. Seylor also signed an Assignment of Trust Income containing language that the claims of the heirs would be subordinate to the claims of Colville Tribal Credit should a default occur under the loan.[42]

Legal title to the real property was acquired pursuant to a gift deed from Mr. Butler less than 60 days after Ms. Seylor signed the loan and mortgage documents.[43] If the loan documents had been declared invalid at that time because of the time difference between the signing of the documents and the ownership of the land, then the property would have been returned to Mr. Butler, and Ms. Seylor would not have enjoyed any benefit of living on and owning the property. However, Ms. Seylor did live on and own the land, and she did conscientiously keep up her payments on the loan, which in this court's view, was an affirmation of the validity of the loan and mortgage documents. She received the benefit of her bargain, and it would not be appropriate at this time to find the technical delay in ownership improper. Thus this court will not invalidate the mortgage on this basis.

Date of Approval by Bureau of Indian Affairs. Sharon Redthunder, acting Superintendent of the BIA, approved the mortgage.[44] Ms. Redthunder actually signed the approval sometime between March 1994 and June 1994, and the mortgage was filed and recorded by the BIA on June 3, 1994.[45] The BIA claimed to have approved the mortgage in 1992.

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[38] Appellee's Brief at 5.

[39] Appellee's Brief at 10.

[40] Appellee's Brief at 10.

[41] Mortgage, Section 4(b), Appellee's Brief at 6, fn 5.

[42] Appellee's Brief at 6.

[43] Exhibit I, Defendant's Memorandum in Opp. to Plaintiff's Motion for Summary Judgment, Appellee's Brief at 6.

[44] BIA Certificate of Approval showing date of executing approval of March 9, 1992, included in Attachment H to Defendant's Memo. In Opp. to Plaintiff's Motion for Summary Judgment, Appellee's Brief at 7.

[45] Affidavit of Rhonda Marchand, para. 6 attached to Plaintiff's Motion for Summary Judgment, Appellee's Brief at 7.

The question for the court becomes whether the BIA action approving the mortgage four years after it was signed by Ms. Seylor, subsequent to the probate, and the BIA erroneously claiming they had approved it in 1992, invalidated the mortgage. These facts as stated are undisputed. What remains for the court to determine are the legal interpretations of the BIA's actions and not any particular issue of material fact.

The trial court, in finding that the Bureau of Indian Affairs had substantially complied with the relevant regulations, found for the appellees. The probate court held that Colville Tribal Credit had a secured claim, that the debt would run with the land, and foreclosure would be the appropriate remedy. This court finds that the Bureau of Indian Affairs acted dishonestly in saying that they had approved the mortgage in 1992, when they had actually approved it in 1994, after the probate. Appellees interpretation would have us accept is that the Bureau of Indian Affairs simply approved the mortgage retroactively.

The legal question at the probate was whether the mortgage was valid. The appellants had an opportunity to question the validity of the mortgage at the probate hearing and did not do so, thus the probate court determined that the appellees claim was secured. This court finds that the appellants waived their right to raise that issue by failing to timely raise it at the probate hearing. Therefore this court accepts the argument of the appellees, though its actions were less than candid.

Value of Property

Mr. Butler submitted a signed statement stating the approximate value of the property at $12,000.00.[46] The property is located at Owhi Lake, and had been previously mortgaged at $33,997.80 and $20,693.12.[47]

This court finds that sufficient evidence was presented to show that the real property was worth at least the amount for which it was mortgaged.

III. CONCLUSION

Based upon the foregoing discussion, the court grants the appellee's motions for summary judgment and denies appellants' motion for partial summary judgment.

IV. ORDER

IT IS ORDERED that:

1. Appellee's motions for summary judgment are granted,
2. Appellants' motion for partial summary judgment is denied.
3. The Decree of Foreclosure is hereby reinstated.

IT IS SO ORDERED.

Daniel HALL, Appellant
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case No. AP03-001, 4 CTCR 10
7 CCAR 31

[Neil Porter, Office of Public Defender, for Appellant.
Esther Payne, Office of Prosecuting Attorney for Appellee.
Trial Court Case Number CR-2002-25333]

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46 Exhibit H, Defendant's Motion for Partial Summary Judgment, Appellee's Brief at 6.

47 Exhibit C5, Exhibit C8, attached to Sharon Holmdahl's Affidavit in Support of Plaintiff's Motion for Summary Judgment, Appellee's Brief at 7.

Oral Arguments held July 18, 2003.
Decided September 3, 2003.
Before Chief Justice Anita Dupris, Justice Conrad Pascal and Justice Howard E. Stewart

Dupris, CJ, for the Panel.

PROCEDURAL HISTORY

On September 26, 2002, Hall was charged with three violations of the Colville Tribal Law and Order Code. On November 21, 2002, just before the jury trial, Hall made an oral motion to present testimony of a witness by telephone. Hall stated the witness was his mother, Connie Flores, who had spoke to both Hall and the victim by telephone during time the offense took place. Hall further alleged Ms. Flores lived out-of-state and could only appear by telephone. The motion was denied by Chief Judge Aycock. At trial the jury found Hall guilty of all three offenses. He timely appealed the verdict. Oral arguments heard on July 18, 2003.

ISSUE

Did the Trial Court abuse its discretion in denying Hall's pretrial motion to allow one of his witnesses to testify by telephone, thus denying Hall due process of law? For reasons set out below we hold that the Trial Court did not abuse its discretion by denying the Appellant's motion for telephonic testimony. Further, we hold there were no due process violations because the Appellee was allowed a witness to testify by telephone and the Appellant's witness was not allowed to do so.

STANDARD OF REVIEW

We review this case under the abuse of discretion standard. We review the Trial Court's decision to determine if its action was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Further, a minimum review for abuse of discretion would require a review for due process. *Sonnenberg v. Court*, 5 CCAR 9, 3 CTCR 9 (1999). Review for an abuse of discretion requires that before we will overturn the Trial Court's decision, we must find that its actions were manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. We further need to review for due process violations. *Grunlose v. CCT,* 5 CCAR 26, 3 CTCR 25, 27 ILR 6033 (1999). We look to record, the facts of the case and the decision made. This review is not *de novo. Smith v. CCT*, 4 CCAR 58, 2 CTCR 67, 25 ILR 6156 (1998).

DISCUSSION

Appellant argues he has the right to present his own witnesses to establish a defense. He argues he was denied his right to have a critical witness testify on his behalf. The witness was the only other person besides the Appellant and the victim who had knowledge about what was happening at the time of the offenses because she allegedly was on the telephone with both the Appellant and the victim at the time of the incident giving rise to the criminal charges against the Appellant.

A review of the record shows that the Trial Court did not deny the Appellant the right to subpoena the witness in question; he did not ask for the witness to be subpoenaed. The right to compulsory process is predicated on the exercise of due diligence on the part of the party calling the witness. It is the defendant's responsibility to properly and timely ensure that his witnesses appear at trial. In this case, the witness initially was not even contacted until the afternoon before the trial. There is no showing that the Trial Court's denial of the Appellant's motion was manifestly unreasonable, exercised on untenable grounds, or for untenable reasons.

Trial management is squarely within the discretion of the Judge.

There is no clear abuse of discretion in this case. In order to prevail, Appellant must show a violation of his due process rights. He cannot do so based on the record before us. Due process is that process due to the individual; it is not necessarily the same process due the other party. In *CCT v. Martin*, 4 CCAR 32, 2 CTCR 53, 24 ILR 6246 (1997), the appellant alleged that she was denied due process when the Court did not allow her to provide additional information at an evidentiary hearing after sentencing. In *Martin* the appellant claimed her rights were violated by the Court having access to the police report when her PSI did not include the report, a fact she could have determined at least thirty days earlier. This Court determined she had an obligation to contact the Court about whether it had the report or not and her failure to do so waived any right to claim violation of due process. *Martin*, at 35.

In this case Appellant was put on notice at least 17 days prior to trial, at the pretrial hearing, that Ms. Flores was a potential witness. It could be argued that notice was given prior to that time as Ms. Flores was listed in the police report which was given to the Appellant on October 9, 2002. In any case, neither party subpoenaed Ms. Flores as a witness. Apparently neither party attempted to contact Ms. Flores until the day prior to trial. It was only when defense counsel talked to the other witness that it was determined that Ms. Flores was crucial to the Appellant's case The only argument Appellant offers to state his due process rights were violated is that the Appellee's doctor witness was allowed to testify by telephone. Appellant cites no authority for this proposition.

At the pretrial and the readiness hearings, both parties indicated they were ready for trial. Presumably this meant that all witnesses whose testimony was crucial for the trial had been contacted and subpoenaed. Allowing one witness to testify by telephone while denying another is not a *per se* abuse of discretion. The first motion was submitted two days prior to trial and was not opposed by counsel. It was well within the Court's discretion to deny the motion based on the information in front of it.

CONCLUSION

The Appellant did not subpoena Ms. Flores. In order to raise the issue of denial of fundamental rights by denial of compulsory process, the Appellant has an obligation to make an attempt to subpoena the witness. Failure to make this initial attempt waived Appellant's right to claim violation of due process. Being too busy to review a client's file is not a valid reason to come in at the last minute and move that a telephonic testimony to be allowed when no subpoena has been issued.

For these reasons, we hold that it was within the Trial Court's discretion to deny the motion for telephonic testimony and that due process was not violated by this denial.

ORDER

The Trial Court is **AFFIRMED** and the matter **REMANDED** to the Trial Court for further proceedings.

COLVILLE CONFEDERATED TRIBES, Appellant,
vs.
Andrew JACK Jr., Appellee.
Case No. AP02-012, 4 CTCR 11
7 CCAR 33

[Jonnie L. Bray, Office of the Prosecuting Attorney, for Appellant.
Cynthia A. Jordan, Office of the Public Defender for Appellee.
Trial Court Case Number CR-2001-24143]

Oral Arguments heard July 18, 2003. Decided November 21, 2003.
Before Chief Justice Dupris, Justice David Bonga and Jusstice Conrad Pascal

Dupris, C.J., for the Panel.

SUMMARY

On June 13, 2002 the Appellee-Defendant Andrew Jack, Jr. sent subpoenas to the Tribal Police Department for the jury trial set for June 20, 2002 on the charge of Reckless Endangerment against him. At a pre-trial readiness hearing on June 17, 2002, Jack and the Appellant, Colville Tribes both told the Trial Court they were ready to go to trial on June 20th. Just before the trial, the Appellee moved to continue the trial, stating his subpoenas had not been served upon material eye witnesses; the continuance was granted by the Court and the trial was reset for July 18, 2002. At a pre-trial hearing on July 15, 2002 the Defendant moved to dismiss and the Court granted the motion. The written order issued by the Court dismissed the charges with prejudice, though neither party had requested it. The Trial Court did not issue findings of fact nor conclusions of law in support of its rulings. This appeal was timely filed by the Tribes. Briefs were submitted and oral arguments heard.

We hold that the Trial Court erred in dismissing the case and, further it erred in *sua sponte* dismissing the case with prejudice. We reverse and remand to the Trial Court for reasons stated below.

ISSUE

Did the Trial Court err in dismissing with prejudice the charges against the Appellee under the circumstances of this case based on the fact the Tribal Police Department failed to serve the Appellee's subpoenas?

DISCUSSION

No one in this case disputes that Jack has the fundamental right to call witnesses on his own behalf. CTC §1-5-2(f)[48] codifies this right, which is recognized in all jurisdictions in the United States.[49] It is fundamental to due process. *See Noreen Lezard v. CCT*, 3 CCAR 4, 2 CTCR 11, 22 ILR 6135 (1995) (a "…defendant must be provided Constitutionally guaranteed due process rights of appropriate notice, the right to a hearing to present evidence and call

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[48] "The Confederated Tribes of the Colville Reservation in exercising powers of self government shall not:…(f) Deny to any person in a criminal proceeding the right ... **to have compulsory process for obtaining witnesses in his favor**..." (Emphasis added)

[49] The Sixth Amendment of the United States Constitution, which applies to the States through the Fourteenth Amendment has language identical to CTC §1-5-2(f) regarding the right "to have compulsory process for obtaining witnesses." *Accord*, the Indian Civil Rights Act, 25 U.S.C. §1302 *et seq*..

witnesses.") Although much time was spent by the parties arguing the right to compulsory process, the real issue is, whether the failure of the police to serve the Appellee's subpoenas amounts to a denial of the Appellee's right to compel material witnesses to testify at his trial. Further, when should a Trial Court dismiss matters with prejudice.

In the instant case, when it was learned on the day of the jury trial that the Police Department did not serve Jack's subpoenas, he moved to continue the trial. The Court granted the continuance and invited him to file a Motion to Dismiss the case. The record does not reflect the reasons for the Trial Court's dismissal with prejudice.

STANDARD OF REVIEW

The issues before us are questions of law; we review the matter *de novo*. *Colville Confederated Tribes vs. Naff,* 2 CTCR 08, 22 ILR 6032 2 CCAR (1995); *Wiley, et al v. Colville Confederated Tribes,* 2 CTCR 09, 22 ILR 6059, 2 CCAR 60 (1995); *Palmer v. Millard, et al,* 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); Pouley v. CCT, 2 CTCR 39, 25 ILR 6024, 4 CCAR 38 (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.,* 3 CTCR 07, 26 ILR 6039, 4 CCAR 68, (1998).

A. The Trial Court Erred in Dismissing Because the Police Department Did Not Serve Appellee's Subpoenas

The limited facts provided to this Court show: Appellee gave his subpoenas to the Police Department on June 13th for a trial set for the 20th, *i.e.* seven days before the trial; on June 17th he represented to the Trial Court he was ready for trial on the 20th. On the 20th he asked for a continuance because his subpoenas had not been served. The continuance was granted, yet the Judge went further and invited Appellee to file a Motion to Dismiss.[50] At the next pretrial hearing the Motion to Dismiss was granted, with prejudice.

Whether the Trial Court erred in dismissing the case because the Tribal Police Department failed to serve subpoenas is one of first impression for this Court. Other jurisdictions have very little cases to guide us. In *State v. Mizell*, 341 So.2d 385 (Louisiana; 1976) The issue before the Louisiana Supreme Court was "...whether the state's failure to serve a subpoena on an essential defense witness ... together with the refusal of the trial judge to grant a recess for the purpose of locating and securing the presence of this witness, effectively denied defendant his constitutional right to compulsory process." *Id* at p. 387. The facts are not on point with this case because the Appellee herein was granted a continuance. In *Mizell* the defendant made a timely application to subpoena an essential witness incarcerated in a state prison. On the day of the trial the State failed to produce the witness who had been transferred to another prison facility, a fact unknown to the defendant. The trial court would not grant a continuance in order for the defendant to locate his witness; the case went forward.

The Louisiana Supreme Court found the trial court erred in denying a continuance to

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[50] Judicial discretion is not boundless. The Colville Tribal Rules of Conduct (CTRC) give us guidance. For example, in order to ensure all parties before the Court are treated equally, and with objectivity and impartiality, CTRC §1.4.01(d) directs the Colville Tribal Judiciary to "...not interfere with the proceeding except where necessary to protect the rights of the parties... [and not to] take an advocate's role." When both parties are represented by spokesmen, a judge's role in directing how the parties present their cases should be minimal. To be otherwise may give the appearance of partiality. It should not be standard practice to invite the filing of Motions to Dismiss when both parties are represented by competent advocates. We address this in the context that we assume the Trial Judge's invitation was an exception, and not a rule for judicial officers responsible for conducting trials fairly and objectively.

obtain the necessary witness, and remanded for a new trial, holding:

> "The right to compulsory process is the right to demand subpoenas for witnesses and **the right to have subpoenas served**." *Id.* pp.387 (emphasis added).

The *Mizell* court found further that the statutory duty of the sheriff to effect service was not a passive one. The sheriff had the duty to actively take steps to find the accused's witnesses, indicating on the return of service what inquires have been made, from whom, and where those inquires were made. It was not enough to assert that the witness couldn't be found. The sheriff must state every fact which justifies this conclusion on his part and when this is done in order to show there had been a diligent search, without which the accused might be deprived of right of compulsory process. *Id*. at p388.

Unlike the situation in *Mizell*, the Trial Judge in this case did grant a continuance of the trial, but then dismissed the case at a subsequent pretrial hearing. At a minimum, under the *Mizell* standard, the Trial Court would have allowed the parties to present arguments or evidence in support of whether or not steps had been taken to deprive the Appellee of a right to compulsory process. By dismissing the case without allowing argument, the Court denied the plaintiff an opportunity to present evidence of whether due diligence on the part of the Police Department or the Appellee had been made to ensure the subpoenas were served.

Appellee argues it is the Prosecutor's Office's responsibility to ensure the Appellee's subpoenas are served, citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). In that case the defendant sought to review the Children and Youth Services files regarding his daughter's complaint against him for sexual abuse. The statutory law prohibited such a review unless ordered by a court of competent jurisdiction. The trial court only reviewed a part of the files and refused the defendant's request for disclosure. The Pennsylvania Supreme Court found that the refusal violated both the Confrontation and Compulsory Process Clauses of the Sixth Amendment. The Unite States Supreme Court granted review.

The language in *Ritchie* upon which the Appellee relies is:

> "Our cases establish, at a minimum, that criminal defendants have the right **to the government's assistance in compelling the attendance of favorable witnesses** at trial and the right to put before a jury evidence that might influence the determination of guilt." at p. 55 (emphasis added).

The context of this holding, however, goes to when the government is in possession of information such as is found in the Children and Youth Services Department (CYSD) files. The Supreme Court recognizes the responsibility of the government to turn over exculpatory or favorable evidence to a defendant (*United States v. Agur*, 427 U.S. 97 (1976)). This is not an issue in the instant case. As for the information in the CSYD files, the Supreme Court held the trial court should have conducted an *in camera* review to see if there was information in the files which could assist the defendant. It further held the defendant did not have a Constitutional right to review the files in order to argue relevance. *Id*. at 58.

What needs exploration is the general statement "the right to the government's assistance in compelling the attendance of favorable witnesses..." Does this mean it is the prosecutor's duty to make sure the police have served the defendant's subpoenas? We think not.[51] The better interpretation is that the government has a responsibility not to hinder or

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[51] The Supreme Court cited to four cases to support its finding. None of them are on point here. *Chambers v. Mississippi*, 410 U.S. 284 (1973) involved the right to call a witness not called by the state, and the right to impeach such a witness if necessary; *Cool v. United States*, 409 U.S. 100 (1972) involved the impropriety of shifting the burden of proof to the defendant by requiring the jury to believe the defendant's witness beyond a reasonable doubt; *Washington v. Texas*, 388 U.S. 14 (1967), in which the Court held a statute prohibiting a co-participant from testifying for the defendant to violate his right to call witnesses on his

prohibit a defendant from compelling a witness to testify, either by enacting or not enacting a statute which infringes on this right.

The Colville Tribes' statutes provide for the Colville Tribal Police Department to serve subpoenas. CTC §1-1-250 ("...Service of such subpoena shall be by a regularly acting member of the police department or by a person appointed by the Court for that purpose.") It is the Chief of Police's duty to provide policemen to perform service of process, CTC §1-3-30(f). It is a tribal police officer's duty not only to know what the law states regarding service of process, but also to perform the duty as assigned, CTC §1-3-62(a) and (f) ("The duties of a tribal policeman shall be: (a) To obey promptly all orders of the Chief of Police... or judge of the Court when assigned to Court duty....(f) To inform himself as to the Tribal Law and Order Code....").

In the best of all possible worlds, subpoenas would be issued, given to the police department, and served immediately. Experience dictates otherwise. The laws of the Colville Tribes do not hinder the parties from having subpoenas issued for service of process. The Colville Tribes has enacted adequate laws to ensure that a defendant's right to compel attendance of an essential witness is protected. It is up to the defendant's advocate, as an integral part of trial preparation, to check whether a subpoena has been served. If it hasn't, it must be brought to the attention of the Court in a timely fashion, and appropriate remedies must be pursued. A continuance is such a remedy; herein it was sought and granted. No one asked the Chief of Police to give reasons for the failure to serve the subpoenas. The Trial Court went right from non-service to dismissal.

To ensure justice and protect sovereignty, the Court must protect the rights of <u>all</u> the parties in a case. In *Pakootas v. CCT*, 4 CCAR 1, 2 (1997), we stated, "...in order to maintain independence as a sovereign nation, the Tribal Court must strive to protect Tribal interest." In this instance, the Court appeared to grant the dismissal based solely on the ground that the subpoenas had not been served, without inquiry regarding the efforts made or the reasons why. We do not feel this decision protects Tribal interests. Just as a defendant is allowed to have his day in court, the Tribes also must be allowed to have its day in court.

We hold that it was error by the Trial Court to dismiss charges for failure to serve subpoenas without inquiry as to what diligent efforts were made by the Police Department to serve, and by the Appellee to ensure the subpoenas were served.

<u>B. The Trial Court Erred by Dismissing with Prejudice</u>

The trial judge dismissed the charge of Reckless Endangerment against the Appellee with prejudice. There is nothing in the record which reflects that either party requested the dismissal with prejudice. We find this an error of law, and reverse.

If granted before an full adjudication on the merits of the case, dismissals with prejudice are normally reserved for situations when jeopardy has attached. In the instant case, jeopardy had not attached because the jury was not impaneled. Dismissals with prejudice are also granted in exceptional cases when the Judge finds a party has acted in bad faith, or filed a frivolous case, for example. The Trial Judge herein did not state on record, nor in his order, the basis for his *sua sponte* decision to dismiss the case with prejudice. In effect, without the input of any of the parties, the Trial Judge has denied the Appellant the opportunity to refile the charges, with no reason on record to support his decision. Such decisions should be supported by a clear record, findings and conclusions. We hold that under the facts of this case entering a

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own behalf; and *Webb v. Texas,* 409 U.S. 95 (1972), in which the Supreme Court found the defendant was denied the right to a witness on his own behalf when the judge intimidated the witness, making him not wan t to testify.

dismissal with prejudice when jeopardy clearly had not attached was error.

Based on the foregoing, we REVERSE the Trial Court's decision to dismiss with prejudice and REMAND to the Trial Court to be set for Trial.

COLVILLE CONFEDERATED TRIBES, Appellant,
vs.
Richard SWAN, Appellee.
Case No. AP02-016, 4 CTCR 12
7 CCAR 37

[Jonnie Bray, Office of Prosecuting Attorney, for Appellant.
Uche Umuolo, Spokane, for Appellee.
Trial Court Case Number CR-2002-25092]

Appeal of order dismissing case with prejudice. The dismissal was based upon excluding statements of the alleged victim on the grounds the statement would be used for the primary purpose of introducing substantive evidence rather than impeachment.

Before Dupris, C.J., Nelson, J., and Chenois, J.

Appearances: Jonnie Bray for the Prosecutor's Office, Colville Confederated Tribes, and Uche Umuolo for Richard Swan.

Nelson, J., for the Panel.

INTRODUCTION

Richard Swan is charged with one count of Battery based upon an incident occurring in the family home in which he allegedly struck his step-daughter, Nyomi Swan.

Ms. Swan made statements regarding the incident to several people. The statements were consistent other than she reported to a social worker that she was struck with a closed fist and later, in a written declaration, that she had been struck by an open palm. The conflicting state-ments and the subsequent decision by the Trial Court to exclude from evidence one of them gave rise to this appeal.

At hearing to discuss pre-trial matters, Prosecutor Jonnie Bray remarked to the Court that Ms. Swan, had changed her testimony "one hundred eighty degrees". After some discussion the Court interpreted this to mean she would testify she had been struck with an open palm and that the prosecution would attempt to impeach her by her statement that she had been struck by a closed fist. The court said it would bar the impeachment testimony because it would be for the primary purpose of introducing substantive evidence. See *Waters v. CCT*, 2CTCR, 23 IL 6120 (1994).

The prosecution, believing it would be unable to prove its case beyond a reasonable doubt, moved to dismiss the complaint. The Court dismissed the complaint with prejudice.

ISSUES ON APPEAL

The issues on appeal are whether the Court erred in holding it would not allow impeachment of Ms. Swan that she was struck by a closed fist following her anticipated testimony that she was struck by an open palm and whether the court erred and abused its discretion by dismissing the complaint with prejudice.

STANDARD OF REVIEW

The issues on appeal present issues of law. Questions of law are reviewed under the non-deferential standard, *de novo* standard. *CTC v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995).

DISCUSSION OF ISSUES OF APPEAL

Whether the Trial Court erred in not allowing impeachment testimony of being struck by a fist following the witness's testimony she had been struck by an open palm.

Waters was too broadly interpreted by the Trial Court. The holding in *Waters* was based upon the alleged victim's complete loss of memory of what occurred and the prosecution's ill-disguised attempt to introduce substantive evidence by attempting to impeach her. The value of *Waters* as a precedent should be limited to its facts.

In this instance, the Trial Court judge asked for a dismissal motion based upon what he would rule should anticipated testimony be forthcoming. The anticipated testimony was that the alleged victim Swan would testify she was struck by her step-father's open palm rather than his closed fist. Since this could be persuasive to the jury in finding the defendant not guilty[52], the prosecutor anticipated impeaching Swan with a prior inconsistent statement in which she said she had been struck with a closed fist. The Trial Court judge indicated he would not allow such impeachment because it would be for the primary purpose of introducing substantive evidence. Then judge then asked the parties for a motion to dismiss, the prosecutor so moved, and the order of dismissal was entered.

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[52] Prosecution Proposed Jury Instruction (Unnumbered): "It is a defense to a charge of battery that the force used was lawful as defined in this instruction. The physical discipline of a child is lawful when it is reasonable and moderate, and is inflicted by a parent or guardian for purposes of restraining or correcting the child.

You must determine whether the force used, when viewed objectively, was reasonable and moderate.

You may, but are not required to, infer that it is unreasonable to do the following act(s) to correct or restrain a child: striking a child with a closed fist or doing any act that is likely to cause, and does cause, bodily harm greater than transient pain or minor temporary marks. You shall consider the age, size, and condition of the child, and the location of the injury, when determining whether the bodily harm is reasonable or moderate. This inference is not binding upon you, and it is for you to determine what weight, if any, such inference is to be given.

The Tribes bear the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the Tribes have not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

The dismissal herein was based upon an anticipated situation. The prosecutor appears to have been intimidated by the judge's comments and thus moved for a dismissal.

We are concerned the Trial Court's effort to expedite the matter went too far by pre-judging what might be forthcoming during trial. His action was based on his interpretation of *Waters*, which not only denied the prosecution its right to trial in this instance, but is sure to result in alleged victims of domestic violence changing their statements to avoid prosecution of the abuser.

A trial court judge should refrain from orchestrating the trial[53]. Certainly it is helpful to know what issues may arise in order to prepare to address them should they arise. But to indicate how he or she will rule upon an issue that has not been framed by the trial setting and its attendant structure of sworn testimony and evidentiary ruling is to deny the parties the opportunity to fairly present their case.

The Trial Court abused its discretion when it dismissed the case against the Appellant with prejudice.

It is not unusual for prosecutors to move for a pre-trial dismissal when evidentiary rulings make it apparent the prosecution may have unexpected difficulty in proving its case beyond a reasonable doubt. Prosecutor Bray's Motion to Dismiss following the Trial Court's decision to exclude the impeachment testimony was not unexpected. Both the prosecution and defense were surprised, however, when the Trial Court dismissed the complaint *with prejudice.*

A dismissal with prejudice should be entered only when the merits of a case have been heard by the court. "Dismissal with prejudice constitutes an adjudication on the merits and operates as if the case had been fully tried and decided." (Citations omitted.) *Hickman v. Adams*, 35 S.W.3d 120, 124 (Tex.App. - Houston [14th Dist.] 2000). "Thus, orders dismissing cases with prejudice have full res judicata and collateral estoppel effect, barring subsequent re-litigation of the same causes of action or issues between the same parties. (Citations omitted.) *Hickman* at 124.

Put another way ".... a dismissal with prejudice constitutes an adjudication on the merits which bars the plaintiff from maintaining another action on the same claim. Black's Law Dictionary 469 (6th Ed. 1990)". *Van Slambrouck v. Marshall Field & Co.* , 98 Ill. App. 485,487, 53 Ill. Dec. 888, 424 N.E.2d 679 (1981).

The dismissal of the complaint by the Trial Court was not based on the merits of action. The Trial Court record reflects no hearings in which evidence was received, testimony offered or cross examination conducted. In short, there is nothing in the record to show the dismissal was based upon the merits of the action. The Dismissal with Prejudice was in error.

CONCLUSION

[53] Colville Tribal Rules of Judicial Conduct, § 1-4-01(d). A judicial officer shall maintain order in his Court. He shall not interfere in the proceeding except where necessary to protect the rights of the parties. A judicial officer should not take an advocate's role. A judicial officer should rely only on those procedures prescribed by the laws and customs of the Tribe.

We hold:

The order of the Trial Court precluding testimony introduced for the primary purpose of impeachment when prima facie evidence of a crime has already been established is REVERSED.

The trial court's Order of Dismissal With Prejudice is MODIFIED to reflect the words "Without Prejudice.

Anthony TONASKET, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case Number AP03-002, 4 CTCR 13
7 CCAR 40

[Mike Larsen, Office of the Public Defender for Appellant.
Jonnie Bray, Office of the Prosecuting Attorney for Appellee.
Trial Court Case Number CR-2003-25296]

Oral Arguments July 18, 2003. Decided January 26, 2004.
Before Justice David Bonga, Justice Earl McGeoghegan and Chief Justice Anita Dupris

Dupris, C.J., for the Panel.

SUMMARY

The Appellant was found guilty by a jury of the charge of Battery, CTC §3-1-4, on November 21, 2002. Three days before his sentencing hearing the Appellant' mother told him she saw some of the jurors sleeping during the closing arguments at the trial. The Appellant informed the Court of this information at the Sentencing Hearing on January 17, 2003. Appellant's subsequent Motion to Set Aside the Verdict and for a New Trial was denied by the Court. The Court, without a hearing, reviewed the record and several affidavits from the jurors and Court staff and found the facts did not support a finding that any juror slept during the closing arguments. The Appellant asserts he should have been allowed a hearing to cross-examine the jurors and Court staff regarding the allegations.

The Appellant timely filed the appeal herein. Oral arguments were heard on July 18, 2003. For reasons stated below we affirm the Trial Court and dismiss the appeal.

ISSUE

Did the Trial Court err when it denied the Appellant's Motion to Set Aside Verdict and for a New Trial based on the Appellant's assertion that two jurors slept during the closing arguments, thereby committing juror misconduct in violation of the Appellant's due process rights?

STANDARD OF REVIEW

The issues before us are questions of law; we review the matter *de novo*. *Colville Confederated Tribes vs. Naff*, 2 CTCR 08, 22 ILR 6032 2 CCAR (1995); *Wiley, et al v. Colville Confederated Tribes*, 2 CTCR 09, 22 ILR 6059, 2 CCAR 60 (1995); *Palmer v. Millard, et al*, 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); Pouley v. CCT, 2 CTCR 39, 25 ILR 6024, 4 CCAR

38 (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.*, 3 CTCR 07, 26 ILR 6039, 4 CCAR 68, (1998).

DISCUSSION

Appellant asserts his statutory right to make a final (i.e. closing) argument in a jury trial[54] is a fundamental right of due process and is essential to his right to assistance of counsel. He further asserts when a juror sleeps through part of the closing argument, the juror is not "mentally present," and his "absence" during a critical component of the Appellant's case presentation is juror misconduct as a matter of law, which entitles the Appellant to a new trial.[55]

A. Right to Make Closing Argument Not a Fundamental Right

Appellant argues that his right to make closing remarks is raised to a fundamental due process right because the Tribes statutorily recognizes it. This argument is not supported by any authority and is not persuasive. It is standard to instruct the jury that the arguments of counsel are not evidence, and are only to help the jurors evaluate the evidence.[56] A fundamental right is derived implicitly or explicitly from the Constitution, and from the common law upon which it is based. We find guidance in a seminal U.S. Supreme Court case, *Twining v. State of New Jersey*, 211 U.S. 78 (1908), in which the Court stated:

> Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law. *Twining, supra,* at p. 106.

The statutory provision, CCT §1-2-43 (Final Argument), providing for closing arguments assists the parties in presenting evidence on one's own behalf; it is not an inalienable nor a fundamental right. Its roots cannot be traced to a tribal custom or tradition, nor to a common law of any jurisdiction on the Colville Reservation, nor to the Colville Tribal Constitution, nor to the Indian Civil Rights Act of 1968, 25 U.S.C. §§1302 *et seq.*, all of which guide us on questions of fundamental rights. We so hold.

B. No Juror Misconduct

Appellant asserts that two jurors slept during closing arguments, thereby "mentally absenting" themselves from the trial at a critical juncture for the Appellant and in effect denying him the right to make a closing argument. In effect neither party was denied a closing argument. The real question is, if one or more juror slept during the closing arguments, did the sleeping jurors thereby commit juror misconduct? Appellant also asserts that the Judge denied him the right to ask questions of the jurors regarding the sleeping allegations, and conducted

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[54] CTC § 1-2-43 Final Argument. Upon the conclusion of the evidence, the plaintiff shall be given an opportunity to argue his case. The defendant shall then be given an opportunity to argue his case, and the plaintiff shall be given an opportunity to make a closing argument. Further argument may be allowed at the Court's discretion.

[55] CTC §1-1-282 Grounds for Appeal. Grounds for requesting **a new trial** or limited appeal on issues of law and/or fact shall be limited to one or more of any of the following: ... (b) Misconduct of the prosecution, judge **or jury**...(emphasis added).

[56] "Counsel's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remarks, statements or arguments which are not supported by the evidence or by the law as given to you by the court." JURY INSTRUCTION NO. 1.

his own fact-finding on the question, thereby irreparably impairing the Appellant's ability to have a fair and objective inquiry. Based on the findings of the Trial Court and the law, we hold the Trial Court was not required to conduct a hearing for the Appellant to question the jurors, and there was no juror misconduct.

1. Standard of Juror Misconduct

There are numerous cases on juror misconduct in federal and state courts. Generally the party alleging the misconduct has the burden to prove the misconduct and prejudice; the trial court has substantial discretion in dealing with a sleeping juror. *See Kelly v. State*, 805 So.2d 88 (Fla. 2d DCA, 2002) (remand for hearing on issue of sleeping juror who slept through significant portions of trial); *State v. Burns*, 800 So.2d 106 (La. App. 2 Cir. 2001) (new trial where judge *sua sponte* replaced sleeping juror without asking attorney's and trial counsel objected); *Spunaugle v. State*, 946 P.2d 246 (Okla, 1997) (Court's denial of defendant's timely motion to replace sleeping juror is reversible error); *People v. Evans* 710 P.2d 1167 (CO Ct of App., 1985) (trial court reversed, case remanded when juror slept through the defendant's argument; Court noted "...closing argument is one of the most consequential parts of the trial.").

Specifically what is this Court to consider in finding "juror misconduct?" The federal courts have Federal Rule of Evidence (FRE) 606(b)[57] to guide them. This is a case of first impression for our Court. After reviewing other jurisdictions' decisions, we find the Supreme Court's decision in *Tanner v. U.S.*, 483 US 107 (1987) instructive.[58]

In *Tanner* the Supreme Court affirmed a denial of a new trial when the facts showed that the jurors were abusing alcohol and drugs throughout the trial as well as sleeping during the trial. The Court found that if it granted a new trial it would in effect impeach the jury's findings, which is frowned upon by public policy. *Id*. at pp 120-121. *Tanner* discusses in length the common-law origins of FRE 606(b). For example, "the near-universal and firmly established common-law rule in the United States prohibited the admission of juror testimony to impeach a jury verdict." (cites omitted) *Id*. at 117. "[T]he result would be to make what was intended to be a private deliberation, the constant subject of public investigation - to the destruction of all frankness and freedom of discussion and conference." *Id.* at 120 (cite omitted). "Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." *Id.* at pp 121-122 (cites omitted). And finally: "Public policy requires a finality to litigation." *Id.* at p. 124.

One recognized exception to the prohibitions of FRE 606(b) is "...to retain the common-law exception allowing post-verdict inquiry of juror incompetence in cases of **substantial if not wholly conclusive evidence of incompetency**." (emphasis added) *Id*. at p.125. We adopt this standard when inquiring into juror incompetence, finding the public policy considerations of

[57] "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, **except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror**. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes." (emphasis added)

[58]. Jury trials are not tribally culturally-based; we have adopted them from the non-Indian judicial systems. As such we need to look to their origins in the non-Indian culture for guidance.

FRE 606(b) persuasive.

If we examine the alleged facts of the Appellant in the most favorable light and accept that one or more of the jurors slept during closing arguments, we find this would not rise to the level of substantial nor wholly conclusive evidence of incompetency. There are no allegations that all of the jurors did not hear all of the evidence or all of the instructions of law of the judge. Closing arguments are not evidence. They are intended to assist the jurors in doing their job: fact-finding. In this instance, however, the Judge conducted a fact-finding inquiry. He evaluated affidavits of jurors and court staff; he relied on his observations. He entered findings of fact, finding there was insufficient evidence of sleeping jurors. It is well within a judge's discretion to conduct an inquiry into the facts in cases such as the instant one. We hold there is insufficient evidence to show juror misconduct in this case.

2. There is No Right to A Hearing on the Issue of Juror Misconduct

Appellant asserts his due process rights were irreparably impaired when the Court disallowed a hearing on the issue of juror misconduct and conducted its own inquiry. One of the questions in *Tanner* was "whether the District Court was required to hold an evidentiary hearing, including juror testimony, on juror alcohol and drug use during the trial." For the public policies set out in *Tanner,* the general rule of FRE 606(b) is that the juror's shall not be subjected to a post-verdict hearing. The limited exceptions to this rule are: "except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." No one alleges that either extraneous prejudicial information or outside influence affects the jurors in this case.

Our jury system is rooted in western common law; we are directed in other criminal matters to use federal law as a guidance; the public policy of providing finality to litigation is valid for our Courts; the public policies of FRE 606(b) regarding protecting the privacy of the jury deliberations are valid in our Courts. The Trial Court conducted an inquiry into the allegations and found the facts did not support a finding that a juror slept during the closing arguments. We cannot ignore these findings of fact. As such, we cannot find that the Appellant was prejudiced by not being able to make an independent inquiry about the issue. Even assuming we accept as fact that a couple of the jurors nodded off during the closing arguments, the Appellant has not shown any causal connection between the napping jurors and the guilty verdict.

Conclusion

Statutorily-allowed closing arguments are procedural rights and not fundamental rights. The Appellant was not denied a closing argument. At best he was not paid attention to; a new trial would not guarantee this either. There was no jury misconduct in this case, nor a right to an independent inquiry into the juror's conduct by the Appellant. We so hold.

The Trial Court is AFFIRMED and this matter is REMANDED to the Trial Court for further action consistent with this Opinion.

Sharon WATERS, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
AP03-005, 4 CTCR 14
7 CCAR 44

[Theodore J. Schott Spokesperson for Appellant, Sharon Waters.
Esther Payne, Spokesperson for Appellee, Colville Confederated Tribes.
Trial Court Case Number CR-2002-25307]

Oral Argument held February 20, 2004. Decided April 14, 2004.
Before Chief Justice Anita Dupris, Justice Elizabeth Fry and Justice Theresa Pouley.

DUPRIS, CJ

SUMMARY OF PROCEEDINGS

Appellant, Sharon Waters, (Appellant) was charged with Disorderly Conduct[59] by criminal complaint on September 9, 2002. On December 9, 2002, the Trial Court entered an Order From Pretrial which indicated that Appellant intended to raise the issue of self-defense at trial. On February 18, 2003, proposed jury instructions were filed by Appellant which included an instruction for self-defense. On June 2, 2003, the Trial Court entered another order from pretrial which indicated that Appellant intended to raise the self-defense argument. Appellee Colville Confederated Tribes (Appellee) did not raise an objection nor did they ask for a motion hearing on the issue at any of these prior notices.

On September 11, 2003, at the preliminary hearing prior to the jury trial, the Trial Court ruled that the affirmative defense of self-defense could not be raised in a Disorderly Conduct case and distinguished *Louie v. CCT*, 2 CCAR 47, 2 CTCR 05, 21 ILR 6136 (1994). Appellant was granted an interlocutory appeal on the issue by the Court of Appeals. Briefing was conducted and oral arguments were heard on February 20, 2004.

We hold that self-defense is available to a defendant charged regarding the public fighting component of the Disorderly Conduct statute. *Louie* sets out the burdens of proof required to meet the self-defense argument. The Trial Court is reversed and this matter remanded to the Trial Court for trial.

ISSUE

May a defendant raise the defense of self-defense to a charge of Disorderly Conduct?

STANDARD OF REVIEW

The question is one of law, and not fact. We review *de novo*. *Colville Confederated Tribes vs. Naff*, 2 CTCR 08, 22 ILR 6032 2 CCAR (1995); *Wiley, et al v. Colville Confederated Tribes,* 2 CTCR 09, 22 ILR 6059, 2 CCAR 60 (1995); *Palmer v. Millard, et al,* 3 CCAR 27, 2 CTCR 14, 23 ILR 6094

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[59]. 3-1-173 **Disorderly Conduct**. Any person who shall engage in fighting in a public place, or who shall disturb or annoy any public or religious assembly, or who shall disturb other persons while in an intoxicated or disorderly condition, or who shall make unreasonable noise or offensively coarse utterances, gestures, shall be guilty of Disorderly Conduct. Disorderly Conduct is a Class C offense.

(1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); Pouley v. CCT, 2 CTCR 39, 25 ILR 6024, 4 CCAR 38 (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.*, 3 CTCR 07, 26 ILR 6039, 4 CCAR 68, (1998).

DISCUSSION

Appellant argues that self-defense is an inherent right, and the Trial Court was in error when it ruled that the self-defense argument in *Louie* only applied to cases where Battery was charged. If a person is being confronted by another, that person has the right to defend himself against attack. *Louie* states:

> "The law of self-defense justifies an act done in reasonable belief of immediate danger, and if an injury was done by defendant in justifiable self-defense, he can never be punished criminally...." *Louie* at 49.

Appellee asserts a custom and tradition argument that has not been developed at the trial level. Appellee states that the public has the right to have a peaceful place and that the Disorderly Conduct statute reflects that public interest by including the public fighting aspect. The community interest in a peaceful existence carries greater weight than the personal interest in the use of self-defense as an argument. Traditionally, argues the Appellee, the Colville Tribes were peaceful and resisted fighting in most instances. As a general rule we do not consider custom and tradition arguments that have not been developed at the trial level. *See Watt v. CCT*, 4 CCAR 48, 2 CTCR 43, 25 ILR 6027 (1998), and *Smith v. CCT*, 4 CCAR 58, 2 CTCR 67, 25 ILR 6156 (1998). The argument of cultural restriction goes more to the common law history of the statute rather than to the issue of self-defense.

We are compelled to agree with the Appellant regarding the use of self-defense when charged with fighting in public. As a matter of common sense we must recognize there may be times when a person will be in a situation where he is unable to withdraw, and must react first in order to retreat. This reaction could be construed as public fighting. If the Court adopts Appellee's arguments, the defendant would have no alternative but to allow himself to be battered. The Court must strike a balance between the public interest and the personal interest of its people.

Self-defense in a Disorderly Conduct charge is a matter of fact, the proof of which is a matter for the fact-finder, either jury or judge, to decide. Once a defendant has established evidence of self-defense, the burden shifts to the Tribes to show its absence beyond a reasonable doubt. This issue has already been settled by this Court. *See Louie, supra,* at 49.

CONCLUSION

Based on the foregoing we hold that self-defense may be asserted as a defense against a Disorderly Conduct charge before the Trial Court based on fighting in public, and *Louie v. CCT, supra* controls regarding the burdens of proof on said defense. The Trial Court's orders to the contrary are REVERSED and this matter is REMANDED to the Trial Court for disposition consistent with this order.

It is SO ORDERED.

Lisa LOUIE, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case No. AP04-005, 4 CTCR
7 CCAR 46

[Dan Gargan, Spokesman, for Appellant.
Jerry Conklin, Prosecuting Attorney, for Appellee.
Trial Court Case Number CR-2002-25132]

Heard May 21, 2004. Decided June 2, 2004.
Before Chief Justice Anita Dupris, Justice Howard E. Stewart and Justice Earl L. McGeoghegan

Dupris, CJ, for the majority.

ISSUE

Did the Trial Judge in this matter abuse her discretion and, contrary to the law in this matter, enter an order denying the Appellant's Motion and Affidavit of Prejudice for reasons stated?

STANDARDS OF REVIEW

This case has not been heard on its merits yet. The issue before the Court of whether or not a Motion and Affidavit should be granted on an interlocutory appeal is specifically allowed by CTC § 1-1-143 ("Such an order of the Trial Court [regarding whether to grant a Motion and Affidavit of Prejudice] may be appealed immediately under the procedures established in the subchapter on Appellate Proceedings of this chapter...").

The question is one of law and fact. In *Pouley v. CCT*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024, (1997) we held that when the issues are mixed questions of law and fact the standard of review remains *de novo* when the "administration of justice favors the appellate court." (Citing *CCT v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032, 6033 (Colv. Ct. App. 1995) which adopted the standard in *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 three judges minimized 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 aboiut the value underlying the legal principles.

When the *McConney* standard does not apply, we give deference to the factual findings of the Trial Court and review the legal issues *de novo*. *Hoffman v. CCT*, 4 CCAR 4, 2 CTCR 37, 22 ILR 6127, 24 ILR 6163, (1997) ("...this Court of Appals 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)' cites omitted).

A review of the record before us indicates that the *Pouley* standard (*i.e.* the adopted-*McConney* standard) does not apply here. This is an interlocutory review of whether a trial judge had sufficient information before her to decide if she should grant a second Affidavit of Prejudice filed by the Appellant against a second judge. It does not involve a precedence-setting legal issue for which the collaborative process provided by three judges minimized the chances of judicial error. It involves the broad discretionary powers of a trial judge in managing a trial from the start, to the fact-finding, and then to the final judgment. The clearly erroneous

standard applies here when we review the facts upon which the judge relied to deny the Affidavit.

The legal issue before is whether the trial judge's decision to deny the Affidavit of Prejudice is contrary to the law in this matter. We review this issue *de novo*.

DISCUSSION

This case has been before once before on the issue of an affidavit of prejudice: the Appellant filed one against Chief Judge Aycock, which was denied initially by Judge Naff.[60] Chief Judge Aycock then voluntarily removed himself from the case. He was, however, the initial judge on the matter herein. The Appellant subsequently filed an affidavit of prejudice against Judge Abbott. Judge Naff ruled first that the facts do not support a finding of prejudice, and second, that Chief Judge Aycock was the initial judge, and, therefore, the Appellant exhausted her automatic right to remove a judge under CTC § 1-1-143.

It is the Appellant's position that her first affidavit of prejudice against Chief Judge Aycock does not count as one of her challenges in that Chief Judge Aycock voluntarily stepped down from the case. She then argues that Judge Abbott has handled the civil cases related to the criminal charges herein, and, therefore, has already formed an opinion regarding the Appellant's actions.

The Appellee has not filed any pleadings in opposition to the Appeal, but Mr. Conklin did argue against it on record at our hearing on May 21, 2004.

A review of the Trial Judge's findings of fact show they are supported by the record. We will not substitute our judgment regarding what the facts are for that of the Trial Judge; we cannot find Judge Naff's findings of fact clearly erroneous. The applicable law was applied correctly in this case. The Appellant has not supported her Appeal.

CONCLUSION

CTC §1-1-287, **Appellate Court Trial; Procedure**, allows us to find at the Initial Hearing that the facts and/or law in this matter as presented do not support a limited appeal. We so find. Based on the foregoing we **AFFIRM** the Trial Court's denial of an Affidavit of Prejudice against Judge Abbott, **DISMISS** the appeal herein, and **REMAND** this matter to the Trial Court for further actions.

It is so ORDERED.

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[60] In *Ortiz and Louie v. CCT*, AP02-005, the Appellant herein appealed Judge Naff's denial of an Affidavit of Prejudice against Chief Judge Aycock. The Trial Court was reversed because the Court of Appeals held, *inter alia,* there should have been a fact-finding inquiry into the allegations of prejudice. *Ortiz and Louie v. CCT*, 7 CCAR 7 at 10 (2002).

COLVILLE CONFEDERATED TRIBES, Appellant,
vs.
ABRAHAMSON, WILLIAMS, CLARK, Appellees.
Case No. AP04-009, 4 CTCR 16
7 CCAR 48

[Jonnie L. Bray, Office of Prosecuting Attorney, for Appellant.
Steven Graham, Attorney at Law, for Appellee, Fawn Abrahamson.
Frank LaFountaine, Attorney at Law, for Appellee, Stephen Williams.
Tim Liesenfelder, Attorney at Law, for Appellee, Reese Clark.
Trial Court case number CR-2004-27047/48/49]

Decided June 10, 2004.
Before Chief Justice Anita Dupris, Justice Edythe Chenois and Justice Earl L. McGeoghegan

DUPRIS, CJ, for the majority.

SUMMARY

The Appellant filed an interlocutory appeal on April 21, 2004 alleging the Trial Court's denial of its joinder motion met the standard for interlocutory appeals set in *Waters v. CCT*, AP03-005 (2003) (unpublished opinion), as set out in the discussion below. This Court notified all parties by Order dated April 21, 2004, that the parties were to file briefs regarding whether the issue raised by the Appellant met the *Waters* standard for interlocutory appeals; the Panel would then meet by conference to decide whether to allow the interlocutory appeal to be heard without further input from the parties. All briefs were due by 4:00 p.m. on May 12, 2004.

The Appellant did not file a brief in support of its interlocutory appeal. Appellees Abrahamson and Williams timely filed their briefs. Appellee Clark filed a withdrawal of his objection to the joinder on May 20, 2004. The Panel met on April 21, 2004 and found that the Appeal should be denied, and that because of the unusually high number of interlocutory appeals being filed that some guidelines should be set pending the amendment of the Court of Appeals Rules by the full Bench.

ISSUE

Does the issue of joinder of defendants meet the standard of review as an interlocutory appeal?

STANDARD OF REVIEW

The standard for granting interlocutory appeals is whether the issue before the Court of Appeals involves a controlling issue of law to which there is a substantial ground for difference of opinion and for which an intermediate appeal may materially advance the ultimate termination of the litigation. This standard was first stated in *Waters v. CCT*, AP03-005 (2003) (unpublished opinion) and is hereby adopted as the controlling standard in this Court.

DISCUSSION

The Appellant, Colville Tribes, did not file a brief as directed by this Court and we could consider this as an abandonment of the appeal, thereby dismissing it just for that reason. We could also dismiss it just on the pleadings alone, *i.e.* the Notice of Appeal and the two briefs that were filed, in that joinder motions are solely within the discretion of the trial judge and not of such import that they meet the standard set above.

We have been receiving an inordinate amount of interlocutory appeals and have

decided that besides dismissing this appeal, we should set some guidelines in order to stem the flow, so to speak, so that only genuine issues of interlocutory appeal can come to us before the final fact-finding happens at the trial level. After a discussion with the majority of the Bench, we hold that the guidelines herein regarding interlocutory appeals will be applied in each case henceforth until the Court of Appeals' court rules are amended to address the issue.

I. Guidelines for Parties

First, we are aware of the impact and delay an interlocutory appeal may have on trial court business. It becomes more delayed when we, as the Court of Appeals, do not have enough information from the Notice of Appeal to deal with the appeal expeditiously.

In order for an interlocutory appeal to be considered by this Court, the Appellant must give us sufficient information to make a decision promptly. Besides what is required in the Code regarding notices of appeal, the appellant must also provide us a memorandum of authorities which meets the requirements of a brief under our court rules. This memorandum shall articulate (1) why the issue involves a controlling issue of law; (2) to which there is a substantial ground for difference of opinion and (3) that will materially advance the ultimate termination of the litigation.

The Appellees shall have no more than five (5) calendar days to file a responsive memorandum of authorities, which shall also comply with the requirements of a brief under our court rules if the initial reviewing Justice orders responsive memoranda.

If the Appellant fails to file a sufficient Notice of Interlocutory Appeal meeting the criteria set out above it will be denied and dismissed immediately by the Chief Justice or her designated Presiding Justice without further review. If it is not denied and dismissed, the Chief Justice or her designated Presiding Justice may request a responsive brief or may decide just on the information or pleading before her if the interlocutory appeal should be granted. If granted, the Chief Justice or her designated Presiding Justice will convene an Appellate Panel to review the issue as an appeal.

Appellate review of interlocutory appeals will be expedited because of the interference they cause to an on-going matter before the Trial Court. For this reason motions to extend time to file briefs will not be granted unless the party shows extreme hardship. The decision to grant or deny such motions will be at the discretion of the Chief Justice or her designated Presiding Justice.

II. Guidelines for Trial Court

Interlocutory Appeals by their very nature should be used sparingly by the parties. They disrupt Trial Court business and should not be used when the issue is really one of trial judge discretion. The trial judge has judicial discretion in how a case is managed and how a trial is managed. Rulings on issues of law are first the responsibility of the trial judge. Rulings on facts are first the responsibility of the fact-finder, either jury or judge.

We find, because of the reasons stated above, that stays of execution should not be automatic when an interlocutory appeal is filed. It is within the sound discretion of the trial judge. If it is not granted the Appellant may raise the issue, and brief it accordingly, under his Notice of Interlocutory Appeal. The same rule should apply regarding the necessity for posting a bond pending the interlocutory appeal.

Finally, using this case as an example, one of the Appellees stated reasons why the Appellant's interlocutory appeal was just a "stalling tactic" because the Appellant had not met some deadlines given it by the Trial Court. If true this raises serious concerns for this Court. Interlocutory Appeals should be the exception, not the rule, and should be used only for

genuine issues of law that need to addressed at the appellate level.

The Appellee's assertion that the Appellant used our system as a "stalling tactic" could lead to sanctions if true. Sanctions and contempt in such instances would be within the province of the Trial Judge in this case. In any interlocutory appeal from now on, if argued properly to our Court, and with sufficient evidence, we may make a specific finding that the interlocutory appeal was frivolous or in bad faith. The trial court may use such a finding, within its discretion, if it wishes to assess sanctions or contempt proceedings against the appellant. Because we are just instituting these guidelines, however, we will not make such a finding for this Appellant in this instance.

CONCLUSION

The interlocutory appeal herein is **DENIED**, for reasons stated above, and it is **DISMISSED**. The guidelines set out in this opinion shall apply to each interlocutory appeal filed after the date of issuance, with the understanding that the Court of Appeals will be amending its court rules to address the issue of interlocutory appeals in the future. This matter is **REMANDED** to the Trial Court for appropriate actions.

It is so **ORDERED**.