Patrick YALLUP, Appellant,

vs.

Colville Confederated Tribes, Appellee.

AP11-016-IA, 6 CTCR 01

11 CCAR 01

[Dale F. Braunger, Office of Public Defender, appeared for Appellant.
Sabrina Fenton, Office of Prosecuting Attorney, appeared for Appellee.
Trial Court case number CR-2011-34345]

Decided November 17, 2011.

Before Chief Justice Anita Dupris, Justice Gary F. Bass and Justice Theresa M. Pouley

Dupris, CJ

SUMMARY

Appellant was charged with a criminal offense in the Trial Court. Just prior to the date set for trial, Appellee filed a motion to continue the jury trial date. It was noted in the motion that counsel for Appellant had been notified of the motion but had not responded with any objection. The judge signed the order, which did not have a new jury date assigned yet. Appellant received an e-mail from Appellee that the continuance had been granted. Though the Court was out of the office on training, Appellant obtained a copy of the signed order which still did not have a new date assigned. He immediately filed an interlocutory appeal challenging the continuance because he did not consent to the continuance and it would have put the jury trial beyond the speedy trial limit[1]. An emergency hearing was held by conference call on November 14, 2011. The COA heard from the parties and then issued a Minute Order which reversed and remanded the matter to the Trial Court for a hearing on the issue of the continuance.

STANDARD OF REVIEW

[1] The original jury trial date was set for November 8, 2011. Speedy trial limit was November 18, 2011.Jury trials are held on the 2nd and 3rd Thursday of each month.

We review findings of fact under the clearly erroneous standard, and errors of law *de novo*. Colville Confederated Tribes vs. Naff, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995); *Wiley, et al v. Colville Confederated Tribes,* 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (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*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024, (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.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998). Our review of this matter will be *de novo* as the issues are a both questions of law and fact.

ISSUES

1. Are there adequate grounds stated for the Court of Appeals to review this matter as an Interlocutory Appeal?

2. Did the Trial Court err in granting the Motion to Continue *ex parte* without the concurrence of the Appellant or setting it for hearing?

DISCUSSION

Issue 1. Are there adequate grounds stated for the Court of Appeals to review this matter as an Interlocutory Appeal?

Court of Appeals Court Rule (COACR) 7-A specifies that the Appellant must show adequate grounds before the COA will review an interlocutory appeal. In the instant case, the appellant is incarcerated in jail and any new trial date would potentially be set beyond the limit allowed for the speedy trial rule; that Appellant did not waive his speedy trial rights; and that the Trial Court judge issued an *ex parte* order which was issued on a motion that was not joined in by opposing counsel and which counsel was not given an opportunity to be heard on his opposition to the continuance. Immediate review of this matter would materially advance the ultimate termination of the litigation and the Trial Court has so far departed from the usual course of judicial proceedings as to call for a review by the COA. We find that Appellant has shown sufficient grounds for the COA to review this Interlocutory Appeal.

Issue 2. Did the Trial Court err in granting the Motion to Continue *ex parte* without the concurrence of the Appellant or setting it for hearing?

Colville Tribal Law and Order (CTLOC) Code Section 1-2-10, Timely Filing of Motions, specifies that written motions must be filed at least five (5) days prior to a hearing. Opposing motions shall be filed at least one (1) day prior to the hearing. Motions must be supported by

an affidavit, which must be filed with the motion. All motions are to cite governing rules and/or laws of the Colville Tribe. CTLOC § 1-2-8 specifies that a party must serve any legal document on opposing counsel at least three (3) days prior to trial.

[N]otice is one very basic part of due process. Whenever any document is filed in court, notice of that document must be served on the opposing party, with a few exceptions. *CCT v. Dogskin,* 10 CCAR 45, 5 CTCR 31 (02-02-2011). The judge is the gatekeeper of due process. It is the Court's responsibility to ensure adequate notice is provided to every litigant, and to allow everyone who appears in Court to have his say, in his own way. *Lezard v. DeConto,* 10 CCAR 23, 5 CTCR 25, 36 ILR 6010 (12-16-2009). Basic principles of due process include notice and the opportunity to be heard. *Finley v. CTSC,* 9 CCAR 71, 5 CTCR 18, 36 ILR 6004 (11-21-2008).

In the instant case, a jury trial had been set for November 10, 2011. Appellee filed its motion on November 8, at approximately 2:12 p.m.[2] It was noted in the Motion that notice had been given to Appellant, but no response had been received. However, no affidavit of service was attached to the motion, contrary to CTLOC § 1-2-10, which would indicate when Appellant was served and if he had adequate time to respond to the motion. At approximately 2:23 p.m.[3], on that same day, the Order was signed by a judge. The Order was apparently then given to a clerk to insert a new trial date.

We find that there were several errors committed by the Court. First, the Court acted on a Motion that was not supported by an Affidavit[4]. Affidavits are statements of facts regarding th issue at hand which are sworn to before an officer who has authority to administer an oath, such as a Notary Public. The person making the affidavit is stating that to the best of his/her knowledge, the contents of the affidavit are true.

Second, the Motion was not timely filed. CTLOC provides that motions are to be filed at least five (5) days prior to any hearing. The instant motion was filed less than two (2) days prior to the jury trial. The additional witnesses were known for at least a month prior to the trial. It was not noted in the Motion what efforts were done to locate them, if they had even been subpoenaed, or what weight their testimony might provide to the ultimate decision of the trier of fact. As to the officer's vacation, it was not noted when the Tribes received notice of the

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[2] Motion/Order to Continue. "Filed" stamped, page1 [Motion}, "2011 Nov -8 PM 2:12."

[3] Motion/Order to Continue. "Filed" stamped, page 2 [Order}, "2011 Nov -8 PM 2:23."

[4] CTLOC § 1-2-10. "Motions shall be supported by affidavit, which shall be served with the motion."

vacation plans, when was the officer subpoenaed, or what weight his/her testimony might affect the outcome of the trial.

Third, the Trial Court did not allow adequate time for the Appellant to respond to the Motion. CTLOC 1-2-10 allows the non-moving party one day prior to a hearing in which to respond to motions. In this case, the judge signed the Order within minutes of it being filed. It appears that no attempt was made by the Court to determine if service had been given to the Appellant, if he was in concurrence with the motion or if he had any arguments against the continuance. Had the Court held an immediate hearing, an agreement might have been made which would have moved the trial forward on the original day or found some other way in which to not violate the Appellant's speedy trial rights.

While this Court is cognizant of emergency circumstances, the issues as cited in the Motion do not rise to the level which would overcome the burden to protect the Appellant's speedy trial rights. Any one of the errors committed alone might have been harmless error, their cumulative effect was of a denial of Appellant's right to due process. We find that the Trial Court erred in granting the Motion to Continue without concurrence by the defendant and by not holding a motion hearing.

CONCLUSIONS

The Trial Court erred by granting a Motion to Continue which potentially would be scheduled for a date beyond the speedy trial limit and which 1) was not supported by an Affidavit; 2) was without adequate evidence that the motion was served on Appellant by having an Affidavit of Service attached; 3) did not contain an acknowledgment that Appellant concurred with the motion; and 4) a hearing on the motion was not held. This matter is Remanded to the Trial Court to schedule a hearing on the Motion to Continue and Appellant's reply. The Order issued on November 8, 2011 is hereby Reversed.

It is SO ORDERED.

Douglas SEYMOUR, Sr., Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

AP11-008, 6 CTCR 02

11 CCAR 04

[Eric Christensend, Cossey & Associates, for Appellant.
Melissa Simonsen, Office of Prosecuting Attorney, for Appellee.
Trial Court Case number CR-2009-32327]

Decided March 28, 2012
Before Chief Justice Anita Dupris, Justice Earl L. McGeoghegan & Justice Theresa M. Pouley

This matter is before the Court of Appeals (COA) for appeal of an Order issued by the Trial Court which continued a jury trial and reset it as a judge trial. Oral arguments were not heard. The appeal will be decided on the briefing submitted by the parties. Eric Christensen, Cossey & Associates, is representing the Appellant. Melissa Simonsen, Office of Prosecuting Attorney, is representing the Appellee. Before Chief Justice Anita Dupris, Justice Earl L.McGeoghegan[5], and Justice Theresa M. Pouley.

Dupris, CJ

PROCEDURAL SUMMARY

At a pre-trial hearing on January 3, 2011, the trial judge told Appellant that any more motions to continue the jury trial set in this matter would be considered by the Court to be a waiver of Appellant's right to a jury trial. It is clear from the record that Appellant has not explicitly waived his right to a jury trial. On January 13, 2011 the judge ruled he waived his right to a jury trial by requesting another continuance of the jury trial set on that day. The judge further found that it was in the best interests of judicial economy to set the matter for a judge trial. Appellant filed a timely appeal on the issue of denying him a jury trial. For reasons below we reverse and remand.

ISSUE

Did the Trial Court err in denying Appellant a right to a jury trial because of judicial economy, based on the Judge's instruction at pre-trial that any further motions to continue would be considered a waiver of a right to a jury trial?

STANDARD OF REVIEW

The issue before this Court is a question of law which we review *de novo*. *Colville Confederated Tribes vs. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995).

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[5] Justice McGeoghegan passed away on December 22, 2011. He participated in the decision-making and was intending to draft this opinion.

DISCUSSION

The record shows that there have been several continuances granted for the jury trial set in this case, extending the time from arraignment in 2009 to the present. On the day of the latest jury trial set, January 13, 2011, Appellant's spokesman informed the Court that his client was unable to get out of Inchelium, Washington in time for the trial because of the snowy conditions where he lived. He asked for a two-hour continuance in order to allow him time to appear.

The Judge denied the request for a two-hour continuance and had the trial reset on the calendar for a judge trial. The Judge ruled that Appellant waived his right to a jury trial because he had been instructed at the pre-trial hearing on January 3, 2011 that any further requests for continuances would result in the matter being set for a judge trial and not a jury trial. The Judge reasoned Appellant was aware of this condition. He reasoned further that it was in the best interests of justice to set the judge trial instead of a jury trial under the circumstances of the case.

We recognize that undue delays and multiple continuances of a jury trial can impact a court's calendar and attendant expenses. We do not agree, however, that such considerations outweigh a person's substantive right to a jury trial. It is settled law in this jurisdiction that any waiver of a jury trial must be voluntary, knowingly made, and specific. *See, eg., Thomas v. CCT*, 1 CCAR 135 (1990); *Laramie v. CCT*, 3 CCAR 1, 22 1LR 6072 (1995).

Our laws guarantee a right to a trial by a jury. CTC, sections 1-5-2(j) and 2-1-173. A right to a jury trial is considered a fundamental right which cannot be dispensed with by a judge as a punishment for asking for continuances. *See Laramie v. CCT, supra.*

We urge our visiting judges to familiarize themselves with our caselaw in order to answer the legal questions in their cases appropriately. There is nothing in the record to indicate an exception to our law which guarantees a jury trial absent a voluntary, knowing and specific waiver of the right. It is the trial judge's responsibility to know the law and to manage the case accordingly.

For the reasons stated above we REVERSE and REMAND for a jury trial. It is so Ordered.

Shawn Lawrence DESAUTEL, Appellant,

vs.

Anita B. DUPRIS, et al., Appellee.

Case No. AP10-012, 6 CTCR 3

11 CCAR 06

[Appellant represented himself *pro se*.
Trial Court case number CV-OC-2008-28266.]

Decided January 21, 2011.

Bass, J.

This matter came before the Court of Appeals pursuant to a Notice of Appeal filed by Appellant on November 15, 2010. Appellant is appealing a final order entered by the Trial Court on the 28th day of October, 2010 which dismissed his case. Appellant is alleging misconduct of the Chief Judge of the Trial Court; irregularity in the proceedings; that the verdict or decision is contrary to law and the evidence; and that substantial justice has not been done. The Court of Appeals reviewed the record and dismisses this appeal based on *res judicata*[6].

ISSUE

Whether the Trial Court can *sua sponte* dismiss an action and reject any future filings when the Court is on Notice the action is barred by *res judicata*.

FACTS

Appellant's application for enrollment filed shortly after his birth was denied on insufficient blood quantum being shown to meet the requirements established by the Colville Confederated Tribes (Tribes) for membership. Over thirty years later new evidence came to light. Appellant reapplied and he was adopted pursuant to the procedure set forth in the Law and Order Code § 8-1-80. Appellant is now a full member of the Tribes. Subsequently, Appellant filed an action based on "new evidence" that alleges he should have been enrolled when his parent first applied following his birth and thus was entitled to a sizable retroactive payment of per-capita and 181-D monies from the Tribes. He lost at both the Trial Court and Court of Appeals. Nevertheless, he re-filed citing the same new evidence, requesting attorney fees, and alleging that the courts misapplied the law. Again, he lost at both the trial and appellate courts. He filed his action one more time with the Trial Court alleging misconduct, and that he was suing the individuals personally and not as Tribal officials. . The Court denied

[6] Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. *Blacks Law Dictionary*, 6th Ed., 1990.

his case and notified him no subsequent filings. would be accepted on this issue. He appeals again.

DISCUSSION

A.INTRODUCTION

In court, "no less than in ordinary life, 'explanations come to an end somewhere.'"[7]. Generally in courts "somewhere" follows a single explanation: the final judgement.[8] The issue presented concerns the Trial Court's power to dismiss the action *sua sponte* pursuant to the *res judicata* doctrine that a final judgment has already been entered, and the litigation is at end. This is one of the Court's inherent powers.

B. STANDARD OF REVIEW

Whether a judge properly exercised an inherent power is reviewed for abuse of discretion.[9] The Trial Court's decision is overturned "only if its action was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."[10] It requires a review for due process at the very least.[11]

C. THE INHERENT POWERS OF THE COURT

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[7] *Liskowitz v. Astrue*, 559 F.3d 736, 743 (7th Cir. 2008) (quoting LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 1 (G.E.M. Anscombe trans., 1968)).

[8] See CTC § 2-2-140 ("judgment shall consist of an order of the Court awarding money damages to be paid to the injured person . . . "); Waters v. CCT [Waters II], 1 CCAR 22, 26, 1985.NACC.0000003, ¶ 15 (1985) ("decisions of the Colville Court of Appeal are final for that case. In other words, a party cannot appeal decisions from the Court of Appeals.")

[9] *O'Flynn v. Fulfer,* 10 CCAR 21, 23 (2009) (contempt power); *Seymour v CCT*, 3 CCAR 11, 16, 1995. NACC.0000001, ¶ 34 (1995) ("The Business Council has provided the Court with broad discretion, in the absence of statutory direction, to 'adopt a process or mode of proceeding' . . . we will not disturb the process or mode of proceeding adopted by the Tribal Court . . . unless clear abuse of discretion is shown.").

[10] *O'Flynn*, 10 CCAR at 23; *see also Waters v. CCT [Waters I]*, 1 CCAR 18, 23, 1985. NACC.0000001, ¶ 25 (1985) (defining abuse of discretion).

[11] *O'Flynn*, 10 CCAR at 23 (*citing Sonnenberg v. Colville Tribal Ct.*, 5 CCAR 9, 14, 1999. NACC.0000003, ¶ 21 (1999)).

Colville Courts, like all courts, possess inherent powers.[12] Other jurisdictions have described these powers as being one of two kinds, equitable and supervisory, and existing independent of any statutory authority.[13] Regardless, the Colville Code codifies this power in Section 1-1-144.[14] This statute has been described as a broad grant of "broad authority"[15] providing guidance in the exercise of the "court's discretionary authority to run an orderly

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[12] *Zacherle v. CCT*, 8 CCAR 70, 73 (2006) (*quoting* *Reservation Service v. Albert*, No. SC-CV-05-94 (Navajo 03/16/1995)) ("Courts have both the inherent and statutory power to define the procedures to be used by judges, practitioners and the public to implement judicial jurisdiction."); see also *O'Flynn*, 10 CCAR at 23 (noting contempt power arises from the Court's inherent powers); *Lezard v. CCT*, 3 CCAR 4, 6 1995.NACC.0000010, ¶ 20 (same); *In re Spencer*, 137 B.R. 506, 511 (B.C., N.D.Okla. 1992) ("All courts possess inherent power to protect their jurisdiction and process from abuse.")

[13] See *Peat, Marwick, Mitchell & Co. v. Superior Court*, 200 Cal. App. 3d 272, 288 (Cal. Ct. App. 1988) (*citing* *Bauguess v. Paine*, 586 P.2d 942, [635–6] (Cal. Sup. Ct. 1978)). The Bankruptcy Court provides an eloquent description of the nature of a court's inherent powers:

> Such powers need not be specified in each and every statutory section or subsection under which judicial proceedings may occur — indeed, it has been said that legislatures cannot take away such general powers even if they would attempt to. Whatever may be the case regarding courts at law, certainly courts of equity are empowered (and, in the nature of their jurisdiction, required) to see to it that their process is used in an equitable manner.

In re Spencer, 137 B.R. at 511 (citations omitted).

[14] This section provides in full:

> Means to Carry Jurisdiction Into Effect. When jurisdiction is vested in the Court, all the means necessary to carry into effect are also given and in the exercise to 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.

[15] Holt v. CCT, 3 CCAR 75, 82, 1997.NACC.0000005, ¶ 15 (1997) ("CTC 1.5.05 allows the Tribal Court broad authority to adopt all means necessary to carry it's jurisdiction into effect, including any suitable process or mode of proceeding consistent with the Spirit of Tribal Law.").

court system."[16] Its function is to allow the Court to develop a "process in the absence of a statutory process."[17] The court, however, disfavors continued reliance on this statute,[18] and only uses it in the face of statutory silence.[19]

Colville case law provides further guidance for the Trial Court's exercise of these powers. The judge is directed to maintain justice and fairness and make decisions for the "good of the whole community."[20] The community should be confident in the court's ability to accurately interpret the Court's "procedures in order to preserve the integrity of the judicial process and to prevent injustice."[21] When the issue implicates the Tribes' "independence as a

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[16] *George v. George*, 1 CCAR 52, 63, 1991.NACC.0000004, ¶ 50 (1991) (discussing the "custom and practice developed over the years in the Tribal Court of tape recording hearing") *Waters IV v. CCT*, 4 CCAR 65, 67, 1998.NACC.0000006, ¶ 20 (1998) (CTC § 1-1-144 "provides guidance to the Court in exercising its jurisdiction"); *Brown v. CCT*, 4 CCAR 28, 30, 1997.NACC.0000001, ¶ 31 (1997) (same).

[17] *Carden v. Colville Hous. Auth.*, 7 CCAR 22, 24 (2003); *see also Colville Enter. Corp. v. Admin. Law Ct.*, 8 CCAR 11, 15 (2005) (stating section 1-1-144's purpose is to aid in the proper operation of the courts when they have developed faster than the enactment of applicable statutes).

[18] *Stensgar v. CCT [Stensgar I]*, 2 CCAR 20, 23, 1993.NACC.0000005, ¶ 31 (1993); *Stensgar v. CCT [Stensgar II]*, 4 CCAR 45, 47, 1998.NACC.0000010, ¶ 26 (1998).

[19] *Carden*, 7 CCAR at 24 ("CTC § 1-1-144 . . . allows the judge to develop a process in the absence of a statutory process for matters that come before the Court."); Pakootas v. CCT, 4 CCAR 1, 2; 1997.NACC.0000007, ¶ 21 (1997) ("this Court finds its Tribal Code and Tribal statutory laws are silent on this matter. Therefore, this Court must rely on CCT [§ 1-1-144]"); but see *Zacherle*, 8 CCAR at 73 (2006) (holding the Court had the power to interpret a statute more specifically than provided in a general definitions section).

[20] *CCT v. LaCourse*, 1 CCAR 2, 5, 1982.NACC.0000001. ¶ 27 (1982) ("Judges have the solemn duty and power to ensure fairness and promote justice in all proceedings before them."); *Sonnenberg*, 5 CCAR at 13, 1999.NACC.0000003, ¶ 36 ("The judge is a tribal leader, who must make day-to-day decisions for the good of the whole community, while at the same time maintaining the integrity of the case for those individuals before him.").

[21] *Stensgar II*, 4 CCAR at 48, 1998.NACC.0000010, ¶ 30 ("a mandate once issued by our Court will not be recalled except for good cause shown, an appellate court has power to

sovereign nation" the Court's duty is to protect tribal rights.[22] Moreover, the Trial Court is to be diligent in its respect for due process.[23]

In the present case there is no statute governing *sua sponte* dismissals of an action. Nevertheless, Section 1-1-144's grant of "broad authority" enabling the court to run an effective court system, certainly covers the present issue.[24] In particular, such a mode of proceeding "preserve[s] the integrity of the judicial process and to prevent injustice."[25] The judicial system's integrity and ability to ensure just results is negated when a litigant can continually re-file a matter in the hopes of a different result, or in the hopes of wearing the other side down. These are the very reasons, as discussed below, for the existence of the res judicata doctrine.

D. A COURT MAINTAINS DISCRETION TO SUA SPONTE DISMISS AN ACTION WHEN THE COURT IS AWARE RES JUDICATA BARS RELITIGATION OF THE ACTION.

1. Res Judicata

Colville courts have long recognized res judicata.[26] It requires: (1) a past final judgment on the merits between the same parties; and (2) a "present actions involv[ing] (a) the

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set aside at any time a mandate that was procured by fraud, or to act to prevent an injustice, or to preserve the integrity of the judicial process."); *see also Sonnenberg*, 5 CCAR at 13, 1999.NACC.0000003, ¶ 39 ("It is incumbent upon the tribal judges and justices to sustain the attitude of trust and respect in their leadership role in the Indian community in order to maintain the community's confidence in the court system.").

[22] *Pakootas*, 4 CCAR at 2, 1997.NACC.0000007, ¶ 21.

[23] *Socula v. CCT*, 10 CCAR 33, 39 (2010) ("the Trial Court must be ever vigilant in protecting the rights of litigants before it, and proceed objectively and fairly in every case, no matter how minor") (finding a due process violation when the Trial Court's decision denying a new hearing was based on personal knowledge depriving the defendant of proper notice).

[24] See *Holt*, 3 CCAR at 82, 1997.NACC.0000005, ¶ 15 (finding grant of broad authority).

[25] See *Stensgar II*, 4 CCAR at 48, 1998.NACC.0000010, ¶ 30; *Sonnenberg*, 5 CCAR at 13, 1999.NACC.0000003, ¶ 39 ("It is incumbent upon the tribal judges and justices to sustain the attitude of trust and respect in their leadership role in the Indian community in order to maintain the community's confidence in the court system.").

[26] *See, e.g., CBC v. George*, 1 CCAR 15, 20, 1984.NACC.0000002, ¶ 28 (1984) (discussing res judicata); In Re L.S., 3 CCAR 72(2), 80–81, 1997.NACC.0000008, ¶ 16 (1997) (finding

same subject matter; (b) the same cause of action; (c) the same persons and parties; and (d) the same quality of the persons for or against whom the claim is made.[27]

The policy behind res judicata is the "prompt and efficient administration of the business that comes before" a court.[28] Fundamentally, the doctrine rests on the principle "that one litigant cannot unduly consume the time of the court at the expense of other litigants, and that, once the court has finally decided an issue, a litigant cannot demand that it be decided again."[29] This reflects "the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions."[30] Preclusion then "protects [litigation] adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."[31]

The present facts indicate res judicata bars the Appellant's current action. The former and present actions involve the same subject matter (retro-active payment related to enrollment), the same cause of action (new evidence rated to enrollment), the same parties leading to the same quality of people for or against, and there has been a decision on the merits. Therefore the five criteria for application of the doctrine of res judicata have been met in this case.

Significantly, the present facts act to highlight the policies behind res judicata. In particular, the Appellant's repeated attempts to litigate the same issue appears be a single

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trial court decision regarding termination of parental rights could not be used as res judicata); *CCT v. Swan*, 7 CCAR 37, 39, 2003.NACC.0000012, ¶ 28 (2003) (finding dismissal with prejudice has "full res judicata . . . effect").

[27] *Colville Tribal Credit v. Antone*, 10 CCAR 3, 7 (2009) (quoting *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401, 410 (2002)).

[28] *United States v. Sioux Nation*, 448 U.S. 371, 432–33 (1980) (Rehnquist, J., dissenting) (citing *Warthen v. United States*, 157 Ct. Cl. 798, 800 (1962)).

[29] *Id.*

[30] *Montana v. United States*, 440 U.S. 147, 153–54 (1979) (citations omitted).

[31] *Id.; see also Peabody Western Coal Co. v. Navajo Nation Labor Commission*, No. SC-CV-14-03, ¶¶ 30–31 (Nav. Sup. Ct. -----) (listing the efficiency in administration; conservation of resources; prevention of inconsistency; preservation of final judgments; and promotion of fairness as the underlying policies).

person "unduly consum[ing] the time of the court at the expense of other litigants."[32] Reliance on the Court's judgments is also weakened as the Appellant is advocating for inconsistent decisions.[33]

2. Sua Sponte Dismissal Because of Res Judicata

Dismissal is within the inherent power of a court.[34] The Colville Court of Appeals has never considered the issue of the *sua sponte* dismissal specific to res judicata but has addressed *sua sponte* dismissal multiple time in other contexts.[35] The leading case, *Campbell v. CCT*, states the rule that the Trial Court maintains "judicial discretion to grant dismissals with prejudice before an adjudication of the merits in certain circumstances."[36] The *Campbell* case, *supra*, read *Stensgar* [37] together with *Swan* [38] as providing "the general rule is that dismissals with prejudice are generally reserved for cases in which . . . there has been a hearing on the merits."[39] Moreover, when lacking guidance the Court should reasonably "all relevant public and private

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[32] *See Sioux Nation,* 448 U.S. at 432–33 (Rehnquist, J., dissenting).

[33] *See Montana*, 440 U.S. at 153–54.

[34] *See Chambers v. Nasco, Inc.*, 501 U.S. 32, 44–45 (1991) (citing *Roadway Express, Inc. v. Piper*, 447 U. S. 742, 765 (1980)) ("A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process. . . . [O]utright dismissal of a lawsuit . . . is a particularly severe sanction, yet is within the court's discretion.").

[35] *Campbell v. CCT*, 8 CCAR 28, 30 (2003) (*sua sponte* dismissal without prejudice) (collecting cases); *CCT v. Swan*, 7 CCAR 38, 2003.NACC.0000012 (2003) (*sua sponte* dismissal with prejudice without adjudication on the merits); *CCT v. Jack*, 7 CCAR 33, 2003.NACC.0000010 (2003) (*sua sponte* dismissal with prejudice within power if jeopardy attached or because of parties bad faith); *Stensgar I v. CCT*, 2 CCAR 20, 1993.NACC.0000005 (1993) (dismissal with prejudice because sentencing took place more than sixty days after guilty finding).

[36] *Campbell v. CCT*, 8 CCAR 28, 32 (2003).

[37] *See supra* note 29.

[38] *See supra* note 29.

[39] *Campbell*, 8 CCAR at 30.

interest."[40] Dismissal *sua sponte* for res judicata logically follows from this rule: res judicata is solely concerned with a previous judgement on the merits.

Looking outside this jurisdiction other courts have come to the same conclusion. The United States Supreme Court stated the rule as: "if a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte*, even though the defense has not been raised."[41] This is "consistent with the policies underlying res judicata: . . . the defendant's interest in avoiding the burdens of twice defending a suit," and, "the avoidance of unnecessary judicial waste."[42] A dismissal on these grounds is disfavored when "no judicial resources have been spent on the resolution of a question . . . thereby eroding the system of party presentation so basic to our system of adjudication."[43]

In the present case the Court was on notice that the same parties and claims had been decided on the merits in prior actions were being raised again. Looking to the relevant private and public interests the Trial Court was correct in dismissing the case and rejecting any additional filings on the matter. The Court's actions protects the defendant's interest in not continually defending the same suit. Moreover, not expending judicial resources in hearing actions already decided and precluding further litigation prevents the wast of additional resources.

CONCLUSION

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[40] *Campbell*, 8 CCAR at 30 (quoting *United States v. Taylor*, 487 U.S. 326, 336 (1988)).

[41] *Arizona*, 530 U.S. at 412 (internal quotations omitted) (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting)); *see also Ray v. Kertes*, 285 F.3d 287, 293 n.5 (3rd Cir. 2002) (noting a court's "inherent power to dismiss sua sponte a complaint which facially violates a bar to suit"); *Stearn v. Dept. of Navy*, 280 F.3d 1376, 1380–81 (Fed. Cir. 2002); *Hicks v. Holland*, 235 F.2d 183, ___ (6th Cir. 1956) (finding lower court "properly dismissed the complaint" because the court records "show that a complaint covering the same subject matter and parties had been dismissed"); *Hedger Transp. Corp. v. Ira S. Bushey & Sons*, 186 F.2d 236, 237 (2nd Cir. 1951) ("Recognizing the identity of issues and parties, the district judge dismissed the complaint on the ground that the previous judgment of dismissal was res judicata. We agree.").

[42] *Arizona*, 530 U.S. at 412.

[43] *Id.* at 412–13; *Stearn*, 280 F.3d at 1380–81.

Sua sponte dismissal of an action for the reason of res judicata is an inherent power of the court which aids the Court in controlling its docket. Such Court action provides for the good of the community by increasing reliance on judicial decisions by rejecting the invitation to create inconsistent judgments. Such actions only aid in the prevention of injustice and promotion of fairness. The case law governing such decisions are in line with the Trial Court's decision to dismiss and reject any subsequent filings. Res judicata is present and the Court was aware of the prior decisions. The Trial Court's action simply prevents the unneeded waste of judicial resources and allows the Court to be used by other litigants, who have not received a final judgment. We hold there has been no abuse of discretion by the Trial Court.

Therefore, the appeal is dismissed with prejudice. The Court of Appeals Clerk is directed to reject any future filings by Appellant which relate to his enrollment.

It is SO ORDERED.

Connie DAVISSON, et al., Appellant,

vs

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP08-001, 6 CTCR 04

11 CCAR 13

[Tena M. Foster, Wayne Swaren, Leone Reinbold, Michael Larson, and Tim Liesenfelder for Appellants. Jonnie L. Bray and Evelyn Van Brunt for Appellee.
Trial Court Case No. CR-2004-27344]

Argued February 29, 2009. Decided April 30, 2012.

En Banc before: Justice Earl L. McGeoghegan, Justice Howard E. Stewart, Justice Edythe Chenois, Justice David C. Bonga, Justice Conrad Pascal, Justice Theresa M. Pouley, Justice Gary F. Bass, and Justice Dennis L. Nelson.[44]

Nelson, J [45]

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[44]Justices McGeoghegan, Stewart, and Chenois have passed away and did not participate in final deliberations for this decision. Justice Pascal also did not participate in the final deliberations for this matter.

Appeal to determine whether provisions of the Domestic Violence Code violate provisions of ICRA and CTCRA by imposing enhanced sentencing and requiring the defendant to prove self defense by a preponderance of the evidence. We affirm in part and reverse in part.

PROCEDURAL HISTORY

On June 3, 2004, the Business Council of the Confederated Tribes of the Colville Reservation (hereinafter CBC) amended the Domestic Violence Code, CTC 5-5 et seq., to enhance sentencing for crimes involving domestic violence. The CBC also added a provision that, should self-defense be claimed, the defendant has the burden of proving self-defense by a preponderance of the evidence, rather than the prosecution having to prove the absence of self-defense by proof beyond a reasonable doubt.

The appellants are numerous defendants charged with crimes involving domestic violence who contend their rights were violated under the Indian Civil Rights Act, 25 USC 1302, (hereinafter ICRA) and the Colville Tribal Civil Rights Act, CTC 1-5 (hereinafter CTCRA) by the enhanced sentencing requirements. Appellants also contend that requiring a defendant to prove self-defense by a preponderance of the evidence for crimes involving domestic violence violates ICRA and CTCRA in that the tribal prosecutor should have the burden to prove a lack of self-defense beyond a reasonable doubt. They make these arguments on the basis of the trial court's interlocutory order denying defendant's motion to accept proposed jury instructions which supported their position.

Grounds for an interlocutory appeal may be found where "the issue presented involve a controlling issue of law as to which there is substantial ground for difference of opinion and that an intermediate appeal from the decision may materially advance the ultimate termination of the outcome:" COACR 7-A(b). This appeal meets the criteria for review.

JURISDICTION

This court has personal and subject matter jurisdiction of these cases pursuant to the Constitution of the Colville Confederated Tribes[46] and the Colville Tribal Code[47]. *Also see*

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[45] Appointed Presiding Justice on December 12, 2011.

[46] Amendment X - Judiciary - 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 Court of Appeals, the Colville Tribal Court, and such additional courts as the Business Council may determine appropriate. It shall be the duty of all courts established under this

Colville Confederated Tribes v. Stockwest, CV86-624, 21 ILR 6075 (1984) and *National Farmers Union Ins. Co. v. Crow Tribe,* 471 U.S. 845, 12 ILR 1035 (1985). The defendants are Native American and the criminal acts alleged herein took place within the exterior boundaries of the Reservation.

STANDARD OF REVIEW

The material facts of these cases are not disputed for the purpose of this appeal. The issues are entirely those of law. Accordingly, the standard of review is *de novo*. *CCT v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995), *Wiley et al. v. CCT*, 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (1995).

STATEMENT OF RELEVANT FACTS

The cases before us are similar only in that they involved alleged crimes involving domestic violence. They do, however, present identical issues of law for this court to determine. In order to put the issues in perspective and for purposes of illustration, we set forth the facts alleged in *Davisson*.

Connie Davisson was charged with willfully striking or otherwise inflicting bodily injury by scratching her former boyfriend on his nose and cheek on October 25, 2004. (Battery) CTC 3-1-4. She is also charged in a separate count of biting him on his chest at the same date and time. (Battery) CTC 3-1-4. She is further charged with entering or remaining in a building without permission with the purpose of committing the above referenced crimes. (Burglary) CTC 3-1-41). And finally, she is charged with possessing a controlled substance. (Prohibited Acts - Possession) CTC 3-1-180.

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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.

[47] Colville Tribal Code 1-1-70 Jurisdiction defined. The jurisdiction of the Tribal Court and the effective area of this code shall include all territory withing the Reservation boundaries, and the lands outside the boundaries of the Reservation held in trust by the United States for Tribal members of the Tribes, and it shall be over all persons therein, provided, however, that criminal jurisdiction of the Court shall not extend to non-Indians.

The first three counts are alleged crimes involving domestic violence. Domestic Violence is defined as "... the occurrence of one or more of the following acts by a family or household but does not include acts of self-defense or culturally appropriate discipline of a child." CTC 5-5-3(d). These include acts "Attempting to cause or causing physical, mental, or emotional harm to another family or household member" (CTC 5-5-3(1) and acts "Attempting to commit or committing any criminal offense under Colville Tribal law against another family or household member." CTC 5-5-3(4). A household member includes "persons who are dating or have dated." CTC 5-5-3(g)(3). It is alleged that Connie Davisson assaulted her former boyfriend.

The complaint charging Ms. Davisson with these crimes noted on its face that the battery and burglary counts were subject to enhanced penalties. The complaint labeled the crimes as "Domestic Violence Battery" and "Domestic Violence Burglary."

The prosecution of Ms. Davisson was without complication until the parties submitted proposed jury instructions. The prosecution/appellee's proposed jury instructions were standard instructions for the crimes of battery and burglary. Additional instructions directed the jurors to determine: 1) whether the defendant committed a crime beyond a reasonable doubt involving domestic violence, and 2) whether, by a preponderance of the evidence, the acts of committing the crime were made by another family or household member. Proposed instructions were also included that provided for the defendant to prove such by a preponderance of the evidence.

The defendant/appellants's proposed jury instructions took a different track. Their proposed instructions contend the amendments to the Domestic Violence Code resulted in the establishment of the new crimes of Domestic Violence Battery and Domestic Violence Burglary. They also included instructions requiring the prosecution to disprove self defense beyond a reasonable doubt for all criminal offenses charged. The Trial Court rejected this view and denied the motion to accept the proposed instructions.

The defendants/appellants filed this appeal.

ISSUES

1. Whether the Due Process and Equal Protection rights given criminal defendants under ICRA and the Tribal Civil Rights Act are violated by the provisions of the Domestic Violence Act that require those claiming self-defense to establish it by a preponderance of the evidence;

2. Whether the Due Process and Equal Protection rights given criminal defendants under ICRA and the Tribal Civil Rights Act are violated by the provisions of the Domestic Violence Code that allows the prosecution to establish that a crime is a crime of domestic

violence by a preponderance of the evidence rather than by evidence beyond a reasonable doubt; and

3. Whether the provisions of the Domestic Violence Code that require those criminal defendants claiming self-defense to establish it by a preponderance of the evidence violate the rights given them under ICRA and the Tribal Civil Rights Act to not be compelled to testify against themselves?

DUE PROCESS AND EQUAL PROTECTION

The Colville Confederated Tribes enacted the Civil Rights Act (CTCRA) of the Confederated Tribes of the Colville Reservation which provides that the Tribes shall not "(d)eny any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." CTC 5 - 2(h). This court has consistently held the CTCRA requires that every defendant in a criminal proceeding is entitled to basic rights including the protections of due process and equal protection of the law. This has always required, at a minimum, proper notice to the defendant and an opportunity for a fair hearing before an impartial decision maker. *Lezard v. CCT*, 3 CCAR 04, 2 CTCR 11, 22 ILR 6135 (1995), *Louie v. CCT*, 2 CCAR 47, 2 CTCR 05, 21 ILR 6136 (1994), *St. Peter v. CCT*, 2 CCAR 02, 1 CTCR 75, 20 ILR 6108 (1993), *Wiley v. CCT*, 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (1994). Colville tribal law, with respect to due process and equal protection, rights of criminal defendants, has always been protective as, if not more protective, than the federal Indian Civil Rights Act and thus any rulings by this court necessarily meet any federal law and federal constitution requirements.

A review of the basic tenets of due process and equal protection of laws may be helpful before examining the issues here.

Due Process of Law. There are two facets to due process of law: procedfural due process and substantive due process.

Procedural due process of law. Procedural due process requires at a minimum notice and an opportunity to be heard. *Silver Firs Town Homes, Inc. v. Silver Lake Water Dist*., 103 Wn.App. 411, 425, 12 P.3d 1022 (2000), review denied, 143 Wn.2d 1013 (2001). Nothing in the record before us shows the appellants were denied procedural due process at trial.

Substantive due process of law. Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures. *Halverson v. Skagit County* , 42 F.3d 1257, 1261 (9th Cir.

1994). The appellants claim that shifting the burdens of proof and persuasion from the prosecution to the defendants for
crimes involving domestic violence violates their right to substantive due process.

When state action does not affect a fundamental right, the proper standard of review is whether a rational basis exists for that action. John E. Nowak and Ronald D. Rotunda, Constitutional Law § 11.4, at 370; § 14.4, at 601 (4th Ed. 1991); *United States v. Glucksberg*, 521 U.S. 702, 728. Under this test, the challenged law must be rationally related to a legitimate state interest. *Id*.; *Seeley v. State*, 132 Wn.2d 776, 795, 940 P.2d 604 (1997); *In re Pers. Restraint of Metcalf*, 92 Wn. App. 165, 963 P.2d 911 (1998), cert. denied, 527 U.S. 1041 (1999). In determining whether a rational relationship exists, a court may assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest. *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993); see *Seeley*, 132 Wn.2d at 795 ; *Glucksberg*, 521 U.S. 702. (Taken generally from *Amunrud v. Bd. of Appeals*, 158 Wn. 2d. 208, 219 (2005)).

Rational basis review applies where there are no factors triggering more intensive scrutiny. *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996), cert. denied, 117 S. Ct. 1563, 137 L. Ed 2d 709 (1997). *State v. Wallace,* 553 86 Wn. App. 546, 937 P.2d 200 (1997).

Intermediate scrutiny is applied to a statute that creates a classification based on a semi-suspect class, where an important right is involved. *Heiskell*, 129 Wn.2d at 123. An example is where the right to liberty is implicated and the classification is based on poverty. *State v. Heiskell*, 129 Wn.2d 113.

State interference with a fundamental right is subject to strict scrutiny. *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 57, 109 P.3d 405 (2005).

Strict scrutiny applies to a statute that creates an inherently suspect classification. Inherently suspect classifications are those based on race, national origin, or alienage. *Petersen v. State*, 100 Wn.2d 421, 444, 671 P.2d 230 (1983). None of the parties have identified an inherently suspect classification in this matter, however, strict scrutiny is also applied where a party is threatened with deprivation of a fundamental right.

The right to not be compelled to testify against oneself is a fundamental right. Thus we review the due process challenge to the amendments to the Domestic Violence Code under the strict scrutiny standard.

Equal Protection

Equal protection of the law is denied when state officials enforce the law with an "unequal hand or evil eye." *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L. Ed. 220, 6 S. Ct. 1064 (1886). Mere selectivity in prosecution creates no constitutional problems; a defendant must show deliberate or purposeful discrimination based on an unjustifiable standard such as race, religion, or other arbitrary classification. *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972); *Yakima v. Johnson,* 16 Wn. App. 143, 553 P.2d 1104 (1976).

For purposes of an equal protection analysis, if the legislature creates a classification based on certain characteristics of an offender, we determine whether the appropriate standard of review is strict scrutiny, intermediate scrutiny, or the rational basis test, depending on the nature of the interest affected by the law and the characteristics of the legislatively created class. *State v. Shawn P.*, 122 Wn.2d 553, 560, 859 P.2d 1220 (1993).

Under the rational relationship test, the law is subjected to minimal scrutiny and will be upheld "unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective." *State v. Smith* , 117 Wn.2d 263, 277, 814 P.2d 652 (1991) (quoting *State v. Phelan*, 100 Wn.2d 508, 512). Under the strict scrutiny test, the law will be upheld only if it is shown to be necessary to accomplish a compelling state interest in order to be upheld. *Smith*, 117 Wn.2d at 277 (citing *State v. Schaaf* , 109 Wn.2d 1, 17, 743 P.2d 240 (1987)); *Phelan* , 100 Wn.2d at 512. Under the intermediate or heightened scrutiny test, the challenged law must be seen as furthering a substantial interest of the State. *Smith*, 117 Wn.2d at 277 (citing *Schaaf* , 109 Wn.2d at 17); *Phelan* , 100 Wn.2d at 512).

Success under any of the articulated tests requires that the appellants first establish a challenged classification. *State v. Osman*. 126 Wn. App. 575 (2005). The appellants have identified only one fundamental right in their Opening Brief and that is the right of a defendant not to be compelled to testify against himself. See Pg. 9. In their Reply Brief, the appellants augment that claim by contending a legal process is flawed which requires defendants in crimes involving domestic violence to prove such by a preponderance of the evidence while defendants claiming self defense in crimes NOT involving domestic violence are relieved of that burden.

Again, the right to not be compelled to testify against oneself is a fundamental right. We review the equal protection challenge to the amendments to the Domestic Violence Code under the strict scrutiny standard.

DISCUSSION OF ISSUES

All three issues center around self-defense. We re-phrase the issues as follows:

Can the CBC shift the burden of proving self defense from the prosecution to the defendant without violating tribal and United States statutes guaranteeing the right to due process and equal protection?

If so, can the CBC change the burden of persuasion in criminal cases involving domestic violence from "beyond a reasonable doubt" when self defense is required to be proven by the prosecution to "by a preponderance of the evidence" when the burden shifts to a defendant?

And, finally, whether shifting the burden of proving self defense to the defendant in crimes involving domestic violence compels the defendant to testify against himself in violation of tribal law?

1. Can the CBC shift the burden of proving self defense from the prosecution to the defendant without violating tribal and United States statutes guaranteeing the right to due process and equal protection?

Self defense is not specifically defined in either Colville tribal law or Colville common law[48], but it is the law that "self-defense justifies an act done in reasonable belief of immediate danger and if an injury was done in justifiable self-defense he can never be punished criminally." *Louie v. CCT,* 2 CCAR 47, 2 CTCR 05, 21 ILR 6136 (1994). This interpretation was sanctioned in the legislative history of the Domestic and Family Violence Code in the section entitled "self defense provisions." This court has applied the state and federal common law rule that once the defendant has presented evidence of self-defense, the absence of self-defense must be proven beyond a reasonable doubt by the prosecution. To be sure, the defendant must present some evidence to raise the issue of self- defense under this analysis. *Louie, supra*. This does not answer the question of whether the legislature can establish different rules on self defense which more directly is the question in this case.

Most of the laws enacted by the CBC have been passed without a legislative history attached. The CBC deemed amendments to the Domestic Violence Code of such importance that it included a legislative history. The history sets forth the need for the legislation and the intent of the CBC in dealing with the pervasive problem of domestic violence. The Code itself identifies the seriousness of the threat of domestic violence to the Tribes, its families, and that it affects the health, welfare, and political integrity of all Reservation residents. The section of the history concerning shifting the burden of proof and burden of persuasion from the prosecution to the defendant is set forth below in its entirety:

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[48] We decline to more specifically define self defense as it not necessary to our holding in these consolidated cases.

Legislative History:

Self-defense Provision:

In giving direction for the drafting of this chapter, the Colville Business Council made the deliberate choice to favor prosecution of crimes involving domestic violence. This choice was intended as a clear statement that this harmful behavior is not to be condoned nor tolerated and rather, shall receive a strong and certain response by the Tribes' law enforcement and justice system.

Consistent with its decision to favor prosecution, when considering claims of self-defense, the CBC carefully examined existing Colville Tribal case law and decided that a departure from prior precedent was warranted in cases involving domestic violence. The self-defense provision in this chapter has been discussed at great length within the Tribes' law enforcement and justice community as well as with the community as a whole at the 2003 Juvenile Task Force Workshop in Keller. With due deliberation and care, the CBC has decided to place the burden of proving self-defense on the defendant accused of a crime involving domestic violence. The fact that this may be contrary to other jurisdictions' allocation of the burden has been weighed in the deliberations.

At the time this chapter was drafted, Colville case law placed the burden on the Tribes (the prosecutor) to prove the absence of self-defense beyond a reasonable doubt once the defendant introduced evidence in support of self-defense. Under this chapter, the burden never shifts from defendant to prosecutor. In cases where the defendant is accused of a crime involving domestic violence and self-defense is claimed, the defendant has the burden of proving by a preponderance of the evidence that he or she was acting in self-defense. To protect against unjust results, the evidentiary threshold was lowered from beyond a reasonable doubt to a preponderance of the evidence. It should be noted that the underlying principle remains the same as always: "The law of self-defense justifies an act done in the reasonable belief of immediate danger, and if an injury was done by a defendant in justifiable self-defense, he can never be punished criminally…". Louie v. Colville Confederated Tribes, 2 CCAR 47, 2 CTCR 05, 21 ILR 6136 (1994).

As in all cases, there are valid concerns that a defendant may be wrongly accused. However, the rule of evidence in Tribal Court should allow all defendants to present all relevant evidence available in support of self-defense.

Evidence of past violence by the alleged victim would clearly be admissible to support a claim of self-defense.

That a defendant may choose to testify in support of the claim of self-defense does not amount to compelling the defendant to testify against himself or herself. Such testimony is not testimony against the defendant, nor would any testimony elicited in cross examination necessarily be."

The legislative history sets forth compelling reasons for enhancing sentencing and shifting the burden of proving self-defense from the prosecution to the defense for crimes involving domestic violence. The amendments satisfy the strict scrutiny test.

There is no tribal case law that considers whether placing the burden of proof on a defendant violates tribal or federal statutes. Accordingly, we look to other jurisdictions, state and federal, for guidance. See CTC 1-2-11.

The State of Washington has considered whether shifting the burden of proof is unconstitutional. One court stated:

"It is not a constitutional imperative that a state "must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. . . . Proof of the nonexistence of all affirmative defenses has never been constitutionally required . . .*Patterson v. New York*, 432 U.S. 197, 210, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977). The state legislatures may define crimes so as to place the burden of proving a defense upon defendant. As noted in *Patterson*, "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. 432 U.S. at 203 n.9, quoting *Morrison v. California*, 291 U.S. 82, 88-89, 78 L. Ed. 664, 54 S. Ct. 281 (1934)." *State v. McCulllum,* 98 Wn.2d 484, 656 P.2d 1064 (1983).

Another Washington State Supreme Court case that reviewed whether it is constitutionally permitted to shift the burden of proof and persuasion from the prosecution to the defendant is *State v. Carama*, 113 Wn.2d 631, 781 P.2d 483 (1989). That court held a

defendant's right to due process was not violated when the legislature shifted the burden of proof of the affirmative defense of consent in a case involving sexual assault from the prosecution to him.

A leading federal case regarding shifting of the burdens of proof and persuasion is *Patterson v. New York*, 433 U.S. 197, 201-202 (1997), That court noted that:

> "(A)mong other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental" *Patterson at* 201-20,2 quoting *Speiser v. Randall*, 357 U.S. 513, 523, 78 S.Ct. 1332, 1341, 2 L.Ed.2d 1460 (1958), et al..

We see no difference in the issues in *Patterson, supra*, and *Carama*. We find the reasoning of both courts persuasive.

The amendments to the domestic violence act offend no principle of justice that are so rooted in the traditions and conscience of our people as to fundamentally deny due process to a defendant in a case involving domestic violence.

We hold the CBC has not violated tribal or federal statutes guaranteeing the right to due process and equal protection by shifting the burden of proving self defense from the prosecution to the defendant for crimes involving domestic violence.

2. Can the CBC change the burden of persuasion in criminal cases involving domestic violence from "beyond a reasonable doubt" when self defense is required to be proven by the prosecution to "by a preponderance of the evidence" when the burden shifts to a defendant?

Appellants contend that the sentencing enhancement provisions of the Domestic Violence Code unlawfully subject them to sentences exceeding the maximum for Class B and Class C offenses.[49] They argue that this factor, if proved by a preponderance of the evidence,

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[49] LOC 5-5-54 b) If a person commits a crime involving domestic violence, the penalties for the underlying crime shall be increased as provided in subsections (1), (2), and (3) that follow.

> (1) If the underlying crime is a Class C offense, the revised maximum fine and sentence shall be that of the next higher Class and in no case shall the sentence be less than forty-five (45) days;

wrongfully increases the maximum penalty for the underlying charge. They contend it is wrongful because due process of law requires that proof that the crime is one of domestic violence must be beyond a reasonable doubt rather than a preponderance of the evidence for those charged with Class B and C offenses. They further contend that the determination that the crime is one involving domestic violence necessarily transforms the crime from either a Class C offense to a Class B offense or a Class B offense to a Class A offense. Accordingly, the determination that the crime is one of domestic violence is necessarily an element of the crime and must be proved beyond a reasonable doubt. We agree.

The concept of sentencing enhancement and its ramifications was thoroughly discussed in *Apprendi v. New Jersey*, 530 U.S. 464 (2000). After an extensive review of a history of judicial sentencing, that court concluded:

> "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U. S., at 252-253 (opinion of Stevens, J.); see also id., at 253 opinion of Scalia, J.).*fn16." *Apprendi* at P. 466.

A determination by the jury that the crime is one of domestic violence transforms the crime from either a Class C to a Class B offense or from a Class B to a Class A offense. It does this by increasing the sentence beyond the maximum for the underlying offense. Therefore, whether the crime is one of domestic violence now becomes an element of the offense should its proof enhance the crime to a higher class. All elements of a crime must be proven beyond a reasonable doubt. *United States v. Gaudin*, 515 U. S. 506, 510 (1995); see also *Sullivan v. Louisiana*, 508 U. S. 275, 278 (1993). Due process of law requires that in instances of those

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> (2) If the underlying crime is a Class B offense, the revised maximum fine and sentence shall be that of the next higher Class and in no case shall the sentence be less than ninety (90) days; or
> (3) If the underlying crime is a Class A offense, the sentence shall be no less than one hundred and eighty (180) days.

charged with Class B and Class C offenses involving domestic violence proof of such must be beyond a reasonable doubt.

The foregoing applies only to defendants charged with Class B and Class C offenses involving domestic violence. The amendments enhancing sentencing for the Domestic Violence Code do not apply to Class A offenses because the maximum sentence is not increased beyond that for other Class A offenses. Accordingly, the present standard of proof for establishing self defense for the crime of domestic violence for Class A offenses remains by a preponderance of the evidence to be proven by the defendant.

We hold that shifting the burden of persuasion to the defendant and the burden of proof to a preponderance of the evidence for Class A criminal offenses involving domestic violence does not violate either the CTCRA or the ICRA.

We also hold that the present scheme of shifting the burden of proof and persuasion to the defendant for Class B and C offenses involving domestic violence does violate the provisions of the CTCRA and ICRA. Accordingly, the prosecution must prove beyond a reasonable doubt that self-defense does not exist for defendants charged with such crimes and that the crime is one of domestic violence.

3. Whether shifting the burden of proving self defense to the defendant in crimes involving domestic violence compels the defendant to testify against himself in violation of tribal law.

To claim self-defense is a choice made by the defendant. Should he claim self- defense in a Class A offense involving domestic violence, he is obligated to prove it by a preponderance of the evidence. He may prove self-defense through the testimony of witnesses or himself or both. It is his decision whether to testify. He may incriminate himself should he choose to do so, but it is his decision whether to testify. He cannot be compelled to testify, but by voluntarily putting himself on the witness stand, he has made moot his right not to be compelled to testify against himself. As was stated in a recent Washington State court: "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *State v. Burke*, 163 Wash.2d 204, 211 (2008).

The United States Supreme court preceded *Burke* when it stated that a defendant faces a dilemma demanding a choice between "complete silence and presenting a defense" which has "never been thought an invasion of the privilege against compelled self-incrimination." *Williams v. Florida*, 399 U.S.78, 84 (1970).

We hold that shifting the burden of proving self-defense to the defendant in Class A offenses involving domestic violence does not compel the defendant to testify against himself. By claiming self-defense he has the burden of proving it by a preponderance of the evidence.

CONCLUSION

We affirm the Trial Court's Order denying the appellants' motion to accept proposed jury instruction. We reverse the Trial Court's order approving the appellee's proposed jury instructions to the extent that it accepts those instructions regarding the shifting of the burdens of proof and persuasion from the prosecution to the defendants who claim self-defense for Class B and C offenses involving domestic violence. We remand this matter to the Trial Court to process these cases consistent with this Opinion.

Kendra TONASKET, Appellant,

vs

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP12-006, 06 CTCR 05

11 CCAR 26

[Jonnie Bray, Office of Public Defender, for Appellant.
Melissa Simonsen, Office of Prosecuting Attorney, for Appellee.
Trial Court Case No. CR-2011-35054]

Decision entered June 26, 2012.

Before Chief Justice Anita Dupris

Dupris, CJ

Appellant, Kendra Tonasket, filed an Interlocutory Appeal on June 13, 2012, alleging the Trial Court wrongfully granted a continuance of her Jury Trial from June 15, 2012 to June 27, 2012, which is six (6) days beyond the 60-day limit. The Appellee, Colville Confederated Tribes (Tribes) did not file a response within the requisite time. COACR 6-A.

Appellant alleges, as grounds for the Interlocutory Appeal, first that the Trial Court has so far departed from the accepted and usual course of judicial proceedings as to call for review by the Court of Appeals (CoA). COACR 7-A(c). Further, Appellant alleges her civil rights are violated in that she is being held beyond sixty (60) days without findings to support the extension. COCAR 7-A(d).

We granted an interlocutory appeal in which the Trial Court set a jury trial beyond the speedy trial limits. *Yallup v. CCT*, 11 CCAR 1, 6 CTCR 1 (2011). *Yallup* is distinguishable from this case, however. In *Yallup* we held that the Trial Court made a series of procedural errors, whose cumulative effects were to deny the Appellant due process.[50] These procedural errors are not present in this case.

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[50]. The Trial Court granted the Tribes' Motion to Continue when it 1) was not supported by an Affidavit; 2) was without adequate evidence that the motion was served on Appellant by having an Affidavit of Service attached; 3) did not contain an acknowledgment that Appellant concurred with the motion; and 4) a hearing on the motion was not held. *Yallup, supra, at 4.*

The Trial Court had sufficient facts before it to make its decision on the question for a continuance; the Appellee stated cause, which was accepted by the Court; the Appellant had an opportunity to object and state her reasons to the Trial Court. There does not appear to be any departure from the accepted and usual course of business to support an interlocutory appeal under COACR 7-A(c).

In *Yallup, supra*, we did hold the Trial Court erred in setting the trial beyond the requisite time required by the speedy trial date, and we found it violated the appellant's civil rights to do so. What is different here is Appellant was able to participate in the decision-making portion of the hearing on the continuance. This Court has not been shown why a seven (7) day extension would prejudice the appellant. As we recognized in *Yallup*, each procedural error could be harmless error; it was the cumulative effect which rendered the continuance in violation of Yallup's civil rights. There is no cumulative group of harmless errors herein. There is a trial judge managing a case within the parameters of the judge's discretion.

It appears from the record that Appellant was granted bail; she apparently just didn't post it or request for a reduction. CTC 2-1-1-2, Time of Trial, has four (4) scenarios in which a time frame is set for trial after a defendant's initial hearing. 2-1-130, Bails and Bonds – Generally, allows a defendant to be admitted to bail on certain conditions. CTC 2-1-133, Denial of Bail, Detention, provides for reasons a defendant may not be allowed bail.

The Trial Court record does not clearly show under which provisions Appellant is being held for bail, thereby defining Appellant's speedy trial rights as 90 or 60 days. This question is not ripe for our review.

For the reasons stated, there are no grounds stated to grant an Interlocutory Appeal in this matter, and the request is DENIED and the matter REMANDED to the Trial Court for further action in accordance with this Opinion.

It is so ORDERED.

Marcos ROSAS/Kammie STANGER, Appellants,

vs.

CHILDREN & FAMILY SERVICES, MINORS, Appellees.

Case No. AP12-001, 6 CTCR 06

11 CCAR 28

[Dale Braunger, Office of Tribal Public Defender, for Marcos Rosas;
Esther Milner, for Kammie Stanger,
Curtis Slatina, Office of Prosecuting Attorney,for Children and Family Services;
Mykel Parker for the minor children.
Trial Court Case No. MI-2011-31017]

Hearing held 04-20-12. Decision 06-26-12.
Before Chief Justice Anita Dupris, Justice Dave Bonga, and Justice Dennis Nelson

Nelson, Associate Justice

This is an appeal from a default judgment arising from an adjudication hearing at which the appellants did not appear at the scheduled time for the hearing. They were, however, represented by spokespersons who were present. We vacate the default judgment and remand for a new adjudication hearing.

PROCEDURAL HISTORY

Marcos Rosas and Kammie Stanger are the parents of two minor children, to wit: T.M. and Z.R.. The children were taken into protective custody by Children and Family Services of the Colville Confederated Tribes (hereinafter CFS) on December 2, 2011. On December 9, 2011, the tribal court entered an Order from temporary custody hearing giving the care and custody of the children to CFS.

An adjudicatory hearing was scheduled for February 5, 2012. The appellants informed their respective spokespersons that they were on their way to the hearing, but may arrive late. The appellants had not arrived at 9:00 a.m. when the hearing was scheduled to begin. Their respective spokespersons were present. The court granted a ten minute recess and when the appellants had not arrived by 9:25 a.m., the presenting officer moved the court to find them in default and to grant the Petition for Minors in Need of Care. The court found the parents to be in default and adjourned.

The appellants arrived for the adjudicatory hearing "within minutes" after the court had adjourned. They notified the court of their presence, but were informed that the hearing had

ended. Subsequently, and without a hearing, the trial court judge entered an Order from Adjudicatory Hearing on March 14, 2012. It included a "Findings and Conclusions" and adjudicated the children as minors in need of care. The Findings and Conclusions stated the parents were in default and that their spokespersons objected to the entry of default on the grounds that they were prepared to proceed in the absence of the parents. The trial court found it in the best interests of the children to remain in the care and custody of CFS "based on the record and applicable law".

The appellants moved to set aside the default on the grounds that entry of the default under the circumstances "was not appropriate". The motion to set aside the default was denied by the trial court on various grounds. E.g. The parents failed to show good cause to set aside the default and the parents needed to personally appear.

The parents filed this as an interlocutory appeal. This is not an interlocutory matter because an adjudication that a child is a minor in need of care is a final order for purposes of appeal . CTC 5-2-261. Accordingly, this matter shall be considered as an appeal from a final order.

STANDARD OF REVIEW

We review findings of fact under the clearly erroneous standard and errors of law de novo. *Colville Confederated Tribes v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995)*; Wiley, et al v. Colville Confederated Tribes*, 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (1995); *Palmer v. Millard, et al*, 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996). The issues presented are issues of law and we will review under the de novo standard.

ISSUES

1. Whether the trial court erred when it declared the parents in default when their spokespersons were present and ready to proceed with the adjudicatory hearing.

2. Whether the adjudication of the children as minors in need of care was in error as it was not based upon evidence at an adjudicatory hearing but upon filings and testimony given at a hearing for temporary custody.

3. Whether the Findings and Conclusions were sufficient for the trial court judge to declare by clear, cogent, and convincing evidence that the children were minors in need of care.

DISCUSSION

<u>1. Whether the trial court erred when it entered a default judgment against the parents when their spokespersons were present and ready to proceed.</u>

On February 5, 2011, the parents did not appear at the time set for an adjudicatory hearing. The trial court found the parents in default even though the spokespersons for the parents were present and ready to proceed. The presenting officer moved for an order of default because the parents were not physically present. He justified the motion by stating he wanted to question the parents and their absence justified finding them in default.

The parents's spokesperson objected by stating that the parents have a right not to testify should they choose, thus the grounds put forward by the presenting officer were without merit. The spokespersons also objected on the grounds that the parents were represented by spokespersons who were present and "stood in the shoes" of the parents; that they were the agents for the parents; and that they were prepared to proceed on their behalf. In other words, the parents were not required to be present for the hearing to proceed.

It is black letter law that an attorney speaks for his client in court in the client's presence and in his absence. In a matter that considered whether an attorney actually made an appearance for his client, a Washington State case noted that when an attorney makes a formal appearance for a defendant, it is the defendant who appears, and not the attorney. *State ex re. Trickel v. Superior Court*, 52 Wash. 13, 100 Pac. 155. This holds equally true for an attorney present in court when his client is not.

On April 14, 2012, the trial court signed an Order from Adjudicatory Hearing which was, in essence, a default judgment against the parents which found their two children to be minors in need of care.

A default judgment is one of the most drastic actions a court may take. *Widicus v. Southwestern Elec. Coop., Inc.* 26 Ill. App.2d 102, 167 N.E.2d 799 (1960). They are not favored in law and "it is the policy of the law that controversies be determined on the merits rather than by default.". *Dloughy v. Dloughy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960). The primary test in determining whether a default should be entered is whether justice is being done. "Justice will not be done if hurried defaults are allowed anymore than if continuing delays are permitted. But justice might, at times, require a default or a delay. What is just and proper must be determined by the facts of each case, not by a hard and fast rule." *Widicus, supra* at 109. Entry of default judgment granting custody of the parties' minor child to Mr. Friedlander was an error of law and an abuse of discretion. *Clark v. Friedlander*, 4 CCAR 55, 2 CTCR 47, 25 ILR 6154 (1998).

The trial court erred in declaring the parents in default for failing to appear when their spokespersons were physically present and ready to proceed. The trial court also erred by entering a default judgment (adjudication) without a hearing on the merits of the action. It is just and proper in this matter that an adjudicatory hearing be held.

2. Whether the adjudication of the children as minors in need of care was in error as it was not based upon evidence at an adjudicatory hearing but upon filings and testimony given at a hearing for temporary custody.

When the Tribe files a Petition to Adjudicate Minors in Need of Care it is required to show by clear, cogent, and convincing evidence at an adjudicatory hearing that the children are minors in need of care. CTC 5-2-261[51]. Clear and convincing evidence is such that the "proponent's assertion is highly probable" and is such as to cause the court to be convinced "without hesitation." *In Re the Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (998), citing *Hoffman v. CCT*, 4 CCAR 04, 2 CTCR 37, 22 ILR 6127, 24 ILR 6163 (1997). This is accomplished at hearing by introducing the testimony of witnesses and what physical evidence may be available. The presenting officer may call the parents to testify, however, they have the right not to be compelled to testify should they be concerned their testimony could incriminate them. CTC 5-2-160(b).

A temporary custody hearing was held in this matter. The court heard the testimony of the CFS case worker and that of the mother, Kammie Stanger. The father, Marcus Rosas, was incarcerated and unable to attend. The court concluded in its Findings of Fact that "there is enough evidence and testimony provided by CFS to grant the agency's request for temporary custody".

The trial court did not indicate whether the standard of proof used to arrive at its conclusion was "a reasonable cause to believe" or by "clear, cogent, and convincing evidence". The standard of proof for temporary custody determinations is "reasonable cause to believe" that a minor is in need of care. CTC 5-2-250 (a)(b) or (c) We presume "reasonable cause to believe" is the standard used at the temporary custody hearing.

The different standards of proof used for the temporary custody hearing and the adjudicatory hearing are necessary because of the exigencies of the initial proceedings and the significance ramifications of removing children from their parents. A hearing must be held for each event at which testimony is provided and demonstrative evidence admitted.

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[51] 5-2-261. Adjudicatory Hearing-Proof. The Juvenile Court shall hear testimony concerning the circumstances which gave rise to the complaint. If the allegations of the petition are sustained by proof that is clear, cogent, and convincing, the Juvenile Court shall find the minor to be a minor-in-need-of-care and proceed to the dispositional hearing. A finding that a minor is a minor-in-need-of-care constitutes a final order for the purpose of appeal.

After each hearing the trial court judge should enter Findings of Fact and Conclusions of Law. These are necessary for a reviewing court to determine, in the case of appeal, the facts upon which the judge made his decision and whether he has abused his discretion or made an error of law.

No adjudicatory hearing was held in this matter. The trial court judge in his Order of Adjudication relied "on the record and applicable law" in determining "it is in both minor children's interest that they remain in the care, custody, and control of the Colville Tribal Children and Family Services".

By reviewing the Findings of Fact and Conclusions of Law in the Order of the Adjudicatory Hearing we should be able to make a direct correlation between the allegations in the Petition and the proof of said allegations at the Adjudicatory Hearing. *Weber v. CFS*, 8 CCAR 32, 4 CTCR 23, 32 ILR 6139 (2005). When intervention is sought, it is the Trial Court's duty to (1) make a complete record of why the intrusion is made, and (2) make a complete record of why the disposition, that is, the solutions to the problems identified at the Adjudicatory Hearing, are necessary, as supported by the record. *Weber, supra.*

Relying "on the record and applicable law" of a prior proceedings as Findings of Fact in awarding "care, custody, and control" of the minor children without conducting an adjudication hearing was error by the trial court judge.

3. Whether the Findings and Conclusions were sufficient for the trial court judge to declare by clear, cogent, and convincing evidence that the children were minors in need of care.

The trial court judge adjudicated the children as Minors in Need of Care based "on the record and the applicable law". This statement does not inform the parties nor the reviewing appellate court of the facts upon which he based his adjudication.

As noted, the standard of proof in a temporary custody hearing is "reasonable cause to believe". The purpose of a temporary custody hearing is to determine whether there is a need to temporarily continue custody of children who have been taken from a family because of the inability or unwillingness of a parent to provide adequate care. A trial court judge cannot apply this standard of proof to adjudicate a child as a minor in need of care.

We find the Findings and Conclusions entered for the Order from Adjudication Hearing to be insufficient on their face. We further find that the trial court judged erred in applying a lesser standard of proof in adjudicating the children as Minors in Need of Care.

CONCLUSION

THEREFORE IT IS ORDERED that the Trial Court default order adjudicating the minor children as minors-in-need-of-care is VACATED and that an adjudicatory hearing be held to hear evidence and testimony that allows the trial judge to make an informed decision regarding whether the minor children should be declared minors-in-need-of-care.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Daniel LIGHTLEY, Appellee.

Case No. AP11-018, 6 CTCR 07, 39 ILR 6069

11 CCAR 33

[Melissa Simonsen, Office of Prosecuting Attorney, for Appellant.
Daryl Rodrigues, Office of Public Defender, for Appellee.
Trial Court Case No. CR-2009-32140]

Oral Argument heard April 20, 2012. Decided August 6, 2012.
Before: Chief Justice Anita Dupris, Justice Gary F. Bass, and Justice Dennis L. Nelson

Bass, J.

This matter comes before the Court of Appeals (COA)from a criminal case initially filed in 2009. There were several continuances throughout the course of this case, almost all based on Appellee's request and/or situation. Subsequently Appellee moved the Trial Court for an Order of Dismissal, which was granted. The Trial Court dismissed the case with prejudice. Appellant timely filed an appeal requesting that the dismissal be amended to reflect that the dismissal was without prejudice.

The COA is concerned counsel for the Appellee, Daryl Rodrigues, did not appear for the initial hearing or the oral argument hearing. There was no notice or explanation by Mr. Rodrigues why he did not appear. Once undertaken, representation of a party, especially in a criminal case where criminal penalties are possible, requires at a minimum, appearances at hearings in the case. To abandon a client at a critical stage of the proceedings cannot be condoned. A show cause hearing has been set and notice given in a separate order.

ISSUES

1) Did the Trial Court err by finding the Appellee's right to a speedy trial was violated?

2) Did the Trial Court err by dismissing the case with prejudice?

3) Did the Appellee make improper ex parte contact when he presented a proposed Order to the Trial Court without having first obtained the Appellant's written position on the proposed Order?

4) Did the Trial Court err in denying the Appellant's motion for a presentment hearing on the proposed order?

STANDARD OF REVIEW

The issue is a question of law which we review de novo. *Colville Confederated Tribes v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995).

DISCUSSION

1. DID THE TRIAL COURT ERR BY FINDING THE APPELLEE'S RIGHT TO A SPEEDY TRIAL WAS VIOLATED?

The Appellee was arraigned on May 15, 2009 and plead not guilty. Pretrial and jury trial dates were set. Continuances were requested and granted. Subsequently, Appellee was held in custody until August 12, 2009, when he was taken to the hospital. About a week later, the Tribes requested a medical furlough, which was opposed by the Appellee. However, the Trial Court granted the medical furlough and instructed that the Appellee notify the Court when he was "released from doctor & show proof to court." Nothing was received from Appellee for several weeks. On September 24, 2009, the Tribes moved to revoke the medical furlough. An order granting the motion was entered 4 days later. The order also specified that the Appellee was to be held pending the next hearing. Apparently Appellee was finally brought before the Trial Court in March 2010 and was put back on the trial track. In May 2010, Appellee moved to change his plea and vacate the trial. A plea offer had been accepted. There were then five (5) continuances through August 2010. There were no entries until a status hearing was held in June 2011 and a bench warrant issued. The warrant was returned that same day. A status hearing was held October 31, 2011. Then November 4, 2011, a motion was entered for the dismissal. The motion was granted November 14, 2011.

The Appellee has a right to a speedy trial. *See Stoneroad-Wolf*, 8 CCAR 84 and *Marchand v. Colville Confederated Tribes*, 8 CCAR 18, 4 CTCR 19 (2005). In *Coleman v. Colville Confederated Tribes*, 2 CCAR 1, 1 CTCR 74 (1993), this court ruled that there was no violation of the speedy trial rule where the Appellee was incarcerated for more than 60 days because:". . . this Panel does not believe the 60 day rule is an inflexible rule. . .", and after examining the circumstances found no violation. In *Stensgar v. Colville Confederated Tribes*, 2 CCAR 20, 1 CTCR 76 (1993), court adopted the following factors to examine whether the right to a speedy sentence had been violated: The length of the delay; the reason for the delay; whether or not the Appellee asserted his right; and prejudice to the Appellee's interests, including prevention of oppressive pretrial incarceration, minimization of anxiety and concern of the accused, and limitation of the possibility that the defense will be impaired.

This court adopts the flexibility approach to violation of speedy trial rights, and will examine the same factors in determining whether the speedy trial rights have been violated as set forth in *Stensgar, supra.*, for speedy sentencing rights, and adding another factor to consider, to wit, the length of the incarceration of the Appellee. In this case there was a lengthy delay between the date Appellee was arraigned on the charges, May 15, 2009, and the date of the dismissal of the charges, November 14, 2011. The Appellee was incarcerated a total of 89 days during the time period between May 15, 2009 and August 12, 2009. The original trial was scheduled for July 9, 2009. That trial date was within the 60 day limit for defendants who are incarcerated, as Appellee herein was.

The whole series of delays in this case started with a motion by Appellee to continue the readiness for trial hearing, indicating that Appellee would sign a speedy trial waiver. The motion stated that Appellee was serving time on an unrelated matter, as well as being held on the charges in the present case. The Trial Court continued the matter on Appellee's motion. Three facts should be considered as a result of this motion: absent the Appellee's motion, Appellee would have had a trial within the 60 days required; Appellee was serving jail time on an unrelated matter, not simply on the charges in this case; and Appellee and or his attorney promised something they did not deliver on, that there would be a speedy trial waiver signed by the Appellee.

The next continuance was in response to a motion by Appellee on August 12, 2009 for a continuance due to the Appellee being in the hospital, and that continuance was granted on August 12, 2009. A motion was then filed by Appellant, for a medical furlough on August 18, 2009, which the Trial Court also granted. The medical furlough order released Appellee from custody until he obtained a release from a doctor and showed that proof to the court. Appellee was released from the hospital at some point, but apparently never obtained a release from a doctor and showed proof to the court. We do know that he appeared in court on March 15, 2010, as he signed an Order releasing him on his personal recognizance. He apparently remained out of custody until he was arrested on a warrant on October 28, 2011.

A continuance was granted just before the trial date of May 20, 2010 when Appellee moved to vacate the trial date and set the matter for entry of a plea pursuant to a plea offer from Appellant. The matter was scheduled for entry of a plea on June 25, 2010. There was no plea entered on June 28, 2010. The change of plea hearing was continued to August 20, 2010.

On August 18, 2010, Appellee's spokesperson requested a continuance of the change of plea hearing because Appellee accepted a plea offer from Appellant, and indicated that the Appellee had some sort of infectious disease. The public defender was to obtain medical records in order to verify his client's condition and when he would be able to come to court.

An Order was entered denying the continuance until August 20. In the denial order, the Trial Court ordered the public defender to file proof by August 20 that the public defender had contact with the Appellee and obtained an updated address and phone number for the Appellee. Failure to provide the proof would result in a bench warrant being entered. Apparently the proof was filed because on August 20, 2010, the Trial Court entered an order continuing the change of plea hearing, but failed to enter the new hearing date on that order.

On August 27, 2010, the Tribes filed a motion to set a new change of plea hearing date and an Order was entered setting a date set for a change of plea for October 8, 2010.

Appellee did not come to court on October 8. 2010, and a plea was not entered. There was no written order entered on October 8 either. The next action takes place on June 17, 2011. The Trial Court entered a warrant for the arrest of the Appellee. Appellee was arrested on the warrant on October 28, 2011. On November 4, 2011, Appellee filed a motion to dismiss for failure to bring the Appellee to trial within the time set by law. The Trial Court dismissed the charges on November 4, 2011.

Most of the continuances and delays are due to continuances granted on request by the Appellee or his failure to appear in court when scheduled. Applying the flexible approach to analyzing whether Appellee's speedy trial rights have been violated the factors are: 1) The delay was lengthy, but was occasioned mostly by Appellee's motions for continuances or medical condition, and the Appellee would have had his case tried within the 60 day speedy trial period absent his motion for a continuances; 2) Appellee did not assert his right to a speedy trial until more than two years had passed after arraignment and had twice said he was going to enter into a plea deal which he never honored; 3) oppressive pretrial incarceration certainly was not a factor, as he was released from incarceration on August 18, 2009, until the court had to issue a warrant to get him back to court after his arrest on October 28, 2011; 4) if there was any anxiety or concern on Appellee's part, it was only caused by his actions; and 5) it was not alleged or proven that his defense would be impaired by the delay occasioned by himself. After considering all of the factors, this COA finds that Appellee's speedy trial rights were not violated.

2) DID THE TRIAL COURT ERR BY DISMISSING THE CASE WITH PREJUDICE?

Appellee moved for a dismissal with prejudice alleging that the Trial Court violated Appellee's speedy trial rights. "In *Stensgar* this Court considered the question of whether the matter had to be dismissed with prejudice because the sentencing took place after sixty days from the finding of guilt. This Court held that the time requirements were jurisdictional, and that the following were factors for the Trial Court to consider in deciding if the dismissal

should be with or without prejudice: that the length of delay was minimal; the cause for delay was administrative and not intentional by the prosecutor; the Appellee delayed in asserting his right to sixty days until after the delay happened; and there was no prejudice to the Appellee. *Stensgar* clearly delineates some guidelines for the Trial Judge to follow in weighing his discretion to grant a dismissal with or without prejudice. We reinforced this discretion in *Jack*. In *Jack* the Trial Judge dismissed the charge with prejudice *sua sponte*. We acknowledged the general rule that dismissals with prejudice are 'normally reserved for situations in which jeopardy has attached.' We went on to state that dismissals with prejudice can also be granted 'when the Judge finds a party has acted in bad faith, or filed a frivolous case, for example.'" *Campbell v. CCT,* 8 CCAR 28, 4 CTCR 22, 32 ILR 6140 (07-22-05). In this instant case, there is no basis for a dismissal with prejudice. The delay in going to trial was primarily due to Appellee's actions or inactions. The trial was originally scheduled within the proper time restraints. Though Appellee did not properly execute a written waiver of the speedy trial, there was sufficient indication that he orally executed the waiver. He delayed asserting his right through several months and hearings. There was no prejudice to the Appellee. We hold that the Trial Court did err in dismissing the charge with prejudice.

3) DID THE APPELLEE MAKE IMPROPER EX PARTE CONTACT WHEN HE PRESENTED A PROPOSED ORDER TO THE TRIAL COURT WITHOUT HAVING FIRST OBTAINED THE PROSECUTOR'S WRITTEN POSITION ON THE PROPOSED ORDER?

On November 4, 2011, counsel for the Appellee presented a proposed order to the Trial Court for a dismissal with prejudice. On the presentment page, it was handwritten that counsel for Appellant "Objects requests presentment or court to prepare its own order." The Trial Court entered the Order without a hearing, presumably knowing that opposing counsel objected to the order and wished for a presentment hearing. The Order was entered on November 14, 2011. On November 18, 2011, counsel for Appellant filed a Motion and Order for Presentment Hearing. Counsel for Appellee objected, saying "The order was signed over plaintiffs request for presentment and the case <u>is</u> dismissed. Trial Court has no jurisdiction to act and the Tribes' remedy is appeal <u>only</u>. (*Emphasis in order*).The Trial Court, however, granted the motion and set a presentment hearing for November 29, 2011. The hearing was held but there was no Order entered by the Court. Apparently the judge let stand his order from Nov. 14.

The judge is the gatekeeper of due process. It is the Court's responsibility to ensure adequate notice is provided to every litigant, and to allow everyone who appears in Court to have his say, in his own way. *Lezard v. DeConto*, 10 CCAR 23, 5 CTCR 25, 36 ILR 6010

(12-16-2009). Basic principles of due process include notice and the opportunity to be heard. *Finley v. CTSC*, 9 CCAR 71, 5 CTCR 18, 36 ILR 6004 (11-21-2008).

Upon a review of the hearing on November 29, 2011, the judge admitted that he must have somehow missed the notation about the objection to the order. However, he did not make any decision as to the validity of the order entered. While we understand that having time to adequately review proposed orders is sometimes limited, in this case we find that it was Trial Court error to have entered an order when one of the parties was clearly objecting to the contents of the proposed order. The Trial Court should have either set a presentment hearing to allow the parties to argue their respective position or given a time limit for the opposing party to submit its own proposed order. The Trial Court could then draft an order from the two which most closely reflected the decision of the Court. We were not presented with any evidence that showed that Appellee did anything more than file the proposed order. Since allegations of ex parte communications are of a serious nature, we hold that Appellant did not meet its burden to prove that there was ex parte communication between counsel and the judge.

4) DID THE TRIAL COURT ERR IN DENYING THE PROSECUTOR'S MOTION FOR A PRESENTMENT HEARING ON THE PROPOSED ORDER?

This issue is moot. The Tribes entered a written motion for a presentment hearing, which was granted by the Trial Court and a hearing set. The hearing was held on November 29, 2011, although no order was issued from that hearing. "In order to minimize future confusion, a judge should always follow up important decisions with a written order, ... The written order should summarize the issues discussed and the decision rendered." *CCT v. Dogskin*, 10 CCAR 45, 5 CTCR 31 (02-02-2011). A review of the hearing was not enlightening. The judge heard from both parties about the proposed order, admitted that he may have overlooked the objection, but then didn't issue a decision about whether the order would be affirmed or not[152]. This left the parties in limbo, so to speak. While we were not asked to rule on the absence of a written order, we want to reiterate that any time that a motion is before the court and argued, there should be a written order issued in order to preserve the issues for appeal. The written order should at least briefly describe why the hearing was originated and what the court decided.

[521.] In his brief, Appellee alleges that on the November 29, 2012 court date, the Trial Court concluded that the case had already been dismissed and that as no motion for reconsideration had been filed the Court's jurisdiction was over. A review of the oral record does not reflect that conclusion. In fact, the judge made no findings nor issued a decision.

ORDER

Based on the foregoing, the Order Dismissing this case with prejudice by the Trial Court is reversed, and the matter is remanded to the Trial Court for action consistent with this decision.

Terrance RANDALL & Samantha LaCOURSE, Appellants,

vs.

CHILDREN & FAMILY SERVICES, Appellee.

Case No. AP12-005, 6 CTCR 08, 39 ILR 6093

11 CCAR 39

[Daryl Rodrigues, Office of Public Defender, appeared for the father, Terrance Randall.
Tim Liesenfelder, appeared for the mother, Samantha LaCourse.
Curtis Slatina, Office of the Prosecuting Attorney, appeared for CCT/CFS.
Mykel Parker, spokesperson, appeared for the minor child, TR.
Trial Court Case No. MI-2012-32008]

Hearing held June 15, 2012. Decided December 13, 2012.

Before Chief Justice Anita Dupris, Justice Dave Bonga & Justice Dennis L. Nelson

Dupris, CJ

SUMMARY OF PROCEEDINGS

On April 12, 2012, CCT/CFS filed for temporary custody of TR, a minor child of Randall and LaCourse, Appellants herein. The Temporary Custody Petition alleged the child was in immediate danger of harm if she remained with Appellants. This allegation was based on the father's history of physical abuse of the mother, as well as the police acting on information from a CCT caseworker that the parents were violating a no-contact order. The Tribes also alleged TR should be taken into temporary custody because of another case in which TR's sibling, BR, was found to be a Minor-In-Need-of-Care (MINOC). The Tribes was granted temporary custody.

On April 30, 2012 the Tribes filed a Petition for MINOC regarding TR. The allegations are identical to the allegations in the Petition for Temporary Custody. The adjudicatory hearing was held on May 21, 2012 at 2:00 p.m.. Neither parent was present at the beginning of the hearing. The mother's spokesman was present and stated on record he did not have contact with his client, nor did he know where she was at the time. The spokesman for the father did

not appear for the hearing. From the record it appears he was appointed to represent the father only three (3) days before the hearing.

The Trial Judge proceeded with the hearing without the presence of the parents and took testimony from a caseworker, who was not the investigating caseworker, regarding the allegations in the Petition. The Trial Judge adjudicated TR to be a MINOC at the conclusion of the caseworker's testimony. At the conclusion of the Judge's findings and order on record finding the child to be a minor-in-need-of-care, both parents and Mr Rodrigues, the spokesman for the father, appeared. Mr. Rodrigues alleges he was in other court proceedings at the start of the adjudicatory hearing herein, and arrived at 2:15 p.m., at which time he was told the hearing was over and the minor was declared a MINOC. The record does not indicate that either parent nor Mr. Rodrigues addressed the Court, on the record, and asked for the hearing to be reopened.

The parents, Appellants herein, filed an Interlocutory Appeal and a request for a Writ of Mandamus on May 22, 2012. Thereafter, on May 29, 2012, the Trial Judge entered a written order from the adjudicatory hearing.[53] The written findings acknowledged that both parents appeared after the Court made its ruling, even though such finding was not put on the record.

On June 15, 2012, at the Initial Hearing we found cause to grant the appeal and noted that it is not an Interlocutory Appeal because the Trial Judge made a final decision on the issue of MINOC. We also found cause to vacate the MINOC Order, and remand for a new hearing.[54] We further found cause to dismiss the request for a Writ of Mandamus in that no party in attendance knew why it had been filed nor could they present any argument for its acceptance.

ISSUES

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[53] The order was presented by CFS's spokesman, Curtis Slatina, Acting Lead Prosecutor. The Judge signed the presented order even though it was not signed off by any of the three other spokesmen, Mr. Liesenfelder, Mr. Rodrigues, and Mr. Parker. The Order was signed after the initiation of this Appeal.

[54] It was noted on the record that Mr. Daryl Rodrigues, spokesman for Appellant Randall, failed to appear for the hearing. He did not notify the Court, either before or after the hearing, of the reason for his absence.

1) Did the Trial Court err in not going back on the record to allow the parents an opportunity to be heard when they appeared at the end of the hearing?

2) Did the Trial Court err in finding the minor child herein to be a Minor-In-Need-Of-Care based on the evidence presented?

STANDARD OF REVIEW

The first issue necessitates a review of the judge's actions in managing the case. We review this issue under the abuse of discretion standard. Under this standard we presume the trial judge's decision to be correct unless it is shown that the decision was manifestly unreasonable, or made on untenable grounds, or made for untenable reasons. *Grunlose v. CCT*, 5 CCAR 26, 3 CTCR 25, 27 ILR 6033 (1999); *Marchand v. CCT*, 8 CCAR 18, 4 CTCR 19, 32 ILR 6012 (2005).

The second issue goes directly to the trial judge's review of the evidence (facts) and application of the law to the facts. It is a mixed question of facts and law. The appropriate standard of review for a mixed question may be determined by reference to the principles which underlie the established rules of standard of review jurisprudence: when the concerns of judicial administration favor the trial judge, his determination should be subject to clearly erroneous review, and when the concerns of judicial administration favor the appellate court, the trial judge's determination should be subject to *de novo* review. *CCT v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995).

We have set out standards and guidelines for the trial court to follow when assessing facts in MINOC cases. As we will show in our opinion below, these standards and guidelines are not always being followed in MINOC cases, including the instant case. This alone supports a finding that the concerns of judicial administration favor the Court of Appeals. We review the second issue *de novo*.

DISCUSSION

1. Did the Trial Court err in not going back on the record to allow the parents an opportunity to be heard when they appeared at the end of the hearing?

This is the second time we have been asked to review a judgment entered against parents in a MINOC case where the parents arrived late for the proceedings and were not allowed to present evidence. *See*, *Rosas and Stanger v. Children and Family Services*, 11 CCAR 28, 6

CTCR 06 (2012)[55]. In *Rosas* the parents notified the Court, through their spokesmen, both who were present, they were on their way but would be late. The Trial Court, after a short recess, went back on record and granted the Tribes' request for a default on the MINOC Petition. The parents appeared just minutes after the Court adjourned. The Trial Judge refused to go back on record, and entered an order finding the children to be Minors-In-Need-Of-Care. In *Rosas* the Judge, who is the same judge in this case, did not even allow the spokesmen for the parents to speak for their clients in the absence of their clients' attendance.

In this case one spokesman did not have contact with his client before the hearing, and the second spokesman had only been appointed three days before the hearing, and had not yet met with his client. The Order From Adjudicatory Hearing (Order) dated May 29, 2012 notes the Court put on record that neither parent was present, nor asked for a delay or continuance. The Order further notes both the parents appeared at the end of the hearing. Neither of these findings are supported by the oral record of the hearing. The oral record shows the Clerk of the Court was asked if the mother, Appellant LaCourse, had notice, to which the Clerk replied "she was aware of [the hearing]." No inquiry was made by the Court or any of the parties present if the father, Appellant Randall, had notice of the hearing.

There is paucity of information on the record to indicate why the judge chose not to allow the parents/Appellants to go on record when they appeared within minutes, i.e. less than twenty (20) minutes from the time the hearing began. In *Rosas*, *supra*, the parents' attorneys were present but not allowed to represent their clients to avoid a default judgment. The Trial Court, in *Rosas* found the minor to be a MINOC just based on the allegations in the Petition without taking any evidence on the record.

In the instant case the Trial Court took evidence in the form of testimony from a caseworker from the Tribes' Children and Family Services (CFS). As we will discuss below, it was not the best evidence. Appellant/LaCourse's attorney was allowed to cross examine the CFS witness, but did not have the assistance of his client at the time.

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[55]The written Opinion and Order in *Rosas* was entered on June 19,2012, after the hearing in this case. In *Rosas*, as in this case, we did inform the parties on record that we were reversing the Trial Court's order on the MINOC hearing.

It appears, from the practice of the Trial Court to deny parents a right to present their cases when they are even just a little late for the hearing, that MINOC hearings are being treated like the adversarial proceedings in criminal cases. We have no findings either on the oral record or from the written findings to support a reason why the Judge was not willing to allow the parents/Appellants an opportunity to present evidence in the case. Although our criminal court has become more westernized, the juvenile court has an opportunity to draw on the traditions and customs of our tribes in fashioning decisions to strengthen our families and communities.

Although a delay in a proceeding may be troublesome, here one must first put it in context of the purpose of the juvenile code. The code must be interpreted liberally in order to preserve and strengthen a child's family ties as well as his cultural ties to the Tribes. *See* CTC 5-2-1, Purpose and Construction.[56] An important purpose of the Juvenile Code is to prevent the breakup of families by offering the assistance of the Tribes' programs and resources to families in trouble and in need of assistance. *Id.*

The record does not reflect any reason the Court could not have heard from the parents and their spokesmen before entering its final adjudicatory order, especially based on the sparse evidence presented herein. To treat the adjudicatory hearing as a pure adversarial hearing flies in the face of the purposes of the juvenile laws.[57] The parents have a due process right to present evidence; each case must be assessed individually on whether their late attendance is so

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

[57]. The denial of participation in the hearing can also be considered acultural. It is settled tradition that everyone who has an interest in a matter, and who wishes to have input is allowed to have his say. Judges, as tribal leaders, must be ever-vigilant in promoting our traditions whenever the opportunity arises in the court-context. In this way we can help preserve what makes tribal courts unique and necessary for resolution of tribal issues.

egregious as to forego this right. This is the only way to ensure a child is given the full benefit of the law and of maintaining his ties to his family and culture.

In this case, the spokesman for the father, Mr. Rodrigues, had only been appointed three days before the hearing, and was delayed because he had already been scheduled in another court hearing at the time of the hearing herein. The Court failed to consider this on the record, thereby denying Appellant/father his due process right to present evidence on his own behalf.

Based on the foregoing we hold the Trial Court abused its discretion in that its decision to deny the parents an opportunity to be heard when they appeared at the end of the hearing was manifestly unreasonable under the circumstances of this case and the applicable law.

2) Did the Trial Court err in finding the minor child herein to be a Minor-In-Need-Of-Care based on the evidence presented?

Based on the discussion below, we find the Court did err in finding the minor to be a MINOC based on the evidence presented. The Petition for Minor-in-Need-of-Care (MINOC) (hereafter Petition) is identical to the Temporary Custody Petition, alleging TR was a MINOC in that he "has been subjected to or has the potential to be subjected to,[58] injury, sexual abuse, or negligent treatment or maltreatment by a person who is legally responsible for the minors' [*sic*] welfare under circumstances which indicated that the minors' [*sic*] health, welfare and safety are harmed thereby; [and he]...has not been, or cannot be provided with adequate food, clothing, shelter, medical care, education or supervision by her parent, guardian or custodian necessary for their [*sic*] health and well-being..."

The relevant facts asserted in the Petition to support the allegation of MINOC are as follows:

1. TR was placed in protective custody on April 11, 2012. No reason was given in the allegation for the reason for the protective custody.
2. Caseworker Buffy Nicholson saw the parents/Appellants traveling together in a car. The police stopped them and arrested Appellant Randall for violating a no-contact order with Appellant LaCourse, as well as for DWS. The facts do not allege when this stop happened.

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[58]. The language "or has the potential to be subjected to" is not in the legal definition of a MINOC under CTC 5-2-30(l). As such, it cannot form a basis for a MINOC finding.

3. Appellant Randall was previously charged in state court with Assault 4th Degree-Domestic Violence, Appellant LaCourse being the victim. Again, the date of the offense is not given; only that the assault occurred while LaCourse was pregnant with TR.

4. Randall has also been charged with "Domestic Violence" in tribal court (date unknown from a reading of the allegations) according to the alleged facts. Petitioner alleges this shows a pattern of domestic violence by Randall against LaCourse.

5. Petitioner alleged LaCourse has made it clear she will remain with Randall.

6. Petitioner alleged CFS has "grave concern" for the child, and "is concerned that the father may assault and injure the minor child."

7. Finally, Petitioner alleged that TR's older brother, BR, is an adjudged MINOC, the Court having found that Randall physically abused BR and LaCourse failed to protect BR from this abuse.

This is summation of the facts alleged, and are not the exact wording nor all of the allegations.

The purpose of an Adjudicatory Hearing is to hear evidence which shows by clear, cogent and convincing evidence, that the minor is a MINOC. CTC 5-2-261. The Petition must allege specifically what acts or omissions were committed by the parents or guardians to support a finding the child is a MINOC. *In Re the Welfare of A.T, and J.T., minors, Weber, Appellant,* 8 CCAR 32, 4 CTCR 23 (2005). The statutory definition of MINOC does not include the "a potential to be subjected to" language included in the Petition; the Petitioner cannot change what the law is without a statutory change. Therefore, the facts must show actual injury, neglect, abuse, or maltreatment under the alleged section of CTC 5-2-30(l). Further, we have held that there must be a direct correlation between the allegations in the Petition and the proof given in the hearing. *Id*.

A review of the evidence presented to the Court show two (2) glaring problems. First, the testimony of the caseworker, Gary Nicholson, was not the best evidence. It was based solely on hearsay. Mr. Nicholson admitted that he was basing his testimony on what he was told to say by Buffy Nicholson, the caseworker for the case. He admitted he did not do any independent investigations. He did not know the age of the minor in question; he didn't know if any visitation had taken place; he did not have any personal knowledge of the case. At one

point he stated "Buffy wanted to make sure I'd say it's important the child is in a safe environment...."

Mr. Nicholson's testimony does not meet a clear, cogent and convincing standard of proof. The best that it supports is that the caseworker, Buffy Nicholson, is concerned for what potentially may happen to TR. We note that this is not a trivial concern, but it does not meet the legal level of proof needed. Hearsay cannot be cross-examined, nor subject to a test of veracity.

The second evidentiary problem is how the Court took judicial notice of another MINOC case involving the parents herein. In *Louie v. CCT*, 8 CCAR 49, 4 CTCR 27 (2006) we set out the standards for the Court to follow when taking judicial notice in an evidentiary hearing. In *In Re Gorr, Marchand, Appellant*, 8 CCAR 76, 4 CTCR 31 (2006) we held the judicial notice standards also apply to juvenile court cases.

When the Trial Court is asked to take judicial notice in an Adjudicatory Hearing, the following must be considered:

(1) taking judicial notice is disfavored, especially when the Court takes judicial notice of facts that would prove or disprove an allegation of the MINOC petition;

(2) Courts may take judicial notice of public records, but only to prove the existence of the orders, and not the proof of the facts therein; and

(3) when a Court is going to take judicial notice, the Judge should (a) give notice to the parties of what he is going to take judicial notice so the parties may provide rebuttal evidence; and (b) allow the parties to present such rebuttal evidence. *Id.*

The Court did none of the above before taking judicial notice. Instead, he took as true the findings of fact in the case involving TR's brother, BR. *See* Order from Adjudicatory Hearing, May 29, 2012, at page 2. The Court included very specific findings which are not on the oral record for this case.[59]

The first concern in a dependency case should always be what is in the best interests of the minor involved. *In Re J.L.V.*, 8 CCAR 23, 4 CTCR 21, 32 ILR 6142 (2005). What is in the best interests of the child would include the Court providing the best possible adjudication of the

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[59]. In the Order from Adjudicatory Hearing the Court found facts regarding physical abuse by Randall towards BR and regarding the non-compliance of the parents in the BR case. It also had unsupported findings regarding the notice given the parents (at page 1) as well as the late appearance of the parents, and non-appearance of Randall's spokesman, Mr. Rodrigues.

merits of the case, free from procedural errors, so that the child and his family may embark on a healing of the problems which brought them to the Court in the first place. This has not taken place in this case. We find the Trial Court erred in finding the minor to be a minor-in-need-of-care based on the evidence presented.

Based on the foregoing, we REVERSE and REMAND to the Trial Court for further actions consistent with our rulings herein.

It is so ORDERED.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Gary STENSGAR and Curtis SIGNOR, Appellees,

Case No. AP12-007/008, 6 CTCR 09

11 CCAR 47

[Appellant appeared through Curtis Slatina, Office of the Prosecuting Attorney.
Appellee appeared through Jeremy Stevens, Office of the Public Defender.
Trial Court Case Numbers: CR-2012-34299 and CR-12-34300]

Oral Arguments heard January 25, 2013. Decided February 25, 2013

Before: Chief Justice Anita Dupris, Justice David Bonga and Justice Dennis Nelson

Nelson, J.

Gary Stensgar and Christopher Signor were arrested on July 31 2011 for Driving While Intoxicated. Both were taken to the tribal jail where each posted bail. Each signed a Notice of Appearance and Promise to Appear informing them to appear for arraignment on August 2, 2011. Both appeared for arraignment only to learn that no complaint or citation had been filed with the court. The trial court judge dismissed the charges against them with prejudice. We overturn the Trial Court and hold the actions of the trial court judge to be void *ab initio*.

ISSUE

`Did the trial court abuse its discretion by dismissing the charges with prejudice when neither a complaint nor a citation had been filed with the court?

STANDARD OF REVIEW

The Tribes allege the trial court abused its discretion and made errors of law. Mixed questions of abuse of discretion and errors of law are reviewed *de novo*. *Colville Confederated Tribes v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 IlR 6059 (1995).

FACTS

The facts in this matter are not at issue. Gary Stensgar and Christopher Signor (hereinafter defendants) were arrested in separate incidents on July 31, 2011, for Driving While intoxicated. LOC 3-1-1 (RCW 45.61.502, 5040). Both were taken to the tribal jail and released upon posting bail. At the time of their release each signed a Notice of Appearance and Promise to Appear for arraignment on August 2, 2011.

Upon appearing at the appointed time and date, they learned that criminal charges had not been filed against them. The time and date set for their arraignment was the time and date regularly set for arraignments[60]. Both the tribal prosecutor and the tribal public defender were present during these arraignments and both spoke for their respective potential clients. Despite not having a charging document in the record, the public defender moved to dismiss the charges against his clients. The Tribes objected. The court, finding that similar events had occurred in the past, dismissed the charges with prejudice.

The Tribes filed a Motion for Reconsideration which was heard on August 16, 2011. On August 18, 2011, the trial court issued its written order dismissing the charges with prejudice and ordered a hearing on the Motion for Reconsideration. After the hearing, the trial court denied the motion and affirmed its decision dismissing the charges with prejudice. This appeal followed.

DISCUSSION

The Colville Law and Order Code mandates that "all criminal proceedings are initiated by a complaint". LOC 2-1-30. It also provides that citations completed by police officers "shall serve as the complaint for purposes of prosecution in court". LOC 2-1-72.

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[60] All criminal arraignments are set for 1:00 p.m. on Mondays, Tuesdays, Wednesdays and Fridays.

In the matters before us no complaint or citation had been filed with the court when the trial court judge dismissed both pending charges with prejudice. To be more specific, no criminal proceedings were in place when the trial court judge dismissed the "charges" against the defendants.

This case is similar to *CCT v. Boyd*, 5 CTCR 21, 10 CCAR 9 (2009) in that no complaint or citation had been filed prior to his first appearance in court. Mr. Boyd was arrested on July 16, 2009, held overnight in the tribal jail, and brought before a judge on a motion for bail review. The judge, after finding no probable cause for Mr. Boyd's arrest, released him and set a date for arraignment. This was done despite the fact that no complaint or citation had been filed. The Tribes subsequently filed their complaint and immediately thereafter filed an interlocutory appeal. We found the trial court judge had acted without authority in hearing the matter before a complaint or citation had been filed and upheld the appeal. The trial court judge was removed from further participation in the matter.

Another case similar to this arose in Washington State wherein the state filed an information against a defendant charging him with murder. Near the date set for trial, the state moved to dismiss the information because a key witness could not be located. The trial court judge dismissed the information without prejudice. Shortly thereafter, the state located the witness and asked the judge to resume the trial. The judge noted that the information had been dismissed. The state said it would re-file the information once the trial reconvened. A new information was not filed, but the trial went forward and the defendant was convicted. He appealed his conviction which was vacated on the grounds that the trial court did not have subject matter jurisdiction. *State v. Corrado*, 79 Wn. App 612, 898 P.2d 360 (1995)[61]

In the matter before us, we have determined that the trial court judge had no criminal cases before her when she dismissed them. We are not aware of any authority granted to a trial court to dismiss pending criminal charges before they are filed with the court. Accordingly, we hold that the trial court judge was without authority to dismiss criminal charges which might come before her but did not exist as an official court proceeding at the

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[61]The *Corrado* decision has been criticized by other courts. See *State v. Franks*, 105 Wash. App. 950, 22 P.3d 269 (2001) and *State v. Barnes*, 146 Wash. 2d 74, 43 P.3d 490 (2002). In summary, the criticism was that a Washington State Superior Court always has subject matter jurisdiction which is granted by the Washington State Constitution. Both cases agreed, however, that Corrado's conviction could have been vacated on other grounds.

time. The order dismissing both cases with prejudice was without any law or precedent authorizing it and was, therefore, void *ab initio*.[62]

We need not reach the issue of the appropriateness of the dismissal with prejudice in these cases in light of our ruling.

CONCLUSION

We reverse the Trial Court's decision and remand for the Trial Court to take action consistent with this Opinion.

Amanda MATT, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case No. AP13-012, 6 CTCR 10
11 CCAR 50

[Virginia Gomez, Office of Public Defender, for Appellant.
Melissa Simonsen, Office of the Prosecuting Attorney, for Appellee.
Trial Court Case No. CR-2013-36017]

Hearing held September 20, 2013. Decision entered October 23, 2013.
Before Acting Chief Justice Theresa M. Pouley and Justice R. John Sloan Jr.

Pouley, CJ

This matter came before the Court of Appeals (COA) for Oral Argument on September 20, 2013. Virginia Gomez appeared for Appellant and Melissa Simonsen appeared for Appellee. Oral arguments were held before the Acting Chief Justice Theresa Pouley and Justice John Sloan.[63]

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[62]Our holding does not mean the charges against the appellees are no longer valid and cannot be prosecuted. The Tribes may proceed to prosecute assuming availability of witnesses and so forth.

[63] Justice Pascal was assigned to this panel but passed away prior to the hearing.

The facts for purposes of the Initial hearing were not disputed and are as follows. The Appellant was arraigned on June 3, 2013 and bail was set at $500.00 or alternatively she could be released on Electronic Home Monitoring (EHM). Appellant moved for reconsideration of the bail and the trial court denied the motion. Appellant was released on EHM on June 12, 2013 and bond was posted on June 21, 2013. On June 21, 2013, Appellant filed this appeal claiming that bail was excessive, that the trial court erred in denial of a release on her personal recognizance and that the trial court erred in requiring bail. While Appellant was on pretrial release, the trial court issued a no bail warrant for a new additional criminal offense. The Appellant did not appear for oral argument and the warrant for her arrest remained active at the time of the initial hearing.

The Tribe filed a Motion to Dismiss on August 19, 2013, arguing that there is no final judgment, sentence or disposition order[64], therefore the appeal isn't ripe for review, that there is no issue to be determined because the Appellant posted bail, was out on release and now has an active warrant and that Appellant failed to file a brief as required under COACR13-A(a). The Panel heard arguments on the motion.

The COA has ruled in prior cases that final orders are those written orders that dispose of substantive issues. In this case, a review of bail that was already posted does not rise to the level of disposing of substantive issues. The issue of excessive bail similarly becomes moot when the bail was actually posted. Therefore the Motion to Dismiss is granted. As we are dismissing on the ripeness issue, we will not rule on the issue of failure to file a brief.

ORDER

It is ORDERED that the Motion to Dismiss is GRANTED and this matter shall be remanded to the Trial Court for action consistent with this Order.

Robert PARISIAN Jr., Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

AP14-004, 6 CTCR 11

11 CCAR 51

[64] Colville Tribal Law & Order Code § 1-2-106(c); Court of Appeals Rule 5(a).

[Virginia Gomez, Office of Public Defender, for Appellant.
Curtis Slatina, Office of Prosecuting Attorney, for Appellee.
Trial Court case number CR-2014-37025]

Filed February 20, 2014. Decided March 5, 2014.
Before Chief Justice Anita Dupris

SUMMARY

Appellant, represented by Virginia Gomez, Office of Public Defender, filed a Notice of Appeal/ Motion for Immediate Review of a Denial of a Writ of Habeas Corpus. Appellee, Gary Zacherle, Commander of the CCT jail, entered a limited appearance through CCT's Office of Reservation Attorney (ORA), Chaitna Sinhya.

This Court, in order to give the matter a full review, first entered a Writ of Mandamus on February 21, 2014, directing the Trial Court to enter its written order on the Writ of Habeas Corpus. As we stated in our Order Regarding Interlocutory Appeal Review and Writ of Mandamus, "Typically Writs for Habeas Corpus are heard on a very short time line, and written orders should be entered promptly...." The Writ of Habeas Corpus was filed on January 27, 2014; the hearing on the Writ was heard on February 7, 2014, and when this Appeal was filed on February 14, 2014 (15 days from the time the Writ was filed), the Trial Court still hadn't issued its final order on the Writ. The Trial Court entered its Memorandum Opinion and Order from Hearing on Petition for Writ of Habeas Corpus on February 24, 2014.

Appellee filed a Motion to Dismiss Appellant's Appeal and Deny Appellant's Motion for Immediate Review. Based on our decision herein we conclude that there is sufficient basis to review Appellant's pleadings and the motion should be denied.

After reviewing the record and applicable law, the Panel finds that this matter should be remanded to allow the Trial Court to specifically address the issue of whether the bail in this matter violates Appellant's right against excessive bail. CTC §1-5-2(g). This holding is based on the reasoning below.

DISCUSSION

This case comes before us in a series of interlocutory appeals filed over the last year specifically asking this Court to address the issue of the reasonableness of bail. *See Matt v. CCT,* 11 CCAR 50 (October 23, 2013), *Vargas v. CCT,* AP13-016IA (unpublished opinion; December 2, 2013), and *Friedlander v. CCT,* AP13-017IA (unpublished opinion; December 2, 2013). Each of the foregoing cases was filed as an Interlocutory Appeal in which the respective appellants alleged unreasonable or excessive bail. Our Court held that it was not an interlocutory issue in that the statutory law of the Tribes first directs the appellants to file a Writ of Habeas Corpus on the issue of bail (CTC §2-12-211) before bringing the matter before the Court of Appeals. In both *Vargas* and *Friedlander* we acknowledged that although other jurisdictions would not use the Writ of Habeas Corpus as a mechanism to review bail, and there may be other best practices which could address the issue better, our statutory laws require it.[65]

The Trial Court's Memorandum Opinion and Order from Hearing on Petition for Writ of Habeas Corpus dated February 24, 2013 (Order), denies Appellant's request for a Writ without stating a reason why. Rather the Order states that a motion to reduce or reconsider a bail reduction is the more appropriate remedy for bail questions, then it goes on to set out procedural guidelines for filing a Writ of Habeas Corpus. As elucidating as this is, we find it non-responsive to the issue of bail.

The Trial Court, in *CCT v. Amanda Matt*, Case No. CR-2013-26017, set out standards for the Trial Court to consider when setting bail. It was a well-reasoned opinion which addressed legal concerns usually raised in bail questions, such as not using bail as a punishment for the crime charged, yet considering the interests of both the public and the individual charged. We need not go through the standards set out in the *Matt* opinion. It was well-researched and well-stated. It considered the seminal case regarding excessive bail, *i.e. Stack v. Boyle*, 341 U.S. 1 (1951), and the parameters set out in that case. We find no reason why we should not adopt these standards set out in the Trial Court's opinion in the *Matt* case.

What we do find in the Trial Court's record, however, is that the Trial Judge did not follow its own *Matt* standards, or rather, there is nothing in the record to indicate

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[65]. 2-1-211 states: "When a person is imprisoned or detained in custody on any criminal charge, for want of bail, such person is entitled to a Writ of Habeas Corpus for the purpose of giving bail, upon averring that fact in his petition, without alleging that he is illegally confined."

that the standards were followed. A review of the Arraignment and Bail Hearing on January 14, 2014 reveals that Trial Judge had adequate information before her to assess the reasonableness of bail , but when asked to state the basis for which she set such a high amount, the Judge refused to do so.[66] This makes it an incomplete record for us. Bail of $10,000 is very high. We all know that our jurisdiction, Okanogan and Ferry Counties, are two of the poorest counties in the State of Washington. Those of us who have lived here, and worked here, know that unemployment is high.

We cannot say bail can never be set this high. We do not say the Trial Judge must issue written findings every time she makes a decision on the record. What we do expect, however, is that every decision should be supported by the record, and when there is a question touching on a defendant's fundamental rights, the Judge needs to state on record the basis of her decision. This was not done, and the Writ was filed appropriately.

HOLDING

Based on the foregoing, we hold that The Writ of Habeas Corpus is the correct way to raise an issue of excessive bail. The amount of bail set of $10,000.00 raises a question of whether or not it is excessive. There is an inadequate record to show what the Trial Judge considered, as set out in the bail standards identified in the *Matt* case to support a finding of such a high bail. We shall reserve our jurisdiction over the Writ of Habeas Corpus and remand this matter to the
Trial Court for a new bail hearing, at which the Judge shall state on record the reasons for setting bail. Appellee's Motion to Dismiss is denied.

It is so Ordered.

Colville Indian Housing Authority, Appellant,
vs.
Darcy K. Edwards, Appellee.
AP14-007 IA, 6 CTCR 12

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66. The actual recording of the Judge's refusal is a bit concerting. When asked to state findings on the record, she replied in a very gruff manner, "No, I'm not going to!" We once again counsel the judges to remember we are tribal leaders, and as such need to treat all who come before with respect.

11 CCAR 54

[Edmund Clay Goodman, Hobbs & Strauss, for Appellant.
Darcy K. Edwards, Pro se.
Trial Court Case no. CV-EV-2013-36298]

Filed March 5, 2014. Decided March 11, 2014.
Before Chief Justice Anita Dupris

This matter came before the Court of Appeals pursuant to the timely filing of a Notice of Interlocutory Appeal by Appellant on March 5, 2014. Appellant is alleging the issue presented involves a controlling question of procedural law and that the decision departs from the accepted and usual court of judicial proceeding. Based on the reasoning below, the Court finds sufficient grounds to remand to the Trial Court for scheduling of an immediate hearing for Unlawful Detainer.

SUMMARY

A civil complaint was filed by Appellant on December 26, 2013, along with a Notice of Summons for Unlawful Detainer. An Order was entered on January 3, 2014, setting this matter for hearing on February 18, 2014. On February 18, 23014, an informal memo was placed in the file by a clerk with stated that another individual (not identified as a party to the action) indicated that Ms. Edwards was incarcerated and that she "somehow wants to continue the court date." Nothing else was stated. On that day, the judge entered an order continuing the hearing to March 5, 2014 for cause, stating that the respondent was in jail and it was unknown for what or for how long. Three days later, Appellant filed a "Motion to Proceed with Hearing on March 5, 2014, with Telephonic Appearance by Respondent if Necessary." The judge entered an order on February 26, 2014 denying the "Motion" and continuing the hearing for an additional 30 days. Appellant then filed this Notion of Interlocutory Appeal.

DISCUSSION

The Chief Justice has broad discretion to review interlocutory appeals and apply applicable law. After a review of the record, the Chief Justice has found that the trial judge did not act objectively in this case when she *sua sponte*[67] continued the hearing twice, without any actual input from Ms. Edwards[68].

> "A judge is to conduct hearing objectively and fairly. This includes conducting the hearing without looking like she is taking one side or the other. Even if the judge hasn't taken one side or the other, if it looks like she is, this violated procedural due process." *(Emphasis in order) Edwards v. Bercier*, 10 CCAR 18, 5 CTCR 23, 37 ILR 6009 (2009).

> It is important that the tribal judge maintain his or her objectivity at all times, and respect the roles others have in cases that come before the judge. The judge, as a tribal leader, must not appear to take sides nor appear to rule based on his or her emotions without regard to what the law is in the case." *CCT v. Boyd,* 10 CCAR 08, 5 CTCR 21, 36 ILR 6099 (2009).

> "Due process guarantees a party the right to participate, it does not mandate that the Court never have a hearing unless and until a party avails himself of the opportunity to participate." *Zavala v. Milstead,* 10 CCAR 58, 5 CTCR 38 (2011).

This case was scheduled for an unlawful detainer hearing. On the day of the hearing, the court apparently received a message from someone that the respondent was incarcerated. There is nothing in the record indicating that the respondent herself

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[67] There seems to be a recurring problem with trial court judges acting *sua sponte* and not seeking input from both parties before making substantive decisions. We are putting the Trial Court on notice that this problem needs to be addressed.

[68] CTLOC § 1-2-10, Timely Filing of Motions. A written motion, including those which may be heard ex parte, shall be filed and served on opposing party no later than five (5) days prior to the time specified for the hearing, unless a different period is fixed by these rules, by order of the Court or for good cause shown. Motions shall be supported by affidavit, which shall be served with the motion...

requested the continuance. It is unclear how the person advising the court of the incarceration was related to the respondent or if that person had any authority to make any requests on behalf of the respondent. In fact, the message just stated that "somehow wants to continue the court case." Based on this sparse information, the judge *sua sponte* decided to continue the hearing. A new hearing was set by the judge, apparently without input by the petitioner. The Petitioner apparently did not object to the continuance order after the fact, but wanting to make sure that the newly set hearing would go as scheduled and not waste resources, moved the court to allow the hearing to proceed, even if the respondent had to appear by telephone. No continuation of this hearing was requested, just confirmation that the hearing would proceed as scheduled. The judge denied the motion and entered another *sua sponte* order for an additional 30 days.

The Chief Justice has reviewed the filing pursuant to COACR 12-A. There was no formal continuance requested in this matter by Ms. Edwards[69]. While it is unfortunate that she was allegedly incarcerated at the time of the hearing, she still has an obligation to defend her position. The initial continuance was apparently made without any input by CIHA. CIHA was denied the opportunity to object to the continuance. Then when CIHA attempted to assure that the next hearing would be held, even if that presence was by telephone[70], the judge decided on her own to continue the hearing yet again. There was no written motion to continue by either party. The judge stated that she would not be in court on the new day and that the hearing would need to be continued anyway. I disagree. There are several judges appointed to the Bench who could have heard the matter on the new day. This was a new filing and not prior decisions had been made by the judge which would require that she continue as the only judge to hear this matter.

CTLOC § 9-3-23, Hearing, states that the Tribal Court shall set an unlawful detainer action for hearing expeditiously, no later than thirty (30) days following the

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[69] There was no followup written motion. It also appears that there was no independent verification that the respondent was incarcerated.

[70] While not a common practice, appearances by telephone are allowed in most cases when properly requested and good cause for the appearance has been established.

date that the defendant must respond to the suit. In this matter, that would have been thirty days after January 16, 2014, i.e. February 15, 2014. The original date of February 18, 2014, did not meet that requirement, but due to court congestion, might be allowed. Ordering a continuance of that date would only be allowed if there was good shown. A possible incarceration by the respondent does not meet that standard, especially when there has been no formal request for continuance., A continuance for an additional thirty days for the judge to be present in court definitely does not meet that good cause standard in this case.

In almost every case there are two sides who need to be heard equally. The petitioner feels that a wrong has been committed against him. He file a complaint in tribal court. The respondent may or may not file an answer within the time limit set by statute. A hearing is set to listen to both sides of the dispute. Time limits for these matters are set by the governing body of the Tribe to ensure that these disputes are heard and settled in a manner that is fair to both sides,. Tribal custom dictates that the judge appear unbiased.

> "In our court system the cultural approach has been eroded and largely replaced by the non-Indian court system. Because of this, it is the tribal judge's heightened responsibility to maintain the cultural milieu of the proceedings before it. The judge is a tribal leader, who must make day-to-day decision for the good of the whole community, while at the same time maintaining the integrity of the case for those individuals before him." *Sonnenberg v. Colville Tribal Court*, 5 CCAR 09, 3 CTCR 09, 26 ILR 6073 (1999).

> "While this Court is cognizant of emergency circumstances, the issues as cited in the Motion do not rise to the level which would overcome the burden to protect the Appellant's speedy trial rights,. Any one of the errors committed alone might have been harmless error, their cumulative effe3ct was of a denial of Appellant's right to due process. We find that the Trial Court erred in granting the Motion to Continue without concurrence by the defendant and by not holding a motion hearing. *Yallup v CCT*, 11 CCAR 01, 6 CTCR 01 (2011).

In the instant case, the judge appeared to disregard the petitioner's expectation of relief when the judge continued the matter without proper reason to do so. The petitioner followed the law and expected a hearing to be held. That hearing was continued without any input from petitioner and without the proper framework being done by the respondent. The first continuance could be allowed if an emergency was properly documented, but the second continuance did not have a sound basis for being entered. The appellant's due process rights were violated when the hearing was initially set beyond the thirty (30) day limit and then compounded by the two continuances.

CONCLUSION

Interlocutory cases are still the exception and not the rule; we must consider them on a case-by-case basis. In this particular case, because of the obvious procedural errors, in order to ensure due process to all litigants, I find there were sufficient errors to review the issues raised. Based on by discretion as the Chief Justice, this case is remanded and the Trial Court is directed to set a hearing expeditiously (which is not April 14) within ten (10) days of this Order.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Daniel CONANT and Cameron TREVINO, Appellees.

AP13-004/005, 6 CTCR 13

11 CCAR 59

[Appellant appeared through spokesperson Melissa Simonsen, Office of Prosecuting Attorney.
Appellees appeared through spokesperson Jonie Bray, Office of Public Defender.
Trial Court Case Nos. CR-2012-35010 and 35308]

Argued March 21, 2014. Decided April 24, 2014.

Before Justice Dennis L. Nelson, Justice Dave Bonga and Justice Mike Taylor

Nelson, J

Daniel Conant, Jr. (Conant) and Cameron Trevino (Trevino) were each separately charged with violating CTC 3-1-123, Disobedience of a Lawful Court Order. The cases were combined at the Initial Hearing as both had similar issues. Conant was alleged to have violated a pre-trial release condition ordered by a Washington State Superior Court. Trevino was alleged to have violated a condition of probation ordered by a United States District Court. The Tribal Court in each case dismissed the complaints against Conant and Trevino on the grounds that CTC 3-1-123 does not apply to orders issued by foreign courts. We affirm.

ISSUE

Whether the Tribal Court erred as a matter of law in dismissing the complaints against the appellees on the grounds that CTC 3-1-123 does not apply to orders issued by foreign courts.

STANDARD OF REVIEW

The issue before the court is solely one of law. Alleged errors of law are reviewed *de novo*. *Colville Confederated Tribes v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 IlR 6059 (1995).
Wiley, et al v. Colville Confederated Tribes, 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (1995); *Palmer v. Millard*, et al, 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996)

FACTS

Conant was alleged to have violated an order releasing him from custody on the condition that he not drive an automobile other than to and from his place of work. The order was issued by the Okanogan Superior Court, Case No. 11-1-00085-9. He admitted to tribal police officers that he drove an automobile within the exterior boundaries of the Colville Indian Reservation in violation of the order of the Superior Court.

Trevino was arrested within the exterior boundaries of the Colville Indian Reservation for Driving While License Suspended (DWLS), a violation of CTC 3-3-5. At the time of his arrest, Trevino was on probation for his conviction in United States

Federal Court for being a Felon in Possession of a Firearm, 18 U.S.C. 922(g)(1). Case No. 2011CR00005-001. A condition of his probation was that he not violate federal, state, or local law, which in this case, was Driving While License Suspended. Accordingly, the Tribes charged him with violating CTC 3-1-123, for disobeying the federal court order.

DISCUSSION

The issue before us is whether CTC 3-1-123 is applicable to orders, subpoenas, or warrants issued by a foreign court. CTC 3-1-123 states:

> "Disobedience of a Lawful Order of the Court. Any person who willfully violates a lawful order, subpoena, or warrant issue by the Tribal Court, or any officer thereof shall be guilty of Disobedience to a Lawful Court Order. Disobedience of a Lawful Court Order is a Class B offense."

The Tribes contend the statute is not clear on its face and, for this reason, we must look "to the Tribal Code as a whole". Appellant Conant brief, Pg. 3. In essence, the Tribes argue that CTC 3-1-123 should be interpreted as a tool to protect tribal sovereignty and the general welfare of the reservation community.

The Tribes further argue that CTC 3-1-231 supports their contention that CTC 3-2-123 is applicable to foreign orders. CTC 3-1-231 Violation of Federal or State Law states:

> Violation of Federal or State Law. Any person who shall commit any act which would be violative of federal criminal law or Washington criminal law, unless authorized by tribal law, shall be guilty of Violation of Federal or State law under this Section. Violation of Federal or State Law is a Class A offense. "[71]

[71] The court is presently reviewing this statute for its constitutionality. See CCT v. Vincent, AP14-002.

The Tribes' final argument is that because CTC 3-1-123 is unclear on its face and ambiguous we should apply the last antecedent rule. The last antecedent rule is a doctrine of statutory interpretation whereby "(r)eferential and qualifying phrases, where no contrary intention appears, refer solely to the last antecedent." A Manual of Style for Contract Drafting, Kenneth A. Adams. The Tribes contend the last antecedent rule mandates that the trial court recognize orders and subpoenas of foreign courts, but not their warrants.[72]

Before further considering the arguments of the appellant, we first look to the Tribal Code for guidance in interpreting its statutes. CTC § 1-1-7(b) directs that we look at the statute's language and give words their plain meaning. We proceed "to extrinsic interpretive aids only when the statute contains unclear or ambiguous language. *Green v. Green,* 5 CTCR 29, 10 CCAR 37 (2011). We find that the statute in question, CTC 1-2-123, is clear on its face and is not ambiguous.

Accordingly, there is no need to further consider the arguments set forth by the appellant alleging the statute is ambiguous.

The decisions of the trial courts are AFFIRMED.

In Re S. L., A Minor Child,
Coeur d'Alene Tribe, Appellant,
vs.
S. L., R. L., Colville Confederated Tribes, Appellees.
AP13-019, 6 CTCR 14
11 CCAR 62

[Eric Van Orden, Legal Counsel, appeared for Appellant.
Curtis Slatina, Office of Prosecuting Attorney, appeared for Appellee-Colville Tribes; Lane Throssell, Legal Services, appeared for Appellee-father; Jay Manon, Attorney, appeared for Appellee-mother; Jonnie Bray, Office of Public Defender, appeared for Appellee-Minor Child.
Juvenile Court No. MI-2013-33007]

Oral argument held June 20, 2014. Decided July 23, 2014.

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[72] "We do not decide whether such a doctrine applies to the interpretation of tribal legislation. Careful drafting can, however, avoid having the issue arise."

Before Chief Justice Anita Dupris, Justice Mark W. Pouley, and Justice Michael Taylor

Pouley, J.

FACTS

The following facts are undisputed. S.L., a minor child, is an enrolled member of the Coeur d'Alene Tribe (the "CDA Tribe" or "CDA"). The child's mother is an enrolled member of the CDA Tribe. The child lived with her mother on the CDA Reservation since birth. The mother has lived on the CDA Reservation her entire life. The child's mother and father were not married. The father is an enrolled member of the Colville Confederated Tribes, but he also resided with the mother on the CDA Reservation before and after the child's birth. The father may have last lived on the Colville Reservation as a teenager.

On March 31, 2013, the mother asked the father to come and get the child. There is some dispute as to the nature of this request. The father and the Colville Tribe characterize the mother's action as "abandonment," but the mother denies this. The father was on the Colville Reservation at the time and his cousin took him to the CDA Reservation to pick up the child from the mother. After getting the child, the father went to relatives' homes on the CDA Reservation to get supplies for the baby and then to the home of a relative on the Colville Reservation. The mother denies giving permission to or expecting the father to take the child to the Colville Reservation. At no time prior to March 31, 2013 had the father taken the child to the Colville Reservation.

At her home on the Colville Reservation, the father's aunt noticed the child had a severe diaper rash, but did not seek immediate medical attention, and the father left with the child to a neighbor's home. The neighbor alerted authorities about the diaper rash and on April 2, 2013 Colville Family Services took the child into protective custody and placed the child with the father's aunt.

The Colville Tribal Court conducted a temporary custody hearing on April 8, 2013. The Court found reasonable cause to believe that S.L. was in immediate danger from her parents, there was need for temporary shelter, and Colville Tribal Children and Family Services were

named temporary custodians. The child was placed with an aunt on the Colville Reservation pending further proceedings. On April 18, 2013 the Chief Judge of the Colville Tribal Court granted the CDA Tribe's motion to transfer the case to the CDA Tribal Court. The CDA Tribal Court accepted jurisdiction that same day. On April 19, 2013 a youth-in-need-of-care petition was filed in the CDA Tribal Court.

It appears that the Colville order transferring the case to CDA may have been entered without notice to the other parties involved in the matter and the Colville Tribes subsequently moved for reconsideration. The Colville Court stayed the transfer order on April 23, 2013, indicating the matter would be heard on an unspecified future date. On April 29, 2013 the CDA Tribal Court entered an Order requesting that the Colville Court give full faith and credit to the CDA Tribal Court orders finding that the child was a youth-in-need-of-care.

On May 31, 2013 the Colville Tribal Court "set aside" the order "that gave Coeur Dalene (sic) Tribal Court exclusive jurisdiction" (presumably referring to the April 18 order transferring the case to the CDA Tribal Court). The order further found "Both Tribal Courts have concurrent jurisdiction in this matter." The Court did not include any legal conclusions to support the order, but did find the mother is an enrolled CDA member, the child is an enrolled CDA member, the father is an enrolled Colville member, and that the Uniform Child Custody Jurisdiction Act applies [now UCCJEA and in Washington the uniform act is codified at R.C.W. 26.27]. There were no findings as to the domicile or residence of the child or the parents.

Prior to the adjudicatory hearing in the matter, the CDA Tribe renewed its request to transfer the case to the CDA Tribal Court. In the July 29, 2013 order following the adjudicatory hearing, the Colville Trial Court reserved "its decision on transferring this case to the Coeur d'Alene Tribe until at least the dispositional hearing." The July 29 order found that the father had no residence of his own, and that the neglect to the child occurred on the CDA Reservation. Following a dispositional hearing on September 24, 2013, the Colville Court entered an order finding that the child and mother were domiciled on the CDA Reservation, they were both CDA tribal members and that the child "resided on the Colville Reservation" at the time the proceedings began. The Court again found the UCCJEA applied, and that the Colville Tribal Court was the most convenient forum. The Colville Trial Court concluded that the CDA and the Colville Tribal Courts had concurrent jurisdiction over the child and therefore denied the CDA Tribe's motion to transfer the case. The Coeur d'Alene Tribe and the mother appeal the

decision of the Trial Court finding concurrent jurisdiction and refusing to transfer the matter to the CDA Tribal Court.

DISCUSSION

The question before this Court is whether the Coeur d'Alene Tribal Court holds exclusive jurisdiction to hear the matter, in which case the matter must be transferred, or whether, as the Colville Trial Court found, jurisdiction is concurrent with both tribes and if so, whether the matter should be heard in the Colville Tribal Court. Because we find the Indian Child Welfare Act is controlling, we REVERSE the decision of the Colville Trial Court and REMAND with directions to transfer the case to the Coeur d'Alene Tribal Court.

Title 5-2 of the Colville Tribal Code initially establishes the scope of the Colville Tribal Court's jurisdiction to consider minor-in-need-of-care petitions. The "Original Jurisdiction" section 5-2-140 states in part:

> The Colville Tribal Juvenile Court has exclusive, original jurisdiction of the following proceedings:
>
> > (a) Proceedings in which an Indian minor who resides or is domiciled within the Colville Indian Reservation is alleged to be a minor-in-need-of-care;

Section 5-2-141 grants the Colville Tribal Court concurrent jurisdiction over "all other proceedings" under this Chapter not covered in section 5-2-140. While the Trial Court's order is unclear as to the legal basis of the holding that the Colville and CDA Tribes share concurrent jurisdiction, it appears to follow from 5-2-141. Perhaps this conclusion was based on the Court's unstated, bur erroneous conclusion that when a child resides in one location and is domiciled in another, concurrent jurisdiction is proper.

While it is generally true that the Indian Child Welfare Act, 25 U.S.C. § 1901 et. seq. applies only to child custody proceedings involving Indian children initiated in State courts, Colville Tribal Code 5-2-148 incorporates the act as follows:

> It is intended that the provisions of this Chapter be consistent with and carry out the purposes of the Indian Child Welfare Act, 25 U.S.C. §§ 1901, et seq. All applicable provisions of that Act shall be deemed to be incorporated by reference in this Chapter

> and in the event of conflict between provisions of that Act and this Chapter, provisions of that Act shall apply.

In *In Re J.* 1 CCAR 62 (09/22/1992) this Court found, in reference to what is now 5-2-148, "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."[73]

The Colville Tribal Code and the Indian Child Welfare Act both address exclusive tribal court jurisdiction to hear child custody proceedings involving Indians. Like CTC 5-2-140(a), § 1911(a) of the ICWA reads:

> (a) Exclusive jurisdiction. An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian Child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

The fact that both the Colville code and ICWA grant tribes exclusive jurisdiction raises the question: if the domicile of the child is the CDA Reservation, but the child was physically located on the Colville Reservation when the proceeding was commenced, does either tribe hold exclusive jurisdiction to hear the matter?

Arguably *§ 1911(a)* gives tribes exclusive jurisdiction as to any state proceeding, but does not address jurisdictional conflicts between two tribes. To reconcile the provisions of CTC 5-2-140, CTC 5-2-148 and § 1911(a) of the ICWA, the ICWA section must be read in context. Section 1911(a) grants exclusive jurisdiction to Indian tribes to hear cases concerning children domiciled "within the reservation of such tribe." The section's first reference to "An Indian tribe" is not to just *any* Indian tribe, but the tribe to which the child is domiciled. While *In Re J*

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[73] In the case *In Re Welfare of A.S.*, 3 CCAR 68 (01/17/1997) this Court again recognized the incorporation of the ICWA, but rejected application of § 1912 (d) of the Act. That section of the ICWA specifically refers to proceedings to terminate parental rights under "state law." The Court refused to substitute in the term "tribal law" without clear direction from the Colville Business Council. This Court agrees that those provisions of the ICWA that specifically create duties and obligations as they relate to "state courts" and proceedings under "state law" are not "... applicable provisions of that Act" as referenced in 5-2-148.

held that the ICWA applies in Colville Tribal Court, the court found that the tribal code and ICWA were not in conflict under the facts of that case. In *In Re J* the mother and child were enrolled CDA members, but at all relevant times they were residents of the Colville Reservation. At the beginning of the *In Re J* proceeding the CDA Tribe consented to the Colville Court's jurisdiction and only raised an objection after CDA disagreed with a placement decision made by the Colville Court over a year after the case was commenced. These are not facts before the court in the instant case.

The Supreme Court decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (herein *Holyfield)* is instructive given the conflict between a child's domicile and her physical location. "'Domicile' is not necessarily synonymous with 'residence,'....and one can reside in one place but be domiciled in another." *Holyfield* at 48 (citations omitted). The child of an unwed mother takes the domicile of the mother. *Holyfield* at 48. In *Holyfield*, the mother's domicile was the Mississippi Band of Choctaw reservation. Even though the children were physically located outside the boundaries of the reservation when the proceeding commenced, the Court found the Mississippi Band of Choctaw had exclusive jurisdiction to hear custody proceedings for the subject children pursuant to § 1911(a) of the ICWA.

Significantly, the Supreme Court reached this decision even though the parents of the children actively attempted to avoid tribal jurisdiction. The mother moved and resided off reservation for the purposes of giving birth outside the boundaries of the reservation. The Supreme Court held that "Tribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves." *Holyfield* at 49. In *Holyfield* the court rejected the argument that the mother's intentional act of giving birth off reservation divested the Mississippi Band of Choctaw exclusive jurisdiction under § 1911(a). A similar result is required here.

In the instant matter the parents of the child were never married. It is undisputed that the CDA Reservation has always been the mother's residence and domicile. It is also undisputed, and the facts overwhelmingly support, that the child is domiciled on the CDA Reservation. Although the Court used the term "resided on the Colville Reservation" in reference to the child's location at the time the action was commenced, the Court also found the father had no permanent residence of his own at that time. It is immaterial, however, whether

the child's "legal residence" was the Colville Reservation when the action commenced. Following the reasoning of *Holyfield* we hold that given a conflict between the domicile and physical location of the child when the action is commenced, the domicile must prevail in establishing proper jurisdiction. We conclude that because the domicile of the mother and child is the CDA Reservation and that the child is a member of the CDA tribe, pursuant to § 1911(a) the CDA Tribal Court has exclusive jurisdiction to hear any custody matter regarding S.L.

At oral argument the question was raised if § 1911(b) of the ICWA impacted the results of this case, including whether the father could object to the transfer of the case from the Colville Tribal Court to the CDA Tribal Court. This provision is not applicable. Section 1911(b) addresses custody proceedings for Indian children not "domiciled or residing within the reservation of the Indian child's tribe... ." In this case, the child is a member of the CDA Tribe and is domiciled within the CDA Reservation. Therefore, § 1911(a) applies to the exclusion of § 1911(b). As our above analysis indicates, this gives the CDA Tribe exclusive jurisdiction and neither parent may voluntarily defeat the CDA Tribe's interest in hearing the matter.

The Court is cognizant that our decision to transfer the case to another jurisdiction after so much time may well disrupt the child and any progress that has been achieved to reunite the child with her parents. This highlights the importance of addressing this issue early in the proceedings, examining all of the factors necessary to render a proper decision and creating a sufficient record for adequate review of that decision. It is unclear from the record how this issue was presented to and decided by the Trial Court. The initial order transferring the matter to CDA was correct as to the outsome, but may not have been entered with proper attention to the presentation of facts and in consideration of the rights of all the parties. The subsequent decision setting aside the order of transfer and finding concurrent jurisdiction lacks sufficient findings and conclusions to determine how the decision was rendered. Deferring the final decision regarding the transfer until after the disposition hearing unnecessarily delayed transferring the matter to the proper forum. Had the court conducted a timely and comprehensive fact-finding regarding all relevant factors to support a decision on the motion to transfer, leading to a final order on the motion, the issue of tranfer could have been resolved early in the proceedings and all subsequent efforts to address the health and safety of the child would be undisturbed by this issue.

CONCLUSION

Based on the foregoing, the Trial Court's order of September 24, 2013 is Reversed and this matter is Remanded to the Trial Court for an order of dismissal transferring the case to the CDA Tribal Court.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Monte MARCHAND, Appellee.

Case No. AP13-018, 6 CTCR 15

11 CCAR 69

[Curtis Slatina, Office of Prosecuting Attorney, appeared for Appellant.
David Stevens, Office of Public Defender, appeared for Appellee.
Trial Court Case No. CR-2013-36097]

Decided August 7, 2014.

Before Chief Justice Anita Dupris, Justice R. John Sloan Jr., and Justice Michael Taylor

The Panel has reviewed the record and the briefs filed in this case and unanimously finds the Appeal suitable for decision without oral argument. The Appellant is represented by Jacquelyn F. Finley, Office of Prosecuting Attorney; the Appellee is represented by David Stevens, Office of Public Defender.

Taylor, J

SUMMARY

The Appeal before the Court involves a matter of first impression in this jurisdiction. In criminal prosecutions the Tribes is obligated to turn over to the

defendant all evidence to be used at trial, especially evidence which may be exculpatory of any offense charged. When, however, potentially exculpatory evidence becomes unavailable, courts are faced with circumstances which require a reasoned analysis of a number of factors to determine how a prosecution should be structured so that a defendant is not prejudiced by the unavailability of the evidence. Such an analysis may require dismissal of the prosecution, a protective instruction to the jury, or some other remedy; but an analysis of the facts and law bearing on the unavailable evidence must occur.

Here, the trial court, noting that evidence requested by the defendant would not be available, did not provide the parties with any opportunity to present facts or law regarding evidence or the circumstances of the unavailability of evidence. Instead the trial court acted, without ruling on the law or making findings of fact, to dismiss the prosecution without prejudice. A Motion to Reconsider the dismissal filed by the Tribes was similarly denied without reference to facts or law bearing on the prosecution or the unavailable evidence.

We find that the dismissal of the prosecution failed to provide procedural due process of law and reverse.

FACTS

The Appellee, Monte Marchand, was arrested on April 6, 2013, after a traffic stop for speeding. Appellee was eventually charged with several offenses including driving under the influence of an intoxicant, intimidation of a public officer, and damage to public property. The events which occurred during the traffic stop were in some part recorded by a digital camera affixed to the dashboard of the police vehicle used to apprehend Appellee.

In the Omnibus Hearing of April 29, 2013, Appellee demanded production of the "dashcam" recording and the Trial Court directed that it be produced in the Order entered that day. At a Pretrial hearing held a week later, the recording had not been

produced. When the Pretrial hearing was reconvened on August 5, 2013, the recording had still not been made available to Appellee.

The Tribes gave the Trial Court two explanations for its inability to produce the recording. First, the Tribes stated that the digital recording had been transferred from the dashcam to the police records custodian's computer and filed in an unknown location and could not be located. Upon hearing this statement the Appellee made an oral motion for dismissal of the charges. The Trial Court orally granted the motion to dismiss without prejudice. A written Order of Dismissal was entered on August 7, 2013, and a Memorandum Opinion supporting the dismissal without prejudice was entered on August 9, 2013. *CCT v. Marchand*, 4 CTrR 5 (2013)

The second explanation of the unavailability of the recording was made in a Motion for Reconsideration of the Dismissal filed by the Tribes. The Motion was supported by memoranda from police officials regarding the recording. The recording was destroyed, said the Tribes, when the recording was transferred to the police records custodian's computer and a malfunction in that computer caused the destruction of the record. Efforts on the part of the police department and tribal computer service staff had not been successful in recovering the record.

The Reconsideration Motion was denied by the trial court on two grounds. First, the Court held that the second explanation (computer malfunction) could have been discovered prior to the hearing at which the charges were dismissed. Second, because the dismissal was made without prejudice and was therefore not a decision on the merits. Memorandum Opinion, September 10, 2013.

The Appeal by the Tribes was timely filed October 1, 2013, noting irregularity in the proceedings of the Court and a decision contrary to law and the evidence.

ISSUE

Did the Trial Court err when it dismissed the criminal complaint without prejudice on the unnoted, oral motion of Appellee, without findings regarding the circumstances of an

unavailability of potentially exculpatory evidence or an examination of the applicable law regarding treatment of such unavailable evidence.

STANDARD OF REVIEW

The Appeal is based on abuse of discretion and error of applicable law. Mixed questions of abuse of discretion or fact (i.e., the specific causes of unavailability of potentially exculpatory evidence and other available evidence) and law (i.e., the standards and remedies to be applied to a circumstance of unavailability of potentially exculpatory evidence in a criminal prosecution) are reviewed de novo by this Court. *Colville Confederated Tribes v. Stensgar and Signor*, 11 CCAR 47, 6 CTCR 09 (2013).

DISCUSSION

The Trial Court dismissed the criminal complaint on Appellee's oral motion after a brief oral argument by the parties. This dismissal was entered both in violation of several provisions of the Colville Tribal Code requiring notice of pretrial motions and time requirements for responding (CTC 1-2-9(a); CTC 1-2-10) and the procedural due process right of the Appellant, and all parties, to present evidence and legal argument regarding the manner of review in which a court is obligated to engage, and remedies available, when it appears that potentially exculpatory evidence is unavailable to the court, the jury, and counsel.

With regard to the law that should be applied in the circumstance of the unavailability of potentially exculpatory evidence, the resolution of this question will be a matter of first impression in this jurisdiction. There are, however, well considered rulings available to the parties and the Court, especially the interpretations of the decision of the U.S. Ninth Circuit Court of Appeals in *United States v. Loud Hawk*, 268 F.2d 1139 (9th Cir. 1979). (*See United States v. Sivilla*, 714 F.3d 1168 (9th Cir., 2013) and *United States v. Flyer*, 633 F.3d 911 (9th Cir., 2011) corruption of evidence stored in computers).

CONCLUSION

The dismissal of this criminal complaint without a complete hearing and a decision regarding the circumstances of the loss of the evidence and the law to be applied to the circumstance of unavailable evidence deprived the Appellant, and all parties, of their right to proceed in the orderly manner that the commitment of the Colville Tribes to due process requires. CTC 56.02(h); *Edwards v Bercier*, 10 CCAR 18, 5 CTCR 23 (2009). We reverse the Trial Court and remand for further proceedings consistent with this opinion.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Jeremy SIMPSON, Appellee.

Case No. AP13-013, 6 CTCR 16

11 CCAR 73

[Sabrina Fenton & Curtis Slatina, Office of Prosecuting Attorney, appeared for Appellant.
David Stevens, Office of Public Defender, appeared for Appellee.
Trial Court Case No. CR-2012-35268]

Oral Argument heard June 20, 2014. Decided August 5, 2014
Before Chief Justice Anita Dupris, Justice R. John Sloan Jr., & Justice Michael Taylor

This matter having come before the Court for Oral Argument on June 20, 2014. Appellant appeared through counsel Sabrina Fenton, Office of Prosecuting Attorney. Appellee appeared through counsel David Stevens, Office of Public Defender.

Sloan, J.

SUMMARY

Appellee was charged in Tribal Court on October 15, 2012, with Battery-Domestic Violence. On February 14, 2013, the Trial Court entered an Agreed Order Staying case for Peacemaking. On May 17, 2013, a status hearing was held at which time the prosecutor asked the matter be dismissed without prejudice as the Appellee had successfully completed Peacemaking. The Public Defender wanted the case closed as did four members of the Peacemakers Circle who were present at the hearing. The Trial Judge said she would leave the matter open for two week unless counsel agreed to a joint motion prior to the deadline. On May 23, 2013, the parties filed an agreed motion to dismiss without prejudice. On May 30, 2013, the Trial Court issued a Memorandum Opinion and Order dismissing the matter with prejudice.

ISSUE

Did the Trial Court abuse its discretion by dismissing the matter with prejudice?

STANDARD OF REVIEW

The issue before this court is a question of law which we review *de novo*. *Naff v. CCT*, 2 CCCAR 50, 2 CTCR 08, 22 ILR 6032 (1995).

DISCUSSION

This Court has dealt with this issue before. In *CCT v. Swan*, 7 CCAR 38 (2003), the court stated "a dismissal with prejudice should be entered only when the merits of the case have been heard by the court." In *Campbell v. CCT*, 8 CCAR 28, 4 CTCR 22, 32 ILR 6140 (2005), we recognized that the Trial Court relied on *Swan* without looking at our other cases regarding dismissals. We referred to *CCT v. Jack*, 7 CCAR 33, 4 CTCR 11, 31 ILR 3023 (2005) and *Stensgar v. CCT,* 2 CCAR 20, 1 CTCR 76, 20 ILR 6151 (1993), regarding some factors to consider, such as: length of delay, cause of delay, whether the defendant timely asserted his rights, potential prejudice to the defendant, whether jeopardy has attached, and if a party has acted in bad faith. A concern in *Swan* was that the trial judge did not set out his reasoning for dismissal with prejudice. In *Campbell*, *supra*, we adopted as guidelines for future analysis of dismissal with or without prejudice the standard in *U.S. v. Taylor*, 487 U.S. 326 (1988), that is the court should consider all relevant public and private interest factors and balance the factors reasonably. *Campbell* at 30.

Here the trial judge made a clear balancing of private and public interests and found both favored dismissal with prejudice. Further, there existed a stated purpose of traditional cultural disposition as expressed by the peacemakers. Such a consideration is culturally appropriate and relevant. CTC 5-5-57.

CONCLUSION

There was no abuse of discretion by the trial judge, and the dismissal with prejudice, as a matter of law, was appropriate. Since both parties were heard at the May 17th hearing, the matter of a further hearing is moot. The Trial Court Order dismissing with prejudice is Affirmed. This matter is remanded to the trial court for action consistent with this Order.

Georgiann MUERI, Appellant,

vs.

Gerold CARDEN, Appellee.

Case No. AP14-016, 6 CTCR 17

11 CCAR 75

[Jay Manon, Spokesperson for Appellant.
Appellee appeared pro se.
Trial Court No. CV-FJ-2014-37070]

Hearing held September 19, 2014. Decided October 8, 2014.
Before: Justices Dupris, CJ, M. Pouley, AJ, and D. Nelson, AJ

This matter came before the Court of Appeals for an Initial Hearing on September 19, 2014. Appellee, Georgia Mueri, appeared in person and with her spokesman, Jay Manon. Appellant, Gerold Carden, appeared in person and was not represented by counsel. Based on the reasoning set out below the Court finds that the Trial Court's order dated July 25, 2014 should be vacated and the matter remanded for a hearing on the issues herein.

DISCUSSION

The relevant facts show that Appellant has a judgment against Appellee from an Okanogan County Superior Court order (State Order). The State Order was recognized as a Tribal Court order after a Show Cause hearing on March 31, 2014, at which both parties attended. On April 8, 2014 Appellant filed an Application for Writ of Garnishment against Appellee's wages from his job with the Colville Tribes' Correctional Facilities. The request for the Writ of Garnishment was granted without a hearing on April 29, 2014. The Clerk's Office mailed a copy of the Writ Application and Order granting the Writ to Appellee on May 1, 2014.

On May 19, 2014 Appellee filed a request with the Trial Court for a hearing on the Writ of Garnishment and asked for an exemption from the garnishment. The record shows that someone from the Tribes' Payroll Department twice filled out paperwork submitted to her to

initiate the withholding of an amount from Appellee's wages based on the Writ entered on April 29, 2014.

The Trial Court Judge, it appears, requested legal advice from the Office of Reservation Attorney (ORA); one of the Reservation Attorneys, responded by memorandum on what he believed the law should be on garnishments for the Tribes. The Trial Judge read the memorandum into the record and adopted the substance of its language in her Memorandum Opinion and Order of Dismissal dated July 25, 2014 (Tribal Order). Neither party was asked to put on record his or her arguments for or against the garnishment. The Judge entered the order *sua sponte*. It is from this Order that Appellant has filed her appeal.

This case is being sent back to the Trial Court for two reasons: (1) no due process was provided to either party before the Tribal Order of July 25, 2014 was entered; and (2) the Trial Judge solicited legal advice from a potential party.

I. DUE PROCESS

We have stated several times, in several cases, that due process requires, at a minimum, the right to adequate notice, an opportunity to be heard, and an opportunity to present one's case before the Court rules on an issue before it. *Eg., Lambert v. CCT,* 10 CCAR 52 (2011) (failure to give adequate notice); *Lezard v. Deconto*, 10 CCAR 23 (2009) (basic tenets of procedural due process); *Zavala v. Milstead*, 10 CCAR 58 (2011) (Appellant afforded procedural due process); *Edwards v. Bercier*, 10 CCAR 18 (2009) (even an appearance of bias towards one party over another violates tenets of procedural due process); *Colville Indian Housing Authority v. Edwards*, 11 CCAR 54 (2014) (interlocutory appeal granted when Judge entered decision without allowing the parties an opportunity to present their arguments, and without providing a hearing); *Goujon v. CTEC*, 9 CCAR 57 (2008). Some of these cited cases were heard by the Trial Judge appealed in this case.

The benchmarks for procedural due process are well-established in our jurisprudence. Providing the minimum, basic requirements of procedural due process, *i.e.* adequate, meaningful notice, opportunity to be heard, and opportunity to present one's case before a decision is made, should be second nature to all trial judges by now. To paraphrase what we stated in *Edwards v. Bercier, supra*, when the Trial Judge fails to allow both parties to present their cases before making his decision, it gives an appearance of bias and unfairness.

The Judge in this case, when presented with a Motion to Continue the hearing set on May 19, 2014, went into the next hearing with her decision to dismiss the case already made. At the Oral Arguments in this Court on September 19, 2014, both parties stated that neither were given notice that the Judge was considering dismissing the case. Appellee did not disagree with the decision, but stated he had asked for a hearing on the Writ of Garnishment entered on April 29, 2014. Neither party were given an opportunity to argue his or her position on the issue of whether the garnishment should continue, nor were either given an opportunity to present evidence on his or her own behalf. Procedural due process was non-existent in this case. For this reason we vacate the Tribal Order and remand the case back to the Trial Court.

II. POTENTIAL PARTY

The record shows that an attorney from the Tribes' Office of Reservation Attorney (ORA) provided legal advice to the Trial Judge on the issue of garnishment of the wages Appellee earns as an employee of a tribal department, *i.e.* the tribal Corrections Facility. The attorneys of the ORA are the chief legal counsel and attorneys general for the Tribal Government, with the Colville Business Council as the Tribal Government's representative. CTC, Section 1-4-1. The ORA report directly to, and are directly supervised by the Colville Business Council (CBC), who are the ORA's principal client. CTC, Section 1-4-3.

The Corrections Facility is a department of the Tribal Government. The Writ of Garnishment was issued against the Corrections Facilities as the employer of Appellee, and as garnishee. If the ORA disagrees with the garnishment it has a statutory obligation to represent the interests of the CBC (Tribal Government). This makes the ORA the legal representative of a potential party to this lawsuit, *i.e.* the entity that has ownership of the wages at the time the wages are garnished. The Trial Court should not solicit legal input from a potential party. For this reason the Tribal Order should be vacated.

For the reasons stated the Memorandum Opinion and Order dated July 25, 2014 is hereby VACATED and this matter is REMANDED to the Trial Court for actions consistent with this Opinion.

Harry WILLIAMS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP14-017, 6 CTCR 18

11 CCAR 78

[David Stevens, Office of Public Defender, appeared for Appellant.
Curtis Slatina, Office of Prosecuting Attorney, appeared for Appellee.
Trial Court Case No. CR-2014-37094]

Hearing September 19, 2014. Decision October 22, 2014
Before Chief Justice Anita Dupris, Justice Mark Pouley and Justice Michael Taylor

Dupris, CJ

This matter came before the Court for an Initial Hearing on September 19, 2014. Appellant appeared through counsel, David Stevens, CCT Office of the Public Defender; Appellee appeared through counsel, Curtis Slatina, CCT Office of the Prosecuting Attorney. The issue presented was whether the Trial Court erred in not granting Appellant/Defendant credit for ninety-eight (98) days of incarceration he served prior to sentencing. Both parties, at sentencing requested that the Trial Judge grant Appellant/Defendant such credit, and so stated at initial hearing in this Court. Credit was denied in the Trial Court's Judgment and Sentence dated August 5, 2014.

Appellant was arraigned on May 1, 2014 on three charges, Vehicular Homicide and two counts of Vehicular Assault. He was ordered to be held without bail. On June 6, 2014 Appellant entered guilty pleas to each of these charges. Each charge carries a maximum penalty of a fine of $5,000 and/or 360 days in jail. He was held in jail again pending his sentencing hearing, which occurred on August 5, 2014. Appellant was not being held in jail for charges other than the three set out above.

The Trial Judge sentenced Appellant to the maximum jail time allowed, *i.e.* 360 days for each charge, with ten (10) days per charge suspended, *i.e.* a total of thirty (30) days suspended. The jail time was ordered to run consecutively, for a total of 1,050 days in jail. The Judge also ordered the Appellant not receive any credit for good time or credit for the time he had already served because of the instant charges. There are no findings on the Judgment and Sentence of August 6, 2014 stating why no credit for the time served was ordered.

We reverse and remand without further briefing. The mandates on the limits of tribal jurisdiction to sentence an Indian defendant are clear. The Code, CTC § 3-1-260, limits jail time for each of the

offenses charges to no more than 360 days.[74] The limits on the Tribes' authority to sentence defendants are also defined by federal law, *i.e.*, the Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.*. While the ICRA now allows for sentences longer than one year for serious offenses, the Colville Business Council has not yet adopted the increased sentencing authority as a part of the law of this jurisdiction.

Previously, our Court ruled in *Buckman v. CCT*, 8 CCAR 101 (2006), that the Trial Court had discretion to deny credit for time served, even when it would cause the defendant to be sentenced longer than the maximum allowed by the statute. That Court's reasoning was that the Colville Business Council, in its legislative capacity, had not restricted this discretion, relying on *Coleman v. CCT*, 3 CCAR 58 (1996) to support its holding. We find this reasoning misplaced.

In Coleman, the defendant was being held or serving time on several prior cases and was being sentenced on the instant cases. The Trial Court had directed the parties to compute his jail time considering the time he had already served. The issue in Coleman was not if credit for time served should be allowed, but whether all his jail time was to be served concurrently. He was being credited for time served, but that time was for those cases he was being held on prior to the instant case before the Court. He was not being held longer than the statute allowed.

The Trial Court cannot ignore the time Appellant has served; the severity of the charges cannot change the rule of law. While the discretion of the Trial Court in sentencing must be preserved, we know of no law that gives the Trial Court the latitude to exceed the mandatory maximum of jail time allowed.

Based on the foregoing, the sentence entered on August 6, 2014 is REVERSED, and this matter is REMANDED for a new sentencing hearing for a sentence within the maximum time allowed by the law. Further, we overturn *Buckman v. CCT*, 8 CCAR 101, to the extent it conflicts with this ruling.

It is so ORDERED.

Coleen MANUAL, Appellant,

vs.

Ben MARCHAND, et al., Appellees.

Case No. AP3-006, 6 CTCR 19

11 CCAR 79

[Leone Reinbold, Attorney at Law, appeared for Appellant.
Brian P. McClatchey, Attorney at Law, appeared for Appellees.
Trial Court Case No. CV-TC-202-36006]

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[74] 3-1-260 **Class A Offense**: A person convicted of a Class A offense shall be sentenced to imprisonment for a period not to exceed 360 days, or a fine not to exceed $5,000.00, or both imprisonment and a fine.

Hearing September 19, 2014. Decided November 24, 2014.
Before Hon. Theresa M. Pouley, Hon. Rebecca M. Baker, and Hon. R. John Sloan Jr.

Sloan, J.

FACTS

Colleen Manual, a Colville Tribal member, supported by her sister and half-sister, bring forth claims alleging fraud, pertaining to tribal enrollment of two children of Shirley Haddrell: Tara Marchand and Kenneth Haddrell. Tara and Kenneth were enrolled into the Colville Tribes and Wesley Manuel was listed as their father. Colleen Manual is Wesley Manual's sister. Appellants allege Shirley Haddrell offered Wesley Manual $100.00 to sign as biological father for Tara and Kenneth so Ms. Haddrell could use his Colville blood to enroll the children.[75]

In this action Appellants are seeking that Wesley Manuel's blood not be used for enrollment purposes and, among other requests, asked the Tribal Court to order the reduction of the blood degree of the Appellees. Appellees answered the complaint stating the Court previously ruled on the matter under an action brought by these appellants in 2009, ruling on December 28, 2012 that the appellants lacked standing. Appellants filed this latest action on January 8, 2013.

The Tribal Court dismissed this cause of action on January 29, 2013 for lack of standing. A motion for reconsideration was filed February 8, 2013 and denied February 11, 2013. Both the Orders of Dismissal and Reconsideration were denied without notice to counsel upon the Court's own action.

STANDARD OF REVIEW

The appellate court reviews issues of law *de novo*. *Naff v. CCT*, 2 CCAR 50, 2 CTCR 8, 22 Ind.Lw.Rptr 6032 (1995).

The determination of whether the trial court erred in not having a hearing before dismissal is reviewed for an abuse of discretion and/or mixed question of law and fact. *CCT v. Stensgar/Signor*, 11 CCAR 47, 6 CTCR 09, 40 Ind.Lw.Rptr 6011 (2013).

DISCUSSION

[75] Appellants rely on a signed, notarized letter attached to the complaint which is neither an affidavit nor a declaration.

Blood Correction

The Colville Tribes, via a limited and specific waiver of sovereign immunity, has enacted a comprehensive code[76] granting jurisdiction to the Colville Tribal Courts to adjudicate issues involving memberships, including blood correction and disenrollment. The Membership Code outlines individuals who have standing to bring enrollment correction actions.

Blood correction and disenrollment are two different actions. Appellants do not seek disenrollment. CTC 8-1-240[77], Blood Correction is before the court. It outlines the procedure for making corrections of all blood degrees presently listed in the roll of the tribes. CTC 8-1-241[78], Standing Parties lists those who have standing as (a) Chairperson of the Business Council, (b) Chief Enrollment Officer, (c) members of the tribes who desire to have their own blood degree listed on the roll of the Tribes corrected, or (d) any person entitled to request a blood degree correction to Amendment IX[79] of the Constitution of the Confederated Tribes.

All parties agree Appellants do not come under (a) or (b). Appellants do not seek to have their own blood degree corrected, thus (c) does not apply either.

Amendment IX, Section 4, does not apply as Appellants do not seek membership themselves (they are already tribal members) nor are they tribal members listed on the 1937 official census of the Tribes seeking to correct their tribal blood quantum. Further, they are not

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[76] Law and Order Code, Title 8, Chapter 8.1, Membership.

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

[78] The following entities shall have standing to file and prosecute a blood degree correction action: (a) The Chairperson of the Colville Business Council Committee with jurisdiction over enrollment matters; (b) The Chief Enrollment Officer of the Colville Confederated Tribes; (c) Members of the Tribes who desire to have their own blood degree, as listed on the roll of the Tribes, corrected: provided that in this section, "member" shall mean the natural person himself or herself, or the legal guardian of any minor or incompetent member, or the administrator or executor of the unprobated estate of a deceased member listed on the roll of the Tribes; (d) Any person entitled to request blood degree correction pursuant to Amendment Nine (IX) to the Constitution of the Confederated Tribes of the Colville Reservation.

[79] All Indian blood identified and stated as being possessed by all persons whose names appear as members of the Confederated Tribes of the Colville Reservation on the official census of the Indians of the Colville Reservation of January 1, 1937, shall be considered Indian blood of the Tribes which constitute the Confederated Tribes of the Colville Reservation: (1) Provided, that no tribal members' blood degree will be decreased as a result of this amendment, (2) Further provided, that pursuant to procedures which shall be adopted by the Colville Business Council, any (a) Applicant for membership; or (b) Tribal member who is listed on the official Census of the Indians of the Colville Reservation of January 1, 1937; or (c) Tribal member descended from a tribal member whose name appears on the official census of the Indians of the Colville Reservation of January 1, 1937, and such Indian blood, when properly authenticated by clear and convincing proof, shall be recognized as blood of the Colville Tribes.

descendants of a tribal member listed on 1937 census seeking to correct or recognize blood previously listed. Appellants seek reduction in blood degree, a remedy not provided under Amendment IX. Amendment IX clearly states that "no tribal member's blood degree will be decreased as a result of this Amendment." Colville Constitution, Art. VII, Section 4.

Further, Amendment IX only allows challenges which result in the recognition of potentially non-Colville blood as "Indian blood of the tribes..." Colville Constitution, Art. VII, sec.4. Amendment IX is to allow individuals who seek an increase in the degree of Indian blood which is deemed Colville blood for purposes of the official 1937 census roll to have a higher degree of Colville blood for enrollment purposes. Courts are to construe tribal laws to effectuate the purpose of the legislation and all the laws previous. CCT 1-1-7(d). For these reasons, Appellants lack standing.

Abuse of Discretion

The Trial Court did not abuse its discretion by dismissing the complaint without hearing or argument. The Trial Court had before it the complaint with exhibits, a prior Order of Dismissal (not appealed) involving much the same issues as this matter, and responsive pleadings requesting dismissal. Then after dismissing for lack of standing, the Court had before it the Motion for Reconsideration with additional documentation, which it also denied. A review for an abuse of discretion violation requires that the Court of Appeals must find the Trial Court's actions were manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *Marchand v. CCT*, 8 CCAR 18, 4 CTCR 19, 32 Ind.Lw.Rptr. 6102 (2005). There is no such showing. It is very clear that the Trial Court reviewed all the documentation and made a reasoned decision.

DECISION

The decision of the Tribal Court to dismiss the complaint for the lack of standing is affirmed. Further, there is no abuse of discretion in dismissing the action without a hearing based upon this record. It is ORDERED that the Trial Court's February 1, 2013 Order Dismissing the Petition with Prejudice and the February 11, 2013 Order are both affirmed. This matter is remanded to the Trial court for action consistent with this Order.

Yvonne SWAN, et al, Appellant,

vs.

COLVILLE BUSINESS COUNCIL, Appellee.

AP13-027, 6 CTCR 20

11 CCAR 83

[Mark J. Carrol, Attorney at Law, appeared for Appellant.
Dana Cleveland, Office of Reservation Attorney, appeared for Appellee.
Trial Court Case No. CV-OC-2013-36124]

Hearing held September 19, 2014. Decision entered December 2, 2014.
Before Chief Justice Anita Dupris, Justice Dennis L. Nelson and Justice Theresa M. Pouley

Dupris, CJ for the Panel

SUMMARY

In this case we are asked to examine our government in the context of our customs and traditions and the relevance of our customs and traditions in the context of our current laws. It is a case in which some tribal members are dissatisfied with the way their elected leaders are handling issues important to our Tribes, and in which one of these tribal members has brought the matter to our Courts for a resolution.

Some of the legal issues have been addressed by this Court in the past; some of the legal issues already have legal foundations established in our cases, yet their complexities and nuances need clarification under the circumstances of this case. We hope we will be able to provide that clarification in this opinion.

The undisputed relevant facts are as follows:

In 2012 the Confederated Tribes of the Colville Reservation (CCT or Tribes) settled a lawsuit against the United States for mismanagement of trust assets. In the settlement the Tribes received $193 million (hereafter moneys). Initially the Colville Business Council (CBC), in its constitutional capacity as representatives of the Tribes, distributed 20% of the moneys to the tribal membership; at a later date, pursuant to Resolution 2012-539, the CBC authorized distribution of another 30% of the moneys to the tribal membership, from which the CBC authorized certain holds or deductions from the payment to be made for debts owed to the Tribes by some of the members. This latter amount was voted on for distribution by the CBC

pursuant to a specific request made by some tribal members. These members had submitted a Petition to the CBC requesting the distribution.

After the distribution of 50% of the moneys, some tribal members, including the appellant in this case, allegedly signed a petition asking the CBC to hold a referendum vote of the membership regarding whether the remaining 50% of the moneys should be distributed to the membership. According to the original Civil Complaint filed in this case on May 23, 2013, one of the alleged signers of the petition for distribution of the remaining 50% attempted to present the petition to one of the Council members at the Council chambers. Appellant alleges the signer was not allowed to do so, and the Councilwoman allegedly called the police, who escorted the signer from the building.[80]

Appellant's original Civil Complaint abounds with anecdotal allegations of the poor treatment Appellant and others received from individual Council members. She alleges they were shunned, treated with condescension, ignored, spoken rudely to, and generally treated in an unprofessional, un-traditional manner by our elected leaders. Appellant goes into great detail about the ill-treatment she and other petitioners received at the hands of CBC members.

Appellees did not call for a referendum vote regarding the remainder of the settlement moneys; Appellees issued a public statement regarding the plans made for the remainder of the moneys, *i.e.* the Qwam Qwmpt' Plan.

Appellant filed the Civil Complaint in May, 2013 alleging violations of the Colville Tribal Civil Rights Act (CTCRA), CTC, Chapter 1-5. Appellee filed a Motion to Dismiss on June 13, 2013. After a hearing on the Motion to Dismiss on August 21, 2013, the Trial Court entered an opinion order dismissing the matter on October 7, 2013. Appellant filed a timely appeal from the Trial Court's order. Briefs were ordered herein, and Oral Arguments took place on September 19, 2014.

Based on the reasoning below, and for the reasons therein stated, we affirm the dismissal.

DISCUSSION

There are four (4) issues we address in this opinion: (1) Does the Trial Court have subject matter jurisdiction over the Civil Complaint filed?; (2) Even if the Trial Court has subject matter jurisdiction, does the affirmative defense of sovereign immunity bar the action?; (3) Do the actions of the CBC violate due process guarantees of the CTCRA by refusing to either (a)

[80]. We cannot find as a fact that the record shows the existence or non-existence of the petition purportedly signed by over 2700 tribal members because neither it, nor a copy of it, was filed with the Trial Court.

hold the referendum vote or (b) allow petitioner to present the request to the CBC, thereby overcoming the defense of sovereign immunity?; and (4) Does custom and tradition overcome the defense of sovereign immunity to support a finding that petitioner should get a hearing at the trial level to present her requests for declaratory and injunctive relief?. All four issues are questions of law; our review is *de novo*. *See CCT v. Naff,* 2 CCAR 50 (1995) and its progeny.

1) Does the Trial Court Have Subject Matter Jurisdiction Over the Civil Complaint filed?

Subject matter jurisdiction is the ability of the Court to hear the matter before it. It must be found in each case before the Court can take any action in the case. *See, e.g., Seymour v. CCT*, 6 CCAR 5 (2001), and *Green v. Green,* 10 CCAR 37 (2011). Our Courts are first guided by the statutory laws of the Tribes in order to determine subject matter jurisdiction. CTC § 1-1-70 states we have original jurisdiction over all tribal lands and all the persons therein. CTC § 2-2-1 states our Courts have civil jurisdiction of all suits involving persons residing within our jurisdiction. CTC § 1-5-4 states that any cause of action filed under the Colville Tribal Civil Rights Act (CTCRA), CTC, Chapter 1-5, can only be brought into the CCT Courts.

The Trial Court held it did not have jurisdiction to hear the case because it found the Tribes were shielded by the doctrine of sovereign immunity. The Trial Court confused subject matter jurisdiction with an affirmative defense. It is clear from our statutes that our Courts have subject matter jurisdiction to hear actions brought under the CTCRA. Appellee conceded this at the Oral Arguments. We so hold.

2) Even if the Trial Court has subject matter jurisdiction, does the affirmative defense of sovereign immunity bar the action?

The doctrine of sovereign immunity has long been incorporated in both our statutory and case laws. *See,* CTC § 1-1-6, Sovereign Immunity,[81] *CCT v. Naff*, 2 CCAR 50 (1995); and *CTEC v. Orr*, 5 CCAR 1 (1998). It is an affirmative defense. For example, the U.S. Supreme Court, in *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381 (1998), a case discussing sovereign immunity claims in federal court by a State under the Eleventh Amendment, recognized sovereign immunity as an affirmative defense which the State could waive, if it so chose. *Id* at p. 389.

[81]. 1-1-6. **Sovereign Immunity**. Except as required by a federal law, or the Constitution of the Colville Tribes, or as specifically waived by a resolution or ordinance of the Council specifically referring to such, the Colville Confederated Tribes shall be immune from suit in any civil action, and their officers and employees immune from suit for any liability arising from the performance of their official duties.

In *CTEC v. Orr, supra,* we stated: "Thus, in order to defeat the sovereign immunity claim herein, Orr's only position is to show that under the Tribal Civil Rights Act, CTC Chapter 1-5, CTEC was subject to the waiver of immunity because of violations of Orr's due process." In this case, the Tribes have raised the defense of sovereign immunity in a timely fashion. As in the Orr case, Appellant must show a violation of her due process or equal protection rights under CTC, Chapter 5-1 in order to overcome the defense, which once raised by Appellees would, as a general rule, defeat this action.

3) Do the actions of the CBC violate due process guarantees of the CTCRA by refusing to either (a) hold the referendum vote or (b) allow petitioner to present the request to the CBC, thereby overcoming the defense of sovereign immunity?

As stated at the beginning, the litany of alleged actions which do not comport with leadership behavior by some of the Council members, have caused frustration and dissatisfaction to some tribal members, thus fueling part of the lawsuit herein. It is also apparent, however, that money is also a fuel upon which this cause of action is driven. We are asked to assess the actions of the appellees, as the elected officials of our government, in the light of our customs and traditions.

As a tribal forum, we have long recognized that even though our court system have become "westernized," and modeled in large part on that of our sister jurisdictions, federal and state, we have a higher responsibility to maintain the "tribal" in our courts first and foremost. In *Smith v. CCT*, 4 CCAR 58, 2 CTCR 67, 25 ILR 2566 (1998), we stated:

> We believe that incorporating our customs into our written law is very important. It is what will set us apart from the state and federal courts. Our courts must approach this carefully, however. Customs and traditions are viable, living doctrines that grow with the community and the time. They are not static, frozen in the past of tepees and buckskin clothing. A good analysis of the applicability of custom and tradition in a case must be able to trace a current practice back to its roots in our society. It will not necessarily have the same complexion, but it should have the same foundation. Our customs and traditions define our uniqueness not only from the non-Indian society, but from other Indian tribes, too. To define a custom or tradition in our current Tribal Court system is an important task which should not be taken lightly by the courts or the parties. At p. 61.

The tradition we are asked to assess in this case is that of that of listening and letting all who wished to have input for the issues to be decided an opportunity to be heard fully before a decision was made. We recognized this tradition in *CCT v. Meusy*, 10 CCAR 62 (2011). In Meusy, a case in which we recognized the doctrine of separation of powers as having a cultural foundation, we also stated that our early leaders recognized " ... separate leadership duties, an opportunity to participate in decision-making by all of the community, and a responsibility of the leaders to decide." *Id*. at p. 69.

Appellant asserts that this tradition was not followed by our elected leaders, thereby violating her right to due process under the CTCRA. As we stated before, our customs and traditions are viable doctrines which, by necessity, grow and change to meet the ever-changing nature of our government.

In 1937, 77 years ago, the members of the twelve tribes voted to establish a new, confederated government. We passed a Constitution and Bylaws, and established a representative government for all 12 tribes; the number of representatives were from districts and not necessarily identified by individual tribes any more. We became known as "The Confederated Tribes of the Colville Reservation," and it is a separate entity from the many individuals comprising the combined membership. We made a transition from selected leaders to elected leaders: an evolvement of a tradition.

Before the establishment of a westernized representative government in 1937, when the members no longer believed in the leadership of someone, they just stopped following him or her as a leader. *Sonnenberg v. Colville Tribal Court,* 5 CCAR 9 (1999). Now the process is that we just stop electing him or her. Again, this process has been in place for 77 years.

In support of her assertion of a tradition and custom which would require the CBC to either (a) order an referendum vote, or (b) allow Appellant and others to meet with the CBC on this issue, Appellant asserts that historically past CBC members allowed input from tribal members in such decision-making processes. As examples she references the actions past Councils took during the negotiations and settlements of what we now refer to as the 181-D claims moneys. The CBC actions took place as early as the late 1960's, and culminated in a settlement in 1994. Throughout the settlement process past Councils invited input from tribal members on the pertinent issues. Appellant referred to other similar instances in her original Civil Complaint.

Past historical practices of Councils do not necessarily establish a tradition or custom, however. Although such a practice may have customary roots, it does not become a requirement for the elected representatives, who change on a yearly basis. The CBC are guided by the Constitution and the statutory laws when defining its legal responsibilities. We couldn't

find anything in the written Constitution or laws of the Tribes which requires that past practices of CBC members bind how current CBC members must conduct their business. There is nothing in either the Constitution, Code of Professional Conduct (CTC, Chapter 1-8), or the Council's Oath of Office which require Council members to listen to, or seek input from, tribal members before making decisions regarding monetary settlements with the federal government.

Appellant erroneously argues CTC § 1-5-1 requires CBC to give them a hearing before the Council. This statutory section states the CBC cannot pass a law which prevents tribal members from petitioning for redress of grievances. There are no statutory laws which forbid the petitioning for redress of grievances; there is only the conduct of the CBC members, as representatives of the tribal members, which prevent granting an audience with the Council. This conduct, no matter how frustrating to the Appellant and other tribal members, does not rise to a level of a due process violation of the right to petition for redress under the Tribal Civil Rights Act. Appellant has not met her burden on this issue to overcome the defense of sovereign immunity. We so hold.

4) Does custom and tradition overcome the defense of sovereign immunity to support a finding that petitioner should get a hearing at the trial level to present her requests for declaratory and injunctive relief?

The crux of this argument is that Appellant alleges she was not provided due process as required by the CTCRA. She alleges the actions of the individual Council members are *ultra vires*, in that some of them individually denied her the right to meet with the CBC and present the request to have input in decisions on what to do with the settlement money. Further, she alleges that due process requires the Trial Court give her a hearing on her requests for declaratory and injunctive relief.

When asked at the Oral Arguments what fundamental due process right was being violated, Appellant's answers were (1) the property right of Appellant and others similarly situated to the settlement moneys and how it was distributed; and (2) the procedural due process rights to be given notice of the settlement, and an opportunity to be given a chance to have a say in how the settlement money is spent. Appellant also argues she has a procedural due process right to an accounting from Appellees of how the money is being and has been spent. Appellant argues the CTCRA supports her claim for such declaratory relief, as well as for asking for an injunction against Appellees from spending the money before the resolution of this case.

Appellee counter-argues that such interference by the courts would violate the doctrine of separation of powers. Appellee argues the matters are political and answerable only by the CBC as the Constitutionally-designated representative of all tribal members. We are not unfamiliar with the doctrine of separation of powers. In Meusy, *supra*, we found that this doctrine has cultural roots in our tribes. Meusy at p. 69. In Meusy we recognized that before our 1937 government, our several tribes were guided by the leadership of several leaders, some for very specific responsibilities, *e.g.* salmon leader, war leader, and others. As a tribe, all members, including the different leaders, discussed issues important to the tribal members, and had input in what the decision should be; ultimately, however, the leader made the final decision. This tradition has evolved.

In 1937 our tribal members voted to change the traditional decision -making method when it adopted a Constitution and Bylaws which, among other things, designated a representative governmental body: the Colville Business Council. Unlike some tribes, we do not have a General Council of all tribal members with superintending powers over the CBC.

The Constitution makes no provision for a General Council nor any other "over-ride" provision whereby the combined membership has authority to make laws or order the CBC to do or not do an act. The Constitution is now the supreme law of the land. The combined membership voted for a constitutional government and, by implication, removed ultimate authority of the combined membership.

The combined membership reserved for itself in the Constitution the right to remove CBC members by the process of recall and to amend the Constitution by referendum. It also reserved the right to regularly elect CBC members. All other powers of the combined membership, actual or perceived, were relinquished and granted to the CBC.

Appellant's assertion that her due process claims rest on her property right to the settlement moneys is misplaced. She is just one tribal member; the CBC are responsible for and answerable to all the tribal members (over 9500 members) collectively, and not just those who come forward with the requests Appellant is making. She has an undivided interest in any of the assets of the Tribes, which, in this case, does not rise to an actionable right under the CTCRA when the CBC makes a decision on how to use an asset. She cannot speak for over 9500 tribal members without their input and agreement.

Appellant argues that she should be able to flesh her arguments out at the trial level because she has asked for declaratory and injunctive relief as allowed by the CTCRA. She opposes having this Court of Appeals make the final decision without the action first being heard by the Trial Court. We disagree.

No matter what arguments she wraps her CTCRA complaint in, the bottom line is: she is not satisfied with how the Appellees have decided to distribute the $93 million settlement. She does not think she should have had any of it taken from her to satisfy a debt owed to the Tribes. She does not want the CBC to be the final decision-maker on how the money is spent. The bottom line in this action, when one brushes aside generalized statements of custom and tradition, is money.

This case is also about how Appellant, and others, feel CBC members are non-responsive to the membership. It is about poor communication skills. It is about the power to exclude tribal members from meeting with their representatives, whatever the reason. It is a cauldron of frustrations. In recognizing what precipitated this legal action, we acknowledge that some things could have been approached more civilly and professionally, if the allegations in the Civil Complaint are even partly true. These are not matters for the Courts to resolve, however. The solutions lie in exercising one's voting rights wisely. If the membership want elected officials who allow open meetings, open dialogues, traditional treatment, respect, and courtesy, the membership must elect those who have these qualities. Our Courts cannot dictate Appellees to have these attributes; the membership must dictate them by how they vote.

Appellant has failed to overcome the defense of sovereign immunity with her due process assertions. We so hold.

CONCLUSION

Based on the foregoing, we find first that this Court, and the Trial Court, have subject matter jurisdiction to hear this case, as well as personal jurisdiction over the parties. Secondly, Appellee has asserted the affirmative defense of sovereign immunity in a timely fashion. Finally, there are no Colville Tribal Civil Rights Act violations asserted by Appellant which would overcome the defense of sovereign immunity. As a matter of law, there would be no different answer at the Trial Court level regarding the assertions of due process Appellant has made and Appellees' defense of sovereign immunity, so there is no good reason to send the matter back to the Trial Court for a hearing on the request for declarative and injunctive relief.

It is so ORDERED.

In Re the Matter of Bernard v. Adolph
Elizabeth FRY, Appellant,
vs.
COLVILLE TRIBAL COURT, Appellee.
Case No. AP14-025 IA, 6 CTCR 21

11 CCAR 90

[Decision made without hearing. Parties appeared pro se.
Trial Court case no. CV-OC-2012-35087.]

Decision entered December 29, 2014.
Before Chief Justice Anita Dupris

Dupris, CJ

Summary

This matter came before the Court of Appeals upon an Interlocutory Appeal filed by Elizabeth Fry (Appellant), Guardian Ad Litem (GAL) in civil custody case of *Krystal Bernard v. Lewis Adolph III*, Tribal Court case number CV-CU-2012-35087, against the Colville Tribal Court. Ms. Fry alleges the Trial Court erred in not allowing her to act as the legal representative of the minors in the above-referenced case. Appellant alleges she was not allowed to make an opening statement, cross-examine witnesses, or otherwise participate as a party representative.

Appellant alleges three (3) grounds for granting an interlocutory appeal: "[1] the Trial Court has committed an obvious error which would render further proceedings useless; or [2] The issue presented involves a controlling issue of law as to which there is substantial ground for difference of opinion and that an intermediate appeal from the decision may materially advance the ultimate resolution of the litigation; or [3] the Trial Court has so far departed from the accepted and usual course of judicial proceedings as to call for review by the COA...."

Judge Sophie Nomee, on behalf of the Colville Tribal Court (Appellee), and the Colville Tribes' Office of Reservation Attorney (ORA)[82] filed a request to deny the appeal and objections to the appeal, respectively. Appellee Court argues that the duties of a GAL do not include representation as an advocate for the minors unless specifically stated in the Order Appointing GAL, and this was not done in the Order herein. The ORA argues that the case is a private civil custody proceeding and, as such, the Court

[82]. As a matter of courtesy I reviewed ORA's pleadings, although it did not file a Notice of Appearance (NOA) on behalf of the Trial Court. The failure to file the NOA in a case where it isn't a party is an oversight which I will assume was due to the unique nature of this case and will not happen again.

should not be named a party. ORA argues that both parties in the civil action are represented by attorneys and if one disagrees with the ruling, that party should appeal.

Based on the reasoning below the interlocutory appeal is denied.

Discussion

Interlocutory Appeals are an exception to the normal rules of appeals. *CIHA v. Edwards*, 11 CCAR 54 (2014). The Chief Justice has broad discretion do accept or deny an interlocutory appeal. COACR 12-A(a).[83] An exception to the normal rules of appeal should be closely guarded and limited so that such appeals do not interfere with the regular administration of justice at the trial level.

The first question that must be answered in this case is whether Appellant has standing to file the appeal in that she is not a named party in the original action. Appellant rests her appeal on the fact that she was appointed as GAL by Order Appointing Guardian Ad Litem (GAL Order) dated December 17, 2013, signed by then Chief Judge Jordan. She asserts this GAL Order gives her the responsibility to represent not only the minors' best interests, but to act as their legal advocate, too. A review of the GAL Order does not sustain this argument.

The GAL Order sets out the GAL's responsibilities regarding investigation and reporting to the Court on what is in the best interests of the minors. It sets out the attorneys' responsibilities to keep the GAL informed and included in all aspects of the case so that the GAL may make a reasoned recommendation to the Court on what is in the best interests of the minors. It states in one place that the GAL may not retain an attorney without the prior approval of the Court and notice to the parties. One assumes this refers to an attorney for the minors.

A GAL is a friend of the Court; she is an advisor to the Court on what is in the best interests of the minors. She investigates, reports, and recommends as an objective witness. An attorney for the minors would have the obligation to represent the wishes

[83]. Even though the Rules give this broad discretion to the Chief Justice, because of the unusual way this matter was appealed, *i.e.* the appellant is not a named party to the original cause of action and she has named the Trial Court as the appellee, the Chief Justice consulted with all the members of the Court of Appeals before rendering this decision.

of the minors; a GAL has the obligation to represent the minors' best interests no matter the wishes of the minors, or even the wishes of the parties. These are fine distinctions.

Appellant has not met the burden of showing how she is a party to the action. Her interlocutory appeal is more of a collateral attack on the Trial Court's decisions on how to conduct the hearings. There is nothing in the record that shows the Trial Court committed an obvious error of law or departed from the usual course of proceedings. Appellant has not shown this Court that there is violation of a substantive nature which necessitates an immediate review by this Court.

In conclusion, reasonable minds may differ. There is nothing in the law that would restrict the Trial Court's discretion to allow a GAL to act as a legal advocate for the minors. In this case, however, the Trial Court has decided not to do so. An adverse ruling does not automatically make it a wrong ruling. The Interlocutory Appeal is denied.

It is so ORDERED. This matter is remanded to the Trial Court for action consistent with this Order.

Dorothy CAMARENA, Appellant.

vs.

Mike SOMDAY, Allan HAMMOND, Deidre ANTONE,
John WHITENER, Lois JAMES, and Cheri MOOMAW, Appellees.

Case No. AP07-013, 6 CTCR 21

11 CCAR 93

[Appellant appeared personally and without representation.
Appellee appeared through counsel Judy Leaming.
Trial Court Case No. CV-OC-2005-25480]

Hearing April 18, 2008. Decision December 29, 2014.
Before Hon. Anita Dupris, Hon. Earl L. McGeoghegan[84], and Hon. Theresa M. Pouley.

Dupris, CJ

[84] Justice McGeoghegan passed away in 2013, but prior to his passing he contributed greatly to the decision.

SUMMARY

The Trial Court found, in its Order Remanding Hearing to the Gaming Commission dated August 6, 2007, that Appellant, Dorothy Camarena, was denied procedural due process in her gaming license revocation hearing before the Colville Tribes' Gaming Commission (Commission). The Court found that the hearing violated the appearance of fairness doctrine in that the employee who revoked Appellant's gaming license, *i.e.* John Whitener, was present during the Commission's deliberations on her request to restore her right to a gaming license, while the Commission asked Appellant to leave the room. The Commission was directed to hold a new hearing on the issue of Appellant's revocation of her gaming license.

The Trial Court also dismissed with prejudice Appellant's request that the Court find her termination from employment by the Commission was wrongful, and that she be reinstated with back pay. The Court held this request was barred by the doctrine of sovereign immunity, and that her dismissal from employment was not a disciplinary action subject to court review.

Appellant filed her appeal with this Court, asking that we reverse the Trial Court's decision that the employment appeal and the revocation of the gaming license were two separate issues, thereby dismissing the employment appeal portion of her case.

Another issue was identified at the Initial Hearing held on September 21, 2007: Does the exhaustion of remedies or ripeness of appeal apply to these proceedings?

Based on the reasoning below, we find that the Trial Court did not err in its holding that the gaming license revocation and the dismissal from employment are two separate issues, and that the Trial Court ruled appropriately on both issues. The exhaustion of remedies question, which was based on the fact that the Commission called a new hearing on the license revocation, at which Appellant refused to participate, is moot based on the ruling on the first issue, and will not be addressed herein.

STANDARD OF REVIEW

The issue of whether the gaming license revocation is inseparable from the dismissal from employment raises questions of law. We review *de novo. See, Naff v. CCT,* 2 CCAR 50 (1995), and its progeny.

DISCUSSION

Appellant was an employee of the Commission, holding the position of Tribal Gaming Agent (TGA). She states in her brief that she worked at the Coulee Dam Casino at the time her gaming license was revoked. Appellee based its revocation on allegations that Appellant had left her work station without authorization, during working hours, on two separate occasions.

Appellee states these unauthorized absences violated the Tribal-State Compact for Class II Gaming (Compact), applicable sections of the federal Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, and Tribal Law, CTC, Chapter 6-5. The Compact and the applicable laws and regulations require that the TGA be present on site at all times. If the TGA is not on site as required, it could be considered a violation of the regulations, laws, and Compact.

The license revocation created a necessary next step: the dismissal of Appellant from her position as a TGA at the Casino, in that a gaming license was a requirement to be so employed. It is understandable why this circuitous situation causes frustrations for Appellant. Appellant filed an appeal at the Trial Court alleging wrongful revocation of her gaming license and wrongful termination from employment.

The issue of the revocation of the gaming license is moot. It appears from the record that the Commission had its first hearing on January 11, 2005; this was the subject of her appeal to the Trial Court. At the next hearing on the license revocation on March 22, 2005, the Commission upheld the revocation, and determined it should be for three (3) months. The record also indicates that when the matter was remanded by the Trial Court by the Order dated August 6, 2007, the Commission held another hearing on November 9, 2007, at which Appellant chose not to participate. (*See* the Trial Court's Order Dismissing Appeal, CV-OC-2005-25480, signed July 14, 2008). Finally, it appears from the record that Appellant has her gaming license again.

Appellant asserts that her termination from her position as TGA was wrongful in that the license revocation was found to be wrongful by the Court, and the termination could not have happened with the revocation. She states that to find otherwise is to leave her without a meaningful remedy.

First, as Appellee has pointed out, having a gaming license is not a right. Gaming licenses are highly regulated, and one must meet rigid standards in order to secure such a license. We have held, however, that a person's job, in certain circumstances, can be a protected property right. *See, eg. Finley v. CTSC*, 8 CCAR 38 (2006), and *Goujon v. CTEC*, 9 CCAR 57 (2008). We also recognize that the continuation of one's employment and its termination is first defined within the applicable regulations and policies of the employer. *See, eg. CTEC v. Orr*, 5 CCAR 1 (1998).

The crux of the issue in this case is how did Appellant lose her job: was she terminated, as defined by the employment manual regarding disciplinary procedures, or was it by other means? It is this distinction upon which the Trial Court based its decision. There is nothing in the record that supports a finding that Appellant was subject to a disciplinary process before she was dismissed from her employment. She was dismissed because she no longer held a

gaming license. This is not a category of discipline under the policies. As Appellee pointed out, it is a requirement of the Commission to not allow any person to hold the position of TGA without a license.

Appellant argues that if the Court cannot consider the dismissal from employment as part and parcel of the license revocation matter, then she has a right without a remedy. She asserts that the Trial Court recognized that her due process rights were violated, and, as a direct result, she lost her job. Appellant's reliance on the Trial Court's finding of lack of due process is misplaced.

There are two types of due process closely guarded by courts: procedural and substantive. Procedural due process requires that a person receives adequate notice, an opportunity to have meaningful input, and an opportunity to participate in the proceedings. *See, eg. Edwards v. Bercier,* 10 CCAR 18 (2009); *Lambert v. CCT,* 10 CCAR 52 (2011); *Lezard v. Deconto* 10 CCAR 23 (2009). Substantive due process goes to the fundamental rights of a person. These rights have the protection of the Constitution and the Tribal Civil Rights Act, CTC Chapter 1-5.

The due process violations found by the Trial Court go to procedural due process. The Court found that Appellant did not receive a fair hearing; the Trial Court did not make a finding as to whether the license should have been revoked. The latter issue, *i.e.* whether the revocation was wrongful would fall within the parameters of substantive due process. For the procedural due process violations the Trial Court did recognize a remedy: the Court vacated the first finding of license revocation of the Commission and sent the issue back for a fair hearing on the issue.

In order to sustain her case, Appellant would have to show that she has an independent right to challenge her dismissal, get her job back, and get back wages, which she has asked this Court to grant. As we stated before , the employment manual does not recognize losing one's gaming license and, therefore the ability to be a TGA, as part of its disciplinary procedure. It is a natural, although unfortunate, consequence of not having a license. Appellant cannot hang the case on due process violations under the Tribal Civil Rights Act, CTC Chapter 1-5. She cannot sustain the case on any exceptions to the doctrine of sovereign immunity, which acts as a shield in this case to any claims for monetary relief.

In conclusion, Appellant's dismissal from employment as a TGA after her license was revoked is not reviewable by the Courts. There is a bright line which cannot be ignored: if one doesn't have a gaming license, one cannot work as a TGA in a casino. The laws are clear. Even though Appellant was dismissed, it was without a disciplinary procedure. She was dismissed

from employment because she did not meet the condition precedent to the job, *i.e.* a gaming license.

For these reasons we affirm the Trial Court and remand for dismissal.

It is so ORDERED.