Jerry LOUIE, Appellant,

vs.

COLVILLE TRIBAL FEDERAL CORPORATION, Appellee,

Case No. AP13-023, 7 CTCR 04

13 CCAR 01

[Mark J. Carroll, Attorney, for Appellant.
Timothy H. McLaughlin, Attorney, for Appellee.
Trial Court Case No. CV-OC-2012-35234]

Decided February 17, 2016.

Before Justice Theresa M. Pouley, Justice Rebecca Baker, and Justice Gary F. Bass

BAKER, J.

This matter comes before this court on appellant Jerry Louie's Motion for Reconsideration of the Opinion and Order of this court filed December 1, 2015. Appellant is represented by Tribal Spokesperson Mark J. Carroll. Appellee is represented by Tribal Spokesperson Timothy H. McLaughlin. The Motion for Reconsideration was timely faxed, filed and served. CTFC's Response to the motion was also timely. This court has fully reviewed these pleadings of the parties in accordance with CTC 1-2-124 which provides for there to be no reply brief or oral arguments on such motions, unless otherwise ordered by the Court of Appeals.

The court is now fully advised with respect to Louie's Motion for Reconsideration and finds that a reply brief would not be helpful to the Court of Appeals, and that oral argument is also unnecessary.

1. Mr. Louie was afforded Due Process Before the Tribal Court.

Mr. Louie is correct that we did not directly address his argument that he was denied a "hearing" and thus due process of law in the Tribal Court, and for this we apologize. Let us expressly address the issue now.

As we explained fully in the course of our Opinion and Order, the decision of a tribunal without hearing oral argument on an issue not necessarily a denial of a "hearing" or in turn due

process. The point is that the parties must be allowed an opportunity to weigh in fully on the issues being decided. In this case, our review of the Tribal Court pleadings, as well as the Judge's lengthy decision indicates that Mr. Louie, through counsel, was allowed to brief all of the issues he wished to raise, and the Tribal Court decided the case based entirely on issues of law. Similarly to the way the Administrative Hearing Officer ("AHO") handled a pretrial motion - a procedure of which we approved - full briefing was allowed and obviously considered, as evidenced by the Tribal Court Judge's written order. And while it is true that an evidentiary hearing was not held in Tribal Court, we have already pointed out that no such hearing is appropriate in this kind of case, at least under the circumstances of this case, which involved a full-fledged evidentiary hearing before the AHO. We will not repeat these reasons here, but suffice it to say that we adopt the same reasoning as set forth in Part IV.B.2 of our Opinion and Order in concluding that no due process violation occurs when, equally in the Tribal Court as in the administrative hearing setting, the parties have a full opportunity to express their arguments on a legal issue or issues through their briefing.

2. Mr. Louie Was Bound by His Agreement to Be Subject to CTFC's Employee Policy Manual, Which Allows No Direct Appeal under the Tribes' Administrative Procedures Act.

We have addressed this issue at pages 10, 11, and 15-16 of our Opinion and Order. We agree with CTFC that, although the Supplementary Procedures may not have been adopted as contemplated in the Employee Policy Manual ("EPM"), the procedures in that regard were of no consequence in this particular case. Under the EPM, there is simply no direct appeal to Tribal Court from an AHO's decision terminating a CTFC employee; the Tribes' Administrative Procedures Act does not apply to CTFC employees. *See* CTFC's Response to Louie's Motion for Reconsideration, at 2-3 (Part II of Response).

3. The Lack of a Complete Recording of the Administrative Hearing(s) Does Not Entitle Mr. Louie to Relief Before the Tribal Court or this Court.

We emphasize that, in the circumstances of this case, where Mr. Louie was obviously afforded due process before the AHO, and where he makes no particularized challenges to the AHO's findings of fact or conclusions of law (*see* discussion, *infra*), the lack of a full recording does not implicate due process or entitle Mr. Louie to a new hearing.

4. A Generalized Challenge of "All Findings of Fact" and "the Entire Order" Is No Adequate for Purposes of Appellate Review.

Mr. Louie, in his Motion for Reconsideration, argues that a challenge to the AHO's order in its entirety, without specific challenges to findings of fact or conclusions of law, entitles him to challenge any and all of the findings and conclusions at this level of review. But this reasoning ignores Court of Appeals Rule 17(1) which requires particularized challenges on motions for reconsideration, which has not been done. Moreover, we find the reasoning in the Washington case of *McCoy v. Kent Nursery, Inc.*, 163 Wn.App.744, 260 P.3d 967 (2011), to be persuasive. Indeed, as explained at 163 Wn.App. at page 788, appellate courts have no business resolving issues of credibility; that is for the tribunal before whom testimony was given to do. The AHO clearly did that, despite our criticism of the way she phrased some of her findings of fact. And, as we pointed out in our Opinion and Order, at page 24, note 23, Mr. Louie made no challenge to the sufficiency of the evidence in how the AHO resolved credibility issues.

We therefore find no basis for a reconsideration of our Opinion and Order affirming the Tribal Court, albeit for perhaps different reasons than those cited by the Tribal Court Judge. Accordingly, we enter the following:

ORDER

Mr. Louie's Motion for Reconsideration is hereby Denied.

Michael D. DESAUTEL Jr. and Terrance RANDALL, Appellants,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP15-011/016, 7 CTCR 5

13 CCAR 03

[David Stevens, Office of Public Defender, appeared for Appellants.
Jared Cobell and Wes Meyring, Office of Prosecuting Attorney, appeared for Appellee.
Trial Court Case No. CR 2014-37316/CR 2015-38158]

Hearing held January 19, 2016. Decision entered May 13, 2016.

Before Hon. Anita Dupris, Hon. Dennis L. Nelson, and Hon. Michael Taylor

Dupris, CJ

SUMMARY

Two cases have been consolidated herein for the purpose of addressing the same legal issues presented, *Michael Dewayne Desautel, Jr. v. CCT,* AP16-011, and *Terrance Johnathan Randall v. CCT,* AP15-016. In both cases the appellants entered uncontested pleas of guilty to the multiple charges against them. All six charges against Desautel[1] and all four charges against Randall each carried the maximum penalty allowed under the Colville Tribal Law and Order Code (CTLOC), that is, up to 360 days in jail and/or a fine of up to $5,000.00.

At their respective sentencing hearings, each of the appellants was sentenced to consecutive jail terms on each of the counts of charges against them. Desautel was sentenced to a total 1080 days in jail with 540 days suspended on the first three charges, and a total 1080 days with 715 suspended on the last three charges. On October 5, 2015, Randall was sentenced to a total 1170 days in jail with 930 suspended.

Appellants challenged the Trial Court's authority to impose consecutive sentences in each case based on the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(c) (ICRA), which was amended in 2010 by the Tribal Law and Order Act of 2010, Pub.L.No. 111-211, § 234 (a), 124 Stat. 2258 (TLOA). The Trial Court ordered briefing on the issue but did not render a decision on it, and entered consecutive sentencing judgments.

Both cases were timely appealed. After briefing, oral arguments were held on January 16, 2016. We find that the consecutive sentences entered in both cases violate the ICRA, as amended by the TLOA, and vacate and remand for new sentencing in compliance with this opinion and order.

STANDARD OF REVIEW

We review questions of law *de novo*. *CCT v. Naff*, 2 CCAR 50 (1995).

ISSUE

[1] Desautel entered *Alford* pleas to three charges on April 13, 2015, and *Alford* pleas to three similar charges on April 21, 2015.

Did the Trial Court violate the ICRA by imposing consecutive sentences in one criminal proceeding which exceeded 360 days in jail without being compliant with the TLOA requirements regarding available rules of evidence?

DISCUSSION

This is a case of first impression. We are asked to review the application of the ICRA's amended sections regarding stacking sentences, and what is required of a tribal court in order to be allowed to stack the sentences under the TLOA amendments to the ICRA. TLOA was enacted in 2010, and, in the relevant section, expanded a tribal court's authority to sentence defendants to longer jail terms, under certain conditions. Section 1302(b) states the tribal courts may sentence a defendant up to three years in jail for each offense; section 1302(c) states that if a defendant is sentenced to more than a year in jail, the tribal government shall, among other things, make its rules of evidence available to the public. This latter section is the only one considered in this appeal. That is, Appellants argue the Tribes does not have written rules of evidence for a defendant to review, and, thus is not TLOA compliant to impose jail sentences longer than 360 days. We agree.

The only statutory reference to rules of evidence is found at CTLOC § 2-1-171.[2] We have ruled on specific evidentiary issues brought before our Court, finding guidance in the Federal Rules of Evidence (FRE's), by applying our CTLOC's Applicable Law section, 1-2-11.[3] In *CCT v. Waters,* 3 CCAR 35 (1996), we adopted the hearsay and impeachment FRE's. *See, also*, *Cate v. CCT,* 12 CCAR 15 (2015) and *Lambert v. CCT,* 12 CCAR 32 (2015), (COA's reliance on FRE's.)

Appellants' position is that the Tribes has not adopted rules of evidence, a prerequisite to allowing consecutive sentences over 360 days. Appellants rely on the plain reading of the ICRA, §§ 1302(b) and (c) (§ b; § c). Appellee asks us to look at the totality of the tribal laws, both statutory and case law, and find that the TLOA requirements of the ICRA are met.

It has been long-recognized by this Court that the ICRA is applicable to the Tribes. It is a federal mandate to all tribal governments, incorporating the basic principles of due process and

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[2] "The Court shall not be bound by common law rules of evidence, but shall use its own discretion as to what evidence it deems necessary and relevant to the charge and the defense."

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

equal protection in the several tribal courts of the nation. We have noted in our cases, too, that tradition and custom mandate a deference to due process standards. *See, e.g., CCT v. Meusy*, 10 CCAR 62 (2011).

In *CCT v. Vincent*, 12 CCAR 07, 09 (2015), we held that the "basic concepts of due process require that the community subject to the law must be able to ascertain with certainty the law that the government may apply to them and that the government officials are not permitted to select among a variable set of standards." Appellants argue the lack of specificity in rules of evidence; Appellee argues the totality of the laws support guidance for parties in knowing what rules to follow. We find the Tribes' argument unsupported by a review of the law.

A defendant cannot be presumed to be knowledgeable about rules of evidence, even though once he or she is appointed an attorney, that knowledge may be available through the attorney. The ICRA is very specific on its requirements under § c. Specifically, § c states that tribal governments seeking to impose sentences longer than 360 days "in any one criminal proceeding" must, before the defendant is charged, have publicly available rules of evidence. There is no ambiguity to this language.

Appellee conceded on record that the sentencing hearing on the appellants' multiple charges was during "one proceeding." As far back as 2002 we recognized the lack of rules of evidence at the trial level. *See*, *Louie v. CCT*, 8 CCAR 49 (2002). We have adopted, piecemeal, different sections of the FRE's as guidance in our Court, but we have not seen similar actions at trial level. There is no consistent statement from the Trial Court on which rules of evidence it follows, and the Colville Business Council (CBC) has not adopted any statutory rules at this time.

The lack of rules of evidence, given the longevity of our Court system, is troubling, and the problem has caught up with us. As a matter of basic due process mandates, and as a matter of the mandates of the ICRA as amended by TLOA, our ruling in *St. Peter v. CCT*, 2 CCAR 2 (1993) is no longer viable. There we held that no federal law existed that prevented sentence stacking; this is no longer true.

We can see no other judicial remedy for the Trial Court. Our basic evidentiary statute, CTLOC § 2-1-171, is no longer adequate to address the issue raised herein because of the new mandates of the ICRA. Appellee argues that the rules of evidence are simply put: "deemed

necessary and relevant." Although this language recognizes the time-honored principle of judicial discretion, it no longer provides adequate notice to parties of what can be deemed necessary and relevant. Its ambiguity defeats the purpose of adequate notice.

This case raises the concern of what rules of evidence should be used in our cases. CTLOC § 1-2-11 gives our Court the discretion to adopt, as guidance, rules that would comport with due process. As such, in criminal cases (civil evidence issues are not before us), we exercise that discretion and hold that in all future criminal matters coming before the Court of Appeals, we will apply the FRE, a federal statutory evidence scheme adopted by Congress in 1975, for the federal courts. The CBC at any time may amend, revise, or reverse this ruling by enacting code provisions dealing with presentation of evidence in criminal proceedings. Until such time as the tribal legislature acts, the FRE will be applied to resolve criminal evidence issues brought to the COA. As has been with all of the decisions of our Court of Appeals, this decision shall be publicly published and available to all persons.

We further hold that the TLOA mandate of the ICRA, 1302(c) requires rules of evidence applying to the Trial Court be made available to defendants before they are charged. Until the publication of this decision, there were no adequate rules of evidence, compliant with the newly-amended ICRA, available to the Trial Court[4]. Therefore, the appellants cannot be sentenced to more than 360 days in "one criminal proceeding." In as much as *St. Peter v. CCT, supra,* is contrary to this ruling, we overturn it.

The judgments in the cases before us are VACATED and the cases are REMANDED for sentencing in compliance with this opinion and order.

[4] We will not go as far as to mandate the Trial Court also adopt the FRE's, but strongly urge that it does so until such time as the CBC addresses the issue too. This would be a logical practice for the Trial Court in light of the fact it knows that the FRE's are the standard by which we will review the criminal cases from hereon.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Myron MICHEL, Appellee.

Case No. AP16-008 IA, 7 CTCR 06

13 CCAR 08

[Jared Cobell and Curtis Slatina, Office of the Prosecuting Attorney, for Appellant
Dan Connolly, Attorney at Law, for Appellee
Trial Court Case No. CR-2016-39052]

Hearing held June 17, 2016. Decided June 22, 2016.

Before Chief Justice Anita Dupris, Justice David C. Bonga, and Justice Dennis L. Nelson

Nelson, J.

At a trial readiness hearing on June 17, 2016, the Colville Confederated Tribes (CCT) moved to dismiss without prejudice the complaint against the defendant, Myron Michel, on the grounds that requested evidence had not been forthcoming. The Trial Court suggested a continuance rather than a dismissal which was declined. Subsequently, the Motion to Dismiss Without Prejudice was denied and the matter scheduled for trial. CCT immediately filed an interlocutory appeal which review was granted. The Trial Court then ordered a stay of proceedings. After reviewing the file and considering the comments of the parties, we vacate the Trial Court's Order Denying Motion to Dismiss Without Prejudice and Motion to Dismiss With Prejudice[5].

The Appellant raised two issues: (1) whether the Trial Court abused its discretion by ordering the Tribes to proceed with trial despite their motion to dismiss without prejudice; and (2) whether the Trial Court can "estop" the Tribes from introducing evidence obtained subsequent to a pre-trial hearing.

For reasons set out below we consider only the first issue, i.e. whether the Trial Court erred in denying the Tribes' Motion to Dismiss Without Prejudice.

STANDARD OF REVIEW

The standard of review for abuse of discretion for contempt of court matters was adopted by this

[5] Appellee orally requested the Motion to Dismiss With Prejudice, without citing any grounds for dismissal. *Order Denying Motion to Dismiss Without Prejudice and Motion to Dismiss With Prejudice*, at 1.9.

court in *Sonnenberg v. Colville Tribal Court*, 5 CCAR 9, 3 CTCR 09, 26 Ind.Lw.Rptr 6073 (1999). We now broaden that standard to include appeals dealing solely with abuse of discretion. A trial court's order will be overturned only if its action was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Sonnenberg* citing *State v ex rel. Carroll v. Junker*, 79 Wn.2d 120, 122-123, 482 P.2d 307 (1966).

FACTS

The facts in this matter are not contested. At the readiness hearing on June 6, the Tribes stated they were not prepared to proceed to trial and moved to dismiss the complaint against the defendant on the ground that requested evidence had not been forthcoming. The Trial Court suggested the matter be continued rather than dismissed. The Tribes declined to request a continuance of the trial. The Trial Court denied the motion to dismiss and ordered the Tribes to proceed with trial on June 9.

The Trial Court's written order, dated June 7, found the Tribes' motion to be "*untimely and non-specific* about what information was requested and whether that information is necessary for the Tribes to prove the elements of the crime." The Order also "estopped" the Tribes from introducing any evidence procured after the pretrial hearing, thus preventing them from using at trial the additional evidence they were seeking from the police department.

DISCUSSION

We have previously held that prosecutors have "broad discretion" in determining whether a criminal matter is to be prosecuted. See *CCT v. Laramie*[6], 2 CTCR 66 citing *Wayta v. United States*, 470 U.S. 598 (1985), 24 ILR 6181, and *Sonnenberg, supra.* The court in *Wayta* concisely explained why allowing the prosecution broad discretion is necessary:

> "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside

[6] Appellee asks us not to apply the clear ruling of *Laramie* by distinguishing the facts of that case from the facts of this case. We do not agree with this approach.

> inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute." *Wayta v. United States*, 608 (1985) (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)).

In *CCT v. Boyd*, 10 CCAR 08 (2009) we said:

> We have previously discussed the separate roles and responsibilities of the Trial Court and the Prosecutor's Office. *See: CCT v. Laramie*, 4 CCAR 22 at p.23, 2 CTCR 49, 24 Ind.Lw.Rptr. 6181 (1997), and *Sonnenberg v. Colville Tribal Court*, at p. 16. It is important that the tribal judge maintain his or her objectivity at all times, and respect the roles others have in the cases that come before the judges. 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.

We find the Trial Court judge abused her discretion in ordering the Tribes to proceed with prosecuting its case. Accordingly, we VACATE that order in its entirety.

The issue whether the Trial Court judge can "estop" the Tribes from introducing at trial evidence obtained subsequent to the pre-trial hearing is rendered moot by our decision.

This matter is remanded to the Trial Court for proceedings consistent with this decision.

Mariah FRANK, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP16-002, 7 CTCR 07

13 CCAR 10

[Richard Lee, Office of Tribal Public Defender for Appellant.
Jared Cobell, Office of the Prosecuting Attorney for Appellee.
Trial Court Case No. CR-2015-38164]

Decided August 12, 2016.

Before Chief Justice Anita Dupris, Justice Dennis L. Nelson, and Justice Michael Taylor

Nelson, J

The appellant, Mariah Frank, was charged and convicted of various crimes in three separate

proceedings with three separate case numbers. Sentencing for all convictions were combined into one criminal proceeding in which she was sentenced to consecutive terms of incarceration, the total of which exceeded one year.

The issue on appeal is whether the consecutive sentences imposed during one criminal proceeding violate the requirements of the Tribal Law and Order Act of 2010. For the reasons set forth below we hold that the Trial Court erred in its imposing, in a single criminal proceeding, consecutive sentences which exceed one year.

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).

FACTS

Mariah Frank was charged with criminal violations in three separate cases[7], to wit:

[1] CR 2015-38164 Receiving Stolen Property, which occurred on August 22, 2015;

[2] CR 2015-38204 Attempting to Elude a Pursuing Police Vehicle; Reckless Driving; Obstructing Justice; Theft; and Unauthorized Use of a Vehicle, all of which occurred on October 26, 2015; and

[3] CR 2015-38205 Theft, which occurred on August 10, 2015.

On January 14, 2016, Ms. Frank pleaded guilty to each charge in each case. Sentencing for all three cases occurred during one criminal proceeding.

In Case No. CR 2015-38164, Receiving Stolen Property, she was sentenced to 180 days incarceration with 0 days suspended. The Order noted that the sentence was consecutive to those imposed in CR 2015-38204 and CR 2015-38205.

In Case No. 2015-38204, she was sentenced in each of the five counts to 360 days incarceration with 180 days suspended. The sentences were concurrent in this case, but consecutive to those imposed in the other two cases.

In Case No. 2015-38205, she was sentenced to 180 days incarceration with 180 days suspended,

[7] The Notice of Appeal listed only one case, CR-2015-38164. However, the issue before us involves all three cases therefore we are including them in this Opinion.

consecutive to the other two cases.

The total number of days Ms. Frank was sentenced to during this proceeding was 540 days which is in excess of one year.

DISCUSSION

The Tribal Law and Order Act of 2010, U.S.C. . 3201 et seq., prohibits tribal courts from imposing sentences in one criminal proceeding to more than one year unless certain requirements are met. One of these requirements is that an evidence code be extant within the tribe's legal structure. U.S.C. 1302(c).

At the time of sentencing in this matter, the Confederated Tribes of the Colville Reservation had not enacted an evidence code and this Court had not adopted one. Therefore, the sentencing of Mariah Frank, in one criminal proceeding, to more than one year, was in violation of the Tribal Law and Order Act.[8]

Accordingly, the foregoing sentences imposed in the aforementioned cases are VACATED and the matters remanded to the Trial Court for re-sentencing in accordance with sentencing procedures prior to our holding in *Desautel/Randall v. CCT*, 13 CCAR 03, 7 CTCR 07 (2016).

John Paul MARTINEZ, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee,

Case No. AP16-001, 7 CTCR 08

13 CCAR 12

[David Stevens, Office of Tribal Public Defender for Appellant.
Wes Meyring, Office of the Prosecuting Attorney for Appellee.
Trial Court Case No. CR-22015-38192]

Decided September 1, 2016.

8 We note that subsequent to the sentencing of Ms. Frank, this court adopted the Federal Rules of Evidence as the evidence code to be used in this Court. See *Desautel/Randall v. CCT*, 13 CCAR 03, 7 CTCR 07 (2016).

Before Chief Justice Anita Dupris, Justice Dennis L. Nelson and Justice Michael Taylor

Nelson, J

The Appellant, John Paul Martinez, was found guilty of two counts of Battery DV. He was sentenced to three hundred sixty days incarceration with one hundred eighty days suspended for each count with the sentences to be served consecutively. The total sentence was seven hundred twenty days incarceration with three hundred sixty days suspended.

The first issue on appeal is whether the consecutive sentences imposed during one criminal proceeding violate the requirements of the Tribal Law and Order Act of 2010. For the reasons set forth below we hold that the Trial Court erred in its imposition, in a single criminal proceeding, of consecutive sentences which exceed one year.

The second issue on appeal is whether the sentencing judge was qualified under the Tribal Law and Order Act of 2010 to impose a sentence which exceeded one year in length.

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).

FACTS

John Paul Martinez was charged in one criminal proceeding with one count of Robbery and two counts of Battery DV. The Robbery count was dismissed with prejudice and he pleaded guilty to the two counts of Battery DV.

He was sentenced on the two counts of Battery DV to three hundred sixty days incarceration with one hundred eighty days suspended with the sentences to be served consecutively. A sentence includes the suspended time of incarceration. *Best v. CCT*, 6 CTCR 23, 12 CCAR 01 (2015). Thus, the total number of days Mr. Martinez was sentenced to during this proceeding was seven hundred twenty days which is in excess of one year.

The judge who sentenced Mr. Martinez passed the Colville Tribal Bar Examination and has attended several classes at the National Judicial College in Reno, Nevada. Among these classes are Search, Seizure, and Criminal Procedure. She holds a Tribal Judicial Skills Certificate issued by the National Judicial College.

DISCUSSION

1. Whether imposition of a sentence of seven hundred twenty days violated the provisions of the Tribal Law and Order Act of 2010.

The Tribal Law and Order Act of 2010, U.S.C. . 3201 et seq., prohibits tribal courts from imposing sentences in one criminal proceeding to more than one year unless certain requirements are met. One of these requirements is that an evidence code be extant within the tribe's legal structure. U.S.C. 1302(c).

At the time of sentencing in this matter, the Confederated Tribes of the Colville Reservation had not enacted an evidence code and this court had not adopted one. Therefore, the sentencing of John Paul Martinez, in one criminal proceeding, to more than one year, was in violation of the Tribal Law and Order Act.[9] The matter should be remanded for re-sentencing.

2. Whether the sentencing judge was qualified to impose a sentence in excess of one year.

Having determined that sentencing in this matter should not exceed one year, we find this issue to be moot. The sentencing judge, whoever that may be, must not impose a sentence in excess of one year. Accordingly, whether he or she is qualified to impose a sentence in excess of one year is no longer relevant in this matter.

Therefore, we order the total sentence imposed herein VACATED and the matter remanded to the trial court for re-sentencing in accordance with sentencing procedures prior to our holding in *Desautel/Randall v. CCT*, AP 15-011, AP 15- 016.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Lucretia JAMES, Appellee.

Case No. AP15-002, 7 CTCR 09

13 CCAR 14

[Jacqueline Finley, Office of Prosecuting Attorney, for Appellant.

9 We note that subsequent to the sentencing of Mr. Martinez, this court adopted the Federal Rules of Evidence as the evidence code to be used in this court. See *Desautel/Randall v. CCT*, AP 15-011, AP 15-016.

Dave Stevens, Office of Public Defender, for Appellee.
Trial Court Case No. CR-2015-38031]

Decided January 30, 2017
Before Chief Justice Anita Dupris, Justice Dave Bonga, and Justice Dennis L. Nelson

Procedural History

On January 25, 2015 an officer of the Colville Tribal Police Department issued a citation complaint to the defendant/appellee, Lucretia James (James) on the charge of Driving While Suspended in the Third Degree. The citation complaint mandated James appear at the Colville Tribal Court for an arraignment hearing on the citation on February 3, 2015, at 1:00 p.m.

James appeared on February 3, 2015 as ordered. The Tribes, through its Tribal Prosecutor's Office (Appellant herein) was not ready for the arraignment hearing at which James appeared as directed by her citation complaint. It appears the Prosecutor attempted to discuss the matter with James at the time of the hearing, and had not filed the original citation complaint nor a criminal citation on the charge before the hearing. Apparently James had since obtained a valid driver's license.

The Court asked for the original citation complaint provided to Appellant by the citing officer. The Prosecutor out-right refused to give it to the Court, arguing to the Court that it was abusing its discretion.[10] James provided her copy of the citation complaint to the Court and asked that the case be dismissed because Appellant was not ready to proceed. The Court gave Appellant 10 minutes to either provide the original citation complaint or file a criminal complaint. Again Appellant refused to comply with the Court's directives, after which the Court used James copy of the citation complaint to hear the case and dismissed it with prejudice. From these orders Appellant filed a timely appeal.

STANDARD OF REVIEW

The issues herein are questions of law. There are no material issues of fact to decide. We review *de novo. CCT v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6059 (1995).

[10] Appellant is encouraged to review its rules of conduct and ethics, as well as the contempt statutes. It may disagree with a judge, but unless the conduct requested would put someone in harms way, to out-right refuse a directive of a judge could make a person liable for contempt. Arguing that the judge is abusing its discretion is a question for the Court of Appeals, and does not justify contemptuous behavior in Court.

ISSUE

1. **Did the Court abuse its discretion in proceeding with a hearing on the charge of Driving While Suspended in the Third Degree against Appellee when all that was available to him was Appellee's copy of the original citation complaint in the possession of Appellant?**[11]

The Court, in its written Order dated February 5, 2015, aptly set out the controlling statutes in this matter. First, all criminal proceedings are initiated by a complaint. CTLOC § 2-1-30. Next, a completed citation complaint (citation hereinafter) by a police officer serves as a complaint for purposes of prosecuting a charge in Tribal Court. CTLOC § 2-1-72. There is no statutory section which recognizes the practice and policy of Appellant's office to supervene on the citation a requirement that it can only be filed after a prosecutorial review.

Appellant's arguments rest on the prevailing practices and policies of the Prosecutors' Office, which in this case, create an untenable situation for Appellee. She was mandated by a citation, which according to the law requires her attendance at a specific date and time before the Court, to appear on February 3, 2015. The practices and policies of the Prosecutor's Office dictate that they will not file any citation without first reviewing it and the officer's statement of probable cause. Appellant points out, in support of prosecutorial review, that the citation shows that it had been referred to the Prosecutors' Office. The citation also states a copy was provided to the Court.

Appellant further argues that because of its practice to first review the citation before filing it with the Court, and because it did not file it as of the time of the hearing, Appellee was under no obligation to appear. Appellant gives no legal authority to this proposition nor how the Appellee would know that she did not have to appear.

Appellant rests it's theory on prosecutorial discretion, which has been long-recognized by this Court. *See, e.g., CCT v. Mellon,* 8 CCAR 01 (2005), *Stoneroad-Wolf v. CCT*, 8 CCAR 84 (2006). It cites *CCT v. Stensgar*, 11 CCAR 47 (2013), and *CCT v. Boyd*, 10 CCAR 08 (2009) as authority for the proposition that the Court abused its discretion. Appellant argues the Court's actions violate separation of powers; that the Court overstepped its authority when it directed

[11] Appellant initially appealed the dismissal with prejudice, but did not address this issue in its brief. Therefore we considered the issue abandoned.

Appellant to file the citation or a criminal complaint.

Stensgar and *Boyd* are distinguishable from this case. In *Stensgar* the defendants were arrested, bail set, and a notice to appear on the issue of bail was provided to them. On the date of the hearing the Prosecutor's Office had not issued a criminal complaint yet; there was no citation complaint provided. Without a complaint, a criminal proceeding had not been initiated, CTC § 2-1-30, so there was no legal proceeding to dismiss (other than, perhaps, the bail issue). In *Boyd* the defendant had been arrested and had been in jail only 24 hours of the 72 the Tribes is allowed to hold a defendant before initiating charges, that is a criminal complaint. Again, there was no legal proceeding to dismiss in that there was no complaint filed.

In this case, a criminal proceeding was initiated when the police officer issued Appellant a citation, which, under the law, is considered a valid criminal complaint. Appellant confuses its practices and policies of filing complaints with what the law is, and it appears that at least in this instance, its practices and policies are at cross-purposes with citation complaints. The statutes are unambiguous: a criminal case is initiated once an officer hands a defendant a completed citation with a mandatory appearance date and time.

Prosecutorial discretion is not boundless; it comes with prosecutorial responsibility to ensure that all citation complaints are timely filed with the Court. As stated earlier, there is no statutory authority to allow Appellant's office to ignore the plain language of the law: a citation complaint initiates a criminal proceeding.

The Court did not abuse its discretion when it addressed how to handle a case in which the defendant has complied with a valid citation, and Appellant's office has failed to address the complaint in a timely manner. We so hold.

The Trial Court's decision is AFFIRMED and this matter is remanded for actions consistent with this Opinion.

ERB CORPORATION, Appellant,

vs.

Robert LOUIE, et al., Appellees.

Case No. AP04-001, 7 CTCR 10

13 CCAR 17

[R. John Sloan, Attorney, for Appellant.
Theresa M. Thin Elk, Office of Reservation Attorney, for Appellee.
Trial Court Case No. CV-OC-2003-23122]

Dupris, CJ, for the Court

PREFACE

This is an old appellate case, initiated in 2004. The oral arguments were held at Gonzaga School of Law before Chief Justice Anita Dupris, Associate Justice Howard E. Stewart and Associate Justice Earl L. McGeoghegan, The oral record taken by the Law School was not given to the Court directly after the hearing and was subsequently lost. The Panel thus did not have a record of the oral arguments to review, so had to rely on memory and written notes. Over the years, the case was put on the back burner, for several reasons. The three justices discussed it at different times but never came to a resolution on the draft of the opinion, although we all decided what we wanted to rule after oral arguments. At one point, Justice McGeoghegan was going to attempt a draft, but it never came to fruition. Our decision, made before we lost both Justice McGeoghean and Justice Stewart, is embodied in this opinion. This opinion reflects the spirit of our discussions and, because of the length of time it took to issue it, does render the issue moot. I apologize.

PROCEDURAL HISTORY

In 1999 Robert Erb (Appellant or Erb) established the Erb Corporation (EC) under the Colville Tribal Law and Order Code (CTLOC), Chapter 10. He was the sole owner; it was a 100% Indian-owned business. Contemporaneous with this business, he was part owner of Cates and Erb Corporation (C&EC), a TERO certified 60% Indian-owned business. The EC did business in the timber industry; the C&EC did construction business.

On September 29, 2002, the TERO director, Bob Louie (Director/Appellee), withdrew TERO certification of the EC as a 100% Indian-owned business finding that it was just a front for C&EC. Erb appealed to the TERO Commission (Commission). After a hearing on the appeal on February 13, 2003, the Commission found it was "a close case" and affirmed the Director's decision to decertify. Erb appealed the administrative decision to the Tribal Court.

On January 26, 2004, the Tribal Court affirmed the Commission's decision, without entering findings of fact and conclusions of law. This appeal ensued, and briefing was

scheduled through July 2004. Oral arguments were held August 25, 2004 at the Gonzaga School of Law Barbieri Courtroom.

ISSUE

Appellant asks us to review the issue of whether the Trial Court acted arbitrarily, capriciously, and contrary to the law. He cites Washington State case law as authority. After a review of our case law, and of the record and briefs submitted, this Court finds that the issue to decide is: **Did the Trial Court err in affirming the administrative decision of the TERO Commission based on the facts and law of the case?**

STANDARD OF REVIEW

It is long-settled law, and it was so in 2004, that questions of law are reviewed *de novo,* questions of fact under the abuse of discretion standard, and mixed questions of law and fact under either one, depending on where the interests of justice are better served, in the Trial Court or the Court of Appeals. *CCT v. Naff*, 2 CCAR 50, 2 CTCR 08 (1995). Based on the record and the applicable law, we find the interests of justice are better served in the Court of Appeals and review *de novo.*

FACTS

The undisputed facts are that the EC was incorporated in 1999 under the laws of the Tribes, CTLOC Chapter 10, for the purpose of conducting business in the timber industry. EC was given a 100% Indian-owned Business (IOB) designation by TERO because Erb, a member of the Colville Tribes, was the sole owner and he complied with all of the conditions precedent to such a designation. For example, all the corporate shares were in Erb's name, as sole owner; all the Board members were CCT members; the EC had articles of incorporation and requisite licenses; and he maintained the required Compliance and Utilization Plan for each job he did, as required by the TERO Ordinance. Also, his employees were paid only from EC funds.

The TERO Director found cause to decertify EC based on his belief that the EC and the C&EC were inextricably tied together in their use of employees and equipment, which appeared to give the advantages of a 100% IOB to a lesser-priority business. C&EC was designated as a 60% IOB because it was partly owned by a non-Indian.

The Commission, after hearing testimony from, *inter alia,* Erb, his secretary Cox, Director Louie, and two compliance officers, Bessette and LaPlante, and after reviewing the documents submitted by Erb (*e.g.* licenses, articles of corporation, work documents, etc.) upheld the Director's decision to decertify, finding that it was "a close case."

DISCUSSION

A *de novo* review necessitates a review of all of the evidence presented to the fact-finder, here the Trial Court, and what the Judge reviewed from the Commission's hearing. This Court must decide if, based on a full review, whether a reasonable person would find the Trial Court had sufficient evidence before it to support its legal findings. As pointed out by Appellee, this Court does not substitute its judgment for that of the Trial Judge if the evidence supports a decision contrary to what this Court would find, as long as the Trial Court's decision is "plausible in light of the record in its entirety..." *Hoffman v. CCT*, 4 CCAR 04, 2 CTCR 37 (1997). We find the Trial Court did not have sufficient evidence to uphold the decertification.

The burden of proving non-compliance by a preponderance of the evidence is on TERO. CTLOC § 10-3-5(d). The Commission found that the EC was in the sole ownership of Erb, and that Colville tribal members, Erb's family comprising the Board with Erb, exercised 100% management and supervisory control of the day-to-day operations of the EC. These are the two (2) requirements to meet when asking for 100% IOB certification. CTLOC § 10-3-4(a)(1). Surprisingly, the Trial Court found for the Commission holding EC did not comply with this section of the TERO Ordinance.

The Commission found, however, that EC did not meet the conditions of CTLOC § 10-03-4(b). This section requires that the IOB "must establish that they provided real value for the stated ownership interest" and that "there is a good reason to believe that arrangement would have been entered into even if there were not an Indian preference program." The Commission has appeared to shift the burden of proof to Erb on those conditions with little or no evidence, other than the suspicions of the Director that the EC and C&EC worked too closely together. It speaks of probabilities and potential violations to support its decision, not concrete facts.

The Trial Court based its decision, it appears, on accepting as fact without further inquiry the conclusions of the Commission that the EC and C&EC intermingled business to the extent it

violated the TERO ordinance. We do not have Findings of Fact and Conclusions of Law to review the basis of the Judge's decision on these issues.

The Trial Court reached the legal conclusion that EC violated the TERO Ordinance by both corporations employing some of the same employees for some jobs, EC leasing expensive equipment from C&EC, and sharing an office and secretarial services. The undisputed evidence before the Commission is that some of the decisions Erb made were based on sound business reasons. For example, he leased C&EC equipment because if he had to buy it or lease it elsewhere the cost would be prohibitive; and some of the employees in the construction business had valuable skills in the timber business too. All finances were kept separate between the two corporations, and Erb always had a Compliance and Utilization Plan for all of its jobs.

Erb has several years of experience in the timber trade. His background supports a finding that he offered "real value" for his ownership. It also supports a finding that he could have a real timber business, based on his experience and background, even without TERO. The burden of proving otherwise first rested on the Commission's shoulders. There are no findings either in the Commission's decision nor in the Trial Court's decision that show otherwise.

Appellee's argument that we give deference to the decision of an administrative body because it holds the expertise in the field does not go unnoticed. Appellee argues the abuse of discretion standard. This has already been addressed and we have found there are both questions of law (*e.g.* did the Commission apply an erroneous standard of review, as well as the Trial Court also applying the wrong standard of review), and questions of fact. For these reasons an abuse of discretion standard does not apply here.

The Judge failed to review the whole record with an independent eye as to what evidence supported the Commission's decision, and the adequacy of the evidence. Again, we point out that the Judge held Erb violated the requirements of establishing a 100% IOB, when in fact the Commission found the exact opposite. The record of the Commission's hearing shows that the allegations were based on more speculation and probabilities than concrete evidence, which does not meet a preponderance of the evidence standard. Had the Trial Court Judge made an independent review of the evidence this would have become evident.

Based on the foregoing, this Court holds that the Trial Court erred in upholding the decertification of EC's designation as a 100% IOB, and the Trial Court's Order of January 26, 2004, is reversed. This matter is remanded to the Trial Court for action consistent with this

Order.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Blanche DOGSKIN, Appellee.

Case No. AP11-012. 7 CTCR 11

13 CCAR 22

[Melissa Simonsen, Office of Prosecuting Attorney, for Appellant.
Daryl Rodrigues, Office of the Public Defender, for Appellee.
Trial Court Case Number CR-2012-33118]

Hearing held September 16, 2011. Decision entered March 6, 2017.

Before Chief Justice Anita Dupris, Justice David C. Bonga and Justice Dennis L. Nelson.

Dupris, CJ, for the Panel.

PROCEDURAL SUMMARY

On April 12, 2010, Blanche Dogskin (Appellee) was criminally charged with Hit and Run Unattended , CTLOC §§ 3-3-3 and 3-3-1, incorporating by reference RCW 46.52.010, and Driving While License Suspended or Revoked, CTLOC § 3-3-5, both charges allegedly occurring on March 29, 2010. Prior to the jury being impaneled, Appellee made a motion in limine, asking the Court to restrict Appellant's evidence to exclude any testimony regarding a police surveillance tape which, at the time of trial, had been automatically erased.

Appellant had objected to a hearing on the motion, alleging it had not received adequate notice or copies of the brief submitted by Appellee. By an Order dated October 28, 2010, the Trial Court granted the motion and dismissed the case, too. Appellant immediately appealed. The Trial Court did not preserve its record of the hearing on the motion, so we reversed and remanded to the Trial Court for a new hearing in order to preserve a record of the motion and arguments.

On remand the Trial Court ordered briefing and scheduled a new hearing on the motion for May 5, 2011. The record shows Appellant received notice of the hearing but did not appear. The Court allowed Appellee/Defendant to present her motion again, and reissued its order granting the motion and dismissing the case with prejudice. Appellant timely appealed.

ISSUES

Appellant states two issues:

1. Were Appellee/Defendant's due process rights violated when the police videotape was not preserved?
2. Was a dismissal with prejudice appropriate in this case?

STANDARD OF REVIEW

Issues of law are reviewed *de novo*, issues of fact under a clearly erroneous standard, and mixed questions of law and fact under either, depending on which Court's review better serves the administration of justice. *CCT v. Naff*, 5 CCAR 50 (1995). Both issues are questions of law, to be reviewed *de novo.*

DISCUSSION

1. Were Appellee/Defendant's due process rights violated when the police videotape was not preserved?

Appellee presented her objection to any use of an erased police videotape, allegedly of her driving and committing a hit and run unattended, as a motion to limit any testimony by officers who said they reviewed the tape before it was automatically erased. She was really moving to suppress evidence, not limit it. A motion in limine would not raise a due process question.

We are asked to accept offers of proof of facts not yet on record to support the positions of the parties herein. There has never been a fact-finding in this case. There is nothing in the record to show that testimony was offered to a fact-finder, to prove the merits of the case, regarding the erased tape. The arguments of the parties rest on suppositions.

A review of the Trial Court's Order of Dismissal with Prejudice shows that the Judge decided what the trial strategy of Appellant would have to have been in order to prove Appellee guilty. She states:

> "On the morning of the trial there were three means of proving the defendant's guilt:
> a. First was to produce the tape alleged to contain video of the defendant backing into another vehicle.
> b. Second was to permit Tribal police Officers testify [*sic*] about what they had seen on the now destroyed tape; and
> c. Three to have Ms. Jonnie Bray testify regarding her claim to have seen the defendant back into another vehicle."

In making these findings the Judge usurped the role of the fact-finder, *i.e.* the jury, and made a decision only the Prosecutor's Office should make: how to present its evidence to prove its case.

This approach of judicial activism is what we review for due process violations.

It is a Judge's responsibility to manage the trial and ensure all parties are given an adequate opportunity to present his or her case. Trial management does not mean, however, making trial-strategy decisions before the evidence is presented. The Judge here was responsible to weigh whether or not any references to an erased videotape presented an unfair advantage to Appellant because Appellee did not have access to it.

If we were to assume the officers' potential testimony as to the contents of the alleged videotape were going to be presented, Appellee had the right and obligation to make appropriate objections, such as, for example, hearsay. It is not the Court's responsibility to peremptorily rule before the matter is fully before it and the fact-finder, the jury.

The problem we have, however, is that both Appellant and Appellee argue the merits of potential evidence that may be presented to support their arguments on due process violations rather than address the procedural irregularities of the Court's order. We find that any substantive rulings on due process should be raised only after the case is fully litigated. Otherwise it would appear that we are giving advisory opinions to the Trial Court. We so hold.

2. Was a dismissal with prejudice appropriate in this case?

We have ruled that, as a general rule, even though dismissals with prejudice are usually granted after jeopardy attaches, they are also granted when the Trial Court finds either the Tribes acted in bad faith or filed a frivolous charge, and/or after a balancing of public and private interests, it is an appropriate dismissal. *Campbell v.* CCT, 8 CCAR 28 (2005); Swan *v. CCT,* 7 CCAR 38 (2003); *CCT v. Jack,* 7 CCAR 33 (2003); *Stensgar v. CCT*, 2 CCAR 20 (1993).

The Trial Court entered a dismissal with prejudice in this case to show that it is "a remedy which can provide a powerful disincentive to the government for mismanagement of potentially exculpatory evidence and such a disincentive in this case is appropriate." Order at page 3. Appellant failed to appear at the hearing in which the Court was considering the dismissal of the case. The record doesn't reflect why it failed to appear.

We may extrapolate from the Court's ruling that it was balancing public and private interests in making its decision, although the Judge did not specifically reference any of the standards we have set out regarding dismissals with prejudice. We find that sufficient reasoning was provided by the Court, and affirm the dismissal.

CONCLUSION

The procedural irregularities do not rise to the level of a due process violation on Appellant' behalf. It appears Appellant did not fully participate in developing the issues at the

trial level, not filing a brief nor attending the hearing on the matter. The Trial Court did not commit reversible error in its dismissal with prejudice. We AFFIRM.

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

Willard A. CARSON, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP16-012, 7 CTCR 12

13 CCAR 25

[Dave Stevens and Theresa Thin Elk, Office of Public Defender, for Appellant.
Wes Meyring, Office of Prosecuting Attorney, for Appellee.
Trial Court Case Number CR-2015-38174; CR-2015-38235; and CR-2016-39035]

Decided January 19, 2017.

Before Chief Justice Anita Dupris, Justice Denis L. Nelson, and Justice Michael Taylor

Taylor, J; For the Court

1. PROCEEDINGS IN THE TRIAL COURT

On May 23, 2016, Mr. Carson pleaded to Trespass Buildings and two counts of Battery on case CR-2015-38174. He was sentenced to 360 days in jail with 160 days suspended with all counts concurrent to one another but consecutive to case CR-2015-38173 (DWLS/R) on which he was already serving a sentence. Mr. Carson then immediately pleaded to DUI, DWLA, and Disobedience of a Lawful Court Order on case CR-2015-38235. He was sentenced to 360 days with all counts concurrent but the 360 days consecutive to his 360 days on CR-2015-38174 (Trespass and Batteries) he had been sentenced to minutes before and the sentence he was already serving on CR-2015-38173 (DWLS/R). He then proceeded directly to plead guilty to Bail Jumping on CR-2016-39035. He was sentenced to 90 days with 60 suspended consecutive to his sentence on CR-2015-38173 (DWLS/R) by the same judge with the Tribes being represented by the same prosecutor on each case. He was represented by the same public defender on each case. He objected that his sentencing was one criminal proceeding and that he could not be sentenced to more than one year. He did not object to the sentences being consecutive to CR-2015-38173 as that was a previous criminal proceeding. His exceptions to consecutive sentencing on the other matters were noted.

2. 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 (1965), *Wiley et al. v. CCT*, 2 CCAR 60, 2 CTCR 09, 22 ILR 6059.

3. ISSUES

A. On the date of the various proceedings below, which have been joined together this appeal, was the Appellee not in compliance with provisions of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 *et. seq.*, as amended by P.L. No 11-211 (2010); such non-compliance limiting the sentencing authority of the Tribal Court to a maximum of one year?

B. Does the rule of lenity apply to the proceedings in this matter, because the federal courts apply that rule in criminal proceedings and in this Appeal the Tribal Court must interpret a federal statute?

4. DISCUSSION

We find that (A) this Appeal, being fully briefed by the parties, is suitable for decision without oral arguments; (B) that on the date of the proceedings below Appellee was compliant with those provisions of ICRA (lack of published evidence rules) which Appellant raises as a basis for this Appeal; and (C) that rule of lenity has been found inapplicable to proceedings in the Courts of the Appellee and shall not be applied by the Court in this Appeal.

Appellant relies on our opinion in *Desautel/Randall v. Colville Confederated Tribes*, 13 CCAR 03, 7 CTCR 5 (2016) to argue that at the time of the proceedings below, the Tribes was not compliant with ICRA as amended in 2010. In *Desautel* we held that, because the Tribes had not adopted and published a generalized code of evidence, the Tribes was not in compliance with ICRA. In *Desautel*, pursuant to Colville Tribal Code provisions and prior decisions of the Court, we acted to adopt the Federal Rules of Evidence to all criminal proceedings before this Court. *See also*: *Martinez v. CCT*, 13 CCAR 12, 7 CTCR 08 (2016), at n. 1.

The opinion in *Desautel* was entered May 13, 2016, and a Motion for Reconsideration was filed in this Court on May 19, 2016. Counsel for Appellant in this Appeal was also counsel for the Appellant in *Desautel* and responded to the Motion for Reconsideration in *Desautel*. Thus, counsel for Appellant was fully advised on the dates of proceedings appealed here, that a comprehensive code of criminal evidence had been adopted by this Court for the Tribes.

In addition, as Appellant sets out in his brief, he is appealing his sentencing in three separate criminal proceedings, opened by the Court under three different cause numbers and prosecuted separately. In none of these cases he was sentenced to more than 360 days. We do not rely on the fact of these clearly separate proceedings to deny relief to Appellant here, because we find that the Tribes, by adoption of the Federal Rules of Evidence in *Desautel* prior to the date of the criminal trials in these causes became compliant with the relevant provisions of the ICRA.

While it is important to the analysis of the application of the requirements in the ICRA to require

that defendants in criminal proceedings have the opportunity to review criminal codes and evidence rules prior to their appearance before the Court, in the circumstance of this Appeal, where counsel in *Desautel* and here were and are identical, we find that this opportunity was substantially available.

B. Our finding that the Appellee on the date of the proceedings below was in compliance with the relevant provisions of the ICRA renders a discussion of the issue of the application of the rule of lenity moot. However, this Court has repeatedly found that the rule of lenity does not apply to proceedings before the Courts of the Tribes. *St. Peter v. CCT*, 1 CTCR 75, 2 CCAR 2 (1993); *Coleman v. CCT*, 2 CTCR 25, 3 CCAR 58 (1996).

We do not have a basis in this Appeal for reviewing our prior holdings.

For the reasons stated above the actions of the Trial Court and the sentences imposed in these matters are affirmed.

Joe PEONE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP16-022 IA, 7 CTCR 13

13 CCAR 27

[Mark Carroll, Attorney, for Appellant.
Christopher Kerley, Attorney, for Appellee.
Trial Court Case No. CV-CU-2015-38307]

Decided March 10, 2017.
Before Chief Justice Anita Dupris, Justice Mark W. Pouley, and Justice Michael Taylor

Dupris, CJ.

This matter is before the Court on an Interlocutory Appeal filed November 18, 2016, regarding the denial of an Affidavit of Prejudice against a presiding judge, entered by a reviewing judge on November 10, 2016. CTLOC § 1-1-143 provides that if a request to change a judge is denied, the moving party has the right to an appeal of the issue immediately. Appellant has filed a timely appeal.

LIMITED FACTS

Appellant has two (2) separate causes of action before the Trial Court regarding his termination from his position with the Tribes' Fish and Wildlife Department. The first cause of action was filed in 2013, and from a review of the case, it appears it is still waiting for an administrative hearing on the issue of employment termination, and has been stayed in Tribal Court. The second cause of action, filed in 2015, based again on Appellant's employment termination, and alleging violations of the Tribes' Civil Rights Statute, CTLOC Chapter 1-5, is pending, and is the basis for the case herein.

On October 24, 2016, the Trial Court held a status hearing on the 2015 case. After a ½ hour hearing, the Presiding Judge entered an order extending the stay in the case and allowing both parties to file additional paperwork to move the case along. Appellant filed an Affidavit of Prejudice against the Presiding Judge, alleging he evinced prejudice against Appellant in the status hearing by his comments. He felt the Presiding Judge had made statements which could show he had already made his decision in how he was going to rule in the case, to the detriment of Appellant.

The Reviewing Judge reviewed the affidavit, the recording of the status hearing, and the pleadings submitted by the parties regarding the request to remove the Presiding Judge from the case. By Order dated November 10, 2016, she held that the evidence was insufficient, and that the request to remove the Presiding Judge was denied. It is this Order that is appealed.

Based on the reasoning below, we find the Reviewing Judge did not commit reversible error, and affirm the decision.

ISSUE

Did the Reviewing Judge err in denying a motion and affidavit of prejudice based on the record and law before her?

STANDARD OF REVIEW

We review the Reviewing Judge's order under the clearly erroneous standard. *Louie v. CCT*, 7 CCAR 46 (2004). We will review the facts the Reviewing Judge had before her in order to determine if there is a sufficient basis for her ruling. We do not substitute our judgment for hers if we disagree, but give deference to her findings unless clear error is found.

DISCUSSION

We have reviewed the recording of the status hearing of October 24, 2016, held before the Presiding Judge, upon which Appellant relies to show the Presiding Judge's bias and prejudice. The Presiding Judge started the hearing exhibiting obvious frustration that the case was still on the docket. He thumped the cases (*i.e.* which could be heard plainly on the record), and made statements to the effect that the case, and its similar case filed in 2013, dealt with the same subject matter, and was on the docket too long. Appellant stated on record that he and Appellee had an agreed order to extend the stay in the case, to which the Presiding Judge stated he wasn't inclined to grant the extension.

It appeared to us that the Presiding Judge was almost thinking out loud about what he considered the law to be of the case, *eg.* sovereign immunity, and his disappointment that Appellee had not yet filed a motion to dismiss based on the sovereign immunity defense. Over the next ½ hour he seemed to dither on about the posture of the case, what the parties needed to file (Appellant an amended complaint, Appellee a motion to dismiss), and how much time the case was taking up on the docket.

First, we find that the Presiding Judge's "thinking out loud" approach to the hearing is off-putting, and could be misconstrued as evincing a bias. There are no court rules or statutes regarding what is to happen at a status hearing. Common sense would dictate it as a time when both parties present the current status of the case to the Court, and the Court would issue an order on what is to happen next.

The Reviewing Judge, under the rules of law established by our case law, has discretion to decide if the request to remove a presiding judge from the case is warranted; it is not an automatic decision, but is based on the particular facts of each case. *St. Peter v. CCT*, 1 CCAR 1 (1993), *In Re L.S.-L & R.S.-L, minors, v. CCT,* 5 CCAR 46 (2001). She heard the same recording of the October 24, 2016 hearing as we did.

The Presiding Judge's approach to the hearing leads us to caution the Trial Court judges regarding their roles as tribal leaders. In *Sonnenberg v. Colville Tribal Court,* 5 CCAR 9 (1999) we discussed the leadership roles of our judges; we said:

> 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 decisions for the good of the

> whole community, while at the same time maintaining the integrity of the case for those individuals before him.... 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.

The expectation is that our judges must at all times appear fair and impartial; this is measured, in important part, by whether the parties feel they are receiving a fair hearing and that their positions are listened to and dealt with impartially, and not what the judge feels he must share on the record regarding his feelings on the status of the case. If a judge cannot act accordingly, he or she has a duty both culturally and ethically to step away from the case.

In this case, although the Presiding Judge seemed to use the time to express his frustrations regarding the case, he did not aim his remarks personally at Appellant or Appellant's counsel. His discourse was a statement of the law of sovereign immunity. He did not make a pre-ruling on the issue; he raised it as an issue that will appear in the case. He also advised Appellant that he could file an amended complaint. This is a fine line, but the Reviewing Judge committed no clearly erroneous error in finding that the Presiding Judge's ramblings on the record rose to a level of being unfair or favoring Appellee in the case. We so hold.

We hereby AFFIRM the trial court and REMAND for actions consistent with this opinion.

Valerie DESAUTEL, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Nathan DESAUTEL, MINORS, Appellees.

Case No. AP10-003, 7 CTCR,

13 CCAR 31

[Daryl Rodrigues, Office of Public Defender, for Appellant.
Melissa Simonsen, Office of Prosecuting Attorney, for Appellee CCT.
Mark Carroll, Spokesperson, for Appellee/Father Nathan Desautel.
Kathleen Hathaway, Office of Legal Services, for the minors/Appellees.
Trial Court Case No. MI-2010-30000]

Decided March 10, 2017.

Before Chief Justice Anita Dupris, Justice Gary F. Bass, and Justice Earl L. McGeoghegan

PREFACE

This is an old case, and we recognize that it has more than likely been resolved without our opinion at this point. The record we reviewed was voluminous, including listening to the recording. We have since lost one of our members of the panel, Associate Justice Earl L. McGeoghegan. He did participate in the initial discussions of the case, however. Our apologies.

PROCEDURAL SUMMARY

In November, 2009, dependency petitions were filed in the Washington State Superior Court in Ferry County on the two minor children of Valerie Desautel, mother/Appellant (Appellant) and Nathan Desautel, father/Appellee. The Superior Court Judge granted the Tribes' Motion to Intervene and Transfer the cases to the Tribal Court in December of 2009. The Tribal Court granted Appellee's, CCT Children and Family Services Program (CFS), motion to amend the Petition for Minor-in-Need-of-Care (MINOC) to include Appellant's minor child from a different relationship and a more detailed fact pattern.

Appellant and Appellee Desautel had been going through the State's civil court

in a custody action at least two (2) years prior to the dependency filings. The adjudicatory hearings in the Tribal Court occurred between April 26, 2010 to May 7, 2010. The Court took in extensive testimonial and documentary evidence. The Court entered its final Findings of Fact and Conclusions of Law, "Amended Order/Nunc Pro Tunc Findings of Fact, Conclusions of Law, Order," dated May 10, 2010, nunc pro tunc to April 4, 2010. The Court found the children to be minors-in-need-of-care, and placed two with their father, Appellee Desautel, and the other with a relative, not the mother. The Court found all three children to be minors-in-need-of-care as to their mother, and the two children of Appellee and Appellant to not be minors-in-need-of-care as to their father, Appellee Desautel. Appellant filed a timely appeal challenging the findings of dependency as well as the legal conclusions and orders thereto.

It is noted that in September, 2010, Appellee Desautel moved to dismiss the appeal, stating Appellee had signed over temporary custody of their children to him in a State Court proceeding. Appellant objected but no one asked for a hearing, thus the issue was moot.

ISSUES

Although Appellant sets out seven (7) separate issues, they can be summed up in three:

1. Did the Court err by not having a competency hearing regarding minor children testifying, and regarding the admission of a minor's statements regarding the allegations of sexual abuse?
2. Did the Court err in finding clear, cogent and convincing evidence that the three children were minors-in-need-of-care as to Appellant/mother and not as to Appellee/father of two of them?
3. Was Appellant given due process in the manner in which the adjudicatory hearings were held in light of the comments of the Judge regarding her findings?

STANDARD OF REVIEW

Questions of law are reviewed *de novo*, and questions of fact under the clearly erroneous standard. *CCT v. Naff*, 2 CCAR 50(1995). When the questions are a mixture

of fact and law, we weigh whether justice favors the Court of Appeals or the Trial Court to decide whether to review the whole record *de novo. Id.*

The question of law herein is regarding children's testimony in child sexual abuse cases. Appellant raises several factual challenges which necessitates a review of the whole recorded record of the prolonged adjudicatory hearing. We find the first issue will be reviewed *de novo* and because of the extensive record of the hearings, and the first-hand experience of the Judge during the prolonged hearings, justice is better served to review the facts under the clearly erroneous standard.

DISCUSSION

1. Did the Court err by not having a competency hearing regarding minor children testifying, and regarding the admission of a minor's statements regarding the allegations of sexual abuse?

First, there is question of whether Appellant raised this argument at the Trial Court, and, therefore Appellees argue, the matter is not ripe for appeal. We have addressed competency and hearsay evidence issues once before in our Court. *Bush v. CCT*, AP 90-13173, in which the CoA affirmed the Trial Court's adoption, as guideline, Washington State RCW 9A.44.120, which set out the parameters of when a child is competent and when the child's out-of-court statements could be used as evidence as an exception to the hearsay rule. *Bush* was a criminal case, but is the only published opinion of both the Trial Court and CoA of our rule of law. We hold the Trial Court did not err.

2. Did the Court err in finding clear, cogent and convincing evidence that the three children were minors-in-need-of-care as to Appellant/mother and not as to Appellee/father of two of them?

In reviewing the facts under the clearly erroneous standard we do not substitute our judgment for that of the Trial Courts, even if we would have ruled differently. We review all of the evidence to decide if there is sufficient evidence to support the Trial Court's findings.

Appellant's challenges to the findings of the Trial Court, *e.g.,* whether Bradley Michel's presence and past history constituted a danger to the children, or whether physical abuse and/or sexual abuse occurred in either parent's custody, really are a

challenge to how the Judge weighed the evidence presented. The credibility of any witness or evidence is the sole province of the fact-finder. There was extensive testimony on everyone's behalf, both professional and personal. There is ample evidence for the Judge to weigh and find as she did. We find no clearly erroneous findings and conclusions. We so hold.

3. Was Appellant given due process in the manner in which the adjudicatory hearings were held in light of the comments of the Judge regarding her findings?

Appellant argues she wasn't allowed to make her case to the Court regarding the allegations of sexual abuse by Appellee Desautel, and that the Judge had made up her mind before the conclusion of the case. Appellee aptly points out that the burden of proof regarding whether the children were minors-in-need-of-care as to their father was on the Tribes, not the mother. It appeared from a review of the record that at times the parties inappropriately tried to morph this case into the civil custody case. The Judge, at the conclusion of the Tribes' case, found insufficient evidence as to the father, but did not rule as to the mother at the time.

The Judge commented that she was going to start on her written decision, even though Appellant hadn't presented her case yet. As imprudent as the remark may have been, it does not rise to the level of a due process violation. We so hold.

The Trial Court's Order is hereby AFFIRMED. This case is remanded to the Trial Court for action consistent with this Opinion and Order.

CHILDREN & FAMILY SERVICES, Appellant,

vs.

Jonathan IBARRA, Jennifer IBARRA, and Minor Child, Appellees.

Case No. AP16-013, 7 CTCR 15

13 CCAR 35

[Curtis Slatina, Office of the Prosecuting Attorney, for Appellant.
Esther Milner, Spokesperson, for Appellee/Father.
Theresa Thin Elk, Office of Public Defender, for Appellee/Mother.
Jamie Edmonds, Office of Legal Services, for the Minor.
Trial Court Case No. MI-2013-33022]

Hearing held August 19, 2016. Decided April 20, 2017.
Before Chief Justice Anita Dupris, Justice Gary F. Bass, and Justice Rebecca M. Baker

Bass, J, for the Panel.

The Trial Court issued two (2) Subpoenas Duces Tecum (SDT) at the request of the mother's attorney in their Minor-In-Need of Care (MINOC) cases. The SDT's asked generally for documents in Appellant's files. The Trial Court denied Appellant's motions to quash the SDT's. The parties were informed at the Initial Hearing on August 19, 2016, that we would be reversing and remanding the orders granting the SDT's. The reasons for our rulings are set out below.

COURSE OF PROCEEDINGS

The MINOC case has been on-going for approximately three (3) years. Appellee, Jennifer Ibarra, made a request for discovery covering the same documents set forth in the SDT's. Appellee thought the discovery produced by Appellant in response to her request for discovery was incomplete; this is the reason she filed two (2) SDT's. The difference between the two (2) SDT's was that the second one requested more documents. Appellee used the phrase "et cetera" to identify what she wanted Appellant to provide to her. The second SDT was signed and dated by Appellant's attorney. The Trial Court twice denied Appellant's motions to quash the SDT's, without a hearing. Appellant filed its timely appeal.

ISSUES

1. Is an SDT the proper remedy for an alleged failure to provide requested discovery ?
2. Can an SDT be issued without a hearing?
3. Were the SDT's overly broad in the scope of the documents to be furnished?

STANDARD OF REVIEW

We review issues of law *de novo*. *Davisson v. CCT,* 11 CCAR 13 (2012). We review questions of fact under the abuse of discretion standard. *CCT v. Naff,* 2 CCAR 50 (1995). If the issues are mixed questions of law and fact, as in this case, we review the whole record *de novo,* when we find the interests of justice are best served for the CoA to review *de novo.* We so find in that there are no written rules governing discovery, so we must give direction to the Trial Court and parties regarding future questions of discovery practices.

DISCUSSION

1. Is an SDT the proper remedy for an alleged failure to provide requested discovery?

There are no written rules in the Colville Tribal Law and Order Code (CTLOC) governing discovery. Cases in our Court mention discovery, but do not identify any legal source for it, define what discovery is, nor when it may be obtained. *See, e.g., Gallagher v. Schrock,* 9 CCAR 39 (2008), *Gallagher v. Anderson,* 5 CCAR 51 (2001). CTLOC § 1-1-144 provides that if a course of proceeding is not specified in the Code, any suitable process or mode of proceeding may be adopted which appears to be most conformable to the spirit of Tribal law. We find that, relying on CTLOC § 1-1-144, the appropriate remedy for failure to comply with requested discovery is to file a motion, and to be provided a hearing on the motion, to allow all parties to present their arguments regarding the requested documents, and to give all parties due process. An SDT is not necessary to provide a remedy on the facts of this case. We so hold.

2. Can an SDT be issued without a hearing?

The statutory law, CTLOC § 1-1-250 (c), specifically states that within the SDT a hearing is to be designated for which the documents covered in the SDT are to be brought for consideration by the Court. No hearing was referenced in either SDT presented by Appellee to the Court. Appellee argued that because the case was reviewed every three (3) months, and all parties knew this, all parties should have assumed the hearing for which the documents were requested was the next-scheduled review hearing. We do not agree. We find that a specific hearing must be referenced in the SDT, with a specific date and time. The SDT's issued herein are legally deficient and must be quashed.

3. Were the SDT's overly broad in the scope of the documents to be furnished?

Although We have already ruled that the SDT's were not the appropriate remedy for an alleged failure to produce requested discovery, we are concerned about the broad scope of the SDT's issued in this case. The SDT's appear to be a fishing expedition for anything in the working files of Appellant that could be used for an unspecified purpose, rather than be tailored to produce documents for a specific purpose to be used at a scheduled hearing. The parties and the Trial Court are cautioned to use or issue only SDT's and requests for discovery tailored with specific reasons and purposes, and not for fishing expeditions. For example, the use of the term "et cetera" after listing documents to be produced is inappropriate. It is not a legal term, and is not definite enough for the responding party to respond to it.

CONCLUSION

Based on the foregoing, we find that the Trial Court erred in granting the STDs. We reverse the Trial Court orders entered on June 23, 2016 and July 20, 2016 and remand this matter to the Trial Court for action consistent with this Order.

LeRoy JERRED, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case No. AP16-018, 7 CTCR 16
13 CCAR 37

[Richard Lee and Dave Stevens, Office of Public Defender, for Appellant.
Weston Meyring, Office of Prosecuting Attorney, for Appellee.
Trial Court Case No. CR-2016-39092]

Decision made on briefs on April 12, 2017.
Before Presiding Justice David C. Bonga, Justice Dennis L. Nelson, and Justice Michael Taylor

Bonga, PJ

STANDARD OF REVIEW

We review findings of facts 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).

FACTS

The facts of this case concern an alleged sale by the appellant, Leroy Jerred, of a flatbed trailer to Mr. Jack Ferguson the biological nephew of the appellant's ex-wife Jeanne Jerred. The sale in question occurred after the divorce.

It was determined at trial that Mr. Jerred agreed to sell the flatbed trailer to Mr. Ferguson for $950.00. On the day of the purported sale, October 9, 2015, Mr. Jerred delivered the trailer to 20 Keller School Road in Keller, Washington that was a location that Mr. Ferguson could retrieve the trailer. Mr. Ferguson was not present for delivery but Mr. Jerred received an envelope in which Mr. Ferguson had placed a money order in the amount of $950.00. Mr. Jerred insisted that the sale was to be a cash sale. Mr. Jerred took back the trailer and removed it from 20 Keller School Road. Mr. Ferguson reported to the local law enforcement office on October 13, 2015 that the trailer had been stolen by Mr. Jerred.

The Tribal Prosecutor's office eventually filed a complaint against Mr. Jerred for two counts. Count I was for Theft (Domestic Violence) and Count II for Malicious Mischief (Domestic Violence). At Trial the jury found Mr. Jerred guilty of Count I for Theft with an enhanced Domestic Violence sentence and not guilty for Count II. Mr. Jerred was sentenced by the Trial Court for the charge of Theft and the sentence was enhanced based upon the Domestic Violence connection.

The appellant timely filed this appeal.

ISSUE

DID THE TRIAL COURT ERR WHEN IT DENIED APPELLANT'S/DEFENDANT'S MOTION TO DISMISS THE DOMESTIC VIOLENCE ENHANCEMENT FOR THE CHARGE OF THEFT?

DISCUSSION

It has been recognized by the federal government that domestic violence is and has been a general problem that was addressed by the Congressional passage of the Violence Against Women Act in 1994. The Confederated Tribes of the Colville Reservation (Tribes) adopted similar legislation in March of 2005. The Tribes determined that domestic violence is contrary to the interests of their people and their traditional values. The Tribes accordingly adopted similar legislation.

For our purposes there is a need to examine and attempt to determine if there is a Tribal definition for "extended family."

Chapter 5-5 DOMESTIC AND FAMILY VIOLENCE CODE.

5-5-3 Definitions and Requirements…

(d) Domestic Violence means the occurrence of one or more of the following acts by a family or household member,…

(4) Attempting to commit or committing any criminal offense under Colville Tribal law against another family or household member.

(g)"Family or Household Members" include:

(1) Persons who are current or former spouses;…

(6) Persons who are a part of the extended family of the victim or abuser and who commonly interact with the victim or abuser;…

The Tribal Court Judge determined that Mr. Ferguson was a member of the extended Jerred family because Mr. Ferguson was the nephew of the former Mrs. Jerred, which would have made Mr. Ferguson a nephew-in-law to the appellant, Leroy Jerred. The Court reasoned that divorce did not mean an end to the extended family and therefore Mr. Ferguson should be considered a member of the extended family. Under the Tribes' Law and Order Code there is not a definition of extended family so the Code directs that one may look to State law definitions "[w]henever the meaning of a term used in this code is not clear on its face or in the context of the Code, such term shall have the meaning given to it by the laws of the state of Washington, unless such meaning would undermine the underlying principles and purposes of this Code. *CTC 1-1-7(d)* and *(e)*.

The trial court judge accepted the term "extended family" as defined in the Washington State Indian Child Welfare Act:

> "Indian child's family" or "extended family member" means an individual, defined by the law or custom of the child's tribe, as a relative of the child. If the child's tribe does not identify such individuals by law or custom, the term means an adult who is the Indian child's grandparent, aunt, uncle, brother, sister, brother-in-law, sister-in-law, niece, nephew, first or second cousin, or stepparent, even following termination of the marriage. *RCW 13.38.040(8)*.

The Trial Judge stated:

> The court's determination goes solely to the question of whether, as a matter of law, the Defendant and alleged victim were no longer extended family members at the time of the alleged crimes. The court concludes that the termination of the marriage between Jeanne Jerred and the Defendant Leroy Jerred did not have the legal effect of terminating the "extended family" relationship between the Defendant and the alleged victim.

However the Panel does not agree with the interpretation by the Trial Court that Mr. Ferguson was a member of the extended Jerred family under Washington law. The State statute *RCW 13.38.040(8)* that was relied upon by the Tribal Judge sets out which specific in-law relationships count to be considered by the state to be part of the native extended family and are limited to brother-in-law and sister-in-law, but not to a nephew-in-law. The state statutory definitions run directly into the basic concept that if a statute sets out and lists specifically what

it covers, those things that are not included in the list are not included.

It should also be noted that the Trial Court did not reflect upon an opinion filed by a panel of the Colville Tribal Court of Appeals on February 4, 2016. The opinion was issued in the dissolution of the marriage between Jeanne Jerred and the appellant in this case, Leroy Jerred, Colville Tribal Court case number AP15-018 and AP 15-019. A statement in the final decision by that Appellate Panel is noteworthy to this case as it stated:

> The goal of all dissolutions should be to separate the parties as completely as possible, this is doubly true when there is a history of violence and abuse…"

The issue on appeal in AP15-018, AP15-019 was whether or not the Trial Court had properly ordered the payment of the share of Mr. Jerred's retirement annuity by placing the burden of collecting the share on Mrs. Jerred. In order to receive the share Mrs. Jerred was to contact her former husband each month for payment. The attorney for the Appellee, Mrs. Jerred, had argued that it was unfair due to the contentious nature of the dissolution to subject Mrs. Jerred to monthly contact with Mr. Jerred to collect her fair share that had been awarded by the Trial court, when the Trial Court could have directed the Civil Service Retirement System to send Mrs. Jerred her court awarded share of the annuity. The Appellate Panel agreed with Appellee's argument and directed the Trial Court to enter the appropriate Order to the Federal Government for direct distribution of the Retirement funds to Mrs. Jerred so that her contact with Mr. Jerred would be limited in nature.

This Appellate Panel acknowledges that under the Tribes Domestic Violence Act there is not a definition of "extended family" and that the Trial Court appropriately looked to Washington state law. It is common that a definition for extended family for Tribal members is complicated and often times creates a situation where it is difficult to understand and identify who and how members are related. The inherent authority of a Tribe to determine and define who are members of their extended family, appears to the Panel, as a needed exercise of political thought and decision. Without that self-determination it appears that non-members will continue to define what an "extended family" is for the Tribes.

Thus the Trial Court in this case was in error for stating:

> The court concludes that the termination of the marriage between Jeanne Jerred and the Defendant did not have the legal effect of terminating the "extended family" relationship between the Defendant and the alleged victim.

Furthermore the Panel concludes that without an official Colville Business Committee definition of "extended family" many decisions may be forthcoming creating judge-made law.

It is hereby DECIDED that the decision of the Jury on Count I, Theft, is **AFFIRMED**.

The enhanced sentence for Domestic Violence is **REVERSED** and **REMANDED** for resentencing.

Ricard TUPLING, Appellant,

vs.

Cassandra KRUSE, Appellee.

Case No. AP14-027, 7 CTCR 17

13 CCAR 41

[The parties appeared in person and without representation.
Trial Court Case No. CV-CU-2013-36210]

Decided June 5, 2017. Dissent issued May 30, 2017

Before: Chief Justice Anita Dupris, Justice Gary F. Bass, and Justice Rebecca M. Baker

Dupris, CJ

SUMMARY

The custody issues in this case have been addressed by three (3) state courts, Okanogan, Island County, and Snohomish County, and the Colville Tribal Courts through several different hearings. The first filings regarding these parties was on September 9, 2013, in Okanogan District Court by Kruse (Appellee), a non-Indian, who obtained an *ex parte* temporary restraining order and temporary custody order (TRO) of the parties' minor child, W.T. (child). At the time of its filing all parties resided on the Colville Indian Reservation (Reservation).

One day after she obtained the Okanogan TRO, Appellee and the child moved to the west side of the State. On that same date, September 10, 2013, Tupling (Appellant) filed for custody of the minor in Tribal Court. There is nothing in the record that shows he notified the Tribal Court of the Okanogan TRO. Appellant did not affect service of his custody pleadings on Appellee until April 21, 2014, seven (7) months after he filed them.

On September 18, 2013, Appellee filed for custody in Snohomish Superior Court, and received a TRO from that Court which, *inter alia*, restrained Appellant from removing the child from its jurisdiction pending the final resolution of the matter.

On September 19, 2013, at a hearing attended by Appellant, and a phone appearance by Appellee, the Okanogan Court found, by a preponderance of the evidence, that no domestic violence occurred between the parties, and dismissed its TRO. The Okanogan order does not

contain findings of fact supporting its ruling.

In spite of the fact that Appellee had not received service of Appellant's tribal custody pleadings, the Tribal Court held at least two (2) hearings on the custody issue, granting temporary custody to Appellant and issuing a warrant to pick up the child. The record does not indicate the basis of the *ex parte* orders, nor the Tribal Court's findings on why it proceeded without proof of adequate service on Appellee.

Appellant took his Tribal Court temporary orders first to Okanogan County, then to Island County, and on to Snohomish County courts for registration of the foreign orders. All the state courts granted full faith and credit of the tribal court orders, and, initially, Snohomish County Superior Court, in April, 2014, dismissed Appellee's custody case, finding it was first filed in Tribal Court. After being asked to reconsider its ruling, the Snohomish Superior Court reversed its ruling in May of 2014, finding it did have concurrent jurisdiction. It reserved further rulings on which Court had the primary jurisdiction until it conferred with the Judge of the Colville Tribal Court.

On July 11, 2014, Appellant filed a request in the Okanogan Court for recognition of the Tribal Order under the Uniform Child Custody Enforcement Act (UCCJEA), RCW Chapter 26.27. Appellant also raised the issue of the Parental Kidnaping Prevention Act (PKPA), 28 USCA, § 1738A, before the Tribal Court. The Tribal Court never addressed the issue.

On November 17, 2014, the judges of the Snohomish and Colville Tribal Courts had a telephone conference to discuss which Court had jurisdiction under UCCJEA. They concluded that the Courts had concurrent jurisdiction; that the child had lived his whole life in Washington State, with the last year in Snohomish County; that Snohomish County was the more convenient forum; and that the Coville Tribal Court would decline jurisdiction in favor of Snohomish County Court jurisdiction, and dismiss the Tribal Court case. From this order Appellant timely filed his appeal.

ISSUES

1) **Did the Trial Court err in failing to address the PKPA issue?**
2) **Did the Trial Court err in finding concurrent jurisdiction with Snohomish Court, and declining jurisdiction in favor of the Snohomish Court under the principles of the UCCJEA?**

STANDARD OF REVIEW

The first issue is a question of law; the second a mixed question of fact and law. We review both under the *de novo* standard. We review mixed questions of fact and law when the administration of justice is better served by such a review by the Court of Appeals. *CCT v. Naff*, 5 CCAR 50 (1995).

DISCUSSION

1) DID THE TRIAL COURT ERR IN FAILING TO ADDRESS THE PKPA ISSUE?

The PKPA is a federal statute which was enacted after the Uniform Child Custody Jurisdiction Act (UCCJA), the precursor of the UCCJEA. The PKPA was enacted in 1980 to address the problem of parents removing children from the jurisdiction of the courts with UCCJEA jurisdiction. The PKPA generally prohibits a parent from removing a child from the court's jurisdiction pending the final resolution of the case.

The PKPA does not explicitly define Indian tribes as "states" for the purpose of interstate full faith and credit. The Washington State UCCJEA, RCW Chapter 26.27, does include tribes as "states" for the purpose of its enforcement. The UCCJEA has been adopted by all fifty (50) states and the Territories. The Confederated Tribes of the Coville Reservation (CCT) has not adopted either a parental kidnaping statute or a UCCJEA statute.

The Colville Tribal Courts do not create legislation. That is the responsibility of the Colville Business Council (CBC). We (I would find) hold the PKPA does not apply in this case.

CTC § 5-1-33 provides that a "spouse" cannot remove a child from our jurisdiction without a court order. Appellant argues we should apply this statute. The parties were not married, however. We have ruled that the child of an unwed mother takes the domicile of the mother. *In Re S.l.* 11 CCAR 62 (2014), citing *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48(1989). Appellee took the child to western Washington before Appellant filed his case in Tribal Court, and after obtaining a temporary custody order in Okanogan County District Court, at a time when she had domiciliary rights to the child. We (I would find) hold that CTC § 5-1-33 does not apply, and that Appellee was within her legal rights to take the child with her when she moved.

Although the Okanogan Court found, on September 19, 2013, it was not proven by a preponderance of the evidence that domestic violence occurred between the parties, we have

no indication of what facts were considered. By this time, Appellee had removed herself from what she considered an abusive relationship, and initiated protection in her new residence.

When Appellee filed in the Snohomish Court, she stated that Washington was her "home state," per a UCCJEA requirement. This was true. While she lived on the CCT Reservation, she was also a resident of Washington State. Not being legally-trained, she may not have been aware that Washington considered the Colville Reservation as a "home state" for purposes of the UCCJEA.

We (I find) hold the PKPA does not apply in our Courts, and, because the parties were not married, CTC § 5-1-33 does not apply either. Appellee was within her legal rights to take the child to another jurisdiction. She was under no legal obligation to stay on the Reservation, and the child's domicile follows her.

2) Did the Trial Court err in finding concurrent jurisdiction with Snohomish Court, and declining jurisdiction in favor of the Snohomish Court under the principles of the UCCJEA?

Washington's UCCJEA, RCW, Chapter 26.27, recognizes tribes as "states" for the purpose of determining jurisdiction over mutual custody cases. The Tribes do not have a similar law. The federal government passed a model UCCJEA, and each separate state and the Territories, adopted its version of the federal model. The UCCJEA directs the states to consider a tribe as a "state" for the purposes of determining a home state. The federal model does not direct tribes to adopt a version of it.

In *Carson v. Barham*, 7 CCAR 17 (2013), we upheld the Trial Court's adoption of a version of a UCCJEA-type procedure which allowed the tribal judge and state judge to confer and consult with each other to decide which court was the more convenient forum for a custody case. It was recognized as an acceptable procedure for comity's sake. Although there were some irregularities in the conference call on November 14, 2014 between the Colville Tribal Court Judge and the Snohomish Court Judge, we (I would) hold that none of them rise to sufficient error to overturn the decision herein.

First, we cannot address whether the Snohomish Court erred in its procedures; we do not have appellate review over state courts. The only review we can make is of the Tribal Court's actions. The Tribal Judge should have made a recording of the call. Without a recording, we are left to review *de novo* the facts the judge had before him at the time of the call.

We know that Appellant and Appellee are the unwed parents of the child, W.T.. Appellee obtained the first order in the custody dispute: the Okanogan TRO and Temporary Custody Order, issued on September 9, 2013. After obtaining her order, she took the child to western Washington to live. She was under no legal obligation to stay on the Reservation. Appellant filed for custody in Tribal Court on September 10, 2013, but did not affect service of his petition and summons until April, 2014, seven (7) months after he filed.

Appellee filed for custody in a state court on September 18, 2013, a day before her hearing on the Okanogan TRO/Temporary Custody Order. On September 18, 2013, Appellee obtained temporary orders from the Snohomish Court which restrained Appellant from removing the child from its jurisdiction pending the final decision in the case.

In the following months Appellant obtained temporary orders from the Tribal Court, although we have no record of why temporary orders were granted *ex parte* when there was no proof of service on Appellee filed in Tribal Court.

During this period the child lived continuously with Appellee in western Washington. The record shows that Appellant did appear in the Snohomish Court during this time, too, with an attorney, advocating his right to custody of the child.

Those were the facts the Tribal Court judge had before him as he conferred with the Snohomish Court judge. They found that both courts had jurisdiction; that Snohomish was the more convenient forum, and that the Tribal Court would decline jurisdiction in favor of the state court, and the Tribal Court judge dismissed the tribal case, allowing the parties to proceed in the state court.

Although the judge erred in not preserving an oral record, and in finding that the UCCJEA applied in Tribal Court, we (I find) hold these errors to be harmless. There is nothing in the record to show that the parties could not adequately address the custody issues in the Snohomish Court.

Our Code, CCT § 1-1-144[12], gives our Courts the ability to fashion a suitable procedure in the absence of a specific statute, when the interest of justice is served. We have concurrent domestic relations jurisdiction with the State of Washington. *See,* Public Law 3-280 (PL280). We

[12] 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 of this jurisdiction, if the course of proceedings is not specified in this Code, any suitable process or mode of proceeding may be adopted which appears most conformable to the spirit of Tribal Law.

need to develop procedures to address cases that are before both the Tribal Court and a state court at the same time. We must ensure that forum shopping is not allowed between the two jurisdictions, while at the same time, not adopt laws that have not been enacted by our CBC.

This case has tied up several courts in search of an answer to where best it should be handled. We do not substitute our judgment for the Trial Court's decision if we disagree with it. We review the record to see if there is sufficient evidence to support the Trial Court's decision, and if it does, we affirm. We so hold/I so find.

CONCLUSION

Based on the foregoing, the Order From UCCJEA Conference entered November 17, 2014 is affirmed. This matter is remanded to the Trial Court for action consistent with this Order.

DISSENT

Bass. J

The Appellant, Richard Tupling, appealed the Order from UCCJEA Conference. For the reasons set forth below, I would hold that errors were committed by both the Colville Tribal Court and the Snohomish County Superior Court of the State of Washington and would reverse the Order from UCCJEA Conference, and remand for further proceedings consistent with this dissent.

FACTS AND COURSE OF PROCEEDINGS

Richard Tupling (Tupling), and Cassandra Kruse (Kruse) are the unmarried parents of W., date of birth April 6, 2012. They resided together with the child within the bounds of the Colville Confederated Tribes reservation from the date of birth of the child until September 9, 2013.

Tupling is a member of the Colville Confederated Tribes. Kruse is non-native. W. is a member of the West Bank Tribe, which is a First Nation in Canada. Although W. is a descendant of a Colville Tribal member by virtue of is father's membership in the Colville Tribe, he is not an enrolled Colville Tribal member.

On September 9, 2013, Kruse obtained an *ex parte* protection order from the Okanogan

County Superior Court (Okanogan) awarding her temporary custody of the child. Kruse listed her address as 2967 Columbia River Road, Okanogan, Okanogan County, Washington, which is within the boundaries of the Colville Indian reservation, and is the address where W., Kruse and Tupling resided. Kruse fled on September 10, 2013 with the child to an location unknown to Tupling.

On September 10, 2013, Tupling filed a Petition for Custody and/or Support in the Colville Tribal Court (Colville).

On September 18, 2013, Kruse filed a Summons and Petition for Residential Schedule/Parenting Plan and Child Support in Snohomish County Superior Court (Snohomish). In the summons instead of listing her actual address she listed the address where she could be served at as the Snohomish County Superior Court Clerk's office.

On September 18, 2013, Snohomish issued a Temporary Restraining Order restraining Kruse and Tupling from changing the residence of the child until further court order. This order did not specify where the residence of the child was at that time, except it was apparent he was with his mother, Kruse.

On September 19, 2013, with Kruse appearing telephonically and Tupling in person, there was a show cause on the *ex parte* protection order in Okanogan. The court found by a preponderance of evidence that domestic violence had not occurred and dismissed the case. Kruse provided an address on Camano Island, Washington, her father's address.

On September 19, 2013, Colville issued a Temporary Order granting Tupling custody of W., and scheduled a Show Cause Hearing for September 30, 2013.

On October 21, 2013, Colville issued a Temporary Residential Schedule establishing primary residence of W. to be with Tupling.

On October 21, 2013, a letter from Colville to Kruse that had been sent to 33 Miller Rd, Omak Washington, which was Kruse's mother's address, was returned to Colville marked "return to sender, not deliverable as addressed, unable to forward".

On October 24, 2013, Colville issued a Warrant for Protective Custody No Bail warrant for W.

On December 2, 2013, the Island County Sheriff was contacted by the Colville Tribal Police Department seeking assistance in locating Kruse. The Stanwood Police Department had

given the Colville Police Department the address that showed as her address on her drivers license, which was 1780 Mercyside Lane, Camano Island, Washington. The Colville Police Department gave that address to the Island County Sheriff's Department, and an officer went to that address and an occupant told him that Kruse did not live there but had moved into her new home on Maple Grove Road. The father of Kruse lived at 1780 Mercyside Lane, Camano Island. The officer talked to Kruse at the Maple Grove Road address, and after finding that the child and the home seemed fine, took no other action.

On December 17, 2013, Okanogan issued an Order for Full Faith and Credit on Colville Tribal Temporary Custody Order, Temporary Parenting Plan and Protective Custody Warrant granting full faith and credit to the Colville Temporary Custody Order, Temporary Parenting Plan and Protective Custody Warrant.

On December 30, 2013, Tupling filed a Petition for Full Faith and Credit on Colville Temporary Custody Order, Temporary Parenting Plan and Protective Custody Warrant in Island County Superior Court, as Camano Island was in Island County.

On April 16, 2014, a Snohomish County Superior Court Commissioner issued an Order Dismissing the Snohomish case involving custody with prejudice, stating the reason that the action was filed first in Colville.

Kruse filed a Motion and Declaration for Revision of Court Commissioner's ruling dated April 16, 2014.

Although there is not a copy signed by a Snohomish judge, there is an unsigned order which apparently was signed by Judge Lucas of Snohomish sometime in May, 2014, that reversed the Snohomish Court Commissioners order of April 16, 2014 and found that there was concurrent jurisdiction and reserving the issue of jurisdiction until a conference between Snohomish and Colville be held to establish jurisdiction under the UCCJEA.

On April 21, 2014, Kruse was served personally with the Petition for Custody, Temporary Residential Schedule and Warrant for Protective custody issued by Colville at 149 North 3rd Street, in Okanogan, Washington, which is the address for the Okanogan County Superior Court.

A hearing was held in Snohomish on the 8th day of May, 2014, ordering that a UCCJEA conference should take place between Snohomish and Colville.

On July 11, 2014, Tupling filed a request for child custody determination registration

under UCCJEA with Okanogan.

On September 5, 2014, a hearing was held in Colville with the Colville Court ordering that a UCCJEA conference would take place.

On September 23, 2014, Colville issued an Order from Motion Hearing ruling that the court would await a conference call with Snohomish before deciding jurisdiction.

On October 15, 2014, Kruse filed a brief with Colville alleging that 28 U.S.C. 1738A, commonly known as the Parental Kidnapping Prevention Act (PKPA), was not applicable to the Colville Tribe. The Colville Tribal Trial Court did not rule on that issue.

On October 24, 2014, a UCCJEA conference was held. The Snohomish judge and Kruse appeared in person in the Snohomish Court. Kruse's attorney and the Colville judge appeared by telephone. No recording of the conference was made by Colville.

Pursuant to the telephone conference of October 24, 2014, an "Order from UCCJEA Conference" (OFUC) was prepared for the signature of the judges from Snohomish and Colville. The Judge from Colville signed it on November 17, 2014 and filed it in Colville November 17, 2014. The Judge from Snohomish signed it on December 9, 2014 and filed it in Snohomish on December 9, 2014. The Findings in the OFUC were that both courts agreed that both courts had subject matter jurisdiction, that the minor child had resided in Washington State his entire life, and the minor had resided in or around Snohomish County for the previous year. Based on the child's residence in Snohomish County, the Courts determined that Snohomish County was the most convenient venue for this matter to be heard. The Conclusions of Law were that the Colville Tribal Court declined to exercise jurisdiction in favor of Washington State, County of Snohomish and Snohomish accepted jurisdiction. The OFUC ordered that the Colville case be dismissed, that the temporary parenting plan and protective custody warrant issued in the Colville case also be dismissed, and that the matter would proceed in Snohomish.

There is nothing in the record before this Court as to any action taken in the Snohomish Court subsequent to the Order from UCCJEA Conference dated November 17, 2014.

Tupling timely appealed the Order from the UCCJEA Conference under Colville Tribal Code (CTC), sections 1-2-77 and 1-2-108.

ISSUES AND STANDARD OF REVIEW

The first issue in this case is did the Trial Court err in ruling in the OFUC that the

conference was under the UCCJEA. Since that is an issue of law, the standard of review is de novo. *CCT v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995).

The second issue is whether the Colville and the Snohomish Courts erred in considering concurrent jurisdiction in a UCCJEA conference. Since that is an issue of law, the standard of review is *de novo. CCT v Naff, supra.*

The third issue is did the Colville and the Snohomish Courts err in a UCCJEA conference when they considered the child's residence in Snohomish County as a basis to invoke the most convenient forum in deciding jurisdiction. Since that is an issue of law, the standard of review is *de novo. CCT v Naff, supra.*

The fourth issue is did Colville and Snohomish Courts err by considering this is a UCCJEA case when the jurisdictional standards of the Colville Tribe were different than those of Washington state in the UCCJEA. Since that is an issue of law, the standard of review is *de novo. CCT v Naff, supra.*

The fifth issue is did the Colville Court have the authority to decline jurisdiction in favor of Snohomish. Since that is an issue of law, the standard of review is *de novo. CCT v Naff, supra.*

The sixth issue is whether the Colville or Snohomish Courts should have considered whether the PKPA applied to this case. Since that is an issue of law, the standard of review is *de novo. CCT v Naff, supra.*

The seventh issue is whether Tupling timely served Kruse. Since that is a mixed question of fact and law the standard of review is *de novo. CCT v Naff, supra.*

The eighth issue is whether the Colville Court erred in not recording the hearing which led to the OFUC. Since that is a mixed question of fact and law, the standard of review is *de novo. CCT v Naff, supra.*

The ninth issue is whether all the factors relevant to the application of comity were considered in this case. Since this is a mixed question of fact and law, the standard of review is *de novo. CCT v. Naff, supra.*

The tenth issue is if the conference in this case is to be considered under comity rather than the UCCJEA, should the first to file rule have been considered. Since that is a question of law, the standard of review is *de novo. CCT v Naff, supra.*

DISCUSSION

The issue of subject matter and personal jurisdiction in child custody cases between state and tribal courts is one of the most complex, confusing and murky legal issues parties, lawyers and courts face. There is a myriad of laws that intersect in such cases. The relationship between just two of the laws, the UCCJEA and the PKPA, and not involving tribes have been described as "technical enough to delight a medieval property lawyer." Mix in the other laws which will be considered in the following discussion and you have a dizzying array of laws to consider, and it is no wonder that parties, lawyers and courts can fail to find their way through the maze. The best way to start this discussion is to address the history of those laws.

Chronologically, the first law that impacts child custody jurisdiction between states and tribes is Public Law 83-280 (PL 280), enacted in 1953. It allowed states to assume jurisdiction over child custody on Indian reservations such as the Colville Reservation, which the State of Washington did assume in RCW 37.12.010. Notably the State of Washington did not assume exclusive jurisdiction over child custody, leaving the Colville Tribes to retain concurrent jurisdiction over such cases, which it did pursuant to CTC 5-1-120 *et seq*. The State of Washington and the Colville Tribes thus have concurrent jurisdiction over child custody matters. The impact of this law is discussed *infra*.

An excellent history of the Uniform Child Custody Jurisdiction Act (UCCJA), the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), and the Parental Kidnapping Prevention Act (PKPA) is contained in a monograph by Patricia M. Hoff prepared for the U. S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention in the December 2001 issue of the Juvenile Justice Bulletin, with appropriate citations. That monograph is used to detail the history set forth below.

Before 1968, state courts could exercise jurisdiction over a child custody case based on a child's presence in the state. Courts freely modified sister states orders because the U. S. Supreme Court rulings had never settled the question of whether the Full Faith and Credit clause of the U. S. Constitution applied to custody decrees. This legal climate fostered child abduction and forum shopping, and because parents with physical possession of a child could choose the forum that would decide custody, parents had a legal incentive to abduct children. The comity doctrine would have been the only means of resolving disputes between states over

which state had jurisdiction. Given the interstate nature of the problem, an interstate solution was needed. The Uniform Conference of Commissioners on Uniform State Laws (NCCUSL) is an national organization that proposes uniform laws for the states to consider in areas of law where there should be uniformity between states. It is up to the states to determine whether to adopt such uniform laws. In 1968 the NCCUSL responded with the Uniform Child Custody Jurisdiction Act (UCCJA), which governed the existence and exercise of jurisdiction in initial child custody determinations and cases involving modification of existing orders. The law required states to enforce and not modify sister states orders. The law was adopted in one form or another by all 50 states.

Although the UCCJA was a major improvement over pre-1968 law governing jurisdiction in child-custody cases, some problems remained. The law did not eliminate the possibility of two or more states having concurrent jurisdiction, and the Act's prohibition against simultaneous proceedings was not routinely effective in preventing courts in different states from exercising jurisdiction and issuing contradictory rulings. Some judges were using the emergency jurisdiction to provide permanent relief rather than temporary relief. Jurisdictional conflicts also continued in modification cases. Also the Act did not provide enforcement procedures to carry out the requirements. Some states had variations in language which undermined the uniform interpretation and application of the law across the country and created loopholes that led to the issuance of conflicting custody orders.

In order to close existing gaps and bring greater uniformity to interstate child-custody practice, Congress in 1980 enacted the PKPA. It *required* (emphasis supplied) state courts to enforce and not modify custody determinations made by sister states consistently with the PKPA unless the original state no longer had or had declined to exercise its jurisdiction; defer to the "exclusive, continuing jurisdiction of the decree state" as long as that issuing state exercised jurisdiction consistently with the PKPA when it made its determination, had jurisdiction under its own law, and remained the residence of the child or contestant; and must refrain from exercising jurisdiction while another state was exercising jurisdiction over a matter consistently with the PKPA.

The PKPA's jurisdictional criteria resemble those of the UCCJA, but there are significant differences. The PKPA prioritizes home state jurisdiction in initial custody cases. Whereas two States may have jurisdiction under the UCCJA, one "home state" and the other significant

connection jurisdiction, the PKPA gives priority to "home state" jurisdiction. The home state is defined as the state where the child lived with a parent for at least six months immediately before the custody action was filed.

The PKPA did not solve all of the problems it targeted because of some confusion about its relationship to the UCCJA, because of the inconsistencies between the two laws, and partly because lawyers and judges ignored the PKPA or were unaware of its impact on UCCJA practice.

Some laws enacted after the UCCJA added a Federal dimension to interstate child custody practices that were unforeseen by the drafters of the UCCJA in 1968. In addition to the PKPA, these include the Full Faith and Credit provisions of the Violence Against Women Act (VAWA) enacted in 1994. VAWA recognized that domestic violence victims often leave the state where they were abused and need continuing protection in their new locations, and thus provided for interstate enforcement of protection orders. Custody provisions incorporated into protection orders, however are not governed by the VAWA. Significantly they are "custody determinations" subject to the PKPA and state law governing jurisdiction in child custody cases.

Enter the UCCJEA. By January, 2016, it had been adopted by 49 states, excepting Massachusetts. It was adopted in the State of Washington in 2001 in RCW Title 26 Chapter 26.27. The intent of the UCCJEA was to avoid jurisdictional competition and conflict with other states in matters of child custody which in the past have resulted in the shifting of children from state to state with harmful effects on their well-being, and to discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child.

The UCCJEA is a complete replacement of the UCCJA. Articles 1 and 2 contain jurisdictional rules that bring the UCCJA into conformity with the PKPA. The UCCJEA grants priority to "home state" jurisdiction; authorizes courts to exercise emergency jurisdiction in cases involving family abuse; and limiting the relief available in emergency cases to temporary custody orders, and directs courts to decline jurisdiction created by unjustifiable conduct.

Under the UCCJEA, like under the PKPA, a court has "home state" jurisdiction if the child has lived in the state for at least 6 months preceding commencement of the action. Commencement of the action is defined in the UCCJEA adopted by the

Washington state legislature in RCW 26.27.021 (5) as "the filing of the first pleading in a proceeding."

RCW 26.27.251, **Simultaneous Proceedings**,(1) provides that a court of Washington may not exercise its jurisdiction over a child custody proceeding if at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum. (emphasis supplied).

RCW 26.27.041, **Application to Indian tribes**, (3) provides that a child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this chapter (emphasis supplied) must be recognized and enforced under Article 3.

ISSUE #1

Did the Colville Tribal trial court err in ruling in the OFUC that this was a conference pursuant to the UCCJEA and conduct the conference as a UCCJEA conference?

All of the documentation in the Trial Court case file consistently refers to the interaction between the Colville and Snohomish as being pursuant to the UCCJEA. The OFUC refers to it as a UCCJEA conference. Washington State has adopted the UCCJEA in Chapter 26.27 of the Revised Code of Washington (RCW). RCW 26.27.101 provides for a conference between courts in a proceeding under the UCCJEA. The Colville Tribes have not adopted the UCCJEA in the Colville Tribal Law and Order Code (CTLOC). The only way the UCCJEA can be enacted by the Colville Tribes is by adoption by its legislature, the Colville Tribal Council. The majority opinion correctly asserts that the Colville Tribal Court of Appeals does not create legislation. The same applies to the Trial Court. The Colville Trial Court could not adopt the UCCJEA, but it did in the OFUC. The Colville Tribal Council did not adopt the UCCJEA. The UCCJEA is not a part of the law of the Colville Tribes. The majority opinion refers to the conference as a "UCCJEA type procedure" pursuant to the concept of comity. Comity was never mentioned at all in any of the proceedings of the Colville and Snohomish courts. The Colville and Snohomish Courts did not engage in the conference on the basis of comity, but only as a

UCCJEA conference. The Trial Court Judge had no authority to act pursuant to the UCCJEA. The Trial Court Judge acted beyond his authority in engaging in a conference with regard to the UCCJEA. Acts by a court acting without authority are void *ab initio*. *CCT v Stensgar*, 6 CTCR 39, 3 CCAR 47 (2013). The Trial Court Judge's action in engaging in a conference with the Snohomish County Superior Court is void *ab initio*.

Issue #2

Did the Colville and Snohomish Courts err by considering concurrent jurisdiction in a UCCJEA conference?

The UCCJEA was intended to eliminate the notion of concurrent jurisdiction, as a justification for exercising judicial power, instead focusing on the home state of the child, "that state that the child had resided in for the six months preceding the commencement of a child custody action," as the basis for subject matter jurisdiction. There is nothing in the UCCJEA that concurrent jurisdiction is a basis for jurisdiction, rather making the home state of the child the paramount consideration. The courts in this case injected a consideration in the OFUC, I. e., concurrent jurisdiction, that cannot be considered in determining jurisdiction. They thereby made a finding that was not authorized by law, and cannot be considered in such a proceeding. Since it was a basis for their Order, the Order is based on an invalid consideration, and is *void ab initio*.

Concurrent subject matter jurisdiction would only be a relevant issue if the case was being considered pursuant to RCW 37.12.010, in which the State of Washington pursuant to Public Law 280 assumed jurisdiction over child custody cases on reservations in the State of Washington and CCT 5-1-120 in which the Colville Tribe retained jurisdiction over child custody cases. This case was considered by Colville and Snohomish strictly under the UCCJEA, in which concurrent subject matter jurisdiction is not a consideration, and thus concurrent jurisdiction was not a factor to be considered. The courts acted without authority to make such a finding. Doing so was void ab initio.

Issue #3

Did the Colville and the Snohomish err in a UCCJEA conference by considering the child's residence in Snohomish County as a fact to consider in order to invoke the most convenient forum factor.

The convenient forum consideration in UCCJEA cases only comes into play if the

courts can't find that there was a home state for the child. In this case the courts did not make any findings that would lend itself to the home state issue. The custody case was filed in Colville Tribal court first. Under RCW 26.27.041 (2) a Washington State court shall treat a tribe as if it were a state of the United States for the purpose of applying articles 1 and 2, which are the General Provisions and Jurisdiction articles of the UCCJEA. Since the courts were treating the conference as a UCCJEA conference, that means that the courts should have been hearing evidence with regard to the home state of the child, which in this case would have been the Colville Indian Reservation. They did not, and erred in not doing so, and by using the most convenient forum applied the wrong part of the UCCJEA to the case. The courts made a finding that was beyond their authority to make. The Order based on considering convenient forum is *void ab initio*.

Issue #4

Did the Colville and the Snohomish err by considering this a UCCJEA case when the jurisdictional standards of the Colville Tribe were different than those of Washington State in the UCCJEA?

RCW 26. 27. 251 supra., indicates that in order for the Washington State version of the UCCJEA to apply to the Colville Tribes, the Colville Tribal Code (CCT) must have jurisdictional standards substantially in conformance with the Washington State UCCJEA. CCT 1-1-430 provides that entrance by any person into the Reservation shall be a consent to civil jurisdiction. CCT section 1-1-71 provides that jurisdiction invoked by this code is exclusive and preempts jurisdiction of any state unless federal law provides otherwise. CCT 1-1-431) (a) (6) provides that the Colville Tribes shall have civil jurisdiction over children and their parents with responsibility for the child who leave the jurisdiction and the court had jurisdiction over whom the court had jurisdiction at the time they left. The jurisdictional standards of the UCCJEA in Washington for initial child custody jurisdiction in this case are contained in RCW 26.27.201 and 26.27.041. RCW 26.27.201 (a) provides that a Washington State court has jurisdiction to make an initial child custody determination only if the state is the home state of the child RCW 26.27.201 (1) (a) provides that a Washington State Court has jurisdiction to make an initial child custody jurisdiction if: "Except as otherwise provided in RCW 26.27.231(which pertains to Temporary emergency jurisdiction), this state is the home state of the child at the date of the commencement of the proceeding, or was the home state of the child within six

months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;". It is obvious from reading the jurisdictional standards of the State of Washington and the Colville Tribe that they greatly differ. The provisions of the CTC are not standards substantially in conformance with the UCCJEA with regard to jurisdiction. That means that the UCCJEA does not apply to this case. Neither court should have applied the UCCJEA to this case, and there should never have been a conference pursuant to the UCCJEA participated in by either judge of either court. Considering this case to be a UCCJEA case is void ab initio because the jurisdictional standards of the CCT were not substantially in conformance with those in the Washington State UCCJEA.

Issue #5

Did Colville have the authority to decline jurisdiction in favor of Snohomish.

CCT "1-1-430 Entrance by any person into the Reservation shall be a consent to civil jurisdiction." CCT "1-1-431 is titled Acts Submitting Person to Jurisdiction of Tribal Court. Subsection (a) (6) of that section reads as follows: "The Colville Confederated Tribes shall have civil jurisdiction over children and their parent(s), guardian, legal custodians or other persons with responsibility for or control of the child who leave the exterior boundaries of the Reservation and over whom the Court had jurisdiction at the time they left." Kruse and W. had entered the reservation, thereby consenting to civil jurisdiction. Kruse is a parent of W..She had responsibility or control of W. when she Kruse left the reservation. The Colville Tribal Court had jurisdiction over Kruse and W. at the time they left the reservation. The tribal trial court judge is obliged to follow the laws of the Colville Tribe by their oath. Declining jurisdiction in this case to the State of Washington is in direct contravention of foregoing cited tribal law. The tribal court judge is not vested with authority to do so. The Trial judges action is void ab initio. See CCT v Stensgar 6 CTCR 09, 11 CCAR 47 (2013).

Issue #6

Should Colville or Snohomish have considered whether the PKPA applied to this case?

The State of Washington is required to comply with the PKPA. In re Marriage of Murphy, 90 Wash.App. 488, 952 P. 2d 624 (1998). In the Murphy case, the appellate court sua sponte raised the issue of the PKPA, even though the trial court had not, and reversed and remanded for the trial court to comply with the PKPA. The fact that W. had been resident on

the Colville reservation, in Okanogan county, Washington from his birth to September 10, 2013, when Kruse fled to either Camano Island, Island County, Washington or Snohomish County, Washington, is admitted by Kruse in her briefs and pleadings. For the PKPA to apply in this case, the Colville Tribes must also be bound by the PKPA. There is a split among the courts as to whether Native American tribes are included under the PKPA, and thus bound by it. Some of the cases are discussed in In re Marriage of Susan C., 114 Wn.App 766 (2002). In re Custody of Sengstock 165 Wis. 2D 86, 477 N.W.2d 310, holds that Tribes are not included under the PKPA. In re the Child Custody of D.W.O.E. 2001 Crow 5 (Crow 5/25/2001) and Miles v Chinle Family Court No. Sc-CV-04-08 (Navajo 02-21-2000) held that the PKPA did not apply to Indian Tribes. In re Larch 872 F.2d 66, (4th Cir. 1989) holds that Tribes are included. Martinez v. Superior Court 152 Ariz. 300, 731 P.2d 1244 (1987) holds that Tribes are included. In re Marriage of Susan C., supra, holds that Tribes are included. In the Matter of the Custody of Mariah Watchman, No. 242 (Fort Peck 12-19-1996), the Fort Peck appellate court implicitly held that the PKPA applied to the Fort Peck Tribe.

The issue of whether the PKPA applied to this case was raised in the Colville trial court and never ruled on by that court. The issue was apparently never raised in Snohomish based on the records available in this appeal. The fact of Kruse in effect kidnapping the child from the Colville reservation, the lifelong residence of the child and fleeing to Island County, Washington and subsequently to Snohomish County, Washington is exactly what the UCCJA, PKPA, and UCCJEA have been designed to prevent i.e., stop parents from removing children from their home state, and fleeing to another jurisdiction to institute child custody proceedings when a proceeding has been commenced in their home state. That action leads to exactly what has happened in this case : parallel litigation in both jurisdictions, and appeals therefrom, and the expenditure of resources of both the parties and the courts. That is not in the best interests of the parties, the courts or the children. The case should be remanded to the trial court to address the issue of whether the PKPA applies to the Colville Tribes.

Issue #7

Did Tupling timely serve Kruse.

There is no question that Tupling filed for custody first, in Colville, but although he sought to serve Kruse, he did not effect service until April 21, 2014, over seven months after his filing. The Colville court never addressed the question of whether Colville lost jurisdiction

due to the lapse of time between filing and service at the Okanogan County Courthouse. That is something the Colville trial court should consider on remand.

Issue #8

Did the Colville err in not recording the hearing which led to the Order From UCCJEA Conference dated November 17, 2014?

The OFUC references a hearing held on the 24th of October, 2014. There is no record of that hearing in the Colville Tribal Court, apparently because the Colville Tribal court judge participated in the hearing from his office in Spokane, rather than at the tribal court. CCT v Dogskin 5 CTCR 31, 10 CCAR 45 (2011), held that when there is no oral record of a hearing, the Court of Appeals is unable to perform a meaningful review of the record and the matter has to be referred back to the trial court to make a new record. The Order appealed in this case seems to incorporate both the considerations appropriate for a UCCJEA conference, and those that should be considered were this a concurrent jurisdiction case, which would be inappropriate in a UCCJEA conference. Without a record, this court is unable to perform a meaningful review to determine on what basis the courts were acting, and thus the matter must be remanded back to the Tribal Court to make a new record.

Issue #9

Were all the factors relevant to the application of comity considered in this case.

The starting point of the discussion of this issue is that the conference between Colville and Snohomish was solely a UCCJEA conference, and not a comity conference. The majority decision is correct in asserting that if the UCCJEA and PKPA do not apply in this case, the doctrine of comity applies. That is because the State of Washington assumed jurisdiction over child custody matters on the Colville reservation under P. L. 280 supra., and the Colville Tribes retained its jurisdiction over child custody matters, leaving each with concurrent jurisdiction over child custody matters. "Comity is a recognition which one nation extends within its own territory to the legislative , executive, or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience an to the rights of persons protected by its own laws. Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation

called upon to give it effect." Somportex Limited v Philadelphia Chewing Gum Corp. 453 F. 2d 435, (3rd Cir. 1971).

If the doctrine of comity is to be applied there are a variety of considerations which must be evaluated in such a conference which were not made in this case, including whether declining jurisdiction would contravene Colville Tribal law and policy. See Purser v Purser, 9 NICS App 102 (April 2010); In the Matter of the Estate of Etsuko Futagi Toland 180 Wn,2d 836, 329 P.2d 386 (2014); and In re Marriage of Redfox, 2001 Crow 13 (Crow 11/23/2001). The Colville Confederated Tribe has made it clear in its code that declining jurisdiction would contravene both Tribal law and policy as stated in the code. Pursuant to CCT 1-1-70 the jurisdiction of the Tribal Court shall be over all persons within the reservation. Pursuant to CCT 1-1-71 titled **Concurrent Jurisdiction,** jurisdiction invoked by the code over any person, cause of action or subject shall be exclusive and shall preempt any jurisdiction of any state. Entrance by any person into the Reservation shall be a consent to civil jurisdiction. CCT 1-1-430. CCT 1-1-431 provides that the Colville Confederated Tribes shall have civil jurisdiction over persons residing on the reservation and children and their parents who leave the exterior boundaries of the Reservation and over whom the Court had jurisdiction at the time they left. Taken together these code provisions make it clear that declining jurisdiction would contravene both the code and the Tribes policy which is that cases such as this should be heard in Tribal Court. Declining jurisdiction contravenes such law and policy. The Tribal trial court judge did not have the authority to decline jurisdiction. The Tribal court judge should have put on the record the law and policy of the Tribes as reflected in the Colville Tribes code and attempted to assert jurisdiction based on them. There is no record of the hearing, and nothing in the OFUC lists any of the law and policy of the Colville Tribes which should have been considered. The declining of jurisdiction by the tribal court judge in this case is void ab initio. On remand, the Colville should conduct a conference with Snohomish and attempt to assert jurisdiction according to the law and policy of the Colville Tribes.

It is worth noting that use of the doctrine of comity in this case is only necessary because there is no law clearly applicable to both the State of Washington and the Colville Tribes in resolving child custody jurisdiction. The PKPA may apply, but it is not clear that it does. The UCCJA, PKPA and the UCCJEA were enacted to resolve jurisdiction in child custody cases as between States. Use of the doctrine of comity in child custody jurisdiction as between States

was not effective in resolving disputes over jurisdiction, and especially parental kidnapping before and after enactment of the UCCJA and the PKPA. Lack of a law clearly applicable to the State of Washington and the Colville Tribes in child custody jurisdiction leaves the State of Washington and the Colville Tribes in the same situation the States were in before the enactment of the UCCJA, PKPA and the UCCJEA. Just as comity was not an effective means of resolving the issue of child custody jurisdiction as between the States, it is not the most effective means in resolving the issue as between the State of Washington and the Colville Tribes. The State of Washington or the Colville Tribes may decline to agree the other has jurisdiction based on their own interests. A parent can flee from one jurisdiction to the other with the child ands seek to persuade the jurisdiction fled to to accept jurisdiction from a position of strength, physical possession of the child. Until a law is enacted that governs child custody jurisdictional issues as between the State of Washington and the Colville Tribes, comity is the only legal doctrine available to determine jurisdiction.

Issue #10

If the conference in this case is to be considered under comity rather than the UCCJEA, should the first to file rule have been considered.

Another consideration that was not addressed by the OFUC is the first to file rule. If the conference in this case is considered to be a proceeding under comity the first to file rule would come into play. The Colville Tribal Court has adopted the first to file rule in concurrent jurisdiction cases in Carson v. Carson 4 CTCR 07, 7 CCAR 17 (2003). Tupling filed the first custody proceeding in Colville. If this case is to be considered to be a concurrent jurisdiction case, in the conference between Colville and Snohomish, Colville should have brought the first to file rule up for consideration. The OFUC does not consider that and there is no recording of the conference between Colville and Snohomish. On remand, there should be a recorded conference between Colville and Snohomish in which the first to file rule should be considered.

This dissent realizes that it may not be possible to untangle the legal morass that has been made of this case in view of the passage of time and erroneous rulings made in both Colville and Snohomish, but Tupling did appeal the entry of the OFUC in this case and this court has a duty to at least point out the errors made for the edification of parties, lawyers and judges in the future, and order the Tribal trial court who created the situation to address these

concerns, follow the law, and attempt to remedy its error.

The reason that this dissent discusses the errors Snohomish made in its conduct of the case is that they are errors made in the conduct of the conference between Colville and Snohomish, resulting in the OFUC, which is the subject of this appeal.

ORDER

This dissent would reverse the Order From UCCJEA Conference, and remand the case to the trial court for further proceedings consistent with this dissent.

Herman "Lou" STONE, Appellant,

vs.

COLVILLE BUSINESS COUNCIL, Appellee.

Case No. AP16-017, 7 CTCR 18

13 CCAR 63

[Mark J. Carroll, Attorney at Law, appeared for Appellant.
Dana Cleveland, Office of Reservation Attorney, appeared for Appellee.
Trial Court Case No. CV-OC-2014-27145]

Decided January 19, 2017.
Before Presiding Justice Dennis Nelson, Justice Gary Bass, and Justice R. John Sloan Jr.

Bass, J., with Nelson J. concurring

This matter came before the Court of Appeals (COA) for an Initial Hearing on October 21, 2016. The Appellant appeared in person and was represented by Mark J. Carroll. The Appellee appeared by the Colville Tribal Reservation Attorney Dana Cleveland.

After hearing from the attorneys for the parties, and a review of the record and the law, the COA finds that the dismissal of the action will be affirmed, but on different grounds entered by the Trial Court.

SUMMARY

A Complaint was filed by Appellant in the Trial Court against the Colville Confederated Tribes (CCT) Business Council (CBC), and individual members of the CBC, all relating to actions taken by the CBC or the individual members of the CBC. Francis W. Somday II was also named as a Defendant, but his official position was not named, nor any specific actions he took as an official were pled.

Appellee filed a Motion to Dismiss on three grounds: (1) lack of subject matter jurisdiction; (2) failure to state a claim upon which relief can be granted; and (3) mootness. Appellee subsequently filed a second Motion to Dismiss, listing the three original grounds and adding that a settlement agreement executed between the parties released the CCT from the present suit.

The Trial Court granted dismissal of the suit on the basis of failure to exhaust administrative

remedies and that the action was barred by the 1992 Settlement Agreement as it arose out of the July 2, 1987 events.

Appellant timely filed an appeal to the Court of Appeals (COA).

The COA finds that the suit against the CBC is barred by sovereign immunity, and the dismissal by the Trial Court is affirmed, on a different basis than found by the Trial Court.

The dismissal of the suit against Francis W. Somday II (Somday) is affirmed on the basis that his official position was not pled, nor any actions he took as an official, which would be need to be pled for the suit to go forward against him. The Trial Court's dismissal did not address the issue of Somday's official immunity prong under the sovereign immunity doctrine, but included Somday with the members of the CBC in its ruling with regard to failure to exhaust administrative remedies and the settlement agreement.

STANDARD OF REVIEW

The issues raised are issues of law and thus are reviewed under the *de novo* standard. *Green v. Green*, 10 CCAR 37, 5 CTCR 29 (02-08-2011).

DISCUSSION

This appellate court is concerned with the trial court's holding, and not whether the reasoning of the decision is correct. [G]enerally a correct decision will not be disturbed because it is based on an incorrect ground. *Colville Business Council v. Wendell George*, 1 CCAR 15, at p 16, citing *5 Am. Jur. 2d* (1984). In this case, at the trial court level, the defense of sovereign immunity was not addressed in the Order of Dismissal, although the issue had been raised by Appellee. The holding was that the suit be dismissed. If this court finds that the dismissal was correct but on a different ground than the trial court, the ruling of dismissal will not be disturbed.

In *George*, *supra*, Mr. George sued the CBC for alleged violations of his civil rights. The CBC moved to dismiss on the basis of lack of jurisdiction; immunity from suit; lack of a claim upon which relief could be granted; and that the issue raised was a political question.

The Trial Court granted the motion to dismiss on the ground that the issue was a political question. The Trial Court did not reach the issues of lack of jurisdiction; immunity of suit; and lack of a claim upon which relief could be granted.

The COA held that the CBC was protected by the doctrine of sovereign immunity and remanded for dismissal. In its holding the COA held that there was no meaningful distinction between the CBC

and the Tribes itself in such a lawsuit. CTLOC §1.1.06 bars an action against the Tribes and thus the CBC on the grounds of sovereign immunity. The holding in *George supra.*, applies here and the CBC is entitled to the defense of sovereign immunity and the dismissal is proper on that ground as to the CBC.

The issue of sovereign immunity as to Somday rests on a different prong of the sovereign immunity doctrine. Somday may have been acting as the Executive Director of the Tribe, which would be an official of the Tribe, as he was not a member of the CBC at the time of the suit, and each one of the individuals named besides him were members of the CBC. The complaint did not plead that he was an official, and did not allege any acts specific to Somday.

The case of *Lou Stone v. Francis Somday,* 1 CCAR 9 (CCT, 1984) dealt with the issue of official immunity as opposed to absolute immunity of the CBC. The COA held that officials hold qualified immunity, not absolute immunity, which the CBC has. The ruling in that case held that a Colville Tribal Official enjoys a qualified immunity under Tribal Law and Order Code section 1.1.06. If a Tribal official, while performing official duties, exceeds the scope of his authority, or, while acting within the scope of authority, exercises a power delegated to him by the Tribe which the Tribe is powerless to delegate, official immunity will not bar actions against the official for such conduct.

Here because there is nothing in the pleading naming Somday as an official, or any acts that he specifically performed for this court to assess under the ruling in the *Stone v Somday* case, *supra*., the dismissal of the suit against Somday is proper without such pleading, although on a different basis than the Trial Court's ruling. In the *George* case *supra*., because official capacity was not designated or pled, the COA held official immunity was not before the Trial Court or the Court of Appeals. The same rationale is applicable in this case as there was no designation of official capacity or pleading as to Somday, and thus official immunity was not before the Trial Court or the Court of Appeals, and we find that dismissal was proper as to Somday.

Because of the court's ruling with regard to sovereign immunity, this court did not reach the issue of what effect the expelling of Stone from the CBC in 1987 would have had on his subsequent candidacy or election to the CBC pursuant to CCT 1-8-3.

ORDER

Based on the foregoing, we find that the suit against the CBC is barred by sovereign immunity. The dismissal by the Trial Court is affirmed. This matter is remanded to the Trial Court for action consistent with this Decision.

Dissent: Justice Sloan believes Appellant has raised issues for which additional briefing would be beneficial and dissents.

Patrick GABRIEL, Appellant,

vs.

Claude COX, et. al, Appellees.

Case No. AP17-001, 7 CTCR 18

13 CCAR 66

[David Stevens, Attorney at Law, represented Appellant Gabriel.
David Shaw, Attorney at Law, represented Appellee CTFC/CTEC.
Alice Koskela, Office of Reservation Attorney, represented Appellee Colville Tribes.
Trial Court Case No. CV-OC-2006-26452]

Decided November 20, 2017.

Before Justices David C. Bonga, Gary F. Bass, and Michael Taylor.

STANDARD OF REVIEW

We review findings of facts under the clearly erroneous standard, and errors of law *de novo. Colville Confederated Tribes v. Naff,* 2 CCAR 50, 2 CTCR 08, 22 Ind.Lw.Rptr. 6032 (1995).

PROCEDURAL HISTORY

This case had its beginnings as an employment issue in 2005 when the Colville Confederated Tribes (Tribes) was in a process to limit its operating costs by consolidating positions. As a result Appellant's position within the Colville Tribal Enterprise Corporation (CTEC) Risk Management Office was combined with the Tribes Risk Management Office. Shortly thereafter Appellant's position was identified to be eliminated in a reduction in force (RIF) process. Appellant untimely challenged the RIF as CTEC management determined the RIF had not yet occurred. A month later on 12/02/05 Appellant did receive a RIF notice and Appellant's last day of work was 12/16/05. Appellant filed a complaint alleging the RIF action violated the Tribes' Law and Order Code, Chapter 10, Tribal Employment Rights Office (TERO) provisions. The TERO Director did not find a violation of Chapter 10 which lead Appellant to initiate an "administrative claim" regarding TERO violations that was dismissed by the Administrative Law Judge on 6/26/06. On 12/29/06 Plaintiff/Appellant filed a Civil Complaint and throughout 2007 numerous motions were filed by the parties that resulted in a 7/17/08 Order to Remand the issue to TERO by the trial court. On 7/31/08

Defendant/Appellee appealed the Order to Remand. The Court of Appeals, on a stipulated motion of the parties Ordered on 9/09/09 to remand the case to the Trial Court. Numerous motions, complaints were filed throughout 2010 by the parties. Motions to Dismiss were filed on 4/29/11 by Appellee CTEC and on 5/02/11 by Appellee Tribes. The Motion to Dismiss was granted by the Trial Judge on 7/26/16. A Motion for Reconsideration was filed by Appellant on 09/22/16 that was denied by the Trial Judge on 01/09/17 and the Appellant timely filed this appeal.

WAS THE DEFENSE OF TRIBAL SOVEREIGN IMMUNITY OVERCOME?

It is well established that Indian Tribes enjoy sovereign immunity from suits absent a clear waiver either by the tribe itself or by Congress. *Colville Tribal Enterprises v. Orr*, 5 CCAR 01 (CCT 12/04/1998); *Oklahoma Tax Commission v. Potawatomi Tribe of Oklahoma,* 498 U.S. 505 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). The doctrine of sovereign immunity requires the waiver to be explicit and unequivocally expressed, it must be in writing, it must be authorized or provided by a party with the authority to waive immunity, and any waiver must be strictly construed in favor of the tribal sovereign party. *Orr, supra.* Tribal immunity from suit is fundamental to tribal sovereignty. It is an essential principle of Indian law, recognized and adhered to by the Colville Courts. *Stone v. Somday*, 1 CCAR 09 (CCT 03/06/1984).

Appellant argued that Tribes/Appellee had explicitly waived sovereign immunity for the claims asserted by Appellant. However the Appellant has not provided any indication or evidence that the Tribes clearly waived its sovereign immunity from suit.

WAS THERE A VIOLATION OF PLAINTIFF/APPELLANT'S DUE PROCESS RIGHTS WHEN A TRIBAL ADMINISTRATIVE AGENCY (TERO) DENIED PLAINTIFF/APPELLANT'S CLAIM WITHOUT INFORMING PLAINTIFF/APPELLANT OF A RIGHT TO APPEAL THE TERO COMMISSION DECISION, AND HOW TO PRESENT THE APPEAL?

The Appellant argues that the Tribes' actions and inactions can amount to a waiver of its sovereign immunity. Allegedly the actions of TERO by providing misinformation to the Appellant and directing the Appellant regarding procedural requirements to appeal a TERO was somehow a due process violation that waived the Tribes' sovereign immunity and opened the door for the Appellant to continue his action against the Tribes. However all of the laws relating to the standards and process for both filing and appeal to the TERO Commission

(currently found at Tribal Code 10-1-31) and for the separate process of reopening a TERO Agency investigation (currently found at 10-1-33) were publicly available at all relevant times. To the extent these TERO laws were ignored or misunderstood, is no exception to the law on tribal sovereign immunity waivers.

Furthermore, requiring the Tribal Government to provide notice above and beyond the statute would be an exercise in redundancy as the Tribes would have to state the law twice - once in the publicly available Tribal Code then once again in the body of the administrative decision at issue. The law should not be interpreted to such an unreasonable end.

IS THE WAIVER OF SOVEREIGN IMMUNITY IN THIS CASE LIMITED TO THE WAIVER UNDER CTC 10-1 EMPLOYMENT RIGHTS AND NOT UNDER CTC 1-5 COLVILLE TRIBAL CIVIL RIGHTS ACT?

There is no waiver of sovereign immunity in this case. The Colville Business Council has clearly preserved its sovereign immunity in order to protect the limited communal resources of the Tribes. Colville Tribal Code 1-1-6 provides:

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

It is the Appellant who bears the burden of establishing the propriety of the Court's jurisdiction. *Kokkonen v. Gardian Life Ins. Co. Of Am.,* 511 U.S. 375, 377 (1994); *Stock West v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989); *Levin v. U.S.*, 663 F.3d 1059, 1963 (9th Cir. 2011) (Where principles of sovereign immunity are at play, the Appellant "bears the burden of pointing to such an unequivocal waiver of immunity"). In this case, the Appellant has not provided any indication or evidence that the Tribes waived its sovereign immunity from suit. The attorney for the Appellant during the opening statement at the Oral Argument hearing stated that the information provided by the Tribes' TERO office was incorrect and that misstatement of the appropriate TERO procedures would be used to prove the Tribes had ***implicitly*** (emphasis added) waived sovereign immunity.

As stated above a waiver of the Tribes' sovereign immunity cannot be implicitly waived, but instead the waiver must be explicit and unequivocal that was not the case in this action.

It is hereby DECIDED that the decision of the Trial Court is **AFFIRMED.**

Dakota WEED-BUTZ and Willard CARSON, Appellants,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Nos. AP16-004, AP16-006, and AP16-007, 7 CTCR 20

13 CCAR 69

[David Stevens, Office of Public Defender, for the Appellants.
Weston Meyring, Office of Prosecuting Attorney, for the Appellee.
Trial Court Case No. CR-2014-37306.]

Decided June 7, 2017

Before Justices Anita Dupris, Rebecca M. Baker, and Gary F. Bass

Consolidated appeals from the Judgments and Sentences of Colville Tribal Court, per the Hon. Scot D. Stuart (Weed-Butz Case Nos. CR 2015-37306 and CR 2015-38084, dated March 31, 2016), and from the Judgment and Sentence of Colville Tribal Court, per the Hon. Andrea George (Carson Case No. CR 2015-38173, dated May 11, 2016).

For the appellants: David Stevens, Office of Public Defender.

For the appellee: Weston B. Meyring, Office of Prosecuting Attorney.

The case was decided by DUPRIS, C.J., BASS, J., and BAKER, J.

BAKER, J., delivered the opinion of the court, in which Dupris, C.J., and Bass, J., concurred.

THESE CONSOLIDATED CASES present the question of the impact on this Court's jurisprudence of the line of federal, state and tribal court cases beginning with the United States Supreme Court decisions in *Crawford v. Washington,* 541 U. S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). These cases and their federal, state and some tribal courts' progeny, deal with a criminal defendant's right of confrontation of witnesses. Here, we deal with suspended driver's license criminal prosecutions brought in Colville Tribal Court under the Colville Law and Order Code (hereinafter "CTLOC"), specifically, CTLOC § 3-3-5. The defendants were convicted in bench trials. No official from the Washington Department of Licensing ("DOL") testified at any of the

trials. Instead, the Trial Courts admitted written "certifications" from officials at the DOL to the effect that, according to DOL records, (a) the defendants had received notices in the past that their licenses would be suspended on a certain date, and (b) as of the dates of their alleged driving incidents the defendants' licenses remained in suspended status.

The defendants rely on, among other authorities, the holding in *State v. Jasper,* 174 Wn. 2d 96, 271 P.2d 876 (2012). They seem to acknowledge that a certified record of a notice of past suspension, *i.e.*, a Washington DOL (public) agency record, would be admissible. They take issue with the admission, without a DOL officer's live testimony and an opportunity to cross-examine/confront the witness, of the statement that their licenses remained in suspended status as of the date of their driving incidents.

The presence of a DOL official had been demanded in pretrial filings but neither of the Trial Court judges addressed the issue until simply admitting the written "certifications" at trial. The defendants assert that the written agency officials' statements of their current or continued suspended status was testimonial in nature and not subject to the customary business or public record exceptions to the rule against hearsay. Thus, they argue, admission of such a statement required the opportunity for cross-examination of the custodian or official asserting the fact of the continued suspended status. In other words, they argue that the Tribes' introduction of the written statement concerning their continued suspension violated their right to confront witnesses against them. This, they argue, violated their rights under the Colville Tribal Civil Rights Act, specifically CTCRA § 1-5-2(f), and the Indian Civil Rights Act, 25 U.S.C. § 1302(6) (1968), and should, accordingly, result in reversal and dismissal of their convictions for driving while license suspended.

STANDARD OF REVIEW

The facts surrounding the issues in this appeal are undisputed, and the parties' cases present only questions of law for us to review. Accordingly, we address the issues before us under the nondeferential standard of *de novo* review. *CCT v. Naff,* 2 CCAR 50, 22 Ind.Lw.Rptr 6032 (1995).

SUMMARY OF DECISION

1. A certified copy of a defendant's driving record from the State of Washington's (DOL) Department of Licensing is admissible as a self-authenticating public record to show that he was given notice that his driver's license had been suspended.

2. The statement of a Department of Licensing official that the defendant's driver's license remained in suspended status on the date of the defendant's later driving incident is

testimonial in nature and cannot be admitted without violating the defendant's right to confrontation of witnesses under the Indian Civil Rights Act and the Colville Tribal Civil Rights Act.

ANALYSIS

1. Record of Notice of Driver's License Suspension

This Court, in a recent decision, determined that criminal defendants are entitled to know prior to their prosecutions the standards to which they will be held in court, in accordance with principles of fundamental due process. We adopted the Federal Rules of Evidence ("FRE") in order to address that lack of specificity in *Desautel v. CCT,* 13 CCAR 03 (2016). *Desautel* overruled *St. Peter v. CCT,* 2 CCAR 2, 20 Ind.Lw.Rptr. 6108 (1993), with respect to *St. Peter*'s holding allowing a more "fluid" set of evidentiary standards to be applied. Although the instant cases arose prior to the ruling in *Desautel,* the same reasoning applies, *i.e.,* defendants should be able to predict what rules will apply to them in court, and the FRE should be the standard under which *both* parties, the Colville Confederated Tribes (hereinafter "Tribes") and criminal defendants, should operate. We first look to the FREs to address the question of whether the "certified copy" from a Washington State DOL official will be admissible to establish that a criminal defendant received notice of the suspension of his driver's license on a given date in the past. The record from the Tribal Court cases does not reveal whether either judge made mention of *any* evidence rule or rationale for doing so, but it is undisputed and obvious from their respective Findings of Fact and Conclusions of Law that each judge allowed a Washington State-certified copy of driving record (CCDR) to be admitted. It is unclear from the record on appeal what the CCDR actually consisted of in these cases, but one of the items associated with each case was apparently a record of a notice of suspension to the particular defendant that his license was to be suspended on a given date, each of these prior to the driving dates pertaining to the respective defendants' cases herein.

Since the CCDR is an out-of-court statement offered to prove the truth of the matter asserted therein (*i.e.,* that a notice of suspension was issued on a given date),[13] we look to those portions of the FREs which provide for certain well-established exceptions to the general rule that hearsay is inadmissible, and, under *Crawford* or *Melendez-Diaz,* whether these exceptions, if allowed, might infringe on the right of confrontation.

FRE 803(6) provides that what has been termed the "business records exception" to the rule against hearsay is allowable as follows:

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13 FRE 801(c) provides the definition of "hearsay."

(6) **Records of a Regularly Conducted Activity**. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

FRE 803(6).

We note that subsection (D) of this rule anticipates that there be testimony from, and the proper foundation laid by, a records custodian, or that there be a certification that complies with a statute or with Rule 902(11) or (12). Again, neither Trial Judge required testimony from a records custodian, and it is apparent that the CTLOC has no section which permits a certification. No discussion by either Trial Court of FRE 902(11) or (12) occurred, either. Nor has either party actually touched on the issue of FRE 902 (11) or (12) or, for that matter, any of the FREs or their State of Washington equivalents, understandably, since the decision in *Desautel, supra,* had not been issued. The fact remains that it appears no actual set of evidentiary rules was applied or analyzed by either Tribal Court Judge, much less by the parties at the trial level, although it is apparent that both judges had a fundamental, shall we say "dedication," to something resembling the FREs or the Washington State equivalents. *See discussion, infra.*

We note that FRE 902(11) and (12) pertain to "self-authenticating records," either "domestic" (FRE 902(11)) or "foreign" (FRE 902(12)), and they make reference to the need for either another rule or a federal statute. We also note that FRE 902's other subsections provide numerous ways in which documents can be considered "self-authenticating." However, as we have stated, no analysis of FRE 902 has occurred by either judge in the Tribal Court (or the parties) in these cases.

Under a strict approach given to us by FRE 803(6), the result is quite simple: if there is no testimony from a records custodian, there is no way a CCDR can be admitted as a "business record" of the State of Washington DOL. That is not the rule that would apply in the case of the record of a notice of suspension, which could be admitted, if "certified" properly, as a "self-authenticating public record" under another FRE. In that regard, we would look to FRE 1002, specifically FRE 1002(2). Here is the relevant language of FRE 1002:

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(2) **Domestic Public Documents That Are Not Sealed but Are Signed and Certified**. A document that bears no seal if:

(a) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(b) another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.

FRE 1002(2).

Assuming that the above certifications were included in the CCDR[14], then the record of the issuance of the record and any record of transmittal of the *notice of suspension* of driver's license would be admissible as a "self-authenticating public record." This does not end our analysis. We are required to review the second part of what the Tribal Court allowed to be admitted without live testimony, namely, the statement that the defendants' licenses *remained in a suspended status* at the time of the defendants' driving incidents.

2. Statement that Defendants' Licenses Remained Suspended

We next turn to the issue of whether it would have been proper to apply FRE 1002(2) (or for that matter FRE 803 or any other FRE) to the statement contained in the DOL "record" to the effect that the defendants' licenses, as of the dates of their respective alleged driving offense dates, remained suspended. The appellants argue that these statements, rather than being a public record, were, in the language of *Crawford*, "testimonial" in nature and required the right of confrontation of the witness asserting it and the opportunity of cross-examination.

Of course the statement is hearsay: an out-of-court statement offered to prove the truth of the matter asserted. FRE 801(c). It is not strictly a public record (or a business record). It is a statement attesting to a defendant's driver's license status on some date subsequent to the initial notice of suspension. It puts together not just the fact of his earlier notice of suspension but also the fact that he did not do whatever was necessary to get his license reinstated. As such, it does not fall under either FRE 803 or FRE 1002.

We have not located any part of the FREs that would allow this as an exception to the rule against hearsay. While there was previous case law, including that from federal and Washington courts and from this Court of Appeals, allowing such a statement to be admitted, the federal and Washington cases have now been overruled (in those venues) in cases

[14] Again, the record we have been provided for appellate review did not include any of the exhibits admitted at trial. But because the parties agree on the content of what was admitted, and because of our analysis on the second issue, *infra*, we conclude it is appropriate to proceed with this decision so that the Tribes' prosecuting authority, the Tribal Court and future DWLS defendants will know how to deal with these types of cases.

addressing *Crawford* (in 2004) and *Melendez-Diaz* (in 2009). *State v. Jasper, supra,* Washington's case overruling *Monson,* 113 Wn.2d 833, 784 P.2d 485 (1989), was decided three years later than *Melendez-Diaz* (*i.e.,* in 2012). Yet the Tribes have asked us in effect to ignore the FREs and this line of cases and simply rely on a previous State of Washington holding which has since been overruled, as a result of *Crawford* and *Melendez-Diaz,* by the 2012 holding in *Jasper, supra.*

It is true that two previous cases in this court addressed similar DWLS issues: *LaCourse v. CCT,* 1 CCAR 46 (1991), and *Condon v. CCT,* 2 CCAR 58, 22 Ind.Lw.Rptr. 6038 (1995). We note with interest that they both relied, with hardly any explanation, on the pre-*Crawford dicta* in *Monson, supra*. Specifically, the *LaCourse* holding declined to allow a conviction for DWLS under the CTLOC to stand without a certified copy of the defendant's *state* driving record (CCDR). Four years later, *Condon* allowed a defendant to be convicted on the admission of the CCDR standing alone. Then, in 2004, the United States Supreme Court decided *Crawford, supra,* which addressed the confrontation clause to the U.S. Constitution. Subsequently, in light of *Crawford,* the Washington Supreme Court addressed more directly the argument that the statement of the defendant's *continued status* was testimonial in nature, but at that time it found a way to avoid making confrontation mandatory in driver's license cases. *State v. Kronich,* 160 Wn.2d 893 (2007). In 2009, came the U.S. Supreme Court decision in *Melendez-Diaz, supra.* n In 2012, the Washington Supreme Court could no longer uphold its *Monson* decision when declaring in *State v. Jasper,* 174 Wn.2d 96 (2012), that allowing admission of such testimonial statements as we have in the instant cases violated the defendant's Sixth Amendment right of confrontation.

Is there a reason for us, in the instant DWLS cases, to remain attached to our *Condon* reasoning which adopted *Monson's* 1989 rationale? Or, as suggested by the Tribes, should we perhaps carve out some procedure of our own which would allow these statements from *Washington State* DOL officials to be admissible in our courts? As our analysis below will explain, we by no means acknowledge that either the U.S. Supreme Court or Washington Supreme Court rulings are *binding* on this court. Yet we conclude that to do otherwise than rely on their analysis, in these DWLS case, would require us to resort to such a tortured process of reasoning as to verge on the ridiculous.

1. ICRA and CTCRA Analysis

The Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304 (1968) (ICRA), has many parallels to the Bill of Rights of the Constitution of the United States, as does our Colville Tribal Civil Rights Act, CTLOC, Chapter 1-5 (CTCRA). We have long-held that we interpret the ICRA and the CTCRA through the lens of our own culture, traditions, and laws. *See*, *St. Peter v. CCT.*, 2

CCAR 2 (1993), *Sam v. CCT.*, 2 CCAR 37 (1937), *Wiley v. CCT*, 2 CCAR 60 (1995).

The ICRA was not designed to be a carbon copy of the Bill of Rights, but to assure that Indians were provided an adequate level of due process and equal protection by the tribal governments. The Bill of Rights of the U.S. Constitution are not applicable to Indian Tribes, *Talton v. Mayes*, 163 U.S. 376 (1876), so the ICRA, and now the CTCRA, provide the basic protections under the Bill of Rights while maintaining deference to tribal sovereignty.

The CTCRA provides that the Tribes, in exercising its powers of self-government, shall not deny to any person "...the right...to be confronted with the witnesses against him...". CLTOC, §1-5-2(f). We ask: is this right *identical* to that involving citizens in federal and state prosecutions? Not necessarily. Congress intended, with the ICRA, to create a body of rights patterned in part on the Bill of Rights to be made applicable in Indian Country (*Solomon v. LaRose*, 355 F.Supp. 715, 718 (D.Neb. 1975)), while, at the same time fostering tribal self-governance and cultural identity (*Wounded Head v. Tribal Council of Oglala Sioux of Pine Ridge Reservation*, 507 F.2d 1079, 1082 (8th Cir. 1975)).

The Tribes adopted its own Civil Rights Act in 1988 which mirrors the ICRA, and is now the law we look to in our civil rights cases. CTLOC, Chapter 1-5. As stated earlier, our Court has interpreted the CTCRA in light of its federal counterpart, the ICRA, and has consistently interpreted it under our customs and traditions and cultural values, using the federal courts' interpretations of the rights in the ICRA as guidance when needed. *Eg. St. Peter*, *Sam*, and *Wiley*, *supra.* The issue of the right to confront a witness in the fact pattern before us is one of first impression. We look for guidance in the federal courts regarding this issue.

The first controlling factor seems therefore to be whether the Colville Confederated Tribes' "tribal customs and traditions" would point to some other approach than that of the federal and state courts. We turn then for guidance to the Colville Tribes' particular approach to areas of criminal prosecution that might implicate the right of confrontation.

Significantly, there is no specific provision in the Tribes' *Constitution* that touches upon the right of confrontation of witnesses. This is in contrast, for example, to the situation the tribal court faced in the case of *Eastern Band of Cherokee Indians v. Brady,* No. CR-07-33-34, 2007.NACE.000002 (2007). In that case, conducting a thorough analysis of how these cases should be approached when a party seeks a result different from that which would result from

a federal Bill of Rights analysis, the tribal court trial judge found the deciding factor to be that the Eastern Band of Cherokees had a provision in its own Constitution which guaranteed the right of confrontation. Declining to carve out what he termed a "domestic violence exception" to the confrontation clause, the judge pointed out: "The request of the Tribe for the consideration of Cherokee custom and tradition is . . to no avail. . . . Therefore, the Court can only conclude that the explanation of the procedural requirements of the Confrontation Clause, as expressed in *Crawford*[,] is the law of the Eastern Band of Cherokee Indians."

As discussed in that decision, the Eastern Band's prosecutorial authority sought a result similar to that reached in the Tribal Court's (*i.e.*, our *Trial Court*'s) decision in *CCT v. Marchand,* which involved four (4) domestic violence cases[15] consolidated for a decision on evidentiary issues which resulted in an unpublished Preliminary Order in 2006 and an also unpublished Final Order entered in 2008.

Since *Marchand* had been analyzed (and distinguished on Tribal Constitutional grounds) in *Brady, supra,* we found it appropriate to review our Tribal Court's 2006/2008 Orders, and found that, in addition to being unpublished and never appealed, they had been archived. Nevertheless, we retrieved the Orders from archives in order to address the Tribes' argument in the instant cases that we should not follow *Crawford, Melendez-Diaz,* and, in turn, *Jasper.* While not expressing disapproval of the Tribal Court's reasoning in that case, we note that its circumstances and legislative backdrop stand in marked contrast, in terms of tribal custom and tradition to the cases at bar.

The CTLOC adopts certain portions of the Washington traffic statutes in dealing with driving offenses committed by those subject to its criminal jurisdiction. The very first section in CTLOC Chapter 3-3 incorporates numerous provisions of the Revised Code of Washington ("RCW"). In distinct contrast to the Tribes' domestic violence code, there is no recitation in Chapter 3-3 of *any* legislative intent; the traffic RCWs mentioned are simply adopted, seemingly as a convenience. CTLOC § 3-3-4 makes it a criminal offense for a driver to drive upon a public highway without a "valid driver's license issued by the State of Washington under RCW 46.20." In *CCT v. George*, 6 CCAR 54, 29 Ind.Lw.Rptr. 6087 (2002), this Court found that

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15 *CCT v. Duran Travis Marchand*, Case No. CR-2004-27279; *CCT v. James P. Monaghan, Jr.*, Case No. CR-2004-27339; *CCT v. Eli P. Van Brunt*, Case No. CR-2004-27396; and *CCT v. Travis L. Michel*, Case No. CR-2005-28060.

restricting suspensions or revocations of drivers' licenses to only those issued by the Tribes would jeopardize the health and welfare of the residents of this reservation by allowing drivers who have been suspended or revoked in state proceedings the privilege to drive on the Reservation. While no reference to a section or chapter of the RCW is made in the CTLOC section pertaining to driving while one's license is suspended or revoked (CTLOC § 3-3-5), nevertheless CTLOC § 3-3-1 does adopt RCW 46.20.015, which refers to, among other concerns, driving while suspended. Another difference is that the CTLOC sets as the maximum penalty for DWLS a $2,500 fine and/or 360 days in jail, whereas RCW 46.20.342 provides for various (and more serious) penalties depending on many different factors such as prior convictions, commission of the offense while a habitual traffic offender, commission of a felony at the same time, and so forth.

Suffice it to say that it is our observation that the Tribes' approach to the crime of DWLS, while not strictly identical to that in the system developed by the State of Washington, is substantially similar to the Washington model. Indeed, the very requirement in the CTLOC of a "valid driver's license" is defined as under Washington state statutory law. We find there is no statement of legislative purpose introducing the CTLOC Chapter 3-3 concerning motor vehicle offenses, and no recitation of tribal tradition and culture in making these driving behaviors against the law of the Tribes. In *Smith v. CCT,* 4 CCAR 58, 25 Ind.Lw.Rptr. 6156, we stated that 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."

Against this backdrop, we conclude that the Tribes have adopted certain State law within its jurisdictional boundaries. We also note that we have not been shown a particularized tribal custom or tradition regarding driving vehicles on the Reservation. Certainly there is nothing in this record to support such a suggestion. In *Watt v. CCT*, 4 CCAR 48, 25 Ind.Lw.Rptr. 6027, we stated, "At best the appellant has supported her arguments with suppositions of what she believes custom and tradition is regarding punishment. She has failed to meet even a minimum burden of showing what is custom and tradition."

We have been encouraged by the Tribes in this proceeding to adopt a rule different than that adopted by Washington's Supreme Court in *Jasper,* which overruled *Monson,* on which we previously relied in our holdings in *LaCourse* and *Condon, supra.* In light of the Tribes'

argument, it is fitting that we take a close look at these two cases, which have been the binding law of the Tribes since their holdings were published.

LaCourse found the Tribes' attempt to rely on officer hearsay in lieu of a CCDR to be reversible error, requiring a copy of the CCDR. While *LaCourse* did not address the second concern we are considering in this opinion, its language did suggest a concern with reliability of evidence and competency of hearsay. *Condon,* likewise, overturned a conviction for lack of "sufficient and appropriate evidence," 2 CCAR 58 at ¶19, citing *LaCourse*'s requirement of a CCDR, also citing *Monson,* and again not addressing the second prong of our analysis here. It is clear even from *LaCourse* and *Condon* that our previous analysis of DWLS evidentiary and procedural requirements relied heavily on Washington Supreme Court analysis, just as the CTLOC pertaining to DWLS offenses relies heavily on the Revised Code of Washington.

We find it impossible to adopt the Tribes' argument that defendants should not have the right to confront testimonial witnesses in DWLS cases. We were not shown a tribal custom or tradition in DWLS cases that would suggest an approach contrary to federal and state interpretation of the right of confrontation (*i.e., Crawford* and *Melendez-Diaz,* in the federal courts and *Jasper* in Washington). The fact that it is (without dispute) cumbersome and inconvenient for an official from Olympia to testify in Tribal Court, and that such an official may not even be subject to subpoena power in Tribal Court, is concerning, but it does not establish a right more "relaxed" than that which is enjoyed by defendants in remote district and municipal courts in the State of Washington. To establish that would require more than what is presented by this case.

The Tribes has urged us to adopt some sort of procedure that would enable the prosecution to forgo calling a DOL official or allowing another way to introduce the fact of the continued suspended status of a defendant. This we decline to do, as the Court is not a legislative authority, and that would be legislating from the bench in violation of the Tribes' Constitutional imperative of separation of powers[16]. The Tribal Business Council may well decide to enact a procedure which requires a defendant to present a *prima facie* issue that indeed his or her license had been reinstated before the Tribes must produce a DOL official for cross-examination, in person or by phone, for example, but that circumstance has neither been a

[16] Constitution, Article VIII, Judiciary. Section 1 - Separate Branch of Government.

part of this case nor fully briefed in relation to whatever other constitutional, ICRA or CTCRA issues it may implicate.

We conclude that the holding in *Condon v. CCT* must be overruled in relation to the admissibility of a DOL official's statement of a DWLS defendant's continued suspended status on the date of his driving incident. We hold that the convictions of the defendants for driving while license suspended must be reversed and the cases remanded for dismissal with prejudice.

It is SO ORDERED.