Andre Pierre PICARD, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP18-016, 8 CTCR 01

15 CCAR 01

[Michael Humiston for Appellant.
Weston Meyring for Appellee.
Trial Court Case No. CR-2018-41054]

Decided January 29, 2020.
Before Chief Justice Anita Dupris, Justice Gary F. Bass, and Justice Theresa M. Pouley

Pouley, J.

SUMMARY

Appellant Andre P. Picard was charged with six counts of violation of the Colville Tribes' criminal laws. He was charged with Disobedience of a Lawful Court Order (Domestic Violence), Battery (Domestic Violence), Interfering with a 911 Call (Domestic Violence), Theft (Domestic Violence), and two counts of Attempt to Commit Disobedience of a Lawful Court Order (Domestic Violence). Defendant pled guilty to some counts and was found guilty on two counts. He was sentenced on August 29, 2018 for a total of 1080 days with 260 suspended. The Court imposed five years of probation. Appellant objected to the "stacked sentencing" in which consecutive sentencing for multiple offenses resulted in a sentence of over 365 days as a violation of the federal Tribal Law and Order Act. This appeal arises from the claim that the Indian Civil Rights Act as amended by the Tribal Law and Order Act does not allow sentencing for over one year. For the reasons stated in this opinion, the panel disagrees.

STANDARD OF REVIEW

Whether a sentence of over 365 days violates the Indian Civil Rights Act as amended by the Tribal Law and Order Act (TLOA) is a question of law that is reviewed *de novo. Desautel/Randall v. Colville Confederated Tribes,* 13 CCAR 3, 7 CTCR 5 (2016); *Frank v. Colville Confederated Tribes,* 13 CCAR 10, 7 CTRC 7 (2016); *Confederated Tribes v. Naff,* 2 CCAR 50 (1995).

ISSUE

Does the Indian Civil Rights Act as amended by the Tribal Law and Order Act of 2010 prohibit sentencing in excess of 365 days?

DISCUSSION

For the fifth time in three years this Court is faced with the question of whether the 2010 amendment to Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 *et seq.*, known as the Tribal Law and Order Act (TLOA), PL 111-211 (2010), restricts the Colville Tribal Court from issuing a total sentence in one case stemming from multiple criminal law offenses to over 365 days in jail. The plain language of TLOA, its legislative history and this Court's application of its principles answers this question.

The TLOA was passed in 2010 as an amendment to the Indian Civil Rights Act, to expand tribal authority in recognition of the fact that the best and most effective intervention to address disproportionate crime in Indian Country is by the Tribes themselves. The opening findings of the TLOA support this conclusion and state: "(a) Congress finds that . . . (2) Congress and the President have acknowledged that (A) tribal law enforcement officers are often the first responders to crimes on Indian reservations; and (B) tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian Country." 25 USC 2801(a)(2). The more sobering findings of the Act are contained in "5(A) domestic and sexual violence against American Indian and Alaska Native Women has reached epidemic proportions; (B) 34 percent of American Indian and Alaska Native women will be raped in their lifetimes; and (C) 39 percent of American Indian and Alaska Native women will be subject to domestic violence; . . .". 25 USC (a)(5)(A-C). As a result of these grave findings, Congress stated the purpose of TLOA was to empower and expand, not contract, tribal authority.

The purposes of TLOA are in section (b) and state: The purposes of this title are . . . (3) to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country; (4) to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women; (5) to prevent drug trafficking and reduce rates of alcohol and drug addiction in Indian country; . . .". 25 USC 2801(b)(3-5). As a consequence of the findings and purpose of TLOA, tribal criminal authority was expanded from its previous limits. The authority of Tribes' and Tribal Courts' sentencing authority was expanded for each offense from 1 year in jail and a $5,000.00 fine to three years in jail (up to a maximum of 9 years) and a $15,000 fine.

Although TLOA was intended to expand tribal authority it has had the undisputed effect of applying extra protections to criminal defendants in single cases with multiple offenses when combined sentencing ("stacked") exceed 1 year. It certainly was unintended and, if section (b) which allows sentencing up to three years and section (c) are read together, that intent is evident. 25 USC 1302 (b) and (c). However, the plain language of section (c) certainly reads otherwise and our Court and other tribal courts (as well as most legal scholars) interpreting this section have read TLOA to require extra efforts to justify sentencing practices that were perfectly permissible prior to its enaction. This unintended effect has been the cause of many tribal court cases about whether sentences can exceed 1 year without the application of TLOA protections.

When a tribe exercises sentencing authority beyond one year, TLOA requires the tribe to meet a variety of requirements. A tribal court can subject a defendant to a term of imprisonment greater than 1 year if the defendant is provided: (1) the right of effective assistance of counsel; (2) indigent defense by a bar licensed attorney; (3) a presiding judge to be licensed by any jurisdiction and to have sufficient training in presiding over criminal proceedings; (4) publicly available criminal laws, rules of evidence, rules of criminal procedure, and rules governing the recusal of judges; and (5) the court maintains a record of proceedings. 25 USC 1302(c)(1-5). Significantly, the tribal courts hearing cases of consecutive sentencing totaling over one year consistently apply the TLOA protections even though the Tribe itself has not "adopted" the three-year sentencing (up to nine years) under tribal statutory law.

TLOA itself has no mechanism for "approval" of tribal judicial or legislative changes to their law. There is no provision in TLOA that states a tribal legislature must "adopt" the provisions. Rather, TLOA is an amendment to the Indian Civil Right Act that is applicable to any "Indian tribe in exercising powers of self-government". 25 USC 1302(a). This general applicability is reiterated in section (c) which states: "in a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year. . .". 25 USC 1302(c). The plain language of the statute and decades of opinions on the Indian Civil Right Act in our tribal courts means that those provisions are applicable to the Tribes. TLOA does not have to be adopted, it is "substantive law" that tribal courts are to apply.

As early as 1984 this Court established that ICRA, and by necessity its amendments, are applicable in tribal criminal proceedings. The Court said:

> The Colville Tribal Court has long recognized the rights guaranteed in the ICRA in its criminal cases. To disregard all the other civil rights guaranteed in the ICRA would defeat its dual purposes. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." The "substantial and intended effect" of the ICRA on tribal courts is to change the laws we apply in assessing important personal and property rights of individual members vis-à-vis their tribe and, at the same time, furthering the Tribes' self-government.

Stone v. Someday, 1 CCAR 9, 1 CTCR 14 (1984). The Court reiterated this principle in *Desautel/Randall* and said: "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 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).

Tribal courts have consistently demonstrated they are up to the challenge of interpreting federal law and balancing the rights of tribal criminal defendants properly. This Court in *Davisson v. Colville Confederated Tribes,* 11 CCAR 13 (2012)(*en banc*) said: "Colville tribal law, with respect to due

process and equal protection, right of criminal defendants, has always been protective as, if not more protective, than the federal Indian Civil Rights Act." The Colville Tribal Court of Appeals particularly has been protective of the rights outlined in the TLOA amendments to the Indian Civil Rights Act.

Our Court has made several important rulings on the applicability of TLOA to Colville proceedings and the requirements that must be met. In *Desautel/Randall v. Colville Confederated Tribes,* 13 CCAR 3, 7 CTCR 5 (2016) the court acknowledged the applicability of TLOA to consecutive sentences for over one year and adopted the Federal Rules of Evidence to comply with TLOA's requirement that there be publicly available evidence rules. The Court went on to overrule a previous case on consecutive sentencing to the extent it was contrary to that decision. In *Frank v. Colville Confederated Tribes,* 13 CCAR 10, 7 CTRC 7 (2016), the Court applied the *Desautel/Randall* requirements to vacate a judgment without the benefit of the evidence rules. In *Martinez v. Colville Confederated Tribes,* 13 CCAR 12, 13 CTCR 8 (2016), the court applied the *Desautel/Randall* rule and ruled as moot the issue of the sufficiency of the judge's qualifications because the evidence rules used were not then available. In *Carson v. Colville Confederate Tribes,* 13 CCAR 25, 7 CTCR 12 (2017), the court found that the rules of evidence were properly available and thus the requirement of TLOA were met. This line of cases demonstrates clearly that TLOA, as an amendment to the Indian Civil Right Act, is applicable to consecutive sentencing exceeding one year. The cases also declare that the provisions of TLOA can and are being met through either tribal statutory law or by tribal court caselaw. Both statutory and caselaw are an exercise of the Tribes powers of self-government. TLOA requirements are a tribal obligation, both a judicial and a legislative responsibility.

A general review of the requirements of TLOA demonstrates that the Colville Tribes in a criminal case with consecutive sentencing that exceeds one year can meet the TLOA requirements. The Colville Tribes provides indigent criminal defense services in CTC 2-1-100. The presiding judge was not challenged, but the Colville Tribal Court has several licensed judges that meet the legal requirement of sufficient legal training to preside over criminal proceedings. There are publicly available criminal laws and regulations. CTC 1-1-322 requires copies of the law be publicly available and the Tribes' laws are available online through the Colville Tribes official website. Similarly, Colville Court of Appeals decisions are publicly available in person or through the Colville Court of Appeals website. *Desautel/Randall* adopted the Federal Rules of Evidence which are publicly available[1]. Rules of criminal procedure are available in CTC 1-2 (Rules of Court) and CTC 2-1 (Rules of Procedure for criminal actions). In addition, the Tribes correctly points out these rules are supplemented in many other areas of tribal law including CTC 1-1-140 (Sessions of Court), CTC 1-1-220 to 223 (relating to jurors), CTC 1-1-250 (Subpoenas) and CTC 1-1-404 (Contempt procedures). There are also rules for recusal of the judge in CTC 1-1-143 which is supplemented by Colville caselaw. *See, Peone v. Colville Confederated Tribes,* 13 CCAR 27, 7 CTCR 13 (2016). The final requirement of a record of proceedings is met by CTC 1-12-12 and the longtime practice of Colville tribal courts.

TLOA does not require a particular format for rules of criminal procedure, criminal laws, recusal of judges or recording of proceedings.

Rather, as with ICRA, it allows the tribe to decide if those rules are adequate to meet the requirements. This case is not the same as *Desautel/Randall* where as early as 2002, the Court noted a lack evidence rules. Here there is a complete set of criminal procedure rules entitled that in CTC 2-1. Furthermore, Appellant does not challenge a particular criminal procedure rule or the absence of a rule as was argued in *Desautel/Randall*. Appellant does not give even a hint of what criminal procedure rule might be missing. This issue was not raised at the trial court. On its face the rules of criminal procedure and other applicable court rules are sufficient to constitute "publicly available rules of criminal procedure" as required by TLOA.

Appellant makes one final argument. Appellant argues that, without evidence or raising the issue before the trial court, that the Colville Correctional Facility is an insufficient long-term incarceration facility. Although not specified by Appellant, section (d) of TLOA does address sentences. 25 USC 1302(d). Under this section it says a tribal court "may" require a defendant to serve in one of 4 types of facilities. 25 USC 1302(d)(1)(A-D). It also says the court "may" require the defendant to serve another alternative form of punishment as determined by the tribal court judge. 25 USC 1302(d)(2). Because the Appellant raises this issue for the first time on appeal, there are insufficient facts to determine the nature of his objection to the facility. This Court will not and cannot determine this factual issue raised for the first time on appeal. (*Williams v. CCT*, 5 CCAR 22 (1999) "We cannot, nor should be attempt to, address issues that have not been fully developed before the Trial Court."; *Leaf v. CIHA*, 6 CCAR 53 (2002) "It is clear that before an Appellant can bring a matter before the Court of Appeals it must be fully litigated at the Trial Court."; *Finley-Justus v. CCT*, 7 CCAR 11 (2003) "As a general rule issues may not be raised for the first time on appeal."; and *Wilson v. Gilliland*, 8 CCAR 64 (2006) "The Tribe moved to strike the argument as an issue improperly raised for the first time on appeal. The Court agreed and entered an order striking the opening brief on September 29, 2004."

CONCLUSION

The Appellant's Judgment and Sentence entered on 08-29-2018 is AFFIRMED and this matter is remanded to the Tribal Court for action consistent with this opinion.

Melissa Louis WILLIAMS, Appellant,

vs.

Colville Confederated Tribes, Appellee.

Case No. AP19-014, 8 CTCR 02

15 CCAR 06

[Mark Carroll, for Appellant.
Marty Rapp, for Appellee.

Trial Court Case No. CV0OC02018-41035]

Filed June 6, 2019. Decided March 11, 2020.
Before Michael Taylor, Presiding Justice; Dave Bonga and R. John Sloan Jr., Associate Justices.

Taylor, J.

PROCEDURAL BACKGROUND

On February 20, 2018, Melissa Williams, Appellant, filed her First Amended Complaint based on provisions of the Colville Tribal Civil Rights Act, CTC §§ 1-5-1, et. seq., (CTCRA) with the Colville Tribal Court CV-OC-2018-41035. On March 07, 2018, the Tribes filed Notice of Appearance on behalf of the Confederated Tribes of the Colville Reservation along with the Tribes' Motion to Dismiss. Colville Tribal Court CV-OC-2018-41035.

On March 21, 2018, Ms. Williams filed her response Memorandum to Tribes' Motion to Dismiss. Colville Tribal Court CV-OC-2018-41035. Ms. Williams' response memorandum cited to CTEC v. Orr. 5 CCAR 1 (1998). In addition, Ms. Williams' legal memorandum provided as an exhibit a copy of the Tribes' Insurance Policy. In part, Ms. Williams' sought relief because the Tribes' failed to pay Ms. Williams' unused vacation pay. Prior to February 20, 2018, Ms. Williams' spokesperson on February 01, 2018, wrote a letter to the Tribes' ORA requesting payment for Ms. Williams' vacation pay. The Tribes' ORA, answered February 05, 2018, "Please be advised this request is denied." See Exhibit D to Ms. Williams' Response Legal Memorandum to Tribes' Motion to Dismiss.

On April 11, 2018, the Tribal Court held a hearing on the Tribes' Motion to Dismiss.

On July 15, 2018, the Tribal Court dismissed Colville Tribal Court CV-OC-2018-41035. Ms. Williams' timely filed her appeal to this Court.

On February 17, 2019, this Court issued its Opinion and Order, Williams v CCT, AP18-
12 (2019), dismissing the claim that she had been unlawfully dismissed from her elected position as a member of the Colville Business Council, and remanding the issue of Ms. Williams' unpaid "financial compensation for unused vacation hours owed to Appellant, we return this matter to the Tribal Court for further review… the Tribal Court in its review of this portion of Appellant's complaint should consider, among any other relevant issues raised by the parties, the meaning of CTC § 1-5-8…."

On May 28, 2019, the Tribal Court, *sua sponte*, without a hearing and without considering "any other relevant issues raised by the parties" again dismissed Colville Tribal Court CV-OC-2018-AP18-41035.(2019).

STANDARD OF REVIEW

The material facts in this second Appeal in this dispute are not contested. The issue regarding the *sua sponte* dismissal of Appellant's complaint is a matter of law. Accordingly the standard of review is *de novo*. *Colville Tribes v Naff*, 2 CCAR 50, 19 CTCR 08 (1995).

ISSUES FOR REVIEW

Issue 1. Did the Tribal Court err in dismissing sua sponte, Appellant's claim regarding compensation for unused vacation leave filed under CTC § 1-5-8 of the Colville Tribal Civil Rights Act?

Issue 2. Did the Tribal Court err in dismissing sua sponte Appellant's claim regarding compensation for unused vacation leave without taking evidence and hearing argument regarding the application and requirements of CTC § 1-5-1, et. seq.?

DISCUSSION

The Colville Tribal Civil Rights Act (CTCRA) provides protection for the civil rights, as defined by the Act, of persons coming within the jurisdiction of the Tribes. The Act provides a waiver of tribal immunity for injunctive and declaratory relief, CTC § 1-5-5, when a claimant successfully shows that specific rights, defined by CTC § 1-5-2, have been violated by an executive or employee of any governmental agency acting within the jurisdiction of the Tribes. CTC § 1-5-3. Tribal immunity with regard to any financial remedy for violation of these specific rights is clearly not waived CTC § 1-5-5; with one very limited, indirect, and fact-based exception, i.e., CTC § 1-5-8.

In CTC § 1-5-8, the Tribal code allows suit in Tribal Court for damages when the claimant alleges a violation of the rights defined in the Act and presents to the Court an "active and enforceable policy of liability insurance." Such damages are limited by the code to the full amount of any coverage provided by the policy for the successful prosecution of a claim alleging the violation of a code defined right, or rights, alleged by the claimant.
CTC § 1-5-8 may provide a remedy by allowing claims against an entity, the Tribes' insurer, which by contract or otherwise, does not benefit from the defense of tribal sovereign immunity. The answers to questions regarding this section and its scope must be provided in the first instance by the Tribal Court pursuant to the presentations of the parties and its own analysis of the law.

In this Appeal, the Appellant has alleged, and Appellee did not deny, that Appellant submitted to the Tribal Court a copy of policy of liability insurance, issued to the Tribes which may provide coverage for violation of a code defined, civil right. This presentation of the insurance policy pursuant to CTC § 1-5-8, requires the Tribal Court to enter into a process of fact finding and legal analysis, using the processes established by our code, to answer questions regarding the facts and law relevant to this dispute including, but not limited to, the following.

1. Does the claim(s) in the Appellant's complaint fall within the defined right(s) protected by the CTCRA?

2. Does CTC § 1-5-8 provide a general waiver of immunity when, to the level of coverage in any such policy, an active and enforceable policy is presented to the Court?

3. Was an "active an enforceable policy of liability insurance" covering the Tribes for violation of a code defined civil right, presented to the Court?

4. Does any presented insurance policy covering the Tribes, contractually prevent the insurer from raising the defense of sovereign immunity as a defense to any claim?

5. Was the claim of Appellant in this case tendered to any tribal insurer to determine any insurance coverage for this claim?

6. If appellant's claim was tendered to any liability insurer to determine coverage, what is the opinion of insurer regarding coverage of Appellant's claim?

7. With regard to the claim of Appellant, did the Colville Business Council, or any person or entity formally authorized by the Colville Business Council, formally on the record, act to direct the liability insurer of the Tribes to raise tribal sovereign immunity as a defense to Appellant's claim.

DECISION AND ORDER

The decision of the Tribal Court dismissing Appellant's claim is reversed, and this matter is remanded to the Tribal Court for proceedings consistent with the Opinion and Order.

Harry BESSETTE, Appelant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP18-019, 8 CTCR 03

15 CCAR 09

[Mark J. Carroll, for Appellant.
Christopher Kerley, for Appellee.
Trial Court Case No. CV-OC-2015-38326]

Decided January 16, 2020. Reconsideration decided May 26, 2020.
Before Theresa M. Pouley, Presiding; David C. Bonga and Rebecca Baker, Associate Justices

Pouley, J.

SUMMARY

Appellant Harry Bessette appeals a Trial Court ruling dismissing a variety of claims arising from his 2012 dismissal from employment. For the reasons stated in this opinion the ruling of the Trial Court on summary judgment dismissing Appellant's claims is AFFIRMED.

Appellant was dismissed from employment with the Confederated Tribes of the Colville Reservation (Tribes) in 2012. He properly appealed that ruling to the Administrative Law Judge (ALJ) and his claims were denied. He properly appealed to the Colville Tribal Court and the Court reversed and remanded the case to the Administrative Law Court. The Tribes appealed this ruling in May of 2014. Appellant properly appealed to the Colville Tribal Court of Appeals and the Court of Appeals affirmed the ruling of the Trial Court in June of 2015. *Confederated Tribes v. Bessette,* 12 CCAR 29

(2015). The Court of Appeals agreed with the Trial Court's ordered remand to the Administrative Law Court.

The case was remanded to the Administrative Law Court and after several procedural steps was finally heard in November of 2018. The Administrative Law Judge issued its decision upholding Appellant's termination on December 20, 2018. Appellant filed this action in the Colville Tribal Court and the Court ruled on cross motions for summary judgment on October 22, 2018. The Trial Court ruled on summary judgment that Appellant's due process claims had no factual basis and the remaining claims of unlawful retaliation, unlawful discharge, negligence, malpractice, and breach of contract were barred by sovereign immunity. This appeal followed and both parties briefed the issues before this Court. For the reasons stated in this opinion the Court of Appeals agrees with the lower court and AFFIRMS the Trial Court ruling.

STANDARD OF REVIEW

Whether sovereign immunity bars a suit or claim under the Colville Civil Rights and Colville tribal law is a question of law that is reviewed *de novo.* Similarly, whether Appellant received proper due process is a question of law to be reviewed *de novo. Confederated Tribes v. Naff,* 2 CCAR 50 (1995), *Confederated Tribes v. Bessette,* 12 CCAR 29 (2015).

ISSUES

1. Did the Trial Court err in dismissing Appellant's claims as being barred by sovereign immunity?

2. Did the Trial Court err in dismissing Appellant's due process claims?

DISCUSSION

1. This Appeal again raises the issue of the scope of the Colville Tribal Civil Rights Act's (CTCRA) waiver of sovereign immunity. CTC 1-5 *et. seq.* The rights protected in the CTCRA are listed in CTC § 1-5-2 and include freedom of religion, free speech, press and assembly, a right against unreasonable search and seizures, restricting double jeopardy and the taking of property, granting criminal defendants protection and recognizing the right to equal protection and due process of law. CTC § 1-5-2 (a-j). Actions to protect those rights are by declaratory and injunctive relief in CTC § 1-5-3. When actions claiming a violation of those right are made "the sovereign immunity of the Colville Tribes is hereby waived in the Courts or the Tribes for the limited purpose of providing declaratory and injunctive relief". CTC § 1-5-5. Damages can only be obtained under CTC § 1-5-8 which says:

> Notwithstanding any other provision of this Chapter or the Colville Tribal Code; with respect to any claim made under this Chapter, in the Courts of the Confederated Tribes, for which the Tribes carries an active and enforceable policy of liability insurance, suit may be brought for damages up to the full available amount of the

> coverage provided in the insurance policy; provided, no judgment on any such claim may be for more than the amount of insurance carried by the Tribes; and further provided, any such judgment against the Tribes may only be satisfied pursuant to the provisions of the policy or policies of insurance then in effect.

These sections read together provide a limited waiver of sovereign immunity for claims made under "this Chapter" for damages where there is an active insurance policy. The Court in *Gibson v. Colville Confederated Tribes,* 14 CCAR 39 (2019), held that a waiver of this statutory formulation does not waive the inherent power of immunity in the common law of the Tribes and that a common law waiver of immunity must otherwise be shown.

Applying these principles to the Appellant's claims, we find sovereign immunity bars those claims not brought as a civil rights violation. This Court declines to adopt the Appellant's argument that a Chapter in the Colville Tribal Civil Rights Code meant to protect and remedy civil rights violations should be extended to apply to all civil suits in which the Tribes carries insurance coverage. Such an expansive interpretation would undermine the express language in the statute. *CTEC v. Orr,* 5 CCAR 1 (1998) supports this interpretation. The Court in *Orr* stated:

> It is our position that for any action to be brought against the Tribes there must be an express and unequivocal waiver of sovereign immunity. *Colville Confederated Tribes v. Naff,* 2 CTCR 08, 22 ILR 6032 (1995). Thus, in order to defeat the sovereign immunity, claim herein, Orr's only position is to show that under the Tribal Civil Rights Act, CTC Chapter 1-5, CTEC was subject to the waiver of immunity because of violations of Orr's due process.
> *Orr at 3-4.*

The waiver of sovereign immunity applies equally to tribal officials named in the suit. CTC § 1-1-6 specifically states that sovereign immunity applies to the "officers and employees" of the Tribes in performing their "official duties". Appellant's reliance on *Lewis v. Clarke,* 581 US ____ (2017) is misplaced. In *Lewis* the court held that in a negligence action for a traffic accident off the reservation a tribal employee could be held liable because the judgment would not operate against the Tribe. Of course, that is not the situation in this matter. In this case the Tribe is the real party in interest and only waived its statutory immunity as outlined above. The Trial Court correctly ruled that sovereign immunity barred these claims.

2. The remaining issue is whether the Trial Court erred in dismissing Appellant's due process claim. We held previously and reiterate that "Due process is that which is due; notice and opportunity to be heard." *Confederated Tribes v. Bessette,* 12 CCAR 29 (2015). Given the procedural history of this case, we find Appellant has been given ample due process. He has had two hearings before the Administrative Court, two appeals in the

Colville Tribal Court and now two reviews before the Colville Court of Appeals. These more than sufficiently constitute proper due process.

CONCLUSION

The Order on Motion to Dismiss by the Trial Court entered on October 22, 2018 is AFFIRMED.

Kelly JERRED, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee,

Case No. AP19-011, 8 CTCR 04

15 CCAR 12

[Payton Garcia, Spokesperson, for Appellant.
Taima Carden, Spokesperson, for Appellee.
Trial Court No. CR-2018-41148]

Decided June 11, 2021.
Before Chief Justice Anita Dupris, Justice David C. Bonga, and Justice Mike Taylor

Dupris, CJ

SUMMARY

Seven (7) criminal charges were filed against Appellant on November 15, 2018 for three counts of Misuse of Public Funds, three counts of Fraud, and one count of Forgery. All charges related to actions taken with her sister Deanna Heath, the appellant in the companion case (AP 19-012). All charges related to purchasing tires with tribal funds for personal use. These criminal complaints had been filed previously but had been dismissed without prejudice and refiled . Appellant Jerred was arraigned on December 11, 2018.

The first case was dismissed without prejudice, and the Tribes refiled the charges on November 15, 2018, one day before the statute of limitations expired. At her arraignment on December 11, 2018, the Court denied Jerred's motion to dismiss. On March 22, 2019 the Court granted the Tribes' Motion to Join the case with the Heath cases, setting the trial to start on March 27, 2019.

At the jury trial Jerred was convicted of six of the seven charges on April 1, 2019, and judgment and sentence was entered on May 3, 2019. She filed a timely appeal on May 31, 2019. Appellant raises two issues on Appeal:

(1) Did the Trial Court err in joining the case with the Heath case (AP19-012)? and (2) Did the Court violate Appellant's due process by failing to dismiss regarding the speedy trial rule?

We found no Trial Court error, based on the reasoning below, and affirmed the Trial Court.

Standard of Review

The issues raised are questions of law. Our review is *de novo*. *CCT v. Naff*, 2 CCAR 50, (1995).

Issues

1) Did the Trial Court err in joining the case with *CCT v. Heath*, Trial Court Case Number CR-2018-41147?

The Motion for Joinder was filed by Appellant on February 11, 2019. Judge Tremaine denied Appellee's request to join the case with the Heath case on March 1, 2019, stating the motion was untimely and should have been raised at the time of the filing of the complaint. Appellee filed a Motion to Reconsider on March 4, 2019, stating the request to join the cases was filed timely under CTC Section 1-2-9 but was not heard by Judge Nomee on February 25, 2019, who reset it for Judge Tremaine on February 28, 2019.

Appellee's Motion to Reconsider the Order denying the joinder cited the legal bases for granting the motion, *i.e.* it was judicially economical because of the size of the jury pool to be called for both cases; many of the witnesses were same; there was a common purpose of the underlying offenses; and there were common jury instructions to be given. Appellant did not respond to the Motion to Reconsider at the Trial Court. On March 22, 2019, Judge Jordan[2] granted the Motion to Reconsider and allowed the cases to be consolidated.

Appellant first relies on the arguments she made in the initial case which was dismissed without prejudice. For example, she argues the Court considered the Federal Rules (FRCPR 13) in determining the authority of the Court to consider the Motion to Join the cases, then argues that we have held the Federal Rules did not apply in our cases, citing *Waters v. CCT*, 3 CCAR 35 (1996). Since the *Waters* case, we have used the Federal Rules of Criminal Procedure (FRCP) as guidance in cases, thereby making Appellant's reliance on this argument misplaced. *See, Sweowat v. CCT*, 5 CCAR 42 (2001) and *Buckman v. CCT*, 8 CCAR 100 (2006). We have also used the Federal Rules o Evidence (FRE) as guidance before the Tribes enacted its own Rules of Evidence at CTC, Chapter 1-9. *See Desautel/Randall v. CCT*, 13 CCAR 3 (2016).

Appellant next argues that to consolidate the cases would "confuse the jurors," of which, she argues, there are plenty to draw from in a membership pool of 9,520 tribal members. She cites no legal authority for us

to review regarding confused jurors. We do not agree with this argument. Lastly, Appellant argues that Judge Jordan should not have ruled on the Motion to Reconsider when it was Judge Tremaine who issued the first order denying the joinder request. Appellant cites *Sonnenberg v. Fry*, 4 CCAR 3 (1997). As Appellee points out, *Sonnenberg* is distinguishable from this case. In *Sonnenberg* the first Judge made a ruling not to sanction Sonnenberg, and Judge Fry disagreed with that decision, so she immediately went back into Court to change the decision and imposed sanctions. We held Judge Fry could not initiate her own court proceedings for a case in which she disagreed with the first judge's decision.

In this case, Judge Jordan did not enter an order because she disagreed with Judge Tremaine's order. She entered an order on the Motion to Reconsider when it was scheduled on her docket, in the regular course of business. Further, Appellant waived her arguments by failing to challenge the Motion to Reconsider. We find Appellant has failed to meet her burden on this issue and affirm the Trial Court.

2. Did the Court violate Appellant's due process by failing to dismiss regarding the speedy trial rule?

Appellant's basic argument on this issue seems to be that the speedy trial rule as set out in CTC Section 2-1-102, was violated because she had been criminally charged first in 2018, and although those charges were subsequently dismissed without prejudice, the time she was under those charges should be counted in the time for the speedy trial requirements. Appellant further argues that being recharged subjects her to double jeopardy.

Neither of the arguments of Appellant have validity. The speedy trial time started when Appellant was arraigned on December 11, 2018, not when the first time the charges were filed. As Appellee points out, Appellant did not appeal the dismissal without prejudice on the first charges. As for the double jeopardy argument, Appellant has misstated the ruling in *Serfass v. U.S.*, 420 U.S. 377 (1975). It refers to subsequent convictions on the same charges, not subsequent filings of the same criminal charges when the first were dismissed without any trials or convictions on the charges. *Serfass* found "...an accused must suffer jeopardy before he can suffer double jeopardy." at p 393. We find Appellant has not met her burden on this issue.

Conclusion

In conclusion, we find the Trial Court did not err by joining this case with *Heath*. Further, there is no speedy trial violation, nor is there a double jeopardy violation.

We AFFIRM and REMAND.

It is so ORDERED.

Deanna HEATH, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee,
Case No. AP19-012, 08 CTCR 05
15 CCAR 15

[Michael Humiston, Spokesperson, for Appellant.
Taima Carden, Spokesperson, for Appellee.
Trial Court Case No. CR-2018-41147]

Decided June 21, 2021
Before Chief Justice Anita Dupris, Justice David C. Bonga, and Justice Michael Taylor

Dupris, CJ

Summary

On June 13, 2018 Appellant Heath was criminally charged with (I) Aiding and Abetting Misuse of Public Funds; (II) Aiding or Abetting Fraud; and (III) Forgery in violation of CTC §§ 3-1-132, 3-1-48, and 3-1-47 respectively. She made her first appearance on July 16, 2018. Appellant's case was eventually consolidated with the companion case, *CCT v. Jerred*, AP19-011 at the trial level, and continued a number of times for various reasons. Appellant never waived her speedy trial rights under CTC Section 2-1-102, and at pretrial hearing on October 15, 2018, the Court granted Appellant's Motion to Dismiss, and dismissed the charges without prejudice. Appellee refiled the charges before the statute of limitations ran out on November 15, 2018.

Procedurally, on March 1, 2019 the Court denied Appellant's Motion to Dismiss, and denied Appellee's Motion to Join Appellant Heath's case with Appellant Jerred's case, a companion case in AP19-011. On March 4, 2019 Appellee filed a Motion to Reconsider the denial of the joinder of the cases. The matter was heard before a different judge who granted the motion to reconsider and ordered joinder of the cases on March 22, 2019.

Appellant was found guilty of all three charges by jury trial, which was held between March 27-29, 2019. Judgment and Sentence were entered by the Court on May 3, 2019 and Appellant filed a timely appeal on May 31, 2019.

As in the companion case of *Jerred v. CCT*, AP19-011, the issues raised on appeal are (1) Did the Trial Court err in joining the case with *CCT v. Jerred*, Trial Court Case Number CR-2018-41148? and (2) Did the Court violate Appellant's due process by failing to dismiss regarding the speedy trial rule?

Standard of Review

The issues raised are questions of law. Our review is *de novo*. *CCT v. Naff*, 2 CCAR 50, (1995).

Issues

1) Did the Trial Court err in joining the case with *CCT v. Jerred*, Trial Court Case Number CR-2018-41148?

The Motion for Joinder was filed by Appellant on February 11, 2019. Judge Tremaine denied Appellee's request to join the case with the *Jerred*

case on March 1, 2019, stating the motion was untimely and should have been raised at the time of the filing of the complaint. Appellee filed a Motion to Reconsider on March 4, 2019, stating the request to join the cases was filed timely under CTC Section 1-2-9 but was not heard by Judge Nomee on February 25, 2019, who reset it for Judge Tremaine on February 28, 2019.

Appellee's Motion to Reconsider the Order denying the joinder cited the legal bases for granting the motion, *i.e.* it was judicially economical because of the size of the jury pool to be called for both cases; many of the witnesses were same; there was a common purpose of the underlying offenses; and there were common jury instructions to be given. On March 22, 2019, Judge Jordan[3] granted the Motion to Reconsider and allowed the cases to be consolidated.

Appellant rests her argument on this issue on an alleged procedural error. She states that Appellee brought the Motion to Reconsider the joinder before a different judge, which was tantamount to "judge-shopping," in violation of her due process rights. She states the proper procedure would be for Appellee to have filed an interlocutory appeal or an appeal after the trial was over, citing *CCT v. LaCourse*, 1 CCAR 2 (1982).[4] Appellant offers no proof that Appellee was "judge-shopping." It is an accusation without foundation and not a legal argument to support the issue of joinder. Further, Appellant offers no legal arguments on the issue of joinder for the Court to review.

On the other hand, Appellee has presented us with standards to review, with legal authority to support its arguments. We can review standards for judicial economy as well as a review of whether the joinder would substantially prejudice Appellant. Appellee directs us to the Federal Rules of Criminal Procedure (FRCP), Rules 8 and 13 for guidance.

We have often looked to federal rules for guidance when our laws do not provide a specific rule or law to follow. *See, eg., Sweowat v. CCT*, 5 CCAR 42 (2001) and *Buckman v. CCT*, 8 CCAR 100 (2006). We have also used the Federal Rules o Evidence (FRE) as guidance before the Tribes enacted its own Rules of Evidence at CTC, Chapter 1-9. *See Desautel/Randall v. CCT*, 13 CCAR 3 (2016).

In this case, Judge Jordan did not enter an order because she disagreed with Judge Tremaine's order. She entered an order on the Motion to Reconsider when it was scheduled on her docket, in the regular course of business. We find Appellant has failed to meet her burden on this issue and affirm the Trial Court.[5]

2) Did the Court violate Appellant's due process by failing to dismiss regarding the speedy trial rule?

Appellant's basic argument on this issue seems to be that the speedy trial rule as set out in CTC Section 2-1-102, was violated because she had been criminally charged first in 2018, and although those charges were subsequently dismissed without prejudice, the time she was under those charges should be counted in the time for the speedy trial requirements. Appellant further argues that being recharged subjects her to double jeopardy.

Neither of the arguments of Appellant have validity. The speedy trial time started when Appellant was arraigned on December 11, 2018, not when the first time the charges were filed. Appellant did not appeal the dismissal

without prejudice on the first charges. Appellant makes a cursory comment in her conclusory remarks that her equal protection and due process rights were violated, and that "[r]etrying her in [this case] thus constitutes double jeopardy...."
Appellant has offered a paucity of legal authority for her arguments.

As for the double jeopardy argument, "...an accused must suffer jeopardy before he can suffer double jeopardy." *Serfass v. U.S.*, 420 U.S. 377, 393 (1975). Double jeopardy refers to subsequent convictions on the same charges, not subsequent filings of the same criminal charges when the first were dismissed without any trials or convictions on the charges. We find Appellant has not met her burden on this issue.

Conclusion

In conclusion, we find the Trial Court did not err by joining this case with the Jerred. Further, there is no speedy trial violation, nor is there a double jeopardy violation.
We AFFIRM and REMAND.
It is so ORDERED.

Joe PEONE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, et. al, Appellees.

Case No. AP17-005, 8 CTCR 06

15 CCAR 19

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

Decided August 9, 2021.
Before Chief Justice Anita Dupris, Justice Mark W. Pouley, and Justice Michael Taylor

Dupris, CJ

This matter came before the Court on an Appeal filed on August 11, 2017 in which Joe Peone, Appellant (Appellant) timely appealed an Order on Motion for Summary Judgment entered by the Trial Court on July 17, 2017 against him and for the above-named Appellees. Appellant challenges the Trial Court's findings that his claims are (1) barred by sovereign immunity; and (2) that he doesn't have an actionable claim under the Tribes' Civil Rights Act, CTC, Chapter 1-5. Based on the reasoning below, we affirm the Trial Court's Order.

PROCEDURAL SUMMARY

Appellant was terminated from his position as Program Director of the Colville Tribes Fish and Wildlife Department on November 28, 2012. A challenge to the basis for his termination has been in the Courts since this time. He has been before the Administrative Court, the Trial Court and this Court, including another case before this Court on the same issues.[6] Appellees' filed Motion for Summary Judgment, which the Trial Court granted on July 17, 2017. The Trial Court held first that sovereign immunity barred the claims of Appellant, and that there were no actionable claims against Dana Cleveland and Francis Somday in their individual capacities.

The Trial Court further held that the Tribes' Civil Rights Statute, CTC, Chapter 5-1, provides a limited waiver of sovereign immunity for declaratory relief only for violations of CTC§ 1-5-2 (a)-(j). It further held that monetary remedies under CTC §1-5-8 were limited to violations under CTC§ 1-5-2 (a)-(j).

As for Appellant's cause of action A, Unlawful Retaliation, the Trial Court held it was barred by the terms of limitations on such actions in the CTA Employment Policy Manual, (EPM) which required Appellant to file his request for relief within one (1) year of his termination. He was terminated on November 29, 2012, and he filed his claim for wrongful termination on November 15, 2015. The Tribes, the Trial Court held, adopted the EPM and its limited waiver "must be strictly construed and enforced." Order on Motion for Summary Judgment, at page 3.

Further, the Trial Court held that as for Appellant's claims for relief regarding alleged procedural defects in the actions and/or inactions of Appellees' in his dismissal were not supported by sufficient allegations to establish a civil rights violation, and, therefore were barred by sovereign immunity. Finally, as for cause of action F, a claim for a due process violation, the Trial Court held was still pending under CV-OC-2013-36088, and AP12-08, and dismissed it from this case.

ISSUES

1. Did the Trial Court apply the correct standard for summary judgment ?
2. Did the Trial Court apply the correct standard for sovereign immunity under the Tribes' Civil Rights Statute, CTC, Chapter 1-5?

STANDARD OF REVIEW

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

DISCUSSION

SUMMARY JUDGMENT

The accepted standard for ruling on motions for summary judgment is whether there is any genuine issue of material fact that supports going forward with the cause of action. The moving party has the first burden of proof on this issue, with deference given to the non-moving party. The burden then shifts to the non-moving party if the moving party has established sufficient argument to grant the motion. The Court reviews all the pleadings filed at the time, including briefs and legal memoranda on the issue of genuine issues of material facts.

Appellant has cited several Court of Appeals cases to support his claim that a summary judgment should not have been granted. However,

none of the cases he has cited are relevant to the issue. The Trial Court held that Appellant made assertions to his causes of action but did not support them with sufficient legal authorities. Assertions alone are insufficient to meet his burden of proof. Upon review of all that the Trial Court had before it, we agree with the Trial Court's decision. We affirm.

SOVEREIGN IMMUNITY AND THE TRIBAL CIVIL RIGHTS ACT

Appellant seeks to recover alleged damages under CTC, Chapter 5-1, for his termination from employment with the Colville Tribal Fish and Wildlife Department. He has been seeking this remedy since his termination in 2012, and in two separate court cases, both based on the same issues. The crux of his arguments are that (1) he was wrongfully terminated in violation of his due process rights under CTC § 1-5-2; (2) the Tribes has waived sovereign immunity in such instances under CTC §§ 1-5-3 and 5; and (3) although general relief is declaratory and/or injunctive relief, CTC § 1-5-5 and 8 allow for some monetary relief, under certain circumstances.

Appellees first claim that the general principles of sovereign immunity bar Appellant's claims. Appellees do recognize that CTC Chapter 5-1 allows for a limited waiver of its sovereign immunity, but says the limited waiver is for the specific grounds set out in CTC § 1-5-2 (a)-(j), and that none of the claims made by Appellant are found in this sections.

We have addressed the issue of recouping monetary damages under the Tribes' insurance policies through the Civil Rights Statute before but have not yet had a case in which we have had to set specific standards. *CTEC v. Orr*, 5 CCAR 1 (1998). The facts alleged in the several causes of action brought in this case do not necessitate a ruling to set such standards.

As stated earlier, some of the causes of action are barred by the time limitations set out in the EPM, as adopted by the Tribes; some are still being reviewed under a case filed before this case, which are still supposed to be under review by the Administrative Judge and/or Trial Court (AP12-08); and some of them are not CTC § 1-5-2 claims.

As Appellees point out, Appellant is arguing that CTC § 1-5-8 is a waiver of any claim against the Tribes and its officials. It only is a limited waiver for violations of Chapter 1-5, not for any general claim. Appellant seems to bootstrap any and all his claims to CTC § 1-5-2 in an attempt to access the Tribes' insurance policy. The Trial Court ruled correctly that sovereign immunity barred his actions to do so. We affirm.

What is not answered by this opinion is what are the parameters of claims that can be made under CTC Chapter 1-5. We don't necessarily accept the Trial Court's findings that these claims are as restrictive as it found. We will wait for the appropriate case to further define what rights are protected, what rights of actions are reviewable, and when does the limited waiver of sovereign immunity apply.

Based on the foregoing, now, therefore

It is ORDERED the Trial Court's Order of July 17, 2017 on granting Appellees' motion for summary judgment is AFFIRMED and this matter is REMANDED to the Trial Court.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Jered S. PICARD, Appellee.

Case No. AP21-006 IA, 8 CTCR 07

15 CCAR 22

[M. Vander Giessen, Office of Prosecuting Attorney, for Appellant.
Appellee appeared pro se.
Trial Court No. CCT-66086]

Decided August 23, 2021.
Before Chief Justice Anita Dupris, Justice Dennis L. Nelson, and Justice Jane M. Smith

Dupris, CJ

This matter came before the Court of Appeals on a Notice of Interlocutory Appeal filed on June 21, 2021 by Appellant Colville Confederated Tribes against Appellee Jered Shay Picard. Appellant is represented by Michael L. Vander Giessen, Tribal Prosecutor's Office. Appellee is *pro se*.

Appellant alleges the Trial Court committed error by entering an order when no criminal case existed while Appellee was incarcerated, and failed to follow the statutory requirements of CTC, Chapter 5-5, the Domestic Violence Code, for release and bail applicable to defendants charged with cases involving domestic violence.

Procedural Summary

The following facts are found in the record:

1. Defendant/Appellee Jered Picard (Appellee) was arrested on June 11, 2021 and booked into the tribal jail at 3:00 a.m.. The charges were (1) Malicious Mischief (Domestic Violence) and (2) Burglary. CTC §§ 3-1-51, and 3-1-41, respectively, both with a domestic violence enhancement, CTC § 5-5-54 .
2. The 72-hour time to arraign Appellee on the charges after he was arrested ended June expired at 3:00 a.m. on June 16, 2021. CTC § 2-1-100.
3. Appellee submitted a furlough request to the Court on June 15, 2021 in the morning, to attend a funeral of his great-aunt.
4. Appellant objected to the furlough request, stating it was going to file its complaint in the morning, and that Appellee was contacting the alleged victim, and posed a flight risk. Appellant stated it would like to discuss the request at the arraignment.
5. Appellant filed the criminal charges against Appellee on June 15, 2021 at 9:08 a.m. and the Court assigned it a case number at 1:07 p.m. that day.
6. Before the case was officially opened on June 15, 2021 the Judge granted the furlough at 9:30 a.m., over the objection of Appellant, and without a hearing on the request, nor an arraignment on the charges.

7. Appellee did show up on June 15th at 1:00 p.m. to be arraigned, and Appellant was represented. The Judge did not show up.
8. A Court Clerk appeared at 1:22 p.m. with an order from the Court stating Appellee was released on his own recognizance until an arraignment set for June 18, 2021. There were some irregularities in the times stated on the order which are not relevant here.
9. The arraignment was continued again to June 21, 2021 because the tribal government recognized a new federal holiday on June 18th, also not relevant here.

Issue

Whether the Trial Court erred in entering orders granting Appellee a furlough when there was no case filed, and later a personal recognizance release before the arraignment without a hearing, and in contravention of the statutory requirements of criminal procedure, CTC §§ 2-1-37, 2-1-100, 2-1-101, and the requirements of the Domestic Violence Code, CTC §§ 5-5-1 *et seq.*

Standard of Review

The issue is one of law, which we review *de novo*. *Naff v. CCT,* 5 CCAR 50 (1995).

Discussion

The facts alleged in this case are analogous to the actions of the judge in *CCT v. Russell Boyd*, 10 CCAR 8 (2009). In *Boyd* the defendant's spokesperson asked the judge to release her client after he had been arrested and in jail 24 hours. The Appellant had not filed a criminal complaint at the time of the request, and argued it had 72 hours in which to do so before the defendant needed to be brought before the Court. The judge granted defendant's motion to be released without an open case before the Court, found there was no probable cause for the defendant's arrest, then directed the Appellant to file its complaint so that an arraignment could be held on the following day. The defendant was released on his own recognizance.

In *Boyd* we set out in particular detail the statutory process by which a criminal case comes to the Court, starting with the filing of a criminal complaint or citation complaint, allowing for the 72 hours in which the Appellant has to review the police reports and decide whether to file a complaint, and commencing with an arraignment on the complaint. We felt it necessary to explain the basics of how a criminal case is initiated because of the obvious lack of knowledge of the process by the judge.

In this case, added requirements exist in that the charges against Appellee have domestic violence enhancements. That is, each charge specifically involves allegations of domestic violence. CTC § 2-3-37, Crimes

Involving Domestic Violence, requires the application of the enhanced procedures found in CTC, Chapter 5-5 when domestic violence is alleged.

Under CTC, Chapter 5-5: (1) police officers responding to a call involving domestic relations have to make an arrest, or explain in a detailed report why an arrest was not made, and persons arrested "shall not be released prior to arraignment", CTC § 5-5-12; (2) the Prosecutor is required to state in the charging document that domestic violence is involved, CTC § 5-5-43; and (3) the Court is required to consider several specific factors in deciding bail conditions, and enter a written order with specificity of such conditions for release. The order of release must be given to the Police Department by the Court with specific language regarding the consequences to the defendant if the conditions are violated. CTC § 5-5-50.

The judge in this case did not comply with any of the conditions of CTC § 5-5-50. The judge made a decision on Appellant's request regarding a furlough apparently without an open court case at the time he made the decision, and without considering the requirements of CTC Chapter 5-5. After Appellant filed charges against Appellant and an arraignment was set before Appellant's furlough was to commence, the judge did not appear for the arraignment. Both parties were present. Instead he entered a bail order releasing Appellee on his own recognizance pending another arraignment set from the bench, and had the Court Clerk deliver it to the parties. Appellant asked the Court Clerk for the hearing to go forward because it wanted to state its objections on record. The parties were informed the judge was not going to hear the matter at that time.

We granted the Interlocutory Appeal because of the irregularities in the procedures in this case. Two questions are raised: (1) was it the Court's responsibility to decide whether Appellee should have been granted the furlough before there was an open Court case?; and (2) did the actions of the Court violate the due process rights of Appellant?

(1) Was it the Court's responsibility to decide whether Appellee should have been granted the furlough before there was an open Court case?

We find the answer to this question is "no." The status of Appellant at the time of the furlough request was that he was under the supervision of Appellant's Executive branch, its Administrative Department, the Tribal Jail, and not the Judicial branch, the Court. It is the responsibility of the Court is to provide the forum for the criminal complaint once it is filed. Once the Court enters a judgment the supervision of a defendant, if ordered to jail or to be released, is once again with the Executive branch and its departments. Appellee is to ask the jail, as the appropriate supervising department, for the furlough. The Police Department has its statutory responsibilities under CTC Chapter 5-5 regarding Appellee, that are independent from the Court's

responsibilities. The Court should not be involved in the case before it is properly brought before it. By doing so the Judge gives the appearance of interfering with the roles and responsibilities of the Police Department (*See, eg.* CTC § 5-5.12), an arm of the Executive branch of the government.

(2) Did the actions of the Court violate the due process rights of Appellant?

We find the answer to this question to be "yes." Appellant first objected to Appellee's release when the furlough was requested (see Colville Tribal Corrections Facility & Colville Tribal Court Uniform Furlough Application dated June 15, 2021, at page 3). Appellant continued its objection at the arraignment at which the Judge failed to appear. The Court was on notice of the objections, and knew, or should have known, of its responsibilities under the Code when a domestic violence case is filed. There is nothing in the record that shows the Court considered the objections of Appellant. All requests to have its objections on record were ignored.

It is well-established law that every party is entitled to minimum due process. *See, e.g. CCT v. Marchand*, 11 CCAR 69 (2014); *CCT v. Dogskin*, 10 CCAR 45 (2011); *Jerred v. Leskinen*, 12 CCAR 73 (2016). That is, the right to adequate notice and the opportunity to be heard on record. The Court did not provide even the minimum due process in this matter to Appellant. It ignored the law in allowing Appellee's furlough prior to an actual case before it, and in contravention of the Domestic Violence Code. There is nothing on the record from the Court to justify such a deviation from the law. We so hold.

It is ORDERED that:

We REVERSE and REMAND, and, per our precedence in *Boyd*, *supra*, we direct the removal of Judge Aycock from the case. The general rule is that we do not remove judges from Trial Court cases unless an exception is warranted in extraordinary circumstances. This is one. Judge Aycock, by his conduct, gives the appearance of unfairness and bias toward Appellant.

Melissa WILLIAMS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, et. al, Appellants.

Case No. AP21-001, 8 CTCR 08

15 CCAR 26

[Mark Carroll, Spokesperson, appeared for Appellant.
Shannon Thomas, Spokesperson, appeared for Appellees.
Trial Court No. CV-OC-2018-41035]

Decided November 15, 2015.
Before Presiding Justice Michael Taylor, Justice David C. Bonga, and Justice R. John Sloan Jr.

Taylor, J.

This Appeal was timely filed in the Court of Appeals subsequent to the Trial Court Decision/Order in Williams v. CCT # CV-OC-2018-41035. In that Trial Court Order Denying Motion And Dismissing Complaint the Court carefully considered the remand Order entered by this Court in AP19-014. In that Order Remanding the Court of Appeals propounded seven specific questions to the Trial Court regarding the law and facts of this dispute. Those questions, in part, asked the Trial Court to determine whether or not Appellant's claims for damages asserted in this action can be characterized as arising under the provisions of CCT 1-5-1 --1-5-8; the Colville Tribal Civil Rights Act (CTCRA). In addition, the Trial Court found it necessary to carefully consider the provisions of an insurance policy alleged by Appellant to cover the claims made by Appellant in this matter.

It was necessary for the Trial Court, and now for this Court, to consider the provisions of that insurance policy alleged here to cover certain claims against Appellee. The policy, agreed by the parties to be in effect at the time the events giving rise to this litigation, is a key factor in this dispute because recovery of the limited damages claimed under the CTCRA is only available if covered by insurance. CCT 1-5-8 The question of insurance coverage has been here solely placed upon the Courts as the Appellee, upon receiving the claim chose, as it is clearly entitled to do, not to tender the claim to its insurer. Therefore, the Courts have no interpretation of the policy provisions at issue provided by the insurer.

Therefore, we consider each of the findings of the Trial Court regarding the question of whether the Appellant's claims arise under the provisions of the CTCRA, the documents provided as relevant evidence by Appellant, the defenses asserted by Appellee, and the provisions of the insurance policy regarding coverage.

ISSUES

Whether the claims of refusal of the Appellee to pay to Appellant compensation for unused vacation leave arise under the provisions of the CTCRA?

Whether Colville Business Council (CBC) Resolution 1997-391 may be considered by the Court in resolving this dispute?

Whether the insurance policy at issue here provided coverage to Appellee for the claims asserted by Appellant here?

Whether the provisions of CCT 1-5-8 provide a general or a limited waiver of Appellee's tribal sovereign immunity in the circumstances of this dispute?

STANDARD OF REVIEW

The issues are those of law, which we review de novo. *Naff v. CCT*, 5 CCAR 50 (1995).

DISCUSSION

Appellant was a duly elected member of the legislative body of the Confederated Tribes of the Colville Reservation (CBC). Within a few months of her election, by processes of the CBC, she was removed from her elected position. Subsequent to her removal she applied to the Tribes for a cash payment totaling the monetary value of the paid vacation leave to which she had become entitled but had not used during her term. The Tribes denied any payment. This litigation in the Tribal Courts under the provisions of the CTCRA ensued. This appeal is the third consideration this Court has given to Appellant's claims in this specific dispute. The Court will consider the relevant rulings of the Trial Court below in sequence.

We find that the Trial Court was correct and supported in finding that CBC Resolution 1997-391 providing for cash payouts for unused CBC vacation leave applicable to the circumstances set out by Appellant in her complaint and that consideration did not violate the "Rule of Mandate." The Trial Court was also correct and supported in finding that the relevant provisions of CBC Resolution 1997-391 should be read independently.

We find that the Trial court was correct and supported in finding that the claims of Appellant here fall within the due process and equal protection provisions of the CTCRA.

We find that under CTC 1-5-8 when an active and enforceable policy of insurance protecting Appellee from losses or judgments for violations of the CTCRA exists, this section of the CTC provides for a waiver of tribal sovereign immunity - limited to actual damages shown at trial and not including court costs, fees, attorney fees and other similar costs and fees.

The question of whether an active and enforceable insurance policy was in effect at the time the claims herein arose is a key one to resolving this appeal. The question is key for a number of reasons but most importantly because, under the provisions of CTC 1-5-8, in the form current at the time these claims arose, the existence of such a policy provides for a waiver of the sovereign immunity of the Tribes; allowing for the imposition of any damages proved at trial.

It is clear from the record that the Tribes was protected by a policy of insurance active at the time the claims herein arose. The question then is whether that active policy was enforceable. The Trial Court carefully reviewed the provisions of that policy in detail and concluded that, because of the definitions and exclusions contained in the policy, the policy was not enforceable and no coverage was provided to the Tribes for the claims asserted in this matter. As a result the Trial Court found that Tribal immunity was not waived under CTC 1-5-8 and the Trial Court was required to dismiss Appellant's complaint.

It is now our obligation to review the active policy and determine whether any of its provisions provided coverage to the Tribes for the claims asserted by Appellant. We find that the insurance policy which was in effect and enforceable at the time the claims herein arose did in fact provide coverage to the Appellee as follows:

We read the policy of insurance as we would read and interpret any form of contract using the plain meaning of the language of the policy and

without favoring any party to the policy or any potential beneficiary of its provisions.

The Trial Court considered the question of whether Appellant was an "insured" at the time her claims arose. The policy excludes claims between parties that may be considered "insured". The claims of Appellant arose after she had been terminated from her position as a member of the CBC.. Thus, she was not an "insured" under the policy and her claims were not excluded.

The policy at Section J (pages 15-16 of policy) provides for coverage of employee benefit plans and at "1 d." vacation plans are covered. The Trial Court found that the use of the word "Administration" in that provision did not include Appellant's claim for unused vacation leave. We find, however, at "2 d" Administration is further defined as effecting enrollment, termination or cancellation of employees included in "employment benefit programs". Thus, Appellant's claims are covered unless excluded by the "Common Policy Exclusions N" (page 34 of policy). We do not find that any of the provisions of "N" clearly exclude a debt owed Appellant and accrued under a tribal law (CBC Resolution 1997-391) owed to a member of the Tribes.

As a result we find that Appellant does benefit from the limited waiver of tribal sovereign immunity under CTC 1-5-8 to the level of actual damages as show at trial and the monetary limits included in the insurance policy.

ORDER

It is ORDERED that:

We reverse and remand to the Trial Court for determination and assessment of damages and further proceedings consistent with the findings in this Opinion.

Melissa WILLIAMS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, et. al, Appellants.

Case No. AP21-001, 8 CTCR 08

15 CCAR 26

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Taylor, J.

This Appeal was timely filed in the Court of Appeals subsequent to the Trial Court Decision/Order in Williams v. CCT # CV-OC-2018-41035. In that Trial Court Order Denying Motion And Dismissing Complaint the Court carefully considered the remand Order entered by this Court in AP19-014. In

that Order Remanding the Court of Appeals propounded seven specific questions to the Trial Court regarding the law and facts of this dispute. Those questions, in part, asked the Trial Court to determine whether or not Appellant's claims for damages asserted in this action can be characterized as arising under the provisions of CCT 1-5-1 --1-5-8; the Colville Tribal Civil Rights Act (CTCRA). In addition, the Trial Court found it necessary to carefully consider the provisions of an insurance policy alleged by Appellant to cover the claims made by Appellant in this matter.

It was necessary for the Trial Court, and now for this Court, to consider the provisions of that insurance policy alleged here to cover certain claims against Appellee. The policy, agreed by the parties to be in effect at the time the events giving rise to this litigation, is a key factor in this dispute because recovery of the limited damages claimed under the CTCRA is only available if covered by insurance. CCT 1-5-8 The question of insurance coverage has been here solely placed upon the Courts as the Appellee, upon receiving the claim chose, as it is clearly entitled to do, not to tender the claim to its insurer. Therefore, the Courts have no interpretation of the policy provisions at issue provided by the insurer.

Therefore, we consider each of the findings of the Trial Court regarding the question of whether the Appellant's claims arise under the provisions of the CTCRA, the documents provided as relevant evidence by Appellant, the defenses asserted by Appellee, and the provisions of the insurance policy regarding coverage.

ISSUES

Whether the claims of refusal of the Appellee to pay to Appellant compensation for unused vacation leave arise under the provisions of the CTCRA?

Whether Colville Business Council (CBC) Resolution 1997-391 may be considered by the Court in resolving this dispute?

Whether the insurance policy at issue here provided coverage to Appellee for the claims asserted by Appellant here?

Whether the provisions of CCT 1-5-8 provide a general or a limited waiver of Appellee's tribal sovereign immunity in the circumstances of this dispute?

STANDARD OF REVIEW

The issues are those of law, which we review de novo. *Naff v. CCT*, 5 CCAR 50 (1995).

DISCUSSION

Appellant was a duly elected member of the legislative body of the Confederated Tribes of the Colville Reservation (CBC). Within a few months of her election, by processes of the CBC, she was removed from her elected position. Subsequent to her removal she applied to the Tribes for a cash payment totaling the monetary value of the paid vacation leave to which she had become entitled but had not used during her term. The Tribes denied any payment. This litigation in the Tribal Courts under the provisions of the

CTCRA ensued. This appeal is the third consideration this Court has given to Appellant's claims in this specific dispute. The Court will consider the relevant rulings of the Trial Court below in sequence.

We find that the Trial Court was correct and supported in finding that CBC Resolution 1997-391 providing for cash payouts for unused CBC vacation leave applicable to the circumstances set out by Appellant in her complaint and that consideration did not violate the "Rule of Mandate." The Trial Court was also correct and supported in finding that the relevant provisions of CBC Resolution 1997-391 should be read independently.

We find that the Trial court was correct and supported in finding that the claims of Appellant here fall within the due process and equal protection provisions of the CTCRA.

We find that under CTC 1-5-8 when an active and enforceable policy of insurance protecting Appellee from losses or judgments for violations of the CTCRA exists, this section of the CTC provides for a waiver of tribal sovereign immunity - limited to actual damages shown at trial and not including court costs, fees, attorney fees and other similar costs and fees.

The question of whether an active and enforceable insurance policy was in effect at the time the claims herein arose is a key one to resolving this appeal. The question is key for a number of reasons but most importantly because, under the provisions of CTC 1-5-8, in the form current at the time these claims arose, the existence of such a policy provides for a waiver of the sovereign immunity of the Tribes; allowing for the imposition of any damages proved at trial.

It is clear from the record that the Tribes was protected by a policy of insurance active at the time the claims herein arose. The question then is whether that active policy was enforceable. The Trial Court carefully reviewed the provisions of that policy in detail and concluded that, because of the definitions and exclusions contained in the policy, the policy was not enforceable and no coverage was provided to the Tribes for the claims asserted in this matter. As a result the Trial Court found that Tribal immunity was not waived under CTC 1-5-8 and the Trial Court was required to dismiss Appellant's complaint.

It is now our obligation to review the active policy and determine whether any of its provisions provided coverage to the Tribes for the claims asserted by Appellant. We find that the insurance policy which was in effect and enforceable at the time the claims herein arose did in fact provide coverage to the Appellee as follows:

We read the policy of insurance as we would read and interpret any form of contract using the plain meaning of the language of the policy and without favoring any party to the policy or any potential beneficiary of its provisions.

The Trial Court considered the question of whether Appellant was an "insured" at the time her claims arose. The policy excludes claims between parties that may be considered "insured". The claims of Appellant arose after she had been terminated from her position as a member of the CBC.. Thus, she was not an "insured" under the policy and her claims were not excluded.

The policy at Section J (pages 15-16 of policy) provides for coverage of employee benefit plans and at "1 d." vacation plans are covered. The Trial Court found that the use of the word "Administration" in that provision did not include Appellant's claim for unused vacation leave. We find, however, at "2

d" Administration is further defined as effecting enrollment, termination or cancellation of employees included in "employment benefit programs". Thus, Appellant's claims are covered unless excluded by the "Common Policy Exclusions N" (page 34 of policy). We do not find that any of the provisions of "N" clearly exclude a debt owed Appellant and accrued under a tribal law (CBC Resolution 1997-391) owed to a member of the Tribes.

As a result we find that Appellant does benefit from the limited waiver of tribal sovereign immunity under CTC 1-5-8 to the level of actual damages as show at trial and the monetary limits included in the insurance policy.

ORDER

It is ORDERED that:

We reverse and remand to the Trial Court for determination and assessment of damages and further proceedings consistent with the findings in this Opinion.

Desiree FREUND, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP21-010, 8 CTCR 09

15 CCAR 32

[Payton Garcia, Spokesperson for Appellant
Taima Carden, Spokesperson for Appellee
Trial Court Case Number CR-2019-42115]

Decision March 3, 2022.
Before Chief Justice Anita Dupris, Justice R. John Sloan Jr., and Justice Jane M. Smith

Smith, J

Appellant appeared before the Court through spokesman Peyton Garcia. Appellee appeared through spokesman Michael Vander Giesen.

Smith, J.

SUMMARY

Appellant and a female friend (Greydall) of her's from out of state, were in Appellant's home drinking alcohol. Appellant's two daughters, Greydall's children, and a friend of Appellant's oldest daughter were also present. The two older girls were in a bedroom listening to music and the other children were in the living room playing. An altercation ensued between the children in the living room. Greydall was yelling at them, so Appellant's oldest daughter (A.S.) went to investigate. A.S. tried to intervene between Greydall and her children. Greydall grabbed A.S.'s arm and A.S. told Greydall

not to touch her. Greydall then went to the kitchen and told Appellant that A.S. had disrespected her. Appellant called A.S. into the kitchen and told her to apologize to Greydall. A.S. refused. Appellant threatened A.S. that her stepfather would beat her. A.S. testified that her mother threw the first punch, then a fight ensued between them in the kitchen. A patch of hair was pulled from A.S.'s head, she was hit with a closed fist to her face, and had several scratches. A.S.'s friend (A.N.), who was in the bedroom, recorded some of the argument and fight on her phone. The two girls then left the house to go to the A.N.'s grandmother's place next door. Someone called the Colville Tribal Police (CTP), and when they arrived they spoke with A.S.. She downplayed the incident, not wanting to get her mother in trouble. The CTP did an investigation. Pictures taken later by the CTO showed scratches, bruising, and other indications of a fight on A.S. Appellant was subsequently charged with Battery with a Domestic Violence enhancement. At trial, the jury found Appellant guilty of the charge and enhancement. Appellant timely appealed the decision, alleging that there was insufficient evidence presented to the jury to find guilty and that the alternate juror was allowed into the jury deliberations.

STANDARD OF REVIEW

The issues are of mixed law and fact. Our standard of review is *de novo*. *CCT v. Naff*, 2 CCAR 50 (1995).

ISSUES

There are two issues before us: 1) Was there sufficient evidence submitted to the jury to affirm a guilty verdict? If yes, then 2) Was it error to allow an alternate juror to be allowed in deliberations, even with the instruction that the juror was not allowed to contribute to the deliberations?

ISSUE 1

Was there sufficient evidence submitted to the jury to affirm a guilty verdict?

A.S. testified that her mother struck her first. A.S. also testified that her mother threatened her with a beating by her stepfather. A.S. had a patch of hair pulled out, and the hairless spot was still visible months after the incident. There were pictures of the scratches and bruises on A.S. taken by the CTP. The pictures were shown to the jurors.

A.N. testified that she was in the bedroom when the fight started, but she managed to record a lot of the altercation on her phone. There was yelling and other fight-related sounds recorded. The jury was able to listen to the phone evidence.

The jury heard the testimony, saw the evidence presented, and determined that the defendant was guilty as charged.

A jury trial and a bench trial have one thing in common - both have "triers of fact." In a jury trial, the trier of fact is the jury. In a bench trial, the trier of fact is the judge. Both of their duties are to look to the law and facts and make an informed decision. In *Campobasso v. Cawston,* 14 CCAR 59 (2019), we stated, "Under a *de novo* review we evaluate the credibility of the

testimony and evidence submitted to the record, as well as the weight the credibility was given by the Trial Court. The test is whether there was a reasonable basis for the judge to make her ruling, based on the facts and the law before her, and not whether we might have ruled differently under the same circumstances." In *Desautel v. CCT, et al.,* 13 CCAR 31 (2017) we stated, "The credibility of any witness or evidence is the sole province of the fact-finder."

The Court finds that there were sufficient facts presented to the jury to allow them to make an informed decision.

Appellant's younger daughter (A.K.), who was only 7 at the time and now 10 years old, was called to testify. She was allowed a support person to sit with her. She was allowed to not have to sit on the witness stand. The spokesmen were ordered to be gentle or they would be out real quick. They were also ordered to keep the questioning brief. The judge refused to put A.K. under oath as he felt she was too young. A.K. briefly testified for the defense that her older sister started the fight. The Prosecutor countered that A.K. was supportive of her mother and would not want to go against her. The Prosecution did not get to further rebut A.K.'s testimony because the judge stopped the questioning before any questions could be asked. He felt she looked scared. The judge stated that he would not allow a child of 10 to testify, that it was a travesty, and he was not going to subject her to that When the Prosecutor stated that the State of Washington determined that 8 year olds were presumptive competent witnesses, the judge stated that he had made his ruling and wasn't going to change it. When asked to reconsider his prior ruling that testimony be allowed by prior testimony, the judge refused and said that he was not going to reconsider. Prosecutor could appeal if he wanted.

In *Desautel v. CCT, et al.,* 13 CCAR 31 (2017) we stated, "We have addressed the competency and hearsay evidence issue once before in our Court. *Bush v. CCT,* AP90-[006], 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."

ISSUE 2

Was it error to allow an alternate juror to be allowed in deliberations, even with the instruction that the juror was not allowed to contribute to the deliberations?

Jury[7] selection proceeded without any major issues. Prior to opening arguments Defense realized he didn't think he had been allowed to offer any for-cause challenges[8]. He brought this to the attention of the Judge, but the Judge brushed it off, telling him he was too late in bringing it to the attention of the Court, and that the Judge was certain he gave both parties the opportunity to contribute. When asked if he would review the record, the Judge made it clear that he wasn't going to review the record as he was sure he asked both parties for for-cause challenges. He refused to take any more time to discuss the matter. He had made his decision and he was not going to

take extra time to determine if he was right or not. It could be appealed if Defense felt he had been wronged.

Upon review by this Court of the oral record, the Judge was in error. He went right into pre-emptories immediately after asking the Prosecutor if he had any for-cause challenges. He did not ask Defense if he had any for-cause challenges. It appears that taking a few extra minutes to confirm whether he erred or not was less of a priority to the Judge than getting the trial to the jury quickly.

At the end of voir dire, the Judge enquired from the clerk and Spokesmen what the usual procedure was for selection of the alternate jurors and when told the procedure[9], he said that he was not going to do it that way, he was going to do it his way, as it was easier for him. The Judge designated the last juror seated as the alternate. The alternate juror would go into deliberations, but would not be allowed to participate. The judge did send the alternate into the deliberations with the other jurors, with the command that the alternate was not to participate in any fashion during deliberations. When the jury finished deliberations, the alternate was dismissed. There was no inquiry if the command to not participate was actually followed nor was there any comments made to the Court suggesting the command had not been followed.

Prior to the trial actually starting and after voir dire, Appellant brought to the attention of the Court that there was a problem with the alternate juror, but the Judge indicated that he had made his decision and would not hear anything further on the subject. The juror was selected and that was that. The trial then moved forward.

It is a concern of this Court that the judge's seeming need to hurry through trials and not wanting to take time to make sure all the parties' rights are being protected may cause harm in the future. We are a tribal court and though we need to make timely decisions, we also are very protective of making sure everyone has an opportunity to have their say in court. We would caution the judge to be concerned less with the time and be more concerned with making sure rights are not being violated.

Appellant argues that we must look to state common law before any other law when tribal statute and common law are lacking[10]. Appellant cites to *State v. Cusick*, 11 Wn. App. 539 (WA Ct. App. 1974). "The presence of an alternate juror during jury deliberation, contrary to RCW 10.49.070[11] and CrR 6.5[12], invades a criminal defendant's right by an impartial jury and is presumed to be prejudicial."

The WA Supreme Court affirmed the conclusion of the Ct of Appeals saying, "A verdict rendered by a jury membership in any strength other than that specifically authorized by law is void." *State v. Cusick*, 530 P.2d 288 (1975). The prosecutor in that case also asked that the case be remanded to see if any actual prejudice could be determined. The Court declined, saying "A factual hearing would not be likely to shed much light on the actual effect of the alternate juror's presence in the jury room. It would certainly be impossible to recreate at this point every move, every expression he might have made during the several hours of deliberations." Other states have adopted the *Cusick* standard: Maryland, North Carolina, New Mexico, Massachusetts, and Oklahoma.

Another issue that was discussed by the *Cusick* court was there was no objection by the defense to the alternate juror. *Cusick* determined that the error was such an intrusion into the defendant's right to a fair and impartial jury that the fact that there was no initial objection was insufficient to reverse its findings.

Appellee counters that the Trial Court did not err by allowing an alternate juror in the deliberations. He states that Colville Tribal law does not prohibit the Court from directing the alternate juror from being present at deliberations. The Code is silent on that subject. He goes on to state that State Court rule and state laws do not apply to our courts. He is correct, however, we have looked them in the past for guidance in deciding issues that we have no prior tribal law to rely on.

Appellee states that *Cusick* held that prejudice would be found unless "it affirmatively appears that there was not and could not have been any prejudice." He goes on to cite to *United States v. Olano*, 507 U.S. 725 (1993). There the court directed two alternate jurors to go to the deliberation room with the 12-person jury, with instructions not to participate in deliberations. The Court advised the attorneys that he was contemplating letting the alternate jurors into deliberations with instructions that they not participate, only observe. He gave them one day to consider. The next day, the Court had an exchange with one of the attorneys. The attorney indicated that they did not want the alternates in deliberations. The following day, the last day of the trial, the Court again asked again if the alternates could be in deliberations. One of the attorneys indicated that he thought the alternates would be allowed. The Court concluded that this attorney spoke for all the parties. None of the other counsel intervened, nor did they object later in the day when the jury was instructed to deliberate. The Supreme Court declined to presume prejudice and held that the unobjected-to presence of the alternates did not warrant reversal. If the jurors did not actively participate, either verbally or through body language, then it was no more intrusive than a book on the table. They were not persuaded because the defendants made no specific showing of prejudice by the presence of the alternate jurors. We can distinguish the instant case from *Olano*. The *Olano* case was a huge trial, involving many defendants and spanning many weeks. The deliberations were anticipated to take several days/weeks. The judge in that case was concerned that any of the jurors might not make it to the end of deliberations. That is why he sat the two alternates as he did. In the instant case, it concerns only one defendant, deliberations may take one or two days. Less reason to worry that the jurors would make it to the end of the trial and through deliberations.

Appellee further argues that we are not limited to only looking at Washington state case law. The Code only says "state" not "Washington state." Appellee then cites to a case from Maryland in which the defendant did not object to the presence of an alternate juror. The court held that it was a tactical decision and was not ineffective assistance of counsel. If there was no objection to the alternate juror then the issue was waived by the defendant and could not be used in an appeal. *State v. Newton,* 146 A.3d 1204. This case can be distinguished from the instant case. The judge in the *Newton* case had already had to declare a mistrial due to illness, conflicts, and being unable to sit a 12-member jury. The judge, who declared that he normally doesn't do this, asked the parties if they would agree to having an alternate

juror sit in the deliberations, with instructions that they were not to participate. He was concerned that there might be a mistrial if problems continued to surface. Both parties agreed. The jury subsequently found the defendant guilty and he was sentenced to life in prison. He appealed, stating that his counsel was ineffective for agreeing to the alternate juror being present in deliberations. There were other issues, but they don't pertain to this issue. The Appellate Court found that if the parties agreed with the change in procedure, then there was no ineffective assistance of counsel and that it could not be appealed.

In the instant case, there had not been any mistrial, there had been no issues of juror illness or conflicts. This was a standard tribal jury trial, which was anticipated to take one to two days to complete. Deliberations were not expected to take days to come to a conclusion. Therefore, there wasn't a valid reason to allow the alternate juror into deliberations. Even the judge in the *Sexton* case said that it was out of common for his to even suggest the alternative procedure.

The Court of Appeals finds the Trial Court erred in allowing an alternate juror into deliberations.

CONCLUSION

The Court of Appeals finds sufficient facts presented to the jurors to support their decision. The Court of Appeals finds sufficient cause to remand for a new trial in that the Trial Court erred by allowing an alternate juror to be present in deliberations.

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

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Jordan SARGENT, Appellee.

Case No. AP21-018, 8 CTCR 10

15 CCAR 39

[Taima Carden, Spokesperson, appeared for Appellant.
Appellee was not represented and did not appear.
Trial Court Case Number CR-2011-34310]

Decision March 21, 2022.
Before Chief Justice Anita Dupris, Justice Dennis L. Nelson, and Justice Jane M. Smith

Dupris, CJ

This case came before the Court of Appeals (COA) for an Initial Hearing on this date. Appellant appeals the Trial Court's "Order On Motion to

Vacate Record of Felony Conviction and Restoration of Gun Rights" issued November 11, 2021. Appellee was given notice of this hearing, but did not appear.

The purpose of an Initial Hearing is to determine

1) whether the facts and/or laws as presented warrant a limited appeal on issues of law and/or of fact;

2) whether a new trial should be granted;

3) whether Appellant has provided sufficient facts and/or law to reverse and remand; or

4) whether the appeal should be dismissed or denied.

The COA, having reviewed the record, reviewed the law, and hearing from Appellant, has found cause to reverse and remand the Trial Court's Order.

FACTS

1. Appellee, Jordan Sargent, was charged with two criminal crimes in the Trial Court in 2012. He plead guilty, was sentenced, and served his sentence. The Trial Court closed his case.

2. On October 25, 2021, Appellee filed a Motion to Vacate Record of Felony Conviction and Restoration of Gun Rights with the Trial Court, claiming he had been rehabilitated and was seeking expungement of this record and his state cases. He also requested that his rights be restored as he had been a law abiding citizen since 2012.

3. On November 01, 2021, the Trial Court entered an order which granted Appellee's request. The Order further allowed the Appellee to withdraw his guilty plea and enter a not guilty plea. It also dismissed the information or indictment for the offenses, released the Appellee from all penalties and disabilities, and ordered that the conviction for those offenses not be included in any subsequent criminal history report used for purposes of determining a sentence. The Order restored Appellee's right to possess a firearm.

4. The Appellant opposed the expungement and restoration.

5. There is no tribal law cited in either the Motion or Order which would allow the Trial Court to grant Appellee's request.

6. The Colville Tribes did not take away Appellee's right to possess a firearm nor did it restrict his rights concerning firearms.

7. There is no felony designation in Colville Tribal Law, only different classes.

DISCUSSION

The COA has reviewed the record, the file, and heard from Appellant. Appellee plead guilty and was sentenced to a fine, court costs, and jail, including conditions for suspensions of some of the fine and jail. None of the conditions were restriction of firearms.

No where in the Colville Tribal Law and Order is there a law that allows the Court to restrict possession of a firearm, nor is there any caselaw which allows such restrictions. The Motion and subsequent Order were both void of any citation to any firearm restrictions that could be imposed, let alone allow the restoration of such restriction. The charges he was facing did not have a firearm enhancement, nor was there any mention of use of a firearm during the altercation on which the charges were filed.

Tribal law is also void of any statute that would allow expungement of any criminal record. Again the Motion and subsequent Order did not cite to any authorizing law. The Order issued by the Trial Court is overbroad.

It appears that the Appellee and Trial Court relied on RCW 9.94A.640, Washington State's New Hope Act, which was enacted to do exactly what Appellee was asking the Trial Court to do, *i.e.* expunge his record and reinstate his right to possess firearms. RCW 9.94A.640 does not apply in our Courts in that it a State statute which has not been adopted by our Tribes. It was error for the Trial Court to rely on it.

CONCLUSION

The written record is void of any law to which the Court could rely on to make its decision. The Order is void of any law which would allow the Court to order expungement of Appellee's record. There is no statutory or case law which would authorize the Court to enter the Order for restoration and expungement. RCW 9.94A.640 does not apply in our Courts. The Trial Court did not take away Appellee's right to possess firearms, therefore it cannot reinstate something it did not take away.

Based on the foregoing, the Order On Motion To Vacate Record of Felony Conviction and Restoration of Gun Rights dated November 1, 2021 is REVERSED and the case is REMANDED to the Trial Court for dismissal of the Motion and Order.

It is so ORDERED.

Daisy GARVAIS, Appellant,

vs.

Bradley MICHEL, Appellee.

Case No. AP19-020, 8 CTCR 11

15 CCAR 42

[Mark Carroll, Spokesperson for Appellant.
Jonnie Bray, Spokesperson for Appellee.
Trial Court Case No. CV-CU-2016-39011]

Decided December 17, 2021.
Before Chief Justice Anita Dupris, Justice Dennis L. Nelson, and Justice Mark W. Pouley

Dupris, CJ, for the Panel

SUMMARY PROCEEDINGS

This matter came before the Court on an Appeal of the Trial Court's Order dated November 21, 2019, in which the Court set aside an order restraining Appellee from contacting the minor T.M., as part of a custody action between the parties.

The Final Decree of Custody between the parties was entered March 17, 2017. Appellee was unrestrained from any contact with his minor son, T.M., in this decree. In March of 2018 T.M. was taken into protective custody by the State of Washington for incidences occurring in Appellant's household, and was thereafter declared a dependent and was taken into legal custody by the State of Washington.

Appellee was notified by Washington Department of Children and Family Services (DCFS) that he would be able to participate in the dependency case, and be offered remedial services and supervised visitation but for the restraining order entered by the Colville Tribal Court. He moved the Court to lift the restraining order so that he could participate in the dependency case in State Court; the motion was granted. Appellant filed a timely appeal of the Order granting the Motion. Based on the reasoning set forth below, we affirm the Trial Court's decision and dismiss the Appeal.

ISSUE

Did the Trial Court apply the appropriate standard of "best interests" and "substantial change of circumstances" in modifying the final custody order?

STANDARD OF REVIEW

The issue is of both fact and law. When it is mixed, as a general rule we *de novo. CCT v. Naff,* 2 CCAR 50, (1995). In reviewing a Trial Court's ruling under this standard, we do not base our decision on whether we would have ruled differently in the same circumstance, but whether in his ruling, the Judge abused his discretion, and the ruling was unreasonable or arbitrary. That is, there is a presumption the Judge's ruling was correct, and it must be shown otherwise by a review of the facts upon which he made his ruling.

DISCUSSION

Our custody laws support finality of custody orders, which a higher burden to overturn or modify them, in the best interests of the minor involved.

This is set out in CTC § 5-1-126, Child Custody Decree – Modification. Section (b) states that a custody decree "shall not" be modified uless facts have arisen since its entry that "amount to a substantial change ... justifying modification ... to serve the best interests of the child."

At the hearing on the request to modify the custody order herein, the Court received evidence that (1) the minor, T.M., was no longer in the custody of Appellant, and was a ward of the Washington Courts, and (2) that DCFS wanted to work with Appellee, as T.M.'s parent, with a goal of reunification. The restraining order prevented this goal.

We are aware that civil custody causes of action and dependency actions may have competing goals when in the civil action the Court must decide the best interests of which parent should have custody, whereas the Court in a dependency action has a goal of reuniting children with their parents or parent, and so that the State doesn't have to be the custodian.

Here the two Courts have the same child before them, and both look at what is in the best interests of the child. The Tribal Court assessed the facts that T.M. was removed from his primary custodian, in whose custody he was phyusically harmed, and that DCFS could, and would, offer Appellee the support and services to help him be a better parent so that the minor could be reunited with family.

The Trial Court did an assessment of the best interests of the minor. Appellant appeals the semantics in that the Judge didn't use exact words from the statute in so doing. The facts do support a substantial change in circumstances. T.M. was removed from Appellant's custody. The Trial Court found that the restraining order was an impediment to the overall goal of reunification under the dependency case, and found that DCFS would provide adequate supervision of Appellee.

Even though the Trial Court did not use the exact wording from the modification statute, as Appellant urges, there are sufficient facts in the record to support the Trial Court's findings and rulings. We find no abuse of discretion.

ORDER

Based on the reasoning set out above, we AFFIRM the Trial Court's decision and DISMISS the Appeal.

It is so ORDERED.

Andrea GEORGE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, et. al, Appellees.

Case No. AP21-016, 8 CTCR 12

15 CCAR 44

[Mark Carroll, Spokesman for Appellant.

Christopher Kerley, Spokesman for Appellees.

Peter Erbland, Appellee, Pro se.
Trial Court Case No. CO-OC-2019-42026]

Decided April 12, 2022.
Before Chief Justice Anita Dupris, Justice Mark W. Pouley, and Justice Michael Taylor

ORDER

In late January, 2019 Appellant Andrea George filed a civil complaint against The Confederated Tribes of the Colville Reservation (CCT), thirteen (13) Council members, past and current, three (3) attorney employees, past and current, of the Office of Reservation Attorneys (ORA), and Peter Erbland, a contract attorney who had done work for the Council. In total, the number of Respondents was eighteen (18). The complaint is not file-stamped by the Trial Court, but it was signed by Appellant on January 25, 2019.

After a very lengthy statement of allegations against each of the Respondents, both singularly and severally, Appellant identified four (4) specific counts of actions of the respondents upon which she based her lawsuit: (1) Sexual Harassment; (2) Intentional Affliction of Emotional Distress; (3) Retaliation; and (4) Defamation.

The Trial Court, after considering the record and pleadings of the parties, granted Respondents' Motion for Summary Judgment. The Motion was filed by all of the Respondents except Mr. Erbland. Mr. Erbland joined in the Motion. The Trial Court found *Gabriel v. Colville Business Council*, 14 CCAR 05 (2018) dispositive in that *Gabriel* held actions regarding CBC members' ethics and ability to remain a CBC member "lies exclusively within the constitutional and statutory powers and authority of the CBC itself." *id.*. That is, separation of powers prevents our review of the actions of the CBC in their capacity as CBC members.

The Trial Court addressed each individual Count, too, discussing the doctrine of sovereign immunity. We need not review the case further then finding we have no subject matter jurisdiction over the case. Sovereign immunity is an affirmative defense, which is raised when the Court has subject matter jurisdiction. *See Swan v. CBC*, 11 CCAR 83 (2014).

As for the actions against Peter Erbland, they are not actionable in this case. Mr. Erbland merely gave legal advice to the CBC; he did not cause any of the allegations against the other Respondents/Appellees.

Based on the foregoing, now therefore

It is ORDERED that the Trial Court's Order of October 18, 2021 is AFFIRMED and this Appeal is DISMISSED WITH PREJUDICE, and REMANDED to the Trial Court for actions consistent with this Order.

Max LAZARD, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP21-007, 8 CTCR 13,

15 CCAR 45

[Michael Humiston for Appellant,
Taima Carden, for Appellee.
Trial Court Case No. CR-2018-41040]

Decided April 18, 2022
Before Chief Justice Anita Dupris, Justice Mary Finkbonner, and Justice Theresa M. Pouley

Dupris, CJ

Procedural Summary

This appeal arises from the latest ruling in this case, which was initially filed on March 21, 2018, in which Appellant was charged with two counts of drug possession (methamphetamine and heroin), and two counts of possession of drug paraphernalia. Appellant, while represented by a spokesperson, entered guilty pleas to the two drug possession charges on May 3, 2018 and was sentenced on that date. The two possession of drug paraphernalia charges were dismissed.

Our Court dismissed an Appeal of the Trial Court's Order of January 15, 2021which reinstated Appellant's suspended sentence 510 days, finding the reinstated jail time did not violate the Tribal Law and Order Act (TLOA), 25 U.S.C. 2801 (2010). The Appellant also asked this Court to review his guilty plea and Judgment and Sentence of May 3, 2018. We held this request was untimely and denied the Appeal.

In April, 2021 Appellant asked the Trial Court to vacate his conviction based on a newly-
issued State of Washington case, *State v. Blake,* 197 Wn.2d 170, 481 P.3d 521, 2021 LEXUS 107 (2021), in which the Washington State Supreme Court (Supreme Court) found the State's drug possession statute unconstitutional because it lacked a *mens rea* element. Appellant asked the Court to review our drug possession statutes under the standards established in *Blake, supra*. Appellee Tribes objected to the Motion to Vacate. On June 25, 2021 the Trial Court denied the Motion to Vacate. Appellant filed a timely appeal from this latest Order.

After reviewing the record and applicable law, and based on the reasoning below, we find that Appellant's case is distinguishable from *Blake, supra*. We will not adopt the rulings in *Blake* and will affirm the Trial Court's Order dated June 25, 2021.

Issue

Does our strict liability criminal statute against drug possession violate a defendant's due process rights without a *mens rea* element, analogous to the reasoning set out in *State v. Blake*, *supra*?

Standard of Review

The issue is one of law. We review *de novo*. *Naff v. CCT*, 2 CCAR 50 (1995).

Discussion

Appellant asks us to adopt the reasoning and ruling in *Blake*, *supra* in which the Washington State Supreme Court found its strict liability felony drug possession statute was unconstitutional as it was beyond the power of the Washington State Legislature to criminalize unknowing possession of drugs. Such conduct, the Supreme Court held, violated defendants' due process rights under the State and Federal Constitutions.

Briefly, the facts under *Blake*, *supra*, were that a defendant was arrested during a search warrant, and when booked into jail, illegal drugs were found in the coin pocket of the jeans she was wearing. At trial she claimed she was innocent because she got the pants second hand from a friend, and she didn't know there were drugs in the coin pocket. The jury found her guilty of possession of drug possession, finding she had not proven her defense of "unwitting possession."

The Washington Court of Appeals affirmed her conviction. On appeal to the Supreme Court the *Blake* defendant challenged the strict liability drug possession, arguing it should have a *mens rea* element. The Supreme Court agreed. It posited that because of the extreme consequences of the crime of drug possession, the defendant's rights to due process were violated when there was no *mens rea* requirement. Under the protected personal liberties aspect of due process, the Court found that *mens rea* is the rule, and not the exception to criminal laws. It found further that a law cannot criminalize "essentially innocent" conduct. *See*, eg. *City of Seattle v. Pullman*, 82 Wn.2d 794, 514 P.2d 1059 (1973).

The Supreme Court emphasized the serious consequences to defendants convicted of a strict liability drug offense, such as the felony statute imposes harsh consequences for passive conduct; it carries the maximum penalty of 5 years in jail and a $10,000.00 fine. Also, felony convictions strip defendants of many fundamental rights at the time of incarceration and long after, as well as harsh collateral consequences of being a convicted drug offender.

Justice Stephens' dissent opinion asserts that the majority opinion goes to far when all they had to do was declare the pre-Blake rulings not requiring a *mens rea* element for the drug offense was wrong, and to over-turn the contrary decisions. She writes that the common law principle of

mens rea is foundational to the criminal justice system, which is supported by (1) RCW 9A.04.060 ("...the provisions of the common law relating to the commission of crime...shall supplement all penal statutes of this state."); (2) US Supreme Court caselaw (eg. *Staples v. United States*, 511 U.S. 600 (1994)); and the Uniform Controlled Substances Act §401(c), which requires a defendant "knowingly or intentionally" possess a controlled substance. Washington is the only state to maintain a strict liability drug possession statute, both in its language and its interpretation.

We are asked to follow the ruling in the *Blake* majority decision in that our drug offenses are strict liability, with no *mens rea* element in the offense. We have found that declaring a tribal statute unconstitutional or otherwise invalid should be the last resort of our inquiry when presented with the question. *Wiley v. CCT,* 2 CCAR 60 (1995). We must first analyze whether the proper case is before us to do so.

Appellant's case is clearly distinguishable from the facts in *Blake*. First, Appellant specifically acknowledged his culpability in his statement of guilty plea in 2018. He specifically stated he possessed methamphetamine and heroin. He was represented by a spokesperson at his guilty plea hearing; if innocent this would have been the time to raise the argument.

In *Blake* the defendant claimed she had no knowledge she had drugs in her pocket. The *Blake* Court found this to be essentially innocent possession, and that upholding the strict liability element of the drug possession charge violates the due process rights of defendants acting with innocent conduct. Appellant's guilty statement does not support an innocent possession.

Further, Appellant's sentence is not akin to the potential penalties recognized by the Court that Blake was subject to, i.e. felony record, felony jail time/fine, and so on. These were important considerations the Court recognized in its decision.

The facts in this case show further that Appellant has made attempts to not fulfill his sentence by filing other Appeals after he has been ordered to jail. It raises the question of whether Appellant is grasping at straws in this case. He was sentenced three (3) years ago, and now is trying to overturn that conviction by hanging his hat on the *Blake* case in order to avoid his reinstated sentence. Any question of constitutionality of his sentence is not viable at this time.

For these reasons, we find that even though it is in our responsibility to review statutes for constitutionality, and even though the question of strict liability of our drug possession offenses may be relevant to a case in the future, this is not the case. Based on our reasoning above we AFFIRM the Trial Court order of June 25, 2021, and REMAND to the Trial Court for actions consistent with this order.

Zachery LOVE, Appellant,

vs.

Steven AYCOCK, in his official capacity as Chief Judge; Jack FERGUSON,

in his official capacity as Councilman; Rodney CAWSTON, in his official

capacity as Chairman; Marvin KHEEL, in his official capacity as Councilman;

Richard SWAN, in his official capacity as Councilman; COLVILLE

CONFEDERATED TRIBES; Steve BROWN; in his official capacity as

Chief of Police; Marty RAAP, in his official capacity as attorney

for the Office of Reservation attorney; and TRIBAL TRIBUNE.

Case No. AP21-017, 8 CTCR 14

15 CCAR 49

[Appellant appeared pro se.
William Dow appeared for Appellees.
Trial Court Case No. CV-OC-2021-44112]

Decided April 5, 2022
Before Chief Justice Anita Dupris

Dupris, CJ

This matter is before the Court of Appeals (COA) on Appellant's Motion to Reinstate Appeal filed on March 1, 2022. An Opposition to Motion to Reinstate Appeal was filed by Appellees on March 17, 2022. Upon review of the facts and the record, the COA finds Appellant has failed to show adequate cause to reinstate the appeal. The Motion is therefore denied and the matter closed[13].

The COA has jurisdiction to hear this matter. COACR 5.

HISTORY

On November 30, 2021, Appellant filed a Notice of Appeal of a Tribal Court order entered on November 3, 2021 which found the Appellant had been disbarred on June 22, 2021 and dismissed the action against the Chief Judge. On December 10, 2021, the COA Clerk sent a letter to Appellant advising him that his appeal would not be perfected until he complied with the Court Rules, i.e. filing an original and three working copies (COACR 8 (a)). No response was received from Appellant. On January 18, 2022, the COA entered an Order Dismissing Appeal as Imperfected.

On March 1, 2022, Appellant filed a Motion to Reinstate Appeal. Appellant alleged that the December 10, 2021, letter sent to him failed to cite to any statutory authority as to what was needed to be "corrected." He also alleges that on January 4, 2022, he was out of the country for 14 days, and did not receive any notices from the COA during that time. He did receive the letter of December 10, which stated that the appeal could not be perfected until he complied with the court rules concerning filing of the original and three copies[14]. He also alleges that since the COA did not put "with prejudice" on its Order, the Order is entered without prejudice, which would allow either a refiling or a motion to reinstate.

On March 3, 2022, an Order on Motion to Reinstate Appeal was entered by the COA. The COA reserved ruling on the Motion to Reinstate, gave Appellant two weeks to file proof of service[15] of his motion on Appellee, along with legal memorandum to support his motion. Upon receipt of the Motion, Appellees were given two weeks to file their response. Appellant was also instructed to only contact the Clerk of Court in writing. As of this date, no response was filed by Appellant on the proof of service of the Motion on Appellees.

On March 17, 2022, spokesperson for Appellees filed an Opposition to Motion to Reinstate Appeal. Appellees assert that COACR 8(a) is specific as to what was required and there is no dispute that it was not satisfied by Appellant.

DISCUSSION

The case in front of the COA is one of first impression. Appellant has filed a Motion for Reinstatement of Appeal. There is no rule in the Court of Appeals Rules nor any statutory law the Colville Tribal Law and Order Code that allows for Reinstatement of Appeal. COACR 17, Motion for Reconsideration; Finality of Order or Opinion, which is more relevant, states "Any party who is in disagreement with the final decision of the COA, may request that the COA review its decision." The Rule goes on to state that the Motion must be accompanied by an Affidavit, be specific as to what is being requested, and must be filed within ten days of receipt of the decision or order. In the instant case, Appellant did not file his Motion until approximately 41 days after its issuance. Even allowing for 3-5 days for the mail service, Appellant was well over the time allowed for the Motion for Reconsideration.

Court of Appeals Court Rule 8(a)'s first paragraph ends with the statement, "All documents filed shall be by an original and three working copies unless otherwise ordered." Colville Tribal Law and Order section 1-2-112(a) also has a concluding sentence in its first paragraph, "All documents filed shall be by an original and three working copies, unless otherwise ordered." Appellant only filed his original Notice of Appeal. He was advised that he needed to comply with the Court rule "regarding filing an original and three working copies." Appellant still has not provided the three working copies to the COA.

Appellee states that it is not the COA's obligation to provide Appellant legal advice. The letter that Appellant alleges was "broad, ambiguous, and vague," actually precisely told Appellant what was needed to be done and where to look to find it. He had six weeks from the December 10th letter and

the January 18th Order to read and comply. Appellee also noted that Appellant's argument that the COA didn't include proof of service or tracking with the letter and that he was out of town on January 4-18, 2022 were red herrings. Appellant never states he didn't receive the letter, only alleges how the letter was mailed. He attached a copy of the letter to his motion which is proof he did receive it.

Further, there is no rule that the COA's orders are automatically without prejudice if not specifically stated as such. Appellee's argument that Appellant should not be allowed to extend his time to file a perfected appeal by not properly filing it in the first place has merit. Failure to properly file an appeal should not allow an Appellant to restart the clock once he gets an order dismissing it as not perfected. If it was not perfected in the first place, any subsequent appeal would be untimely.

To be admitted to the Colville Tribal Court Bar, a spokesperson must sign an Oath that states, in part, "I have read the Colville Tribal Law and Order Code and am familiar with its contents;" and "I will abide by the rules established by the Council and the Colville Tribal Court." It is clear that Appellant has not adequately read the Colville Tribal Law and Order Code regarding appellate procedures, nor has he adequately read the COA Court Rules. Both are relatively short and concise.

CONCLUSION

It is clear that Appellant has not followed the COACRs or the Orders of the Court. He has failed to submit proof of service on Appellees of his Motion to Reinstate Appeal. He has failed to submit the three working copies as required. He has not met the deadline specified for a Motion for Reconsideration. Finally, he has not shown adequate cause for the COA to grant his motion.

It is ORDERED that the Motion to Reinstate Appeal is DENIED WITH PREJUDICE and REMANDED to the Trial Court for action consistent with this Order.

Nikki DICK and Carla MARCONI, Appellants,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP21-008 and 009, 8 CTCR 15

15 CCAR 52

[M. Carroll, appeared for Appellants.
P. Erbland, appeared for Appellee.
Trial Court Case Nos. CV-OS-2016-39179 and CV-AD-2016-39000]

Decided June 13, 2022
Before Presiding Justice Mark W. Pouley, Justice David C. Bonga, and Justice Michael Taylor

Pouley, J.

FACTS

Appellants Nikki Dick and Carol Marconi were both employed by the Tribes. In November of 2007 the Tribes, attempting to address financial shortfalls, terminated many employees, including the Appellants. Appellants both filed appeals pursuant to the Tribes' Employment Policy Manual. In June 2008, an Administrative Law Judge made favorable rulings for both Appellants. The ALJ overturned their terminations, awarded back wages, and ordered their reinstatement. Despite the outcome of the ALJ review, the Tribes did not pay the back wages or reinstate the Appellants to their previous positions. Appellants filed complaints in the Colville Tribal Court.

In July 2008 the trial court upheld the substance of the ALJ order, overturning the employment terminations. However, the court noted that the jobs subject to reinstatement no longer existed and were not budgeted for. In addition, the Tribe had not budgeted to pay back wages. The Court noted its limited authority to order the Business Council to act, so the court encouraged the parties to negotiate a settlement. The matter returned to the trial court in May 2011[16] after the parties attempts at settlement were unsuccessful. Consistent with its earlier ruling, the trial court upheld the ALJ decision, but dismissed the Appellants' actions, finding the court did not have authority to require the Tribes to reestablish the jobs or budget for them. In addition, the court did not have authority to award monetary damages since there was no insurance policy to pay the damages. No appeal was taken from this order.

The matter before this court was filed on July 29, 2016. Appellants claim they discovered that an insurance policy existed at the time of the original suit. They claim the Tribes intentionally or negligently withheld this information at the time of the original action. The Tribes tendered Appellants' claims to their insurer, AIG Insurance, who issued a coverage letter in August 2017. The insurer declined coverage, citing specific exclusion language within the policy and additional language excluding payment of "back wages" contained in Employment Related Liability Endorsement. This appeal followed.

DECISION

As the issues before the court are matters of law, the standard of review is *de novo. Naff v CCT,* 5 CCAR 50 (1995).

The 2011 final judgment of the trial court was not appealed so the decision rendered by the court is final. To the extent Appellants' current pleadings challenge the findings of the court or seek to "reopen" litigation of the points already decided, Appellants' claims must fail. The only valid question is whether the Appellants have an actionable claim against the Tribes based on the allegation that the Tribes failed to disclose the existence of insurance coverage at the time of the original litigation. We find that no actionable claim exists, and we therefore AFFIRM the trial court's dismissal of Appellants' claims.

It is well established that the Colville Confederated Tribes, as a sovereign, may not be sued unless it waives that sovereign immunity. In addition, the Tribes may limit any such waiver to specific claims and remedies. *CTEC v. Orr,* 5 CCAR 1, at 4 (1998). The Colville Civil Rights Act provides a limited waiver of sovereign immunity, and this court has reviewed

permissible claims and remedies allowed by the waiver numerous times. We do so again in this case.

CTC 1-5-2 enumerates specific civil rights protected by the code. CTC 1-5-4 only allows actions seeking declaratory and/or injunctive relief to be brought in the Tribal Court to protect the enumerated rights. CTC 1-5-8 allows for an award of monetary damages only to the extent there exists an insurance policy that will cover the claimed loss. There is no requirement that the Tribes maintain any insurance policy or that any policy that exists provide any specific scope of coverage. In other words, the Tribes may further limit the narrow waiver of immunity by simply not seeking or providing coverage for any alleged civil rights violations.

In the 2011 rulings on the matters, the trial court entered declaratory relief as provided in CTC 1-5-4. Unfortunately, the court also concluded that it had no authority to order the Colville Business Council to create and budget the job positions once held by the Appellants. The court correctly found that the Appellants were damaged by the Tribes' actions, but that the court lacked any available remedy. This decision was not appealed and thus stands. The court also found that since the Appellants did not present an insurance policy that provided coverage for back wages awarded by the ALJ, and affirmed by the court, those claims too must be dismissed. This decision was not appealed, but Appellants now claim the Tribes improperly withheld the existence of such a policy and that damages should be awarded because of the Tribes' misconduct. Regardless of how one gets there, the only damages that could possibly be awarded are for "back wages" as awarded by the ALJ.

In this case the trial court correctly found that even if the claims may be resurrected from dismissal in 2011, unlawful discharge, malpractice, misfeasance and malfeasance, unlawful retaliation, negligence and negligent supervision, and outrage all sound in tort and are not civil rights violations enumerated in 1-5-2. These claims are absolutely barred by sovereign immunity and no express waiver of immunity exists. The claims were correctly dismissed in 2011 and there is no basis to reexamine them today. Likewise, the court correctly found the court may not order Appellants' reinstatement as that issue was decided in 2011 and never appealed.

Appellant's claim the Tribes acted wrongfully by not disclosing a valid insurance policy during the original litigation. They further argue that such failure constitutes an "Error, misstatement, misleading statement, omission, neglect or breach of duty of the INSURED; that arises out of the discharge of duties for the NAMED INSURED, individually or collectively" which is a covered loss under the Colville Business Councils Errors and Omissions insurance policy in effect in 2006-2007. Even if true, this argument does not create an actionable claim because the alleged misconduct is not an enumerated civil rights violation. For that, Appellants reach back to the 2011 findings that their civil rights were violated when the Tribes failed to comply with the ALJ order. The only claim of damages Appellants might assert under CTC 1-5-
8 then, is for "back wages" which were awarded, but never paid.

In *Gibson v. CTC,* 14 CCAR 39 (2019), this Court held that the Tribes may raise sovereign immunity as an absolute defense to actions brought under CTC 1-5-8, regardless of the existence of insurance coverage. In *Williams v. CTC*, AP 19-014 this Court held that when sovereign immunity has not been asserted as an affirmative defense, and when an insurance policy is

presented, the court must enter a process of fact-finding and legal analysis to determine if damages may be awarded. The court may only award damages for injuries suffered because of violations of rights enumerated in 1-5-2. If the claims meet this first test, only damages covered by a valid and enforceable insurance policy may be awarded by the court. As this court held in both *Gibson* and *Williams*, regardless of the existence of any insurance policy, the Tribes, as sovereign, may assert complete immunity from suit or direct the Tribes' liability insurer to raise sovereign immunity as a defense.

In the original action between these parties the Tribes asserted sovereign immunity as a defense to the award of damages, no claim was tendered to an insurer for review of coverage, and no policy was presented to the court. While the 2011 decision is not before this court for review, it is clear the court correctly dismissed the Appellants' claims for damages. Does the Tribes' failure to present an existing policy during the original litigation open it to a valid claim for damages in this case?

When this matter was filed, the Tribes tendered the claim to their insurer. After full review the insurer concluded that there is no coverage for an award of "back wages." The Appellants attempt to argue that other language in the policy might support another conclusion, but the exclusion of back wages is clear an unambiguous and leaves no doubt there is no coverage for the Appellants' only civil rights claims. Like the court did in 2011 the 2021 order before us also correctly dismissed the Appellants' claims for damages.

This court is not blind to the unfortunate position to which the Appellants are left by our decision. As Judge Aycock identified in his first ruling in this matter, the Appellants were wronged by the Tribes' actions, and they deserve a remedy. In his order Judge Aycock encouraged the Tribes and the Appellants to negotiate a settlement that might at least partially satisfy everyone. Unfortunately, the parties were unable to do that and the Colville Tribal Court system, at trial and appeal, is unable to fashion a satisfactory remedy.

The decision of the trial court is AFFIRMED.

John WHITELAW, Appellant,

vs.

Ramona CAMPOBASSO and Melissa CAMPOBASSO, Appellees.

Case No. AP22-005 IA, 8 CTCR 16

15 CCAR 56

[Mark J. Carroll, for Appellant.
Appellees appeared pro se.
Trial Court Case No. CV-EV-2021-44144]

Decided June 23, 2022
Before Chief Justice Anita Dupris, Justice David C. Bonga, and Justice Dennis L. Nelson

Dupris, CJ

PROCEDURAL HISTORY

On August 27, 2021 Ramona and Melissa Campobasso, Appellees herein, filed a Civil Complaint for Unlawful Detainer, Writ of Restitution, and Waste against John Whitelaw, Appellant herein. On October 12, the Court granted Appellee's Motion and Affidavit for Substituted Service in chambers, without a hearing on record. The Court also set an eviction hearing for December 7, 2021.

Appellees stated on record that they had documentary proof of substitute service by publication in the Star newspaper and by posting the Notice and Summons in two different places on the Reservation. Appellees did not file the written proof with the Court, so we could not verify such proof of service from reviewing the record.

On November 15, 2021 Appellant filed an Answer and Affirmative Defense to the Civil Complaint, and Appellant's Spokesperson, Mark Carroll, filed a Notice of Appearance on behalf of Appellant.

On December 7, 2021 Court entered Orders enforcing Unlawful Detainer and Writ of Restitution for Appellees and against Appellant. Neither Appellant nor his Spokesperson appeared at the December 7, 2021 hearing. The Court order states both parties had been properly served Notice of the hearing.

On October 28, 2021 a Court Clerk served Appellant a copy of the Order of Substituted Service dated October 12, 2021 which directed Appellant to file his answer with 20-30 days, or a default judgment may be entered against him. The same Order of Substituted Service set an eviction hearing for December 7, 2021.

Appellant complied with the Order of Substituted Service by filing an Answer and Affirmative Defenses on November 15, 2021, along with a Notice of Appearance by his Spokesperson, Mark Carroll. Mr. Carroll was not served Notice of the December 7, 2021 hearing. The record does not reflect any new Notice of Hearing for the December 7, 2021 hearing after Appellant and his Spokesperson filed the Answer and Affirmative Defenses.

In the December 7, 2021 hearing an Order to Enforce Unlawful Detainer and Writ of Restitution was entered on record and signed on February 4, 2022. The Court found that both parties had been properly served, and Appellant and his Spokesperson failed to appear. The record does not reflect proper service of the December 7, 2021 hearing on either Appellant or his Spokesperson .

On March 2, 2022 Appellant filed a Motion to Reconsider the December 7th Order, and asked for a trial on the merits. This Motion to Reconsider was denied by the Court by Order dated April 22, 2022. The

Judge held, in its Order denying Reconsideration, that Appellant's Spokesperson filed a Notice of Appearance on November 15, 2021, and Appellant was served notice of the hearing by a Court Clerk on October 28, 2021.

The Court further found, in its Order of April 22, 2022:

1. Appellant and his Spokesperson failed to appear for the December 7, 2021 hearing, which was the only chance to give their version of the dispute.
2. Appellant was given notice of the December 7, 2021 hearing on eviction when the Court Clerk personally served him the Order for Substitute Service, which had the Court date in it.
3. Spokesperson Carroll filed an Notice of Appearance on November 15, 2021, and it was Appellant's responsibility to make sure his Spokesperson had all the relevant information, such as, among other things, the hearing date of December 7, 2021.
4. The Court did serve all the parties with the December 7, 2021 hearing.

Based on the above, the Court denied the Motion.

Appellant filed an Interlocutory Appeal on May 13, 2022, to which Appellee has not filed a response or objection.

Based on the foregoing, we granted the Interlocutory Appeal, and at the Initial Hearing we found errors of law sufficient to reverse and remand.

ISSUES

1. Did the Court err by granting a default hearing after Appellant's Spokesperson filed an Answer and Affirmative Defenses prior to the December 7, 2021 hearing?
2. Did the Court err by not notifying Appellant's Spokesperson of the December 7, 2021 hearing?
3. Did the Court err by not issuing a separate Notice of Hearing for December 7, 2021 after Appellant filed an Answer and Affirmative Defenses?

STANDARD OF REVIEW

The three identified issues are issues of law. We review *de novo*. *Naff v. CCT*, 2 CCAR 50 (1995).

DISCUSSION

Appellant raised three grounds for an Interlocutory Appeal:

1. The Trial Court has committed obvious error which would render further proceedings useless;

2. The issues presented involve controlling issues of law as to which there is substantial grounds for difference of opinion and that an intermediate appeal from the decision may materially advance the termination of the litigation; and
3. The Trial Court has departed from the accepted and usual course of judicial proceedings.

Based on our discussion below, We find the Court did commit reversible error on all three grounds and we will reverse and remand for a trial.

1. **Did the Court err by granting a default hearing after Appellant's Spokesperson filed an Answer and Affirmative Defenses prior to the December 7, 2021 hearing?**

The Order of Substituted Service of October 12, 2021 had a Court date set of December 7, 2021; it also had language that told the Respondent/Appellant if he did not respond in a timely fashion that a default judgment could be entered against him. Appellant did file a timely response, and retained a Spokesperson to represent him in the matter.

The record does not reflect why the Court would set an Eviction Hearing in an Order for Substituted Service. This is not standard practice. There is nothing in the record that shows Appellee, as Petitioner, asked the Court for a hearing date by separate Motion and Affidavit. The Court did not issue a separate Notice of Hearing for the December 7, 2021 eviction hearing that comports with due process. The Court went ahead with a default hearing even though Appellant and his Spokesperson notified the Court they were participating in the case.

We have held :

> "Parties must have reasonable notice prior to any substantive hearing to allow the parties time to prepare their respective cases [cites omitted]... When a person is not given adequate notice of what is to be considered in a hearing, all the other procedural rights are impacted. He does not have adequate time to prepare for the hearing, and to submit evidence on his own behalf.... the parties have a right to present their evidence in a meaningful manner. The judge is the gatekeeper of due process. It is the Court's responsibility to ensure adequate notice is provided to every litigant, and to allow everyone who appears in Court to have his say, in his own way." *Lezard v. Conto*, 10 CCAR 23 (2009).

To further compound the error, the Court, in it's Order Denying Reconsideration, April 22, 2022, found it was Appellant's responsibility to notify his Spokesperson of the December 7, 2021 hearing set out in an Order for Substituted Service. This is not standard practice; once a Spokesperson

has filed a Notice of Appearance, it is required that the Court include him or her in all Notices. Default judgments are to be considered only if, after adequate notice, the responding party does not respond. This is not the case here. The Trial Court committed reversible error, we so hold.

2. The issues presented involve controlling issues of law as to which there is substantial grounds for difference of opinion and that an intermediate appeal from the decision may materially advance the termination of the litigation.

The crux of the Interlocutory Appeal is that Appellant was not afforded adequate procedural due process. He was denied his opportunity to present his evidence before a judgment was rendered against him. The Court, in its April 22, 2022 Order, finds that Appellant was given notice of the December 7, 2021 eviction hearing, and it was his responsibility to share the information with his Spokesperson; the Court found that "This was the one and only opportunity that they had to present their version of the dispute in question." Order Denying Motion for Reconsideration at page 1.

As we stated under Issue 1, *supra*, the Notice the Court relied on was inadequate. Appellant has stated sufficient evidence and law to support this ground for an Interlocutory Appeal, and we find the Court made a reversible error. We so hold.

3. The Trial Court has departed from the accepted and usual course of judicial proceedings.

The first departure from the usual course of judicial proceedings was when the Court set an eviction hearing on a Notice and Summons by publication. The Notice and Summons was answered by Appellant, and that precluded going forward for a default hearing without sufficient notice to Appellant. See, for example, Washington Court Rule 55. Appellant's spokesperson was also not served notice. Our Court does not have a separate court rule for Default Judgments, so we must look elsewhere for guidance. CTC, section 2-2-102, Applicable Law.

The second departure is when the Court held it did not have to notify Appellant's Spokesperson of the December 7, 2021 hearing, and that it was his client's responsibility to do so. This premise is not supported by any law, statutory or case law, that we are aware of. This is in violation of basic tenets of procedural due process. We so hold.

Based on the foregoing, we hold that the Court committed reversible errors in not providing Appellant adequate due process, and that he has the right to present his evidence in this matter before a final judgment can be entered.

It is so ORDERED, and this matter is REVERSED and REMANDED to the Trial Court for actions consistent with this Order.

Selena ADRIAN, Appellant,

vs.

Buffy Nicholson and Skywalker Renion, Appellees.

Case No. AP22-003, 8 CTCR 17

15 CCAR 61

[Appellant appeared Pro se.
Appellees appeared Pro se.
Trial Court Case No. CV-CU-2021-44154]

Decided July 11, 2022.
Before Chief Justice Anita Dupris, Justice Mary Finkbonner, and Justice Dennis L. Nelson

Dupris, CJ

PROCEDURAL SUMMARY

On September 15 2021 Appellee filed a Petition for Custody and/or Support for the minor child, K.R., and against Appellant and Skywalker Renion, the parents of K.R..[17]

Also on September 15, 2021 Appellee filed a Motion and Affidavit for emergency restraining orders, temporary custody orders, and an Order to Show Cause to Intervene in Custody. The Court granted temporary custody, visitation, and restraining orders on September 16, 2021, and set a Show Cause for September 20, 2021.

At the September 20, 2021 Hearing Appellant asked for a continuance to get evidence to present. The Court granted her Motion to Continue and ordered that the temporary orders would continue. The Show Cause was continued to September 27, 2021.

On September 27, 2021 Appellee filed an Amended Petition for Custody and/or Support in which she added a co-petitioner, Shannon C. Nicholson.

At the September 27, 2021 Show Cause hearing the Court found " [Appellant] wants the help of [Appellee] to help with [minor]." The Court granted Appellee temporary custody with visitation and ordered Appellant could not remove minor from Appellee. The Court then set a "status hearing" for December 7, 2021. The Order of September 27, 2021 hearing was not signed until October 16, 2021.

The record shows the Court held another Show Cause hearing on January 11, 2022 at which Appellant did not appear. The Order states Appellant was served Notice of this hearing, but the Notice is not reflected in the Court's records. Appellees were granted temporary custody. The Court then set a Custody Hearing in the Order of January 11, 2022, and gave notice of the Custody Hearing set for February 22, 2022 with the following language: **"THIS ORDER SHALL SERVE AS NOTICE TO ALL PARTIES OF THE NEXT SCHEDULED HEARING."**

At the Custody Hearing on February 22, 2022, the Court granted Appellees permanent custody of K.R., finding it was in the minor's best interests to grant Appellees custody. The Court took judicial notice of a Minor-In-Need-of-Care (MINOC) case in its findings. Further it found that Appellant had a recurring drug problem, while at the same time recognizing Appellant's testimony that she was currently in a treatment program.[18]

The Court, after being notified on record of her new address, sent the final order of custody to Appellant to her old address. She filed her Appeal on April 18, 2022, eight days passed the normal 30-day limit, counting from the time she actually got a copy of the final order.

We granted the Appeal and held an Initial Hearing on June 17, 2022. At the Initial Hearing we found (1) good cause to go forward with the appeal; (2) the Court committed reversible error because its Notice of Hearing for the Custody Hearing did not comport with the law on what is to be included in the Notice; (2) the Court committed reversible error by not applying the requisite standards in taking judicial notice; and (3) the Court committed reversible error in not applying the correct standards for third party custody actions. Based on the reasoning below, we reverse and remand.

ISSUES

Appellant raises three Issues:

1. Did the Court err in not providing adequate notice of the permanent Custody Hearing held on February 22, 2022?
2. Did the Court err in not applying the correct standards for taking judicial notice of a MINOC case?
3. Did the Court err in not applying the correct standards for a third party custody case?

Appellee raises the issue:

1. Should the Appeal be dismissed as untimely, as the Order of Custody was entered on February 22, 2022, and signed on March 8, 2022, 40 days before the Appeal was filed?

STANDARD OF REVIEW

All four issues are issues of law, and will be reviewed *de novo*. *Naff v. CCT*, 2 CCAR 50 (1995).

Timeliness of the Appeal

The final Order was entered on Record on February 22, 2022, signed on March 8, 2022, and mailed on March 11, 2022. The record shows the Court mailed the Order to the wrong address. The Court file indicates the Clerk sent the Order to her old address, and that it was returned as undeliverable. She gave the Court her current address at the Feb. 22, 2022 hearing (it is noted in the Judge's notes from the hearing). She filed it on the 38th day from the time it was mailed, 8 days after the 30-day time limit for filing an appeal.

We have held that "It is the Court of Appeals's duty to decide what the law is and to administer justice fairly. This Court may make exceptions to procedural rules when the issues presented are of such a serious nature that

this Court should reach a decision in spite of the procedural flaws." *Gallaher v. Foster*, 6 CCAR 48 (2002). The Appellant is *pro se*. The nature of the Court's errors are such that there is good cause to grant the Appeal under the standards established by the *Gallaher* case. We so hold.

Adequate Notice of a Permanent Custody Hearing

The language that needs to be in a Notice of a permanent custody hearing has become black letter law in our Courts. In 1991 this Court recognized the inadequacy of the Code in informing parties of what will be required in a custody proceeding. We stated:

> "The ...Code gives inadequate notice to litigants of the Court's requirements that the hearing on permanent custody is the one and only opportunity for presentation by the litigants of testimony of their witnesses, and of the requirements for live testimony. In the absence of an amendment to the Code, the Trial Court's notice to the parties setting the hearing should advise the litigants of those requirements." *George v. George*, 1 CCAR 52 (1991).

Notices for custody hearings have been required to include specific language on the due process protections to be afforded to litigants for over 30 years. The Notice issued by the Court in this case was at the end of a temporary custody order, and just stated the Order was the Notice for the "next scheduled hearing." This does not comport with the *George* requirements, and is reversible error.

Judicial Notice

We have set standards for taking judicial notice, first in a criminal case, (*Louie v. CCT*, 8 CCAR49, (2006)); then in MINOC cases, (*In Re Gorr,* 8 CCAR 76 (2006)), and *Randall/LaCourse v. CFS*, 11 CCAR 39 (2012)); and finally extended the standards to all cases in a third party custody case, *Whalawitsa v. Kauweloa*, 14 CCAR 27 (2018). The following must be considered when taking judicial notice:

> 1) Taking judicial notice is disfavored, especially when the Court takes judicial notice of facts that would prove or disprove an allegation...; 2) Courts may take judicial notice of public records, but only to prove the existence of the orders, and not the proof of the facts therein; and 3) when a Court is going to take judicial notice, the Judges should (a) give notice to the parties of what he is going to take judicial notice so the parties may provide rebuttal evidence; and (b) allow the parties to present such rebuttal evidence.

The record shows that none of the requirements for taking judicial notice were followed by the Court in this case. This is reversible error. We so hold.

Third Party Custody

A third party custody action must first include evidence, or lack of evidence, on the fitness of a parent. This is a relevant factor which evidence

is first raised by the third-party petitioner to overcome a rebuttable presumption of the parent's right to custody. Best interests is the factor to consider if the presumption of fitness is overcome. *Jerred v. Leskinen*, 12 CCAR 73 (2016). The Court did not address this standard in its findings. This is reversible error.

CONCLUSION

Based on the foregoing reasoning, we hold that the errors of the Trial Court are such that the Appeal is granted, and the order of February 22, 2022 is REVERSED, and this matter is REMANDED for a new trial, which must comport with all the requisite standards.

It is so ORDERED.

Michael FINLEY, INCHELIUM SHORT STOP, Gene NICHOLSON, and

GENE'S NATIVE SMOKES, Appellants,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP22-002, 8 CTCR 18

15 CCAR 65

[Appellant appeared pro se.
William J. Dow, appeared for Appellee.
Trial Court Case No. CV-OC-2021-44000]

Decided June 23, 2022.
Before Chief Justice Anita Dupris, Justice Mark W. Pouley, and Justice Jane M. Smith

Dupris, CJ

PROCEDURAL SUMMARY

On January 4, 2021 Appellants filed a Complaint for Declaratory Judgment and Injunctive Relief and Damages against Appellee. The basis for the Complaint was Appellants' dispute in the collection of fuel taxes. The case was filed by Appellants' Spokesperson, Zachary Love[19].

On February 9, 2021 Appellants filed an Amended Complaint, adding three additional Respondents: Jack Ferguson, Colville Business Council (CBC) Councilman, Francis Somday, CCT Executive Director, and Janice Peasley, an accountant for the Colville Confederated Tribes (CCT)[20]. The Amended Complaint sought injunctive relief regarding the collection of the fuel tax in question, and to recover tobacco rebate tax monies being withheld by CCT.

Appellees filed an answer with affirmative defenses on March 1, 2021. On March 9, 2021 the Court denied Appellants' motion for temporary orders

of restraint and preliminary injunction. The Order was signed on March 18, 2021.

The Court entered an Order Granting in Part Defendant's Motion for Partial Summary Dismissal on May 25, 2021. The Court held, as a matter of law, Appellants were bound by the fuel tax agreement with the State of Washington and were to comply with the law and start paying the fuel tax. The Court dismissed with prejudice Counts I, II, and IV of the Amended Complaint, all relating to the legality of the fuel tax agreement entered into between the CCT and the State of Washington, and its applicability to Appellants and their businesses.

In the ensuing months between the Order of May 25, 2021 and the Final Order of Resolution dated March 30, 2022 the record shows the parties filed other pleadings setting out their positions on the issues that brought them before this Court. Specifically the issues are (1) the withholding of the tobacco tax incentives from Appellant Nicholson, and (2) the dispute on the amount of tax fuel owing by Appellant Finley.

The relevant sections of the Final Order of Resolution of March 30, 2022 are:

(2) Appellants were to comply with the May 25, 2021 orders to pay the fuel taxes;

(3) No material issue of fact or law regarding Appellants' failure to collect fuel taxes;

(4) A judgment of $88,726.86 against Appellant Finley owed for state fuel taxes;

(5) CCT has withheld $533,018.26 in tobacco incentives from Appellant Nicholson because of the amount he owes in fuel tax payments, the time for withholding being from December 18, 2020 to March 3, 2022;

(6) Appellant Nicholson has failed to collect and remit $268,289.10 in state fuel taxes.

The Final Order also sets out what Appellee has offered as a resolution to making payments regarding the tobacco payments to Appellants once Appellants comply with the state fuel taxes owed. The Court accepted this offer of resolution in its Order.

Although the term "Resolution" was used, Appellants had not agreed to the terms, specifically the withholding of the tobacco payments from Appellant Nicholson and the amount owing for state fuel taxes by Appellant Finley.

On April 11, 2022 Appellant Finley filed a Motion to Reconsider and Vacate Order stating Appellant Nicholson was in agreement with the motion. Appellant disagreed with the proposed resolution order presented by Appellee, and stated he believed they would get a hearing on the evidence before a final order was entered. He stated he disputes the amount alleged that he owes on the state fuel tax; he states Appellants' due process rights were violated because they were not afforded an opportunity to present their evidence and arguments. The Trial Court did not rule on this motion.

The Appeal was initially filed as an Interlocutory Appeal on April 11, 2022. We noted that the final orders had been entered and designated it as an Appeal of a final order, and granted its filing.

An Initial Hearing was held on June 17, 2022, at which all parties appeared. We found cause to reverse and remand the matter to the Trial

Court for a trial on the issues.

DISCUSSION

Basic tenets of procedural due process are that a party is given adequate notice and an opportunity to present his case in a meaningful manner before the Court makes its final decision. *See, e.g. Lezard v. Conto*, 10 CCAR 23 (2009). The Final Order of Resolution is analogous to an order granting summary judgment. The Court found no material issues of fact or law regarding Appellants' responsibility for paying the state fuel taxes. It did not rule on the legal basis for allowing the withholding of Appellant Nicholson's tobacco payments, nor did it rule on Appellant Finley's assertion that the state fuel taxes he was found liable for were not correct.

Although it was termed a "resolution" it is clear Appellants did not agree with the final orders. Both issues they raised regarding the tobacco payments and the difference in the amount believed owing for state fuel taxes go to genuine issues of material facts and law.

For instance, Appellee, at the Initial Hearing, could not state what legal authority existed to withhold the tobacco payments, yet the Court ruled on the withholding without a hearing on the issue. The Final Order does not address Appellant Finley's assertion that he has evidence that the amount owing for the state fuel tax is not correct.

We find the Trial Court committed reversible error in not providing Appellants an opportunity to present their evidence in a hearing before a final order was entered by the Court. We so hold.

It is ORDERED that the Final Order of Resolution of March 31, 2022 is REVERSED, and this matter is REMANDED for a trial on the merits of Appellants' claims identified herein.

Michael FINLEY, INCHELIUM SHORT STOP, Gene NICHOLSON, and

GENE'S NATIVE SMOKES, Appellants,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP22-002 IA, 8 CTCR 19

15 CCAR 67

[Appellant appeared pro se.
William J. Dow, appeared for Appellee.
Trial Court Case No. CV-OC-2021-44000]

Decided August 16, 2022.
Before Chief Justice Anita Dupris, Justice Mark W. Pouley, and Justice Jane M. Smith

Dupris, CJ

This matter came before the Court of Appeals on a Motion for Reconsideration filed by Appellee on July 5, 2022. Appellee asks this Court to not allow a full trial on the merits of the issues before us. Appellee asks that we consider the tobacco incentive issue for Appellant Nicholson to be moot, and that we limit the remand for Appellant Finley to only the issue of how much unpaid fuel taxes are owed. Appellee asks that we change our remand to reflect that further proceedings be held, and not necessarily a trial.

Appellants' object to the requests for modification, asserting (1) there is still no basis identified in law which allows Appellees to withhold the tobacco incentives in lieu of the payment of unpaid fuel taxes; and (2) they should be provided an opportunity to present all of their arguments in that being pro se they were at a disadvantage in being able to do so.

Based on the reasoning set out below we find cause to deny in part and grant in part Appellee's Motion for Reconsideration.

DISCUSSION

TOBACCO INCENTIVES ISSUE

Appellee states the tobacco incentive payments are "provided voluntarily by the Tribes to tobacco retailers such as Appellant Nicholson's business."[21] (Brief in Support of Appellee's Motion for Reconsideration, page 2). Appellee acknowledges that the correct amount due Appellant Nicholson for the tobacco incentives is set out in the Trial Court's Final Order of Resolution dated March 30, 202, that is, $533,018.26. The nature of the origin of the tobacco incentives are not before this Court. The fact is, it does exist.

The question still remains of what legal authority did the Court exercise in seizing the tobacco incentives without allowing Appellant Nicholson an opportunity to contest such seizure? We asked this question at the Initial Hearing on June 17, 2022. The arguments Appellee makes in support of asking to find the question moot do not address this question. Instead Appellee sets out what other possible consequences Appellant Nicholson may face because of his failure to pay his fuel taxes. We find cause to deny reconsideration of the tobacco incentive inquiry.

FUEL TAXES OWING

Appellee asks that we limit the inquiry of the amount of fuel tax owed by Appellant Finley to just that issue, and not a full trial on the issue of the fuel taxes. We agree. The Trial Court entered a judgment that found, as a matter of law, there was no genuine issue of law regarding the legality of the fuel taxes agreement between Appellee and the State of Washington, and no genuine issue of fact regarding Appellee's liability to pay said taxes.

This appeal was granted as a final appeal even though Appellants filed an Interlocutory Appeal on the issues. We found it was a final appeal because the Trial Court's order of March 30, 2022 (file stamped March 31, 2022) entered orders of final resolution of the issues presented by way of an order for summary judgment on the documents and pleadings on file.

Our order in which we granted the Appeal, dated April 29, 2022, specifically limits the issues on appeal to the withholding of the tobacco incentives and that the Final Order of Resolution "was entered without Appellant's opportunity to present their [sic] evidence on record, including a disputed amount of the delinquent fuel charges, as well as evidence of their [sic] ability to pay the delinquent amount ordered."

The issue we identified regarding Appellant Finley, which was not argued by Appellant Nicholson, was that he had a different amount owing on the fuel tax, and was not afforded an opportunity to present it and the circumstances of how it was to be paid to the Court. These are the only issues left for the Trial Court to make an informed decision on. The legality of the fuel tax agreement and its applicability to Appellants has already been made, as a matter of law, and are not open to re-litigation in this case. We so hold.

Based on the foregoing, now, therefore

It is ORDERED that:

This matter is remanded to the Trial Court for proceedings consistent with due process to address (1) the legal authority to withhold Appellant Nicholson's tobacco incentive payments in a case dealing with fuel tax payments; and (2) the amount of fuel tax owing by Appellant Finley, as well as an inquiry into his ability to pay it.

Further, the proceedings need not be a trial, as long as the parties are afforded adequate due process.

Andrea GEORGE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP21-015, 8 CTCR 20

15 CCAR 69

[M. Carroll, appeared for Appellant.
P. Erbland, appeared for Appellee.
Trial Court Case No. CV-OC-2017-40036]

Decided August 12, 2022.
Before Chief Justice Anita Dupris, Justice Mark W. Pouley, and Justice Michael Taylor

Taylor, J.

SUMMARY

The Initial Complaint in this matter, claiming jurisdiction and relief under CTC § 1-5, was filed on March 9, 2017; an Amended Complaint was later filed. We review this Appeal based on the Amended Complaint. (Hereinafter the "AC"). In that AC the Appellant asserted claims, iner alia, for sexual harassment, filure to promote, and defamation. The Appelee Tribes filed a Motion to Dismiss the AC on June 9, 2017, asserting as defenses common law tribal sovereign immunity, statute of limitations, and failure to assert claims of violation of civil rights as defined by CTC § 1-5-2.

The Tribal Court heard Oral Arguments on March 26, 2021, and after considering all pleadings, Motions and Memoranda of Law, and Tribal cvase and statutory law, entered an Order granting Appellee's Motion to Dismiss and dismissing the Complaint; dated October 18, 2021. The Tribal Court

rviewed each of the Appellant's six claims for relief, stated above, and found all beyond the jurisdiction of the Court; potentially barred by the sovereign immunity of the Tribes, and/or barred by the statute of limitations CTC § 2-2-31, and/or failure to allege actionable claims, and/or failure to state a claim for violation of a civil right as defined by CTC § 1-5-2. A timely appeal to the Court was filed.

We conclude that the holding of the Tribal Court, after its exhaustive review of the voluminous AC, was correct and must be affirmed; but have a somewhat more attenuated view of the law supporting the dismissal of that AC.

STANDARD OF REVIEW

The Code of the Tribes contains a statute of limitations CTC § 2-2-31 and a civil rights act CTC § 1-5. We review here questions of law to determine whether the AC can go forward after being dismissed in total by the Tribal Court on the grounds that the claims made by the Appellant are barred by the statute of limitations and do not fall within the protections provided by the tribal civil rights act. These are issues of law and are to be reviewed *de novo. Confederated Tribes v. Naff,* 2 CCAR 50, 2 CTCR 08 (1995).

DISCUSSION

Statute of Limitations

The Colville Tribal Code includes a statute of limitations CTC § 2-2-31 which provides tht "no complaint shall be filed in a civil action unless the events shall have occurred within a three years period prior to the date of filing the complaint..." The Tribal Court ruled that the statute of limitations barred all of Appellant's claims based upon allegations of offenses that occurred before March 9, 2014. We hold the findings of the Tribal Court to be essentially correct regarding the great bulk of Appellant's claims set out in her sixty-page AC. Appellant in her memorandum (Brief) on Appeal, at page 6, conceded the Trial Court's findings of a limitation bar to be correct, by listing six events which Appellant alleges are bases for complaints each of which is said to have occurred subsequent to March 9, 2014.

On review these six allegations present several problems for Appellant which prevent this Court from basing upon them any reversal of the Tribal Court's dismissal of the AC. First, there allegations assert claims of standard tort, contract, or wage claims which are not included in the listing of protected civil rights in CTC § 1-5-2. Second, several of these allegations describe events in which no harm or damage to Appellant is shown. Third, with regard to allegation No. 5, we cannot find anything in the AC that supports this allegation. No. 5 was not pleaded. Finally, as set out below, none of these allegations survive the unwaived sovereign immunity of the Tribes.

SOVEREIGN IMMUNITY

Appellant filed a Civil Complaint for Violation of Civil Rights against the Appellee Confederated Tribes of the Colville Reservation. Appellant claimed as a basis for her Complaint, and the jurisdiction of this Court, the Colville Tribal Civil Rights Act (CTCRA) CTC § 1-5. Appellant pleaded an action for damages to CTC § 1-5-2(h); the denial of equal protection of the Tribes' laws.

Appellee raised tribal sovereign immunity as an affirmative defense in answer to the AC and in the Appellee's Motion to Dismiss the Complaints. While CTCRA provides for a limited waiver of statutory immunities under certain conditions, when the Tribes asserts its sovereign immunity in opposition to claims made against it, and thereby chooses to forgo any insurance coverage available from policies that the Tribes has purchased, the waiver of statutory immunity in CTC 1-5-2, becomes unavailable to claimants. *Gibson v. Colville Confederated Tribes*, 14 CCAR 39 (2019); Marconi @ *Dick v. Colville Confederated Tribes,* WL 2971863, 15 CCAR 52, 8 CTCR 15, (2022); *Bessette v. Colville Confederated Tribes,* Case No. AP18-019, 15 CCAR 09, 8 CTCR 03.

Unwaived tribal sovereign immunity deprives the Courts of the Confederated Tribes of jurisdiction to proceed in this matter and, therefore the dismissal of the Amended Complaint is Affirmed.

Andrea GEORGE, Appellant,

v.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP21-015, 8 CTCR 21

15 CCAR 72

[M. Carroll, appeared for Appellant.
P. Erbland, appeared for Appellee.
Trial Court Case No. CV-OC-2017-40036]

Decided September 29, 2022.
Before Chief Justice Anita Dupris, Justice Mark W. Pouley, and Justice Michael Taylor

Dupris, CJ

On August 22, 2022, Appellant Andrea George filed a Motion to Reconsider our Order Affirming the Trial Court dated August 11, 2022. Appellant agrues that this Court has "overlooked, misapprehended and wrongly decided" our Order dated August 12, 2022 regarding two issues: Sovereign immunity and Statute of limitations. Appellee filed its Response to the Motion for Reconsideration on September 7, 2022, in which Appellee objected to the reconsideration. The Court, after considering the arguments of the parties, finds cause to deny the Motion to Reconsider based on the reasoning below.

SOVEREIGN IMMUNITY

Appellant first argues sovereign immunity doesn't apply because we have held in *CTEC v. Orr,* 5 CCAR 5 (1998) that proof of insurance coverage establishes a limited waiver of immunity. Further, she argues, if proof of an

insurance policy is proven by a fact-finding on the applicability of the insurance should be held as set out in our ruling in *William v. CCT,* 15 CCAR 6 (2021). She argues she proved thr existence of the insurance policy so we were wrong in dismissing the case.

Appellant is correct that there is proof that an insurance policy exists. Our decisions in *Gibson v. CCT*, 14 CCAR 39 (2019), and *Marconi and Dick v. CCT,* 15 CCAR 52 (2022) held sovereign immunity raised as a defense to the insurance claims is absolute, the Tribes having chosen to forgo any insurance coverage available. We so ruled in this matter and Appellant has not provided us with any reason to reconsider this ruling. The Motion to Reconsider on this ground is denied.

STATUTE OF LIMITATIONS

Appellant argues the Statute of Limitations does not bar her claim, yet she has not made any new arguments that we haven't already addressed. In our Order of August 22, 2022 we held (a) the bulk of the claims were barred by the Statute of Limitations, having occurred before the March 9, 2014 deadline; and (b) those delineated in the Motion to Reconsider are specifically addressed on page 3 of our Opinion Order. Appellant has not provided us with any new arguments on these issues that would cause us to change our opinion on this issue. The Motion to Reconsider on this ground is denied.

It is so Ordered.

Randy ZACHERLE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP22-009, 8 CTCR 22

15 CCAR 73

[Appellant appeared pro se.
Appellee did not participate.
Trial Court Case No. CR-2006-29043]

Decided November 14, 2022.
Before Chief Justice Anita Dupris

Dupris, CJ

This matter came before the Chief Justice upon a request by Appellant, Randy Zacherle, *pro se*, which he entitled "aHabeas Corpus Petition," filed October 27, 2022. There is no proof that Mr. Zacherle has served a copy of his pleading on the Tribes' representative.

Appellant's requests are denied, and this matter is dismissed, based on the reasoning below.

SUMMARY OF APPEAL

Appellant has filed an extensive initiating pleading entitled "Habeas Corpus Petition." The Petition is not a request for habeas corpus, however. It is an appeal of an appeal already decided by this Court in 2006, *i.e. Zacherle v. CCT*, AP06-006. In AP06-006 we affirmed a jury decision that Appellant was quilty of Indecent Liberties. In this case he specifically requested that we direct the Trial Court to give him a new evidentiary hearing based on his allegation that new evidence exists.

Appellant's Appeal contains 50 pages of his legal argument, as well as 27 exhibits, all related to this argument that we should allow a new review of his conviction 16 years ago. He cited federal, state, and tribal cases, and alleges everything from procedural defects, to ineffective counsel, to prosecutorial misconduct and judicial misconduct. The specific arguments Appellant makes will not be summarized in specificity herein.

CONTROLLING LAW

The Court of Appeals has jurisdiction to review final judgments, sentences and disposition orders. CTC 1-2-106, COACR 5. The Court of Appeals may review Writs of Habeas Corpus for (1) errors of law; (2) irregularity in the proceedings; (3) abuse of discretion; or (4) when substantial justice has not been done. COACR 7-B. A Writ of Habeas Corpus may be filed by a person who is "imprisoned or otherwise restrained of his liberty on the Reservation..." CCT 2-1-210. Such a review must first be addressed at the Trial Court level. CTC 2-1-212 through 217.

There is no current order of the Trial Court upon which this Appeal has been based, nor is it alleged that Appellant is imprisoned or otherwise restrained. It appears Appellant uses the title Habeas Corpus Petition as a way to seek appellate review of his old confiction; he maintains his innocence throughout his pleading.[22]

Appellant's appeal goes to issues that would have been, or should have been addressed during his trial and appeal in 2006. There is nothing for this Court to review at this time. There is nothing to indicate that Appellant has taken his new arguments to the Trial Court. We do not have original jurisdiction to consider his new arguments; we only review final orders and decisions of the Trial Court.

Based on the foregoing, now therefore

It is ORDERED that the Appeal filed herein is DENIED and DISMISSED as not complying with the law and rules governing appeals before this Court.

Jeffrey PALMER, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP18-021, 8 ctcr 23

15 CCAR 75

[Appellant appeared pro se.
Appellee appeared through Jacqueline Finley.
Trial Court Case No. FW-2018-5055]

Decided February 4, 2019
Before Chief Justice Anita Dupris, Justice Gary F. Bass, and Justice Theresa M. Pouley

Dupris, CJ

This matter came before the Court of Appeals for an Initial Hearing on January 18, 2019. Appellant appeared in person and without representation. Appellee appeared through spokesperson Jackie Finley, Office of the Prosecuting Attorney.

The purpose of an Initial Hearing is to determine whether the facts and/or laws as presented: 1) warrant a limited appeal on issues of law and/or of fact; or 2) whether there is reason to reverse and remand for a new trial; or 3) whether the appeal should be dismissed or denied.

After reviewing the record and hearing from the parties, the COA has determined that there is sufficient basis to reverse and remand based upon the allegations by the Appellant in that he was not given due process of law.

HISTORY

Appellant was issued a civil infraction citation on September 28, 2018. The citation charged Appellant with Aiding and Abetting, CTLOC 4-1-252, Protected Wildlife. Aiding and Abetting is cited at CTLOC 4-1-253. No mandatory appearance date/time was given.

The back of the citation given to Appellant indicated that this was an "Infraction" and gave instructions on how to either pay the monetary deterrent, request a hearing to explain mitigating circumstances, or to request a hearing to contest the determination. There is a 15-day time limit to respond. Appellant choose to contest the hearing, signing the request on October 8, 2018. It is unclear when this response was received by the Court as there was no "Filed" stamp on the signed document.

On October 24, 2018, a "Notice of Hearing" was issued by the Court Clerk setting the contested hearing for November 1, 2018 at 10:00 am. Notice was received by the Appellant the night before the hearing. The parties appeared before the Court and a short hearing was held. Appellant alleges he raised the issue of lack of adequate notice but the Court went ahead with the hearing. An order was issued imposing a monetary penalty and suspending the Appellant’s hunting privileges for 24 months. Appellant timely filed an appeal, alleging due process of law violations. Upon review of the record, the Court of Appeals agrees there were due process violations, and based on the reasoning below, finds cause to reverse and remand the matter for a new trial.

DISCUSSION

1. Defective Notice from the Court-Threatening Language.

Subsequent to the request for a contested hearing, the Court sent out a Notice Of Hearing. The Notice contained language that should not have been included in a civil infraction notice:

> **"YOUR FAILURE TO APPEAR WITHOUT PRIOR AUTHORIZATION FROM THE COURT WILL RESULT IN THE ISSUANCE OF A BENCH WARRANT FOR YOUR ARREST AND REVOCATION OF YOUR BAIL OR PERSONAL RECOGNIZANCE RELEASE, AND FORFEITURE OF ANY BOND POSTED**."

Bail and personal recognizance language is not appropriate for this notice as neither applies to civil infractions. CTLOC 4-1-321[23], Civil Actions, provides that violations are considered civil in nature and shall be adjudicated under the "Infractions; Field Bonds; Other Civil Violations and Forfeitures Chapter," CTLOC 2-3. CTLOC 2-3-4(b)[24] defines an infractions as a civil offense and not a crime. Thus, the warning that a bench warrant would issue for a failure to appear is misleading. The notice should be amended to correctly reflect the penalties that could be imposed for failing to appear for a civil infraction hearing. Failure to appear for a mitigated or a contested hearing only result in: 1) the penalty being imposed as stated in the citation; 2) if bond has been posted, that bond could be subject to forfeiture; and 3) any firearms seized, could also be subject to forfeiture proceedings.

2. Defective Notice from the Court-Inadequate Notice of Requirements at Hearing.

The Notice sent out by the Court did not give Appellant proper notice of what was to happen at the upcoming hearing. In *George v. George*, 1 CCAR 52 (1991) this Court said that the Trial Court gave litigants inadequate notice of the scope and type of evidence which was being required at the civil hearing. *George* concerned a custody matter, but the basic notice requirements apply to all civil hearing notices, *i.e.* adequate notice, time to prepare, and present evidence on one's own behalf.

In the instant notice, the Appellant was instructed that "If you have any questions or need to subpoena witnesses, contact your Attorney or a Tribal Court Criminal Clerk for additional information or assistance." Again, this wording makes reference to a "criminal court clerk" which could lead a litigant to believe this hearing was a criminal hearing, rather than a civil infraction hearing. In addition, there is no place on the notice that gives the litigant any information as to how to contact the "criminal court clerk", i.e. no phone number, no street address or e-mail address.

More importantly, it does not let a litigant know that this is his one and only time to contest his alleged violation. If the Court does not give litigants at least an expectation of what is going to happen, they are putting the litigants at a great disadvantage in contesting their cases. Further, the Notice of Hearing sent by the Court was signed October 24, 2018 and the contested hearing set for November 1, 2018, only one week after the issuance of the Notice of Hearing, and received by Appellant only the night before the hearing. This is a clear violation of his due process rights.

We have held:

> "When a person is not given adequate notice of what is to be considered in a hearing, all the other procedural rights

are impacted. He does not have adequate time to prepare for the hearing, and to submit evidence on his own behalf. Even if the end result appears clear to the judge, the parties have a right to present their evidence in a meaningful manner. The judge is the gatekeeper of due process. It is the Court's responsibility to ensure adequate notice is provided to every litigant, and to allow everyone who appears in Court to have is say, in his own way." *Lezard v. DeConto,* 10 CCAR 23, 5 CTCR 25, 36 Ind.Lw.Rptr. 6010 (2009).

"Parties must have reasonable notice prior to any substantive hearing to allow the parties time to prepare their respective cases. It is not reasonable to expect any party to be prepared ... with only one day's notice." *Gallaher v. Foster, et al.,* 6 CCAR 48, 3 CTCR 50, 29 Ind.Lw.Rptr. 6079 (2002).

The Notice of Hearing also fails to instruct the litigant where the Court is located. All notices originating from the Court should have, at a minimum, the current Court address and phone numbers legibly listed on them.

CONCLUSION

Based on the foregoing, we find that the Trial Court violated the Appellant's due process rights. The Trial Court did not allow appellant adequate time to prepare for his contested hearing and the Trial Court issued a defective Notice of Hearing.

We REVERSE the Order issued on November 5, 2018 and REMAND to the Trial Court for action consistent with this Order.

Alyssa PALMER, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP18-022, 8 CTCR 24

15 CCAR 78

[Appellant appeared pro se.
Appellee appeared through Jacqueline Finley.
Trial Court Case No. FW-2018-5054]

Decided February 4, 2019
Before Chief Justice Anita Dupris, Justice Gary F. Bass, and Justice Theresa M. Pouley

Dupris, CJ

This matter came before the Court of Appeals for an Initial Hearing on January 18, 2019. Appellant appeared in person and without representation.

Appellee appeared through spokesperson Jackie Finley, Office of the Prosecuting Attorney.

The purpose of an Initial Hearing is to determine whether the facts and/or laws as presented: 1) warrant a limited appeal on issues of law and/or of fact; or 2) whether a new trial should be granted; or 3) whether the appeal should be dismissed or denied; or 4) whether there is good cause shown to reverse and remand.

After reviewing the record and hearing from the parties, the COA has determined that there is sufficient basis to reverse and remand based upon the allegations by the Appellant that she was not given due process of law.

HISTORY

Appellant was issued a civil infraction citation on September 28, 2018. The citation charged Appellant with Violations of Chapter or Regulations, CTLOC 4-1-241[25]. No further information given as to which provision of Chapter 4 or which regulation was violated. No mandatory appearance date/time was given.

The back of the citation given to Appellant indicated that this was an "Infraction" and gave instructions on how to either pay the monetary deterrent, request a hearing to explain mitigating circumstances, or to request a hearing to contest the determination. There is a 15-day time limit to respond. Appellant choose to contest the hearing, signing the request on October 8, 2018. It is unclear when this response was received by the Court as there was no "Filed" stamp on the signed document.

On October 24, 2018, a "Notice of Hearing" was issued by the Court Clerk setting the contested hearing for November 1, 2018 at 10:00 am. Notice was received by the Appellant the night before the hearing. The parties appeared before the Court and a short hearing was held. Appellant allegedly raised the issue of lack of notice but the Court went ahead with the hearing. An order was issued imposing a monetary penalty and suspending the Appellant's hunting privileges for 12 months. The bow used in the violation was forfeited. Appellant timely filed an appeal, alleging due process of law violations. Upon review of the record, the Court of Appeals agrees there were due process violations.

DISCUSSION

1. Defective Notice from the Court-Threatening Language.

Subsequent to the request for a contested hearing, the Court sent out a Notice Of Hearing. The Notice contained language that should not have been included in a civil infraction notice: **YOUR FAILURE TO APPEAR WITHOUT PRIOR AUTHORIZATION FROM THE COURT WILL RESULT IN THE ISSUANCE OF A BENCH WARRANT FOR YOUR ARREST AND REVOCATION OF YOUR BAIL OR PERSONAL RECOGNIZANCE RELEASE, AND FORFEITURE OF ANY BOND POSTED** (both bolding and use of upper case letters appear in the notice). Bail and personal recognizance language is not appropriate for this notice as neither applies to civil infractions.

CTLOC 4-1-321[26], Civil Actions, provides that violations are considered civil in nature and shall be adjudicated under the "Infractions; Field Bonds; Other Civil Violations and Forfeitures Chapter," CTLOC 2-3. CTLOC 2-3-4(b)[27] defines an infractions as a civil offense and not a crime. Thus, the warning that a bench warrant would issue for a failure to appear is misleading and unnecessarily threatening, especially if the person is not familiar with legal system. The notice should be amended to correctly reflect the penalties that could be imposed for failing to appear for a civil infraction hearing. Failure to appear for a mitigated or a contested hearing only result in: 1) the penalty being imposed as stated in the citation; 2) if bond has been posted, that bond could be subject to forfeiture; and 3) any firearms seized, could also be subject to forfeiture proceedings.

2. Defective Notice from the Court-Inadequate Notice of Requirements at Hearing.

The Notice sent out by the Court did not give Appellant proper notice of what was to happen at the upcoming hearing. In *George v. George*, 1 CCAR 52 (1991) this Court said that the Trial Court gave litigants inadequate notice of the scope and type of evidence which was being required at the civil hearing. That hearing concerned a custody matter, but the basic notice requirement follows through to all civil hearing notices. A more recent case supported this position. "When a person is not given adequate notice of what is to be considered in a hearing, all the other procedural rights are impacted. He does not have adequate time to prepare for the hearing, and to submit evidence on his own behalf. Even if the end result appears clear to the judge, the parties have a right to present their evidence in a meaningful manner. The judge is the gatekeeper of due process. It is the Court's responsibility to ensure adequate notice is provided to very litigant, and to allow everyone who appears in Court to have his say, in his own way." *Lezard v. DeConto,* 10 CCAR 23, 5 CTCR 25, 36 Ind.Lw.Rptr 6010 (2009).

In the instant notice, the Appellant was instructed that "If you have any questions or need to subpoena witnesses, contact your Attorney or a Tribal Court Criminal Clerk for additional information or assistance." Again, this wording makes reference to a "criminal court clerk" which could lead a litigant to believe this hearing was a criminal hearing, rather than a civil infraction hearing. In addition, there is no place on the notice that gives the litigant any information as to how to contact the "criminal court clerk", i.e. no phone number, no street address or e-mail address. It does not let a litigant know that this is her one and only time to contest her alleged violation. If the Court does not give litigants at least an expectation of what is going to happen, they are putting the litigants at a great disadvantage in contesting their cases.

3. Violation of Due Process-Insufficient Time to Prepare.

The Notice of Hearing that was sent by the Court was signed October 24, 2018 and set the contested hearing date for November 1, 2018, only one week after the issuance of the Notice of Hearing. Appellant stated that she only received the notice the night before the hearing. She did not have time to contact any witnesses nor prepare for the hearing.

CTLOC 2-3-42 sets the procedure for setting of hearings. It states that unless the defendant has made arrangements with the Clerk of the Court to

schedule a hearing date, the Court shall set the date and notify the parties of the date, time, and place of the hearing. The date of the hearing shall be within thirty days of the receipt of the defendant's requesting a contested hearing. The Court notice shall be sent out within five business days of the receipt of defendant's request.

In the instant case, the time line is as follows:

1. Original citation issued to defendant by Officer Johnson on October 8, 2018.

2. The back of the defendant's copy of the citation was signed by defendant on October 8, 2018 requesting a contested hearing. There is no filed stamp on the citation as to when the request was received by the Court.

3. Original citation filed with the Trial Court on October 9, 2018.

4.Notice of contested hearing was signed by the Court Clerk on October 24, 2018 and allegedly put in to the mail system the same day. Again, no filed stamp.

5. Hearing held November 1, 2018.

We can assume that the Court received the signed request between October 17 and 24, 2018 (since there was no filed stamp, we don't have a firm date). The Court was required to send notice of the contested hearing within five business days of receipt of the request. Notice of Hearing was signed on October 24. Given those dates, the Court would have needed to set the contested hearing within thirty days of October 17 (the earliest) and October 24 (the day the notice was signed by the Clerk), i.e. by November 19 (Veteran's Day holiday would extend an additional day) or November 27 (Veterans' Day and Thanksgiving Day holidays). Appellant received his notice on October 31, 2018. The contested hearing could have been set anytime the week of November 12, which would have allowed Appellant two weeks to prepare. Instead the Court set the date only week after issuing the Notice of Hearing. "Parties must have reasonable notice prior to any substantive hearing to allow the parties time to prepare their respective cases. It is not reasonable to expect any party to be prepared ... with only one day's notice." *Gallaher v. Foster, et. al,* 6 CCAR 48, 3 CTCR 50, 29 Ind.Lw.Rptr 6079 (2002).

The Notice of Hearing also fails to instruct the litigant where the Court is located. A large number of people who hunt and fish on the Colville Reservation have no idea where the Trial Court is physically located, as they may never had a need to go there or were unaware that the Court has be relocated to a new facility. All notices originating from the Court should have, at a minimum, the current Court address and phone numbers legibly listed on them.

Appellant alleges that at the hearing he requested a continuance so that she could adequately prepare. Appellee disputes this allegation, but admits that one day's notice is a violation of due process.

4. Violation of Due Process-Lack of Notice of Forfeiture of Bow.

Appellant's archery bow was seized at the time the infraction was issued. There was no notice given to Appellant that the bow would be forfeited at the hearing on November 1, 2018. A review of Chapter 4 failed to provide any provision on how to process items seized. Chapter 2 has forfeiture provisions and clearly the Court did not follow those procedures.

CTLOC 2-3-153(b)[28] states that if property is seized without a lawful arrest, than a hearing shall be held within ten days after such seizure, with notice to the owner. The judge must find by a preponderance of the evidence that the property should be forfeited to the Tribes.

CONCLUSION

Based on the foregoing, we find that the Trial Court violated the Appellant's due process rights by not allowing adequate time to prepare for her hearing and for issuing a defective Notice of Hearing. We reverse the Order issued on November 5, 2018 and remand to the Trial Court for action consistent with this Order.

Nicholas CIRCLE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP19-013 IA, 8 CTCR 25

15 CCAR 83

[Appellant appeared through spokesperson Jonnie Bray.
Appellee appeared through spokesperson Wes Meyring.
Trial Court Case No. CR-2019-42069]

Decided June 13, 2019.
Before Chief Justice Anita Dupris

This matter came before the Court of Appeals pursuant to a filing of a Notice of Interlocutory Appeal by Appellant on May 28, 2019. Appellant has alleged: (1) The issue presented involves a controlling issue of law as to which there is substantial grounds for difference of opinion and that an intermediate appeal from the decision may materially advance the ultimate termination of the litigation; and (2) Trial Court has so far departed from the accepted and usual course of judicial proceedings as to call for review by the Court of Appeals.

Pursuant to the Colville Law and Order Code, § 1-2-117, Interlocutory Appeal - Initial Review, and Court of Appeals Rule, COACR 12-A, the Chief Justice shall review the Notice and determine if there are adequate grounds to proceed. The Chief Justice has broad discretion to accept or deny the interlocutory appeal. Based on the reasoning set forth herein, Appellant has failed to show sufficient basis to proceed with the Interlocutory Appeal.

DISCUSSION

Appellant requests: (1) clarification of whether *Sonnenberg v. CCT*, 5 CCAR 9 (1999) has been overruled by CTLOC §§ 1-1-400 to 404; (2)

whether filling contempt charges is solely the role of the Court; (3) remand for dismissal, arguing the Prosecutor's limited ability to file contempt charges so that such a filing will not interfere with the Court's discretion to find a person in contempt; and (4) if the interlocutory appeal id denied, to remove the Trial Judge from the case based on allegations of bias.

The Trial Judge's ruling are reviewed under the abuse of discretion standard. An interlocutory appeal is an exception to the rule that we review only final orders and judgments. The standard is high regarding whether sufficient allegations would necessitate an interlocutory review. The allegations set forth asking for an interlocutory review, i.e. challenging the Judge's discretionary decisions regarding contempt of court caes, are not met in this case. Usually this interlocutory appeal would be denied as a matter of course, and the matter dismissed without much discussion. The Appellant is asking the Court to go beyond what is addressed in an Interlocutory Appeal. For this reason, the reasoning of the Court is set out below.

The Trial Court, in denying Appellant's motion to dismiss, interpreted *Sonnenberg v. CCT*, 5 CCAR 9 (1999) to say the CTLOC §§ 1-1-400 to 404 was considered not applicable becaue they were passed after the filing of the case. The issue before the Court of Appeals in *Sonnenberg* was not whether the statutes regarding contempt of court applied to the case. The relevant issue addressed was regarding ther due process procedures needed in contempt proceedings by the Court when the contempt that occurred was not direct contempt.

An example of direct contempt is set ou in the May 25, 2019 order, detailing the Appellant's behavior before a different judge on April 15, 2019. In *Sonnenberg,* Appellant was held in contempt for conduct occurring outside the courtroom. Also, the Judge entered a written order onthe contempt which did not conform to the oral order she made on the record.

In this case, Appellant asks for an advisory opinion regarding the viability of *Sonnenberg* because of the contempt statutes found in CTLOC §§ 1-1-400 to 404. First this Court does not make advisory rulings. It appears Appellant believes there is a contradiction between *Sonnenberg* and the contempt statutes. If this is true, the matter needs to be addressed by Trial Court first, on the merits of the arguments. These arguments cannot be raised first at the Court of Appeals.

Appellant alleges the Prosecutor's Office, i.e. the Tribes, cannot bring criminal contempt proceedings because of *Sonnenberg*. CTLOC § 1-1-403 provides for criminal contempt. Whether it can be proved as a crime has yet to be answered by the Trial Court in this case. Again, the matter needs to be addressed by the Trial Court first, on the merits of the arguments. These arguments cannot be raised first at the Court of Appeals.

Finally, Appellant asks that the Trial Judge be removed from the case. This is another issue that must first be addressed by the Trial Court under the appropriate statute. It will not be addressed herein.

Based on the foregoing, now therefore,

It is ORDERED that the Interlocutory Appeal filed herein is DENIED, and the matter is DISMISSED.

Deanna M. HEATH, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellant.

Case No. AP22-001, 8 CTCR 26

15 CCAR 85

[Appellant appeared through spokesperson Michael Humiston.
Appellee appeared through spokesperson Taima Carden.
Trial Court Case No. CR-2018-41147]

Decided March 21, 2022.
Before Chief Justice Anita Dupris, Justice Dave Bonga, and Justice Mary Cardoza Finkbonner

Dupris, CJ

This case came before the Court of Appeals (CoA) for an Initial Hearing on this date. Appellant appeals the Trial Court's post-sentencing Order dated January 14, 2022 in which the Trial Court found Appellant was liable for the remaining amount of restitution of $1,144.28. The original amount is $1,663.64. The Restitution order was included in Appellant's sentence of May 3, 2019, as a joint and several debt owed by Appellant and, in a companion case, by her co-defendant/sister, Kelly Jerred.

The purpose of an Initial Hearing is to determine

1) whether the facts and/or laws as presented warrant a limited appeal on issues of law and/or fact;
2) whether the Trial Court's Order should be reversed, and the matter remanded for a new trial; or
3) whether the appeal should be dismissed or denied.

The CoA, having reviewed the record and applicable law, finds cause to affirm the Trial Court's Order and dismiss the Appeal based on the reasoning below.

FACTS

Appellant was found guilty by jury trial of 3 charges involving aiding or abetting misuse of public funds, aiding or abetting fraud, and forgery, and sentenced on May 3, 2019. As part of her sentence she, and her co-defendant, Kelly Jerred, were ordered to pay restitution of $1,663.64 to the Tribes. The Order stated the obligation was "joint and several." Appellant was represented by a spokesperson during the sentencing, and signed the Judgment and Sentence stating she had read it.

Appellant alleges in her Notice of Appeal that Kelly Jerred's case was erroneously closed, and that the post-sentencing hearing the Order stated Appellant was responsible for all the remainder of the restitution owing. Appellee attempted to get Ms. Jerred's case reopened but the Trial Court denied the request.

DISCUSSION

Appellant first states the Trial Court erred in ordering joing and several liability for restitution for Appellant and her co-defendant, Kelly Jerred. The Judgment and Sentence Order was entered on May 3, 2019. It is too late to challenge the Order at this date.

Appellant argues she should not be liable for the total amount just because Ms. Jerred's case was erroneously closed. The closure of Ms. Jerred's case is not relevant to this Appeal. Appellant is not a party to Ms. Jerred's Judgment and Sentence, and cannot challenge whether it should have been closed or not.

Appellant was put on notice at her sentencing that she would be jointly and severally liable for the restitution ordered. Appellant has no appealable issue in this matter as a matter of law. She may have a potential civil remedy against Ms. Jerred, but that is not before us.

Based on the foregoing, we AFFIRM the Order of January 14, 2022, and REMAND for actions consistent with this Order.

[1] Subsequent to this case, the Tribes adopted their own Rules of Evidence on July 18, 2019. It is found at CTLOC Chapter 1-9. Resolution 2019-422. Codified on July 23, 2019.

[2] Three judges have been involved in this case: Tremaine, Nomee, Jordan. Tremaine and Jordan were pro-
tem judges, and it appears they each handled what was on the docket on the days they were presiding judges. Judge Jordan conducted the jury trial.

[3] Three judges have been involved in this case: Tremaine, Nomee, Jordan. Tremaine and Jordan were pro-tem judges, and it appears they each handled what was on the docket on the days they were presiding judges. Judge Jordan conducted the jury trial.

[4] A review of *CCT v. LaCourse* shows little application to this case. The Trial Court held, *sua sponte* that the Disorderly Conduct statute was unconstitutional as vague. The Court of Appeals reversed and remanded. The only language that appears relevant to Appellant's argument is that the Court of Appeals stated the Tribes could appeal ruling of the Court in certain circumstances.

[5] Appellant raises an ancillary issue that the first case, CR-2018-41076, should have been dismissed with prejudice as a matter of law. We will not consider this issue raised for the first time in Appellant's Brief, and not identified as an issue to brief in this Appeal.

[6]. AP12-08. Apparently in this case the matter was stayed and remanded to the Trial Court to allow Appellant to exhaust his Tribal Court remedies as the case was going to be given another administrative hearing. Peone's spokesperson conceded at the Oral Arguments that the case was still pending when he filed this case.

[7] CTC 1-1-221. Number of Jurors. In any case a jury shall consist of six (6) jurors drawn from the current list of eligible jurors by the Court clerk or judge.

[8] CTC 1-1-222. Challenges. Any party to the case may challenge and have dismissed not more than three jurors selected from the list of eligible's without cause, but there shall be no limit to challenge for cause. The judge shall decide as to the sufficiency of a challenge for cause.

[9] The procedure for selection of an alternate was that seven jurors would be selected through voir dire. All seven would be sworn in for the trial. At the end of the trial, one juror would be randomly selected just prior to deliberations and excused.

[10] CTC 1-2-11. Applicable Law. In all cases the Court shall apply, in the following order of priority unless superceded 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.

[11] RCW 4.44.290. Replacement juror procedure.

If after the formation of the jury, and before verdict, a juror becomes unable to perform his or her duty, the court may discharge the juror. In that case, unless the parties agree to proceed with the other jurors: (1) An alternate juror may replace the discharged juror and the jury instructed to start their deliberations anew; (2) a new juror may be sworn and the trial begin anew; or (3) the jury may be discharged and a new jury then or afterwards formed.

[12] Cr Rule 6.5 Alternate jurors.

When the jury is selected the court may direct the selection of one or more additional jurors, in its discretion, to be known as alternate jurors. Each party shall be entitled to one peremptory challenge for each alternate juror to be selected. When several defendants are on trial together, each defendant shall be to one challenge in addition to the challenge provided above, with discretion in the trial judge to afford the prosecution such additional challenges as circumstances warrant. If at any time before submission of the case to the jury a juror is found unable to perform his duties the court shall order him discharged, and the clerk shall draw the name of an alternate who shall take his place on the jury. [Adopted April 18, 1973, effective July 1, 1973.] Comment: Supersedes RCW 10.49.070.

[13] On March 30, 2022, Appellees filed an Opposition to Motion for Extension of Time. The COA is not in receipt of any Motion for Extension of Time filed by Appellant or anyone else. The Opposition Motion will not be considered in this Order.

[14] COACR 8.a, Filing. All papers required or permitted to be filed in the COA shall be filed with the COA Clerk. Filing may be accomplished by personal service, mail, electronic mail (e-mail), or fax as provided for in the following section, addressed to the Clerk, but filing shall not be timely unless the papers are received by the COA Clerk within the time fixed for filing. **All documents filed shall be by an original and three working copies, unless otherwise ordered.**

[15] [Court Rule 8(b)] requires service on all parties of all papers filed by a party. The Party must then file proof of service with the clerk of court... An appeal will be dismissed if the appellant has not properly filed proof of service within the time limits of [Court Rules 8(b)]. *Leaf v. CIHA,* 7 CCAR 06 (02-06-2003).

[16] It is unclear from the record why the decision in the initial case was delayed beyond the 60-day review set by the court. It is similar unclear why the matter before the court, filed in 2016, did not have a final order until 2021. The delays are immaterial to this Court's decision.

[17]. The child's name will not be used in this Opinion; the father, Skywalker Renion, was served by publication and has not participated in this case. He will not be discussed in this Opinion.

[18]. A review of the Court's Findings of Fact show a mixed bag of actual finding of fact, statements of what the parties stated to the Court instead of a finding of whether the Court found the statements credible (*e.g.* Finding # 1.7 "The Petitioners believe the minor child would not be safe..."; #1.9 "The Petitioners state that the Respondent... has provided... proof of her sobriety"; and #1.10: "The Respondent... stated to this Court..."), and some conclusions of law (*e.g.* #1.8: "The Petitioners request full custody... and this would be in the best interests of the minor..."; and "1.16: The Court find that it would be in the best interest of the minor...").

[19]. Mr. Love was subsequently disbarred by the CBC on June 22, 2021.

[20] The three Respondents were subsequently dismissed from the case by a Court Order entered on March 31, 2022.

[21]CTC, Chapter 6-8, Tobacco Code, does not have a provision for the tobacco incentives.

[22] Appellant also asks for a Writ of Certiorari. We do not use Writs of Certiorari in this Court.

[23] Except as otherwise provided in this Chapter, all violations or regulations promulgated under this Chapter shall be considered civil in nature, and shall be adjudicated as provided by the Infractions; Field Bonds; Other Civil Violations and Forfeitures Chapter under this Code.

[24] "Infraction" means a civil offense in which the remedy involved is a civil fine or penalty which has been pre-determined by the Business Council as provided by the subchapter "Infractions" of this Chapter. An infraction **is not a crime and the punishment imposed therefore shall not be deemed for any purpose a penal or criminal punishment** and shall not affect or impair the credibility of a witness or oterhwise of any person convicted thereof. *Emphasis added.*

[25] 4-1-241, Violations of Chapter or Regulation. No person shall take any action which is a violation of any provision of this Chapter or any regulation adopted pursuant to this Chapter. No person shall kill, take or catch any species of bird, animal, or fish in excess of the number fixed as the bag or possession limit. No person shall hunt or trap for any birds or animals within the boundries of any cl,osed area or fish within any closed waters.

[26] Except as otherwise provided in this Chapter, all violations or regulations promulgated under this Chapter shall be considered civil in nature, and shall be adjudicated as provided by the Infractions; Field Bonds; Other Civil Violations and Forfeitures Chapter under this Code.

[27] "Infraction" means a civil offense in which the remedy involved is a civil fine or penalty which has been pre-determined by the Business Council as provided by the subchapter "Infractions" of this Chapter. An infraction **is not a crime and the punishment imposed therefore shall not be deemed for any purpose a penal or criminal punishment** and shall not affect or impair the credibility of a witness or oterhwise of any person convicted thereof. *Emphasis added.*

[28] 2-3-153, Notice, Hearing, Disposal of Contraband. (b) If the property seized under the provisions of this subchapter is not seized pursuant to a lawful arrest for violation of this Code, the a hearing shall be held within ten (10) days after such seizure, and notice of such hearing shall be given in writing to the person in whose possession the property was found, if any. If the owner or possessor of th property is not known, then such notice of hearing shall be posted for ten (10) days in a public manner on the premises from which the property was seized. Upon a finding by a preponderance of the evidence of the judge that the property is contraband, the judge shall order the contraband to be destroyed immediately, or disposed of, and all proceeds therefrom shall be the sole property of the Tribes. If the oproperty may be adapted to any lawful use, it shall be forfeited to the Tribes for their use.