Oscar MELLON, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
AP02-015, 4 CTCR 17
8 CCAR 01

[Michael Larsen and Neil Porter, Colville Tribal Public Defender's Office, for Appellant.
David Ward, Office of Prosecuting Attorney, for Appellee.
Trial Court Case Number CR-2001-24221]

Argued April 18, 2003. Decided January 12, 2005.
Before Chief Justice Anita Dupris, Justice Edythe Chenois and Justice Theresa Pouley

Dupris, CJ

PROCEDURAL HISTORY

On September 14, 2001 the Appellant was charged by an amended complaint with the criminal charges of: Count I, Fraudulent Credit Card Use, CTC § 3-1-49; Count II, Embezzlement, CTC § 3-1-43; Count III, Misuse of Public Funds, CTC § 3-1-131; and Count IV, Theft, CTC § 3-1-55. All four charges were based on the same eight allegations of the Appellant's use of a VISA credit card on the Tribes' credit line, issued to him while he was a member of the Colville Tribal Business Council (CBC).

The Trial Court dismissed the charge of Theft in a pre-trial order dated February 11, 2002, upon a motion of the Appellant. The Trial Court denied the Appellant's Motions to Dismiss the other charges in the same order, and further held it had jurisdiction over all of the alleged incidents, including four in which the Appellant used the credit card off the Colville Reservation (Reservation).

The Appellant was found guilty of Fraudulent Credit Card Use and Misuse of Public Funds, and not guilty of Embezzlement by jury trial on June 20-21, 2002. He was sentenced on the two charges, *i.e.* Fraudulent Credit Card Use and Misuse of Public Funds on August 1, 2002.

He filed his Notice of Appeal on August 2, 2002, initially raising eight (8) separate issues for appeal. In his Opening Brief filed on February 28, 2003 the Appellant withdrew three of the issues: (1) whether the Trial Court erred for denying to dismiss the charges of Fraudulent Use of Credit Card and Misuse of Public Funds for insufficiency of complaint; (2) whether the Trial Court erred in the jury instructions used; and (3) whether sentencing the Appellant consecutively for multiple charges arising from the same factual conduct constituted double jeopardy.

The issues remaining for oral arguments, held on April 18, 2003, were: (1) whether the

Trial Court erred for failing to dismiss the charges based on incidents occurring off the Colville Reservation for lack of jurisdiction; (2) whether the Appellant's due process rights were violated based on the allegation he was not given adequate notice that he could be prosecuted for crimes relating to his credit card use; (3) whether the Appellant was wrongfully charged with general and specific crimes based on the same factual conduct; (4) whether the Trial Court erred in sentencing the Appellant to, *inter alia*, two years of probation; and (5) whether the Trial Court erred in granting the Appellee's Motion to Strike the Deferred Prosecution initially offered by the Prosecution, then withdrawn.

Based on the reasoning below we affirm the Trial Court.

DISCUSSION

In his Opening Brief, the Appellant quotes one of our most respected ancestors, Christine "Mourning Dove" Quintasket, stating "Honesty and personal integrity is [*sic*] an important attribute of American Indian life and is a documented part of the Tribes' historical and cultural tradition." *See* Appellant's Opening Brief, page 17. He goes on to say, "Tribal members have a right to expect that when their public officials speak, that their pronouncements will be more than mere words, and that those words will be honored." *Id.* These principles do speak to our customs and traditions, our organic laws, and should guide this Court in its decision.

STATEMENT OF FACTS

Appellant Oscar Mellon was elected to the Colville Tribal Council in 1999 as a representative from the Keller District.[1] He ran again when his term was up in 2001 but was not re-elected. In July, 1999 he was sworn in, taking an oath of office. After he was sworn in, he was issued a VISA credit card on a tribal account with Coulee Dam Federal Credit Union. The Authorized User Request Form the Appellant signed authorized him to use the credit card for business and travel-related expenses directly tied to his position as a Council member. He agreed to be responsible for the charges on the credit card; the Colville Confederated Tribes (Tribes) was designed as the "co-owner or Trustee," and thus was also designated to be responsible for the charges to the card.

On about July 11, 2001 the Appellant reported that he had lost the VISA card in question around July 8, 2001. The Appellant left the office of Keller Councilman on July 15, 2001. The

[1] The Colville Tribal Council is comprised of fourteen members elected from four (4) different districts designated in the Colville Tribal Constitution: Nespelem, Omak and Inchelium districts have four representatives each; the Keller district has two representatives.

Tribes received information that the Appellant used the credit card he reported as lost for personal purposes after the date he reported it lost and both while he was still on the Council and off the Council.

After an investigation the Tribes brought the criminal charges herein, alleging facts based on eight of the several different incidents in which the Appellant used the credit card for personal purposes.[2] The eight (8) credit card uses by the Appellant which formed the basis of the criminal charges against him include four (4) gas charges at the service station in Nespelem, Washington, which is on the Colville Reservation; two (2) gas charges at a service station off the Reservation in Coulee Dam, Washington; and two (2) cash advances totaling $842.98, taken at the Two Rivers Casino, which is off the Reservation. All eight incidences occurred between July 6-15, 2001.

At the jury trial on Jun 21, 2002 the jury found the Appellant not guilty of Embezzlement, and guilty of both Fraudulent Credit Card Use and Misuse of Public Funds. The Trial Court sentenced him consecutively on both charges on August 1, 2002 to the following: (1) $10.00 court costs; (2) a $5,000 fine with $4,000 suspended on conditions; and (3) 360 days in jail with 270 suspended, with some of the time to be served on electric home monitoring. The conditions of the suspended portion of the sentence were ordered to be in effect for two (2) years from the time of the sentencing, the length of which is being challenged on this appeal. The Appellant filed a timely appeal on August 2, 2002.

ISSUES

The issues we will address herein are:

1. Did the Trial Court err when it found jurisdiction over the crimes which included actions the Appellant took off the Reservation regarding credit card use?
2. Was the Appellant's right to due process violated because Resolution 1999-395 failed to give him adequate notice that if he violated the policies of the Resolution he could be subjected to criminal charges?
3. Did the Trial Court err in granting the Appellee's Motion to Strike the Deferred Prosecution agreement initially submitted by both parties?
4. Did the Trial Court exceed its authority by sentencing the Appellant to conditions to be in

[2] In his Order on Pre-Trial Motions dated February 11, 2002, the Judge found that the Appellant was not being selectively prosecuted (which is not an issue before us) because, unlike credit card charges of other Council members, the Appellant's charges were often not travel-related. The judge found about eight cash advances the Appellant took from various cash machines at several tribal casinos, both in-state and out-of-state, totaling in excess of $1,300.00. None of these transactions were made a basis of any of the criminal charges herein.

effect for two (2) years?[3]

STANDARD OF REVIEW

All the issues presented are questions of law. We review *de novo*. *Colville Confederated Tribes vs. Naff,* 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995); *Wiley, et al v. Colville Confederated Tribes,* 2 CCAR 60 , 2 CTCR 09, 22 ILR 6059 (1995); *Palmer v. Millard, et al,* 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); *Pouley v. CCT*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024, (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998).

1. Did the Trial Court err when it found jurisdiction over crimes which included actions the Appellant took off the Reservation regarding credit card use?

The Appellant's position is that four (4) of the actions he took regarding use of the credit card took place off the Colville Reservation, thereby depriving the Court of jurisdiction. Specifically, there were two charges at a service station off the Reservation and two at the Spokane Tribe's Two Rivers Casino.

The Trial Court addressed this issue in its Order on Pre-Trial Motions, denying the Appellant's Motion to Dismiss, and finding there was jurisdiction. The Trial Court held that there was sufficient nexus among the Appellant, the credit card given to the Appellant for use only for tribal business purposes, all of the credit activities being billed to and paid by the Tribes, and the harm, resulting on the Reservation. Referring to CTC §1-7-70, the Tribes' general jurisdiction statute[4] the Trial Court found that it was the Tribes' intent to authorize the Court to exercise as broad jurisdiction as possible.

Both parties argued whether the incidences in question that took place off the Reservation

[3] The Appellant also identified in his brief an issue of "whether the Tribes unlawfully charged the Appellant with both general and specific charges for the same factual conduct in violation of CTC 1-1-7(k)." The Appellant made no arguments nor cited any persuasive authority on this point. CTC 1-1-7(k) states: "When there is a conflict between one provision of this Code which treats a subject in a general way and another which treats the same subject in a specific manner, the specific provisions will prevail." This is a tenet of statutory construction and cannot be "violated" in the sense the Appellant is asserting it. For these reasons we will not address this issue.

[4] "To the greatest extent permissible by law, the jurisdiction of the Tribal Court shall apply to all persons on lands in the North Half and on other lands where the Colville Confederated Tribes may be authorized to enforce its interests or rights and member asserting rights held by the Tribe without regard to location."

were "essential elements" of the crimes charged. The Appellant argues they are, and because they occurred off the Reservation the Court did not have jurisdiction. The Appellee urges this Court to adopt the State of Washington's statutory approach which includes language of when the crime is committed in whole or in part within the jurisdiction of the Court. *See*, *State v. Lane*, 112 Wash.2d 464, 771 P.2d 1150 (1989).

The facts alleged are not "essential elements" of the crimes charged. The charge of Fraudulent Use of Credit Card, CTC §3-1-49 reads:

> "Any person who shall use a credit card for the purpose of obtaining property or services with knowledge that the card is stolen, has been revoked or canceled, or is unauthorized for use, shall be guilty of Fraudulent Credit Card Use.... [which] is a Class B offense."

The charge of Misuse of Public Funds, CTC §3-1-131 reads:

> "Any person who shall, being a public servant or other person charged with receipt, safekeeping, transfer or disbursement of public funds, without lawful authority, appropriate funds to his own use or the use of another, or who shall otherwise handle public funds in a manner not authorized by law, shall be guilty of Misuse of Public Funds....[which] is a Class B offense."

Class B offenses carry a maximum penalty of 180 days in jail, or $2,500.00 fine, or both.

The jury instructions correctly identify the <u>essential elements</u> of each of the offenses. Jury Instruction 5 sets out the essential elements of the crime Fraudulent Use of Credit Card as:

> "a. A credit card was used; or [*sic*]
> b. For the purpose of obtaining property or services; or [*sic*]
> c. The user had knowledge he was not authorized to use it; or [*sic*]
> d. The Tribes had an ownership interest in the card."

The language in the Jury Instruction tracks the statutory language. Jury Instruction 16 sets out the essential elements of the crime Misuse of Public Funds as:

> "a. A person being a public servant or other person charged with the receipt safekeeping, transfer or disbursement of public funds; or [*sic*]
> b. Acts without lawful authority, knowing he is without authority; or [*sic*]
> c. The act consists of appropriating these public funds for his own uses."

Where the acts took place that form the basis of the charges herein are jurisdictional in nature, and not elements of the offenses charged. Jurisdiction goes to the power of the Court to hear the matter because the defendant committed the actions that form the basis of the crimes charged within the jurisdictional boundaries of the Reservation. The question is, where is the

situs of the crime? The Trial Court answered this question in its Order on Pre-Trial Motions of February 11, 2002. It held:

> " In this case, the credit card was the credit line of the Tribes. The Tribes is certainly on the Reservation. Wherever he may have actually used the card, the harm occurred here. Both the general authorization and the specific limits were placed here on the Reservation... He was given lawful custody of the card here... He was a public servant here and was charged with the safeguarding of the funds here....
>
> There is certainly sufficient nexus with the Tribes for jurisdiction in this case not to violate due process. He received the card because he was a council member for the Tribes. The use agreement was entered into here. He received his bills here. He was given memos from the Tribes [*sic*] accounting department for previous charges. He reimbursed the Tribes here. He lives here. He is a Tribal member." pp 11-12

The question is not one of finding a "nexus" between the actions off-reservation. The question, as answered by the Trial Court, is whether the crime "occur" on the Reservation for purposes of finding criminal jurisdiction. The Trial Court aptly pointed out all the instances in which the crimes occurred on the Reservation in its findings above. In *State v. Lane*, 112 Wash.2d 464, 771 P.2d 1150 (1989), The Washington State Supreme Court looked at the common-law roots of territorial jurisdiction, which required that the crime charged occur within the boundaries of the State. It said:

> "At common law, a state could criminalize an act if the conduct or results occurred within the state... A concomitant notion, that a crime had only one situs, limited the territoriality principle.... [T]he situs principle has been expanded, but conduct within the state is still required. The cases are not to the contrary. The dispute centers upon how much activity is required and upon whether the conduct itself must be an element of the crime." *Lane,* Utter's concurring opinion at p 480.

In *Louie v. CCT,* 2 CCAR 47 (1994) , we found that a complaint had to give sufficient notice of the specific acts that formed the basis of the crime charged. In *Bachand v. CCT*, 4 CCAR 23 (1997) we found the defendant received adequate notice of the specific actions he took that constituted a crime under the statute when the police report was read into the record at the time the defendant entered a guilty plea. The questions in *Louie* and *Bachand* were what constituted adequate notice of the crimes charged in order to meet due process requirements. In neither case did we discuss what were the essential elements of the crime that had to occur on the Reservation

in order to acquire jurisdiction over the actions.

As set out in the jury instructions, the essential elements are set out in the applicable statute. The complaint gives the Appellant adequate notice of the bases for the crimes charged. The Trial Court's duty was to determine, as a matter of law, if the actions occurred on the Reservation. Its findings are sufficient and we will not disturb them on Appeal.[5] We affirm the Trial Court's finding of jurisdiction.

2. Was the Appellant's right to due process violated because Resolution 1999-395 failed to give him adequate notice that if he violated the policies of the Resolution he could be subjected to criminal charges?

> Resolution 1999-395 states:
>
> WHEREAS, it is the recommendation of the Executive Committee that individual Council members owing reimbursement(s) for Council Travel will receive written notice with copies to the Council Secretaries, Accounting Supervisor and CBC Chairman. The reimbursement(s) will be paid within (10) working days, unless reimbursement to be made by another Agency/Organization. No travel will be approved until the reimbursement is made. Any travel dispute(s) will be resolved through CBC Secretaries, Accounting Supervisor or individual CBC and individual Executive Committee Member(s)....

The Appellant argues that he relied on the practice developed under the Resolution in his past actions regarding use of the VISA card in question. Ample evidence was presented to the Trial Court to show that he used the VISA card for non-travel-related expenses (*see* footnote 2, *supra*) without criminal consequences before. He further argues that the Resolution has the same force and effect as the criminal statutes, and supersedes the statutes in that it provides a more specific law for Council members to follow regarding personal use of the tribal credit card which "preempts application of criminal sanctions." Finally, Appellant argues the Resolution "vitiates" the criminal statutes, and, as an extra-judicial method of dealing with Council members, cannot be subject to prosecutorial interference, and as interpreted by past practice, does not give the Appellant adequate notice that he could be subject to criminal sanctions, in violation

[5] The question of whether the actions occurred on the Reservation would involve questions of fact only if the defendant raised an affirmative defense, alleging the actions didn't occur as alleged in the complaint. That is not a question in this case. The record doesn't reflect that the Appellant denies he charged gas to the tribal VISA card off the Reservation nor that he charged cash advances at the Two Rivers Casino. His defense was that he mistook the tribal card for his personal card. The jury did not accept this defense, apparently, because it found him guilty. It is not being challenged in the Appeal herein, so we will not review the jury's decision on that basis.

of his due process rights.

Although long on argument, the Appellant is short on reasoning, and cites no credible authority for these premises. It is a long-recognized tenet that one has notice of what constitutes a crime when one enters a jurisdiction. The Appellant was in the unique position of being one of the law-makers for the Tribes. He took an oath to uphold the Constitution and laws of the Tribes. His argument that misusing a tribal VISA credit card for personal use, at several tribal casinos, and at a gas station is a privilege and right of a Councilman is disingenuous. At the best, his reliance on not being prosecuted because he was a Councilman was seriously misplaced.

At the very least, the Council has a Constitutional duty not to enact policies that would violate the laws of the Tribes. The language of the Resolution and the actions of other Councilmen under the facts herein do not support the Appellant's argument. It is clear from the language that the VISA was to be used for business purposes. The jury found the Appellant misused it. Not only is it against the laws of the Tribes, but he took an oath to act ethically while in office as Councilman. As he stated in his brief: "Tribal members have a right to expect that when their public officials speak, that their pronouncements will be more than mere words, and that those words will be honored." We affirm the Trial Court's holding that the Appellant's due process rights were not violated. His reliance on the cloak of the Resolution was unfounded.

3. Did the Trial Court err in granting the Appellee's Motion to Strike the Deferred Prosecution agreement initially submitted by both parties?

Appellant argues that he entered into a deferred prosecution agreement with the Prosecutor in good faith, and compromised his trial strategies, to his detriment, when he shared information with the Prosecutor. The Prosecutor moved to strike the agreement and asked to proceed to trial. The Motion was granted.

Both parties rely heavily in their arguments to this Court on caselaw dealing with plea agreements that are withdrawn. This reliance is misplaced. Deferred prosecutions are not plea agreements. By their very nature they are pre-adjudicative instruments designed to rehabilitate rather than punish. They are considered sentencing alternatives. *See, State v. Ammons,* 105 Wn.2d 175, 180 (1986) (citing *State ex rel Schillberg v. Cascade Dist. Court,* 94 Wn.2d 772 (1980))

Generally speaking, the government has broad prosecutorial discretion when deciding who to prosecute. *See, Wayte v. United States*, 470 U.S. 598, 607 (1985). This discretion included withdrawing the decision for a deferred prosecution. Nothing in the record indicates the Appellant moved to limit or exclude any information he feels the Prosecutor gained through

the negotiation process. When asked at Oral Arguments what kind of information was used neither party identified any specifics. We hold that Trial Court did not abuse its discretion in allowing the prosecutor to exercise his discretion in withdrawing the deferred prosecution agreement. If any harm came from it, the Appellant did nothing to prevent it at trial level and we do not have enough proof of harm to review it now. The Appellant has failed to sustain his burden on this issue. We affirm.

4. Did the Trial Court exceed its authority by sentencing the Appellant to conditions to be in effect for two (2) years?

The Appellant was sentenced consecutively on two (2) Class B offenses. Each carried a maximum jail time of 180 days and/or a fine of $2,500. The total jail time allowed, when sentenced consecutively, is 360 days. As a condition of his suspended jail time and suspended fine, the Court imposed two (2) years probation and other conditions for two (2) years, *i.e.* twice the time allowed for the jail term (actually twice the time plus ten days).

The only authority provided for this issue is the statutory provision allowing the Court to impose "reasonable" conditions for probation. CTC §3-1-261. Appellant argues that it is logical to assume that twice the allowed jail time is unreasonable.

We cannot rule on suppositions. We take judicial notice that it has been a long-standing practice of the Trial Court to impose such conditions. By saying it is unreasonable does not make it legally so. The practice is reasonable on its face. The Appellant has not shown where the harm would be nor how his due process rights would be violated. In effect, to shorten the time would place the burden on the Appellant to pay his fine, do his community service work, and comply with all the conditions in a shorter time span. We cannot speculate on what effect this would have on his ability to do all of these things in a shorter time.

We need not speculate. We find that the statute allowing for reasonable conditions supports the Trial Court's decision. The Appellant has not met his burden in showing the Trial Court abused its discretion. We affirm.

ORDER

Based on the foregoing reasons, we AFFIRM the Trial Court on all the issues herein, and REMAND this matter back to the Trial Court for further actions consistent with this Opinion Order.

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COLVILLE TRIBAL ENTERPRISE CORPORATION, Petitioner,

vs.

ADMINISTRATIVE LAW COURT, Respondent,

Nannette CHAPA, Real Party in Interest.

Case No. AP99-006, 4 CTCR 18

8 CCAR 11

[Leslie Weatherhead, represented Petitioner;
Respondent did not appear nor was represented;
R. John Sloan Jr., represented the Real Party in Interest;
Trial Court Case Number: A99-19004]

Oral arguments held December 17, 1999. Decided March 31, 2005.
Before Chief Justice Anita Dupris, Justice Dave Bonga and Justice Earl L. McGeoghegan

The Court of Appeals heard Oral Arguments on this case on December 17, 1999. The Petitioner, Colville Tribal Enterprise Corporation (CTEC), appeared through counsel, Leslie Weatherhead, attorney; The Respondent Court did not appear; the Real Party in Interest, Nannette Chapa, appeared in person and through counsel, R. John Sloan, attorney.

Dupris, CJ, for the panel.

SUMMARY

The Petitioner, Colville Tribal Enterprise Corporation, (CTEC) filed a Writ of Prohibition asking this Court to prohibit the Colville Tribal Administrative Judge from exceeding his jurisdiction. The Administrative Judge heard an employment appeal in which Nannette Chapa (Chapa), was reinstated in her position with CTEC's Gaming Division. The Administrative Court Judge found that, as a matter of law, Chapa did not commit the offense of Theft, which was the basis for her employment termination. Chapa asserts the Writ of Prohibition is not properly before this Court and should be denied. We agree.

FACTS

Chapa was an employee with CTEC at the Okanogan Bingo Casino in the pull-tab department. The manager of the casino terminated Chapa's employment with CTEC after seeing on a casino video surveillance camera of January 19, 1999 Chapa giving the husband of a fellow employee $40 worth of pull tabs without receiving money for them. CTEC found that Chapa committed a theft of money. Chapa appealed through administrative channels, then filed

an appeal with the Colville Tribal Administrative Court.

Chapa did not deny she gave the $40 worth of pull tabs. She stated she told the pull tab teller she was going to "pay back" the pull tab amount later in the lunch room. Chapa stated she did in fact pay the $40.00. An accounting of the pull tabs a couple of days later showed that the pull tab games balanced.

The Administrative Court found that CTEC could not prove Chapa intended to deprive CTEC of its property which, the Administrative Court held, was an element of Theft. The Court held the termination was contrary to the law, granted Chapa's appeal and ordered her reinstatement.

CTEC filed a Writ of Prohibition with the Court of Appeals to order the Administrative Court to confine its decision to its lawful jurisdiction and to sustain CTEC's decision to terminate Chapa.

ISSUES

SHOULD A REQUEST FOR A WRIT OF PROHIBITION BE REVIEWED BY THE COURT OF APPEALS WHEN, AS IN THIS CASE, IT IS FILED FROM THE ADMINISTRATIVE COURT INSTEAD OF THE TRIAL COURT? IF SO, SHOULD IT BE GRANTED IN THIS CASE?

DISCUSSION

I. THE COLVILLE TRIBAL ADMINISTRATIVE COURT IS NOT A COORDINATE COURT OF THE TRIAL COURT

The first question is whether CTEC may bring its appeal directly to the Court of Appeals, thereby bypassing the Trial Court. Appellant argues the Trial Court and the Administrative Court are coordinate courts operating at the same level but adjudicating different matters, and the administrative court is in effect a division of the Trial Court. It cites, as authority, Resolution 1989-385 (Colville Tribal Court as an administrative court in certain cases).[6] As such, CTEC argues, the Court of Appeals has the authority to review decisions of lower courts and the authority to issue the Writ of Prohibition to the Administrative Court.

Chapa argues the two courts are not coordinate courts and that CTEC did not exhaust its

[6] Resolution 1989-385, states, in relevant part: "... the Colville Tribal Court ...[shall] be the administrative court in all cases where any ordinance or resolution of the Colville Tribes provides for a hearing before an administrative court and such ordinance or resolution does not specifically identify a court or agency to act as the administrative law court...."

remedies before appearing in the Court of Appeals. In support, Chapa asserts the Trial Court has more authority and less limitations than the Administrative Court. The uniqueness of the question makes it one of first impression and without an equal in the non-Indian court systems. For these reasons we do not have legal authority from the state and federal systems to offer us guidance.

We have ruled in the past that the Administrative Court is part of the Executive Branch and is an administrative tribunal. *See E. S. v. CCT Adm. Law Court, et al.*, 1 CCAR 48, 1 CTCR 54 (1991).

In *CTEC v. Orr*, 5 CCAR 1, 3 CTCR 05, 26 ILR 6005, (1998) we stated

> "...it is our understanding that the Colville Tribal Administrative Court is a court of limited jurisdiction, not a court of last resort.... [and] limited by the jurisdiction given them by the lawmakers. They are not normally considered full courts of equity."[7]

The language regarding the administrative court is *in dicta*, however, and not squarely answered by this Court. After reviewing the law we find the dicta in *Orr* to state the better law in this matter, and hereby adopt it as controlling. We hold that the Colville Tribal Administrative Court is not a coordinate court of the Trial Court. It is an administrative tribunal with limited jurisdiction.

II. REQUEST FOR WRITS MAY BE BROUGHT DIRECTLY TO THE COURT OF APPEALS IN CASES WHERE THE TRIBAL COURT JUDGES ALSO ACT AS ADMINISTRATIVE JUDGES

Even so, Petitioner argues, it should be able to bring it's request for a Writ directly to the Court of Appeals because the judges of the Administrative Court are inextricably tied to the Trial Court. The Council has designated the trial judges as the administrative judges. *See* Resolution 1989-385 *(supra*, at footnote 1). Petitioner's argument has merit. It is conceivable there can be potential conflicts of interest when an Associate Judge is asked to rule on the appropriateness of the Chief Judge's opinions when the Chief Judge is acting as an administrative judge. The Chief Judge is responsible for assigning cases to the Associate Judges, and for administrative supervision of the Associate Judges. *See* CTC §1-1-100 ("...Associate Judges shall preside over proceedings as assigned by the Chief Judge...."). It creates an appearance of fairness problem.

This Court has issued Writs of Mandamus in two cases. *See, Gallagher v. Anderson, et*

[7] In *CTEC v. Orr* the issues involved implied contracts and termination-at-will of employees, and not the nature of the administrative court.

al., 5 CCAR 51, 3 CTCR 37 (2001) (Court of Appeals issued a Writ of Mandamus directing Trial Court to rule on eight motions) and *CCT v. Laramie,* 4 CCAR 2, 2 CTCR 65, (1997) (Court of Appeals issued a Writ of Mandamus directing the Trial Court to issue a stay pending appeal and determination by the Court of Appeals if the order being appealed was final). Both Writs came from the Trial Court. Whether Writs from Administrative Court may be filed initially with the Court of Appeals is a question of first impression.

The U.S. Supreme Court, in *Ex Parte Republic Peru*, 318 U.S. 578, 63 S. Ct. 793, 87 L. Ed. 1014, (1943), citing *Ex parte United States*, 287 U.S. 24, recognized that in certain circumstances it could address a Writ of Mandamus even when appellate jurisdiction was in a lower court. It said:

> "...[S]uch power will be exercised only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this Court should be taken. In other words, application for the writ ordinarily must be made to the intermediate appellate court, and made to this Court as the court of ultimate review only in such exceptional cases." (at 87 L. Ed. pp 584-585)

Although the Navajo Nation has statutory authority which allows its Supreme Court to issue Writs to lower courts, (*see, Yellowhorse et al v. the Window Rock District Court, the Honorable Robert Yazzie, Judge*, No. A-CV-15-86, 1986) the Navajo Supreme Court also recognizes the inherent authority of its Court to issue such writs:

> "The highest appellate court should also have authority to entertain original proceedings, such as those for writ of mandamus or prohibition, in aid of performing its responsibilities as a court of review. This authority is generally and properly held to be an inherent aspect of the highest court's status as such." *In the Matter of Contempt of Arnold Sells*, A-CV-05-85 (Navajo, 5/31/1985) (cite omitted).

We find these authorities persuasive and hold that an exceptional case exists herein. That is, when the same judges act in the capacity of both trial judges and administrative judges, it is appropriate to seek relief by Writ directly from the Court of Appeals. Respondent argues that this Court is without any statutory authority to issue Writs. It is true there is no specific statutory authority. We agree, however, with the Navajo Court's assertion of an inherent authority to address the issues in a Writ. Our Courts are young in comparison to the state and federal systems.

We are constantly growing, in amount of cases and complexity. In recognition of the potential that the Court would grow faster than the statutes, the Tribes enacted CTC §1-1-144. [8] We hold that in this case the Court of Appeals has the authority to address the request for a Writ herein.

III. WRIT OF PROHIBITION STANDARDS NOT MET

In assessing whether a writ of prohibition should issue, we first need to establish the standards to use. There are none in our tribal statutory or case laws at present. In *Yellowhorse, supra*, the test for a Writ of Prohibition was set out as follows:

> A writ of prohibition is an extraordinary remedy which will be granted only in rare cases showing absolute necessity. At a minimum the application must show that (1) the lower court is about to exercise judicial power; (2) the exercise of such power by the lower court is not authorized by law; and (3) the exercise of such power will result in injury, loss or damage for which there is no plain, speedy and adequate remedy at law.

Both parties, citing state and federal authorities, recognized that Writs of Prohibition are extraordinary remedies, used to confine a lower court to not going beyond its jurisdiction in its decisions, and used in situations for which there is no adequate legal remedy. We reviewed the standards set in the state and federal cases, and find that the standard set out in *Yellowhorse, supra*, is more appropriate for our jurisdiction. The *Yellowhorse* standard has three (3) criteria: (1) the lower court's prospective, impending exercise of jurisdiction; (2) the illegality of such exercise of jurisdiction; and (3) the irreparable, immediate harm to the Petitioner for which there is no other adequate legal remedy other than a Writ. This high standard is necessary to prevent the Court of Appeals from unduly interfering with the day-to-day work of the lower courts. We adopt the *Yellowhorse* standard.

It is the Petitioner's position that the lower court herein exceeded its jurisdiction in that the Administrative Court found the weight of the evidence was different than that found by CTEC. The Administrative Court found that the evidence was insufficient to prove that Chapa ***intended*** to commit theft and her termination from employment for theft was contrary to law.

The Petitioner asserts the Administrative Court, in making such findings, acted beyond

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[8] Means to Carry Jurisdiction Into Effect. When jurisdiction is vested in the Court, all the means necessary to carry into effect are also given and in the exercise to this jurisdiction, if the course of proceeding is not specified in this Code, any suitable process or mode of proceeding may be adopted which appears most conformable to the spirit of Tribal Law.

the court's limited jurisdiction as granted in CTEC's Personnel Policies and Procedures Manual (Manual), which states, in part:

> "The Administrative Court shall affirm the decision to terminate unless the Administrative Court finds that, (1) at the time the decision was made there was no evidence to support the decision; (2) that the decision was contrary to Law. It shall not be grounds to reverse that the Administrative Court would have reached a different decision. The decision of the Administrative Court shall be final and there shall be no further appeals or review in any Court or other forum."

The Petitioner, by its own policies then, cannot ask for a review of the decision by the Trial Court because decisions of the Administrative Judge are final. For this reason CTEC has filed the request for a Writ of Prohibition, asking this Court to direct the Administrative Court to not exceed its jurisdiction in its review of CTEC's decision. CTEC asserts the Administrative Court acted beyond its jurisdiction. Beyond finding that the Administrative Court exceeded its jurisdiction, the Petitioner also asks us to direct the Administrative Court to change its decision, which in effect, would be reversing the Administrative Court's decision. Chapa, as real party in interest, aptly points out that in fact the Petitioner is using the Writ of Prohibition to get an appeal because it does not allow appeals in its own policies.

We apply the *Yellowhorse* three-prong test in deciding whether a Writ of Prohibition should be granted herein. That is: (1) the lower court is about to exercise judicial power; (2) the exercise of such power by the lower court is not authorized by law; and (3) the exercise of such power will result in injury, loss or damage for which there is no plain, speedy and adequate remedy at law. *Yellowhorse, supra*. If the Petitioner fails to meet any one of the prongs of the test, the Writ should not be granted.

The Petitioner cannot meet the first part of the standard for Writs of Prohibition: it asks this Court for a retrospective remedy. It asks this Court to tell the Administrative Judge he was wrong in his already-entered findings, and to change them. There is no issue on the prospective, impending exercise of jurisdiction by the Administrative Judge before this Court. For this reason we will not even address the second and third prongs of the *Yellowhorse* standard, and we deny the Writ and hereby dismiss the request for a Writ of Prohibition in this matter.

It is so ORDERED.

Ryan MARCHAND, Appellant,

vs.

Colville Confederated Tribes, Appellee.

Case No. AP05-001, 4 CTCR 19

8 CCAR 18

[Steve Graham, Attorney at Law, representing Appellant.
Samuel Conkin, Office of Prosecuting Attorney, representing Appellee.
Trial Court Case No. CR-2004-27167]

No oral arguments were conducted, decision based on briefs filed.
Decided May 20, 2005

Before David Bonga, Presiding Justice, and Associate Justices Edythe Chenois and Howard E. Stewart

Bonga, J.

SUMMARY

On June 7, 2004, Appellant was charged by criminal complaint with Battery, Contributing to the Delinquency of a Minor, and Abduction. A judge trial was begun on August 5, 2004, and concluded on August 28, 2004. Appellant was found guilty of all three charges. Sentencing was held on October 15, 2004. At the conclusion of the testimony, Judge Aycock reserved imposition of the sentence until he had a chance to review the report that was submitted and was able to craft a sentence that would be tailored to Appellant's situation. Judge Aycock stated on the record that he would make his ruling the following Monday, which would have been October 18, 2004. A written decision was eventually issued on January 4, 2005. Appellant timely filed his appeal. A briefing schedule was agreed upon by the parties. Appellee failed to submit a brief. After review of the documents submitted, review of additional case law, the Court has found that the Trial Court erred by continuing the trial absent extraordinary circumstances beyond the 60 day limit.

STANDARD OF REVIEW

The appellant must prove the trial judge clearly abused his discretion based on a review of the facts of the case and the decision made. This review by the Court of Appeals cannot be *de novo*. It is within the discretion of the Trial Court to grant or deny continuances. Unless there is a showing of clear abuse of discretion, this Court will not overturn a decision of the Trial Court. A review for an abuse of discretion violation requires that the Court of Appeals must find the Trial Court's actions were manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *Jack v. CCT*, 6 CCAR 11 (2002). Review for an abuse of discretion requires that before we will overturn the Trial Court's decision, we must find that its actions were manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. We further need to review for due process violations. *Grunlose v. CCT*, 5 CCAR 26 (1999).

COACR 13(e)(3) Effect if Briefs Not Filed, states that if an appellee does not file a brief which has been ordered pursuant to an established briefing schedule and doesn't request an extension, the Court may decide the appeal based on the appellant's brief and the trial record.

ISSUE: Did the Trial Court err by continuing the trial for the tribal prosecutors to locate witnesses to come to court?

Appellant argues in his brief that his client was prejudiced by the court when it put the trial on hold to allow the prosecution to locate additional witnesses. He asserts that it is widely regarded that a goal of the courts is to avoid delay. A judge's recollection may be compromised by a delay, no matter how conscientious a note-taker he may be. This would violate his client's rights to due process through a speedy trial. A review of the record indicates that there were no exceptional circumstances stated that would allow the Court to continue the trial past the 60-day limit. As Appellee did not submit any argument in opposition to Appellant's position, we are compelled to grant this appeal based on this ground without discussing the two additional grounds for appeal. We hold that the trial court erred by continuing the trial past the 60-day limit without finding exceptional circumstances for the continuance.

Based on the above, we are granting the appeal and remanding to the trial court for dismissal of the case.

Echo CRIM, Appellant,

vs.

Shon BAKER, Appellee.

Case No. AP04-007, 4 CTCR 20

8 CCAR 20

[Dan Gargan, Spokesperson for Appellant.
Tim Liesenfelder, Spokesperson for Appellee.
Trial Court Case Number CD-CR-2003-23271]

Argued on August 19, 2004. Decided July 11, 2005.
Before Chief Justice Anita Dupris, Justice Edythe Chenois and Justice Elizabeth Fry

Fry, J. for the Panel.

SUMMARY

This matter came regular before this Court on August 19, 2004 for Oral Argument. The following persons were present, Dan Gargan, Spokesman for Echo Crim, Tim Liesenfelder, Attorney, Spokesman for Shon Baker, and Shon Baker, Appellee.

The Court, having reviewed the records and files herein, and being fully advised in the premises, affirms and remands.

FACTS I.

Echo Crim, Appellant, and Shon Baker, Appellee, resided together in an apartment for six years. It was not established that they had a meretricious relationship. The Trial Court signed the order March 19, 2004 for the trial on November 7, 2003 dividing their property. Both parties were represented by counsel at trial. Show cause hearings were held on July 21, 2003 and August 11, 2003. The Court found that the Appellant had removed Appellee's clothing from the apartment and charged the Appellant with 75% of the value of the clothes for a total of $1,030.50. The Court found that the Appellant had thrown food out of the apartment and ordered that she pay the Appellee $200.00. The Court denied the Appellant's request for the items on the lists filed by her on July 7, 2003 and August 7, 2003 since there was no testimony on them at trial. The Court denied the motions by the Appellee for his items on page one of his list entitled "Shon's Stuff Missing from Truman and Jackies" filed with the Court on November 7, 2003, as he did not prove at trial that the Appellant removed them from Truman and Jackie s residence.

The Court then found that (a) the washer/dryer belonged to the Appellee, (b) the Nintendo Game with four games would be split 50/50 between the parties, with one person to keep it and reimburse the other for 50% of its value, or $350.00, (c) the same would happen with the new tent, one person would keep it and reimburse the other for 50% of its value, or $80.00, (d) the blue blanket was ordered to be split 50/50 with one person keeping it and reimbursing the other for 50% of its value, or $10.00, (e) the VHS/VCR was dealt with in the same for a value of $120.00, (f) the multi-colored bath mat would be dealt with in the same way, for a value of $10.00, (g) four bath mats would be dealt with in the same way, for a value of $20.00, (h) the 27" television would be dealt with in the same way, for a value of $250.00, (i) the $150.00 borrowed from Debra Crim would be split 50/50 between the parties, (j) the shower stall damage cost would be shared equally with the amount split equally when the receipt arrived, (k) the broken eagle bell should be returned to Shon Baker, as it was a gift to him. The Court ordered the parties to mediation to settle ownership of items on the Appellant's Exhibit E filed on December 4, 2003 and the Appellee's two lists filed on November 21, 2003.

The Court issued a restraining order against the Appellee to not contact or be within 100 feet of the Appellant, nor to be within 50 feet of her residence, but is allowed to visit other people at the same apartments. The Court also issued a restraining order against the Appellant to not contact or be within 100 feet of the Appellee. The restraining orders shall remain in effect until November 7, 2005 unless modified.

The Court ordered that settlement of the items (i) to (k) should also be dealt with during the same mediation. The Court reserved rulings on Finding of Fact #6, which referred to the post-trial lists, and which was ordered to be the subject matter of mediation between the parties.

Appellant now argues that (1) many items on the list by Appellee were not there or were already removed, (2) Appellant had testified that 6-16 garbage bags of clothing had been removed by the Appellee, (3) no inventory of property had been taken, (4) a sum certain had not been determined, (5) no ruling on the vehicle though the title was with the Appellant, (6) the food in the apartment spoiled and they disposed of it and now it is valued at $200.00, and their purchase was never established at trial, both claimed purchase, (7) there should be a correction in the math on what she owes, which the Court ordered at $1,030.50 for clothing and $200.00 for food for a total of $1,230.50 and not $2,261.12, (8) there is a fair amount of the property still in the apartment, he requested to store. The Appeals Court allowed the Trial Court to determine this matter.

The Appellee argues that (1) there was no arbitrariness at trial, (2) the Trial Court was in the best position to judge veracity, evidence was in the record, a number of things were removed

from the apartment, values you were assigned to items, (2) mediation was not done.

ISSUES II.

1. Is there a sufficient basis for the Court's ruling?
2. Should the Appellate Court remand for any reason?

DISCUSSION III.

The standard of review in this case is the "clearly erroneous" standard as established in *Colville Confederated Tribes v. Nadene Naff*, 2 CTCR 08, 2 CCAR 50, 22 ILR 6032. The case of *Hoffman v. Colville Confederated Tribes*, 4 CCAR 4 (Colville Confederated 05/05/1997) discussed the *Pullman-Standard v. Swint*[9] decision, which based this standard of review on Federal Rules of Civil Procedure (hereinafter FRCP), Rule 52(a), which in 1982 provided that district courts' "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Upon review of these proceedings, this Court determines that there was a sufficient basis for most of the findings of facts. There are however, several exceptions. There is the Debra Crim loan, characterized by the Trial Court as money "borrowed from Debra Crim," which according to the record was actually made to her rather than from her. The Trial Court should determine who Debra Crim borrowed the money from, and to whom she owes it. The Trial Court should make a ruling on the ownership of the vehicle, and should also correct the math in the amount that the Appellant owes the Appellant to $1,230.50.

The Trial Court should reconsider her decision to order mediation on the remaining item lists, since it seems apparent that the parties will not be able to mediate with mutual restraining orders in effect.

ORDER IV.

The Court, being fully advised in the premises, affirms the lower court decision except for the following, wherein the Court finds good cause to remand this matter to the Trial Court for a determination of the following:

(1) to whom the Debra Crim Loan is to be repaid, the Appellant or the Appellee, or to share equally,
(2) the value and ownership of the vehicle,

[9] 456 U.S. 273, 102 S.Ct. 1781 (1982).

(3) correction of the judgment amount owed by the Appellant to $1,230.50,

(4) the value and ownership of the remaining unlitigated items on the post-trial lists.

IT IS SO ORDERED.

In Re the Welfare of J.L.V. (05-20-92), J.M.V. (12-29-93), & I.B. (04-20-99).
Jose Valdez-Catalan, Appellant,
vs.
Colville Confederated Tribes (CFS), Jessilyn Ballesteros (mother),
and J.V., J.V., and I.B. (Minors), Appellees.
Case No. AP02-006, 4 CTCR 21
8 CCAR 23

[Wayne Svaren, Spokesperson for Appellant Father.
David Ward, Spokesperson for Appellee CCT.
Dana Cleveland, Spokesperson for Appellee Minors.
Tim Liesenfelder, Spokesperson for Appellee Mother.
Trial Court case number CV-MI-2000-02003]

Argued July 18, 2003. Decided July 21, 2005.
Before Chief Justice Anita Dupris, Justice Dennis L. Nelson, and Justice Theresa M. Pouley

This matter came before the Court of Appeals on July 17, 2003 for oral argument. Appellant, father, appeared through counsel Wayne Svaren. The Appellee, CFS, appeared through David Ward. The Appellee, Jessilyn Ballesteros, did not appear in person or through counsel. The Appellees, J.L.V., J.M.V. and I.B., appeared through their spokesperson, Dana Cleveland of Colville Legal Services. Oral arguments were held before Chief Justice Dupris, Justice Nelson and Justice Pouley.

Pouley, J for the Panel

SUMMARY

The Appellant Jose Valdez-Catalon (Appellant) appeals the October 30, 2002 Dependency Review Order which excluded Appellant, the natural father, from consideration for placement of his two minor children and their sibling, his step-child. Appellant asserts that the Trial Court (Court) erred in excluding him from consideration on the basis of his citizenship and residence in Mexico and on the basis of "not splitting up the siblings." Appellant argues in the alternative that the Court made

insufficient factual findings to support these claims and failed to articulate clear legal standards for its conclusions. The Colville Tribes, Appellant and the children's counsel argue that any error is a harmless error because the children should remain on the Colville Indian Reservation and that Colville custom and tradition would require such a result.

Based on the reasoning below the Court of Appeals (COA) finds that the Court made insufficient legal and factual findings to exclude the natural father from consideration for placement of the children, and REVERSES and REMANDS this matter for findings consistent with the standards set in this opinion.

FACTS

The three minors in this case, J.L.V., J.M.V and I.B., were made Minors-in-Need-of-Care and have remained in an out-of-home placement since August 5, 2000. Appellee Jessilyn Ballesteros is the natural mother of all three children. Appellant Jose Valdez-Catalon is the natural father of J.L.V and J.M.V and the stepfather to I.B. Appellant is a Mexican citizen and resides in Mexico. The putative father of I.B. is Jay Seller, but paternity has not yet been established and his whereabouts are unknown. *CCT Individual Service Plan (ISP)* 9-1-01. The mother and all three children are members of the Colville Confederated Tribes.

In 2000, the children were picked up and placed in foster care. The Court's orders, spanning more than two years, chronicle Appellant's involvement in the subsequent dependency process. In 2000, Appellant was incarcerated in the Spokane jail and was eventually deported. The Order from the Adjudicatory Hearing dated August 30, 2000 states that the children wished to visit with their father and that the Court found visitation to be in the children's best interest. On March 7, 2001, the Court found that Appellant had taken an "active role" with his children. On April 9, 2001, the Court's order allowed Appellant weekly visits with the children during his incarceration. On June 6, 2001, the Court found the mother had not complied with her court ordered requirements. The Court also found Appellant had progressed with his requirements and ordered Colville Family Services (CFS) to investigate placement with him including assessment of CFS's ability to monitor a case in Mexico, to obtain enforcement of Colville Orders, to identify services available to transport the children to Mexico and to arrange for visitation with the children.

In the next review hearings, CFS recommended the return of children to their father in Mexico. Appellant had complied with all court orders and CFS made arrangements to have his compliance information properly documented in Mexico and communicated to the Tribe, including urinalysis results. The remaining identified issue was whether CFS could continue to actively monitor the case in Mexico. The review order, filed on June 17, 2002, directed the Tribe to prepare appropriate documentation to coordinate services with Mexico and prepare a home study. *See Appellant's Opening* Brief, page 4, and *Tribal Court Order*, filed October 30, 2002.

At the next review hearing, appealed to COA, the Court apparently reconsidered the previous

plan of placing the children with their father in Mexico. In October of 2002[10], the Court reviewed this matter and found that: 1) the CFS Caseworker was considering Appellant for placement of the children; 2) that the Colville Prosecuting Attorney learned that the U.S. State Department considered Mexico to be "out of compliance" in its agreements with the United States; 3) that sending the children to Mexico would be a "crapshoot." The Court then ordered that: "Jose Valdez-Catalan will no longer be considered an option for placement of the minor children so long as he remains in Mexico. The Court will not consider splitting up the three minor children to send two children, J. and J., to Mexico."

Appellant timely appealed. Numerous continuances, not detailed here, were properly requested and granted. Oral arguments were finally heard in July of 2003. It should be noted that in each of these hearings Appellee mother was not in substantial compliance with her court- ordered requirements and was not being considered for placement.

DISCUSSION

I. Can the Trial Court, on the basis of the record in this matter, exclude placement with a natural parent in compliance with his service plan based on the fact that he is a citizen and resident of Mexico?

Appellant argues that he is a fit parent, has complied with all court orders and should not wrongfully excluded from his children. Both parties argue that the "best interest of the child" standard should apply. However, Appellant argues, the Court failed to articulate clear legal standards. Appellee CFS argues this failure is harmless error. We hold that when important dispositive rulings regarding rights of parents and children are implicated, the Court must properly apply the "best interest of the child" standard finding to exclude the natural parent from placement.

The "best interest of the child" standard is well-established in Colville Tribal statutory and case law. The Colville Tribal Code, CCT 5-2-1 states:

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

10 Although the Order itself has a file stamp of October, 2003, it was undisputably entered in October of 2002.

CTC 5-2-1.

The COA had occasion to further define this standard. In the context of terminating a parents rights, with almost identical purpose language, the COA in *In Re the Welfare of L.S, M.S., and C.S.,* stated:

> It is uniformly held that substantive decisions regarding the welfare of a child shall be in the best interest of the child. Welfare of child is paramount consideration in determining the best interests of the child. *(Emphasis added, citations omitted.)* Tribal Courts have regularly exercised discretion in determining the welfare and what is in the best interest of minor children and, in the best interest of the Colville Confederated Tribes.

3 CCAR 72, 74 (1997).

Thus the Colville Tribal Code directs and the COA has held that in determining the care of minor children, such care must be in the best interest of the child and the Tribe, and must seek to give such care and guidance to preserve and strengthen families whenever possible. *See CTC 5-2; In Re the Welfare of J.AM., K.A.M., P.M., S.Z.M.Z.,* 3 CCAR 6, 8 (1995).

Case law is equally well-established on factors used to determine the best interests of the child. The determination of the best interests of the child is a highly factual inquiry which will not be disturbed on appeal without a showing of abuse of discretion. The Court must weigh a variety of factors, including identifying the appropriate factors and weighing such factors to reach an appropriate legal conclusion. Appellant argues the Court should adopt the standards articulated in *In the Matter of the Dependency of J.B.S.,* 123 Wn. 2d. 1 (1993). Although we note that some of the specific factual inquiries for persons who are foreign nationals are useful, Colville Tribal law provides sufficient guidance on the factors to be weighed. For clarity, we will outline the factors which should be included in an inquiry based on the best interest of the child. The following factors, and others as needed on a fact-specific basis, should be used in determining the best interest of the child:

1. The appropriateness of the care, guidance and control given to a child. *CTC 5-2-1.*
2. Preserving and strengthening the child's family which may include consideration of the harm suffered by the child in severing family relations. *CTC 5-2-1.*
3. Preserving and strengthening the child's cultural and ethnic identity which may include considerations involved in placing a child in another cultural or ethnic region. *CTC 5-2-1.*
4. The appropriateness of the home environment including the availability of a safe and stable home, and the effect of abrupt changes in that environment.*CTC5-2-1; In Re Welfare of S.M.C., E.M.P., 2 CCAR 45, 46 (1994);*
5. The availability of services, including therapeutic, educational and cultural for the child at their home or placement. *In re Welfare of D.A., L.F.,* 3CCAR 54,56 (1996).
6. The attachment of the child to the parents and/or their home and/or their siblings including consideration of the length of current placement. *In re Welfare of L.S., M.S., and C.S.,* 3 CCAR 72, 74 (1997). This would necessarily include consideration of the child's

psychological and emotional bonds with each parent, siblings and extended family. *In the Matter of the Dependency of J.B.S.,* 123 Wn. 2d. 1, 11 (1993).

7. The attributes of the child including his or her age, physical well-being, and depending on the age of the child perhaps the child's wishes and certainly any harm to be suffered by the child by a substantial change in circumstances. *In re Welfare of L.S., M.S., and C.S.,* 3 CCAR 72, 74 (1997) and *In re J.B.S.* 123 Wn. 2d at 11.

This list is not meant to be exhaustive but rather instructive of the type of factors to be considered and weighed with specific facts by the Court.

When these factors are compared to the record below, the factual record does not provide sufficient information to weigh and balance the factors. We are not unmindful of the burden such an inquiry would place on the Court in a typical review case where little has changed. However, this examination is necessary when such a substantial modification, such as finding a child will not be returned home to a parent, is done in a dependency review hearing.

The Appellee CFS and the Children's Attorney argue that the custom and tradition of the Colville Tribes weighs in favor of the children remaining on the Colville Reservation. Thus, Appellees argue, since the result of the Court was correct, then the error must be harmless. We do not agree. The custom and tradition of the Tribes was neither argued, weighed or considered in the Court's findings. Appellees are correct that this is a factor that must be weighed. However, the Court's lack of findings preclude us from reviewing the matter. As a final note, the Court did not consider or issue any findings regarding the "best interest of the Tribe." For all these reasons, we hold the Court erred in failing to identify the legal factors and weigh each factor as required.

II. Did the Court err in finding that the detriment from separating siblings was sufficient to exclude consideration of the natural father for placement?

Appellant agues that the Court gave improper weight to this factor when balanced against the return of the natural children to their natural parent who is successfully complying with court orders. This is an appropriate factor to consider in placing children. *See, Number 6 & 7, supra.* However, this factor alone cannot support an order to exclude a natural parent from having his or her children returned. As with the previous factor, we hold the Court erred in failing to properly identify and weigh the factors for consideration.

CONCLUSION

For the reasons stated in this Opinion, this matter is REVERSED and REMANDED for the Court to properly weigh the above factors and enter Findings of Fact and Conclusions of Law consistent with the "best interests of child" standard.

Benjamin CAMPBELL, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.
Case No. AP05-006, 4 CTCR 22
8 CCAR 28

[Wayne Svaren, Spokesperson for Appellant.
Samuel J. Conklin, Spokesperson for Appellee.
Trial Court Case No. CR-2005-28014]

Initial hearing held July 15, 2005. Decided July 22, 2005.
Before Chief Justice Anita Dupris, Justice Edythe Chenois and Justice Howard E. Stewart

Dupris, CJ, for the Panel.

This matter came before the Court for an Initial Hearing on July 15, 2005. This hearing was rescheduled from June 17, 2005 in order for the parties to submit initial briefings specifically on the issue whether the Appellant has a *prima facie* case to go forward on appeal. For the reasons stated below we find there is no *prima facie* case and the Appeal is denied.

FACTS

On January 14, 2005 the Appellant was charged with one count of Obstructing Justice and one count of Criminal Homicide; he was arraigned on the same day as he was charged. He was held without bail pending the trial, which under the law entitles him to a trial within sixty (60) days of his arraignment. After several pretrial hearings around the sixtieth day, the Appellee Tribes moved to dismiss the charges without prejudice alleging the Tribes was not prepared to go forward in that it was waiting for evidence from the Federal Bureau of Investigation. The Appellant objected on record to the dismissal without prejudice based on the length of time he had been incarcerated without bail. The Chief Judge, in his ruling dated the 21st of March, 2005 and signed the 1st of April, 2005, stated the rule of law in *CCT v. Laramie*, 4 CCAR 22 (1997), and *CCT v. Swan*, 7 CCAR 38 (2003) dictated that it would be an abuse of discretion if he didn't dismiss without prejudice. He relied on the language in *Swan* which states: "A dismissal with prejudice should be entered only when the merits of a case have been heard by the court." The Appellant filed a timely appeal, asserting that a dismissal with prejudice was appropriate in this case.

ISSUE

This Court, upon initial review of the Appeal as submitted could not identify an

appealable issue based on the prior rulings of this Court. The parties were instructed to file briefs specifically addressing whether there was a *prima facie* basis for the appeal, given there is prosecutorial discretion to not prosecute a case. The Appellant filed a brief; the Appellee did not.

The Appellant acknowledged that prosecutorial discretion allows the Appellee to ask the matter be dismissed. He argues, however, that the Judge's discretion allows granting a dismissal with prejudice.

We consider the following issue:

Does the Trial Court have discretion to grant a dismissal with prejudice under any circumstances?

DISCUSSION

The Trial Court's reading of *Swan* is correct but incomplete. *Swan* is not the only case in which this Court has dealt with dismissals with and without prejudice. There are two (2) other cases, *CCT v. Jack*, 7 CCAR 33 (2003) and *Stensgar v. CCT*, 2 CCAR 20, 20 ILR 6151 (1993), both of which give some direction on factors to consider in dismissing with or without prejudice. Unfortunately these cases were not discussed in *Swan*, so we will interpret all of them together in order to give the Trial Court a uniform standard to consider when confronted with motions for dismissals with or without prejudice.

In *Stensgar* this Court considered the question of whether the matter had to be dismissed with prejudice because the sentencing took place after sixty days from the finding of guilt. This Court held that the time requirements were jurisdictional, and that the following were factors for the Trial Court to consider in deciding if the dismissal should be with or without prejudice: that the length of delay was minimal; the cause for delay was administrative and not intentional by the prosecutor; the defendant delayed in asserting his right to sixty days until after the delay happened; and there was no prejudice to the defendant.

Stensgar clearly delineates some guidelines for the Trial Judge to follow in weighing his discretion to grant a dismissal with or without prejudice. We reinforced this discretion in *Jack*. In *Jack* the Trial Judge dismissed the charge with prejudice *sua sponte*. We acknowledged the general rule that dismissals with prejudice are "normally reserved for situations in which jeopardy has attached." We went on to state that dismissals with prejudice can also be granted "when the Judge finds a party has acted in bad faith, or filed a frivolous case, for example."

Both the *Stensgar* and *Jack* cases recognize the Trial Judge's discretion to grant dismissals with prejudice. *Swan*, taken in context of such rulings, reinforces that the general rule is that dismissals with prejudice are generally reserved for cases in which jeopardy has attached

or there has been a hearing on the merits. One distinction in *Swan* is that the Judge entered the dismissal with prejudice *sua sponte*, as he did in *Jack*. Another distinction for *Swan* is that the Trial Judge did not set out his reasoning for dismissal with prejudice in a situation where there was no adjudication on the merits.

Finally, in *Stensgar* this Court looked to federal analysis of the issue as a guideline. In *United States v. Taylor*, 487 US 326 (1988), the Supreme Court stated that if there were no federal guidelines to follow, as there were in its case, the court "would be expected to consider 'all relevant public and private interest factors' and to balance those factors reasonably..." [cites omitted] *Id* at 336.

RULING

It appears the Trial Court limited its analysis to *Swan* in deciding it had no discretion to grant a dismissal with prejudice. It was not the intention of this Court to so severely limit the Trial Court's discretion that it would appear that we would be substituting our judgments for the Trial Judge's judgment in such day-to-day decisions. *Swan* must be read in its context. That is, the Trial Judge made some prior rulings on potential evidence, and, when the prosecutor moved to dismiss, the Trial Judge granted the dismissal with prejudice *sua sponte*, and without an analysis of any factors available in *Stensgar*, *Jack*, or even the federal factors found in *Taylor*, *supra*. This Court could have been clearer in *Swan* that it recognizes judicial discretion to grant dismissals with prejudice before an adjudication of the merits in certain circumstances. That is the rule of law when reading all of our cases together. We so recognize it in this opinion.

Based on the rule of law and a review of the record, we find that the Appellant has not made a *prima facie* showing of an appealable issue, and the Appeal should be denied.

ORDER

Based on the reasoning herein we find that (1) the Trial Court has discretion, in appropriate circumstances and with reasoned analysis, to grant motions to dismiss with prejudice; and (2) this Appeal should be denied for lack of an appealable issue.

It is SO ORDERED.

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In Re Welfare of A. T. and J. T., Minors.

Roberta WEBER, Appellant,

vs.

CHILDREN & FAMILY SERVICES, A. T. & J. T, and Richard THOMAS,

Appellees.

Case No. AP05-007, 4 CTCR 23

8 CCAR 32

[Leoni Reinbold, Spokesperson for Appellant-Mother, Roberta Weber.
Jonnie Bray, Office of Prosecuting Attorney, spokesperson for Appellee-Children & Family Services.
Mike Larsen, Office of Public Defender, spokesperson for Appellee-Father, Richard Thomas.
Lane Throssell, Legal Services, spokesperson for Appellee-Minors.
Juvenile Case Number MI-2005-25018]

Hearing held August 19, 2005. Decided September 8, 2005.
Before Chief Justice Anita Dupris and Justice Dennis L. Nelson. Justice Conrad Pascal was not present.

Dupris, CJ

PROCEDURAL SUMMARY OF APPEAL

On June 15, 2005 we held an Initial Hearing and found the record incomplete. The Order Granting Petition for Minor-In-Need-Of-Care (MINOC) entered by the Trial Court on May 16, 2005 and signed June 3, 2005 did not include Findings of Fact specifically supporting the Conclusion of Law that the children were Minors-In-Need-Of-Care. We stayed the Initial Hearing and directed the Trial Court to file more specific findings. This was not done.[11] On August 19, 2005, we ordered the Order Granting Petition for MINOC be vacated and remanded for the reasons stated below.

ISSUE

Is the Trial Court's Findings of Fact sufficient to conclude, as a matter of law, that the children herein are Minors-In-Need-Of-Care?

DISCUSSION

The MINOC Petition was filed in this case on April 29, 2005. The Petition alleged the

[11] It appears the Trial Judge did not get the order with these directions until one week ago; however, there is nothing in our files from the Trial Court asking for more time.

following facts regarding the alleged MINOC status of the children:

(1) The children were taken into temporary custody on April 27, 2005.
(2) When the officer contacted the father, the father smelled of intoxicants.
(3) The father made a self-report to the officer of his drinking as well as his sister and mother drinking. He also indicated that he drank alcohol while the children both played and slept.
(4) The father was arrested for DUI.... while his children were in the car with him.
(5) the father is being investigated for inappropriate sexual contact with Sheree Thomas.[12]
(6) CFS believes the father was granted custody of the minors pursuant to a Yakima (*sic*) Tribal Court order.

There are no facts alleged in the Petition regarding the mother, Roberta Weber's ability to care for the children. After an Adjudicatory Hearing[13] on May 16, 2005, the Court found the children herein were Minors-In-Need-Of-Care and scheduled a Disposition Hearing.

The only facts in the Trial Court's Order Granting Petition for Minor in Need of Care regarding the mother are (1) that Roberta Weber did not follow through with the Court orders set out in those custody cases, and (2) that she did not have contact with the children since July 2003.

There are no findings regarding what actions the father took or failed to take which would make him an unfit parent. The Findings of Fact regarding the father are that (1) the father has stipulated to the petition for MINOC, however, not the facts contained therein; and (2) the Court took judicial notice of the civil cases giving the father custody.[14]

CTC §5-2-261 Adjudicatory Hearing—Proof, states that the allegations of a MINOC Petition must be proved by clear, cogent and convincing evidence. The Trial Court's Findings of Fact, Conclusions of Law, and Order granting the MINOC Petition are insufficient.

There are no specific Findings of Facts in the Order regarding what actions either parent took or failed to take that proves the "minors have not been or cannot be provided with adequate

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[12] The age and relationship of this person is not alleged; she is not a child listed in the Petition.

[13] **CTC §5-2-259 Adjudicatory Hearing**
The Juvenile Court shall conduct the adjudicatory hearing for the sole purpose of determining whether the minor is a minor-in-need-of care. The hearing shall be private and closed.

[14] The Order does not reflect any part of the foreign orders nor their relevant sections in the findings or conclusions; it only gives a conclusory statement that such orders exist and are judicially recognized by the Trial Court.

food, clothing, shelter, medical care, education or supervision by their parents, guardians or custodians as necessary for their health or well-being." CTC§5-2-30 Definitions, (l) Minor-in-need-of-care.

The Trial Court concluded the "minor's [*sic*] father is not available to care for them," but there are no Findings of Facts to support this conclusion.

There are no Conclusions of Law regarding the mother, Roberta Weber's fitness as a parent. On May 27, 2005 a Disposition Hearing was held.[15] The Trial Court entered the Order of Disposition Hearing placing the children with the mother, Roberta Weber, upon the condition she have a "clean urinalysis" before she received custody of the children. The Court also set several conditions for Roberta Weber to accomplish, including obtaining a mental health evaluation.

The father, Richard Thomas, was also ordered to do several rehabilitative things before the next hearing.

On June 2, 2005, Appellee Child and Family Services requested a hearing to modify the Dispositional placement of the minors with the mother, alleging she tested positive for drugs. The mother filed her timely appeal herein alleging the Trial Court did not have a basis for finding the children Minors-In-Need-Of-Care regarding the mother. We agree.

STANDARD OF REVIEW

The Court of Appeals engages in *de novo* review of assignments of errors which involve issues of law. *In Re The Welfare of R.S.P.V.*, 3 CTCR 07, 26 ILR 6039, 4 CCAR 68, (1998). The issues herein are issues of law. The issue is whether the Trial Court had been shown by clear, cogent and convincing evidence that both parents herein could or would not provide their children "with adequate food, clothing, shelter, medical care, education or supervision."

Regarding the mother-Appellant a more basic issue exists: were her fundamental due process rights violated? From a review of the record we hold they were. The statutorily-required pleading, *i.e.* Petition for MINOC, does not give the Appellant notice of what actions or omissions, if any, she has taken regarding the children which constitute a finding of MINOC. It is fundamental to due process that a person have notice of alleged wrong-doing, an opportunity to be heard, and an opportunity to present evidence in one's own behalf. The Appellant could not respond to a Petition that does not set out specifically what she was to have done or failed to do.

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[15] CTC §5-2-262, Disposition Hearing, states that at the disposition hearing the Court "shall hear evidence on the question of proper disposition."

For this reason alone the finding of MINOC as it applies to her should be set aside.

What concerns us, too, is that there is not enough in the written Trial Court record for us to review *de novo* whether the Tribes proved its case at the Adjudicatory Hearing by clear, cogent, and convincing evidence. By reviewing the Findings of Fact and Conclusions of Law in the Order of the Adjudicatory Hearing we should be able to make a direct correlation between the allegations in the Petition and the proof of said allegations at the Adjudicatory Hearing.

We cannot do this in the Orders herein. For example, the Petition alleges the father abused alcohol while his minor children were with him, including a time when he was subsequently arrested for Driving Under the Influence of Alcohol; and that he was being investigated for inappropriate sexual contact with another person (whose age and relationship are not set out in the Petition). There are no allegations in the Petition whatsoever regarding the mother's fitness.

The Findings acknowledge the father doesn't agree with the facts alleged in the Petition for MINOC. This is not clear, cogent nor convincing evidence of the facts alleged regarding the father's behavior herein; it only proves that Mr. Thomas disagrees with the allegations. The Findings go into more detail of the mother's situation, but these findings have no direct correlation with allegations in the Petition.

A finding of fact must state a fact proved at the Trial. "The father abused alcohol while in the presence of his children" is a sample of a finding of fact. A conclusion of law states a legal conclusion regarding the fact that has been found. For instance, an example of a conclusion of law regarding the sample finding of fact in this paragraph would be: "it has been shown by clear, cogent and convincing evidence that the father cannot provide adequate supervision to the minors."

We are not unaware of the sensitive nature of cases such as these. We understand that the underlying intentions of all involved are for the best interests of the children. The Courts should always be conscientious of the impact made on a family when there is official intervention.

When the intervention is sought, it is the Trial Court's duty to (1) make a complete record of why the intrusion is made; and (2) make a complete record of why the disposition, that is, the solutions to the problems identified at the Adjudicatory Hearing, are necessary, <u>as supported by the record</u>.

We hold that the Trial Court (1) failed to give due process to the Appellant, Roberta Weber; and (2) failed to make a complete, reviewable record of the findings and conclusions establishing the Minor-In-Need-Of-Care status of the minors herein. We find that the Order of

Adjudicatory Hearing dated May 16, 2005 and signed June 3, 2005 should be VACATED and this matter REMANDED for action consistent with this Opinion.

IT IS SO ORDERED.

In Re the Welfare of S. S.
Irene SMITH, Appellant,
vs.
CCT Children & Family Services, John SPRINGER, S. S.
Case No. AP05-013, 4 CTCR 24
8 CCAR 36

[Leone Reinbold for Appellant/mother, Irene Smith.
Evelyn Van Brunt for CCT Children & Family Serivces.
Lane Throssell for the minor, S. S.
Mike Larsen for the father, John Springer.
Juvenile Court Case No. MI-2005-25021]

Hearing held November 18, 2005. Decided November 21, 2005.
Before Chief Justice Anita Dupris, Justice Howard E. Stewart, and Justice Gary Bass

Dupris, CJ

This matter came before the Court of Appeals for an Initial Hearing on November 18, 2005. Appellant has appealed the Trial Court's denial of her Motion to Dismiss the Disposition Hearing. The Juvenile Court held it was not in the best interests of the child to dismiss the case. Appellant asserts it should be dismissed in that she received inadequate notice of the Disposition Hearing.

After reviewing the record below, we find that the Disposition Hearing on August 17, 2005 was not recorded. In *George v. George*, 1 CCAR 52 (1991), we held that we could not make an adequate ruling on Appeal when there is an inadequate Trial record. The recourse is to remand the matter for a new hearing. Appellant asked that we consider the Appeal without the oral record in that she is appealing lack of adequate notice for the Disposition Hearing, which can be found from reviewing the written record.

In *In Re The Welfare of E.A., J.A., J.A.*, 3 CCAR 64 (1996) we held that the Juvenile Court erred in granting a dismissal without first making findings and conclusions that the

dismissal was in the best interests of the minors. We found it is not sufficient to grant a dismissal of a dependency case merely because of an alleged procedural error.

We now hold there must be a showing of prejudice to the moving party, a parent in this instance, that outweighs the best interests of the child. This child had been adjudicated a Minor-In-Need-Of-Care already[16]. This ruling is not being challenged in the Appeal herein.

Although the written record shows the Juvenile Court denied Appellant's Motion to Dismiss as not in the best interests of the child, the Order does not make specific findings for this conclusion of law. We would need to review the oral record of the proceeding in order to determine if there is sufficient evidence on the record to support this conclusion of law. Since there is no oral record, it must be remanded to make an oral record.

For the reasons stated above we VACATE the Order of Disposition entered below, and REMAND for another hearing, at which the Juvenile Court is directed to make either written or oral findings regarding the denial of Appellant's Motion to Dismiss with regard to the best interests of the child.

IT IS SO ORDERED.

[16] It should be noted that from a review of the record it appears that the disposition hearing was heard in front of Judge Abbott, yet the findings and order from the hearing were signed by Judge Aycock. In *In Re the Welfare of A.S.*, 3 CCAR 10 (1995) we held that a Disposition Order signed by a judge who did not preside over the hearing was invalid, and the matter was remanded for a correctly entered order. This issue was not raised herein, but we would still encourage the Juvenile Court to correct the affected orders herein in line with *In Re A.S.*, *supra.*

FINLEY, Tobias, Appellant,

v.

CTSC, TILLMAN & ANDREWS. Appellants.

Case No. AP05-008, 4 CTCR 25

8 CCAR 38

[R. John Sloan Jr., appearing for Appellant
Bruce Didesch, appearing for Appellees
Trial Court case number AD-2004-25004]

Argued November 18, 2005. Decided March 6, 2006.
Before Chief Justice Anita Dupris, Justice Dave Bonga and Justice Dennis L. Nelson.

Appeal of order denying appeal of termination of employment. The denial was based on the administrative law court's finding, following a preliminary hearing, that although Finley was a seasonal employee receiving benefits associated with employment exceeding ninety days, he was nevertheless a probationary employee. Senior staff interpreted company policy to not allow probationary employees the right to appeal termination of their employment. We find Finley was a seasonal employee having a reasonable expectation of continued employment and hold he was entitled to appeal. Reversed and remanded.

Nelson, J., for the panel.

INTRODUCTION

The relevant facts in this matter are not challenged. Tobias Finley is an enrolled member of the Colville Confederated Tribes first employed by Colville Tribal Services Corporation (CTSC) on April 18, 2003. He was employed on several projects in different capacities working as a laborer, cement finisher, and foreman/carpenter. Each time Finley was assigned to a project requiring a different skill his employment classification. During this time of continuous employment he received good performance evaluations and no disciplinary action was taken against him. He was temporarily laid off on October 22, 2004 and recalled by CTSC for ten days in January 2005, laid off again, and then re-hired on January 27. He was terminated by CTSC on April 20 for allegedly violating company policies. CTSC considered Finley a seasonal employee at the time he was terminated.

Finley was informed by CTSC's Chief Executive Officer, Paul Tillman, and by its Human Resources Director, Lois Pakootas, of his right to appeal his termination to the Administrative Law Court. Tillman testified at an appeal hearing that Finley, although a seasonal employee, was in a probationary status thus not eligible to appeal his termination.

The Administrative Law Court found Finley to be a seasonal employee on probationary status. Because of his probationary status that the Court held he had no right to appeal his termination.

ISSUE ON APPEAL

The Notice of Appeal states the issue on appeal is whether Finley has the right to appeal the termination of his employment to the tribal Administrative Court. Re-phrased, we view the issue as whether the administrative law court denied Finley due process of law by denying him a hearing regarding the termination of his employment.

STANDARD OF REVIEW

This matter concerns issues of law and fact. Combined questions of law and fact are reviewed under the non-deferential *de novo* standard when the administration of justice favors the Court of Appeals. "Clearly erroneous" review is used in such questions when the administration of justice favors the Trial Court. *CTC v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995). In this instance, the questions herein hinge on the reliance on Colville Tribal Enterprises Corporation Employee Policy Manual (Manual) as the guiding law for the parties. We find that the administration of justice favors this Court in that a critical question is whether the Appellant should go through another "initial review" period after becoming a seasonal employee, which is more a question of law.

DISCUSSION

The Colville Tribal Civil Rights Act, CTC 1-5-2(h) states in pertinent part: "The Confederated Tribes of the Colville Reservation in exercising powers of self government shall not... (h) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." This is nearly identical with the Indian Civil Rights Act.[17]

[17] 25 U.S.C. 1302(8) states: "No Indian Tribe exercising powers of self government shall ...(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."

Finley contends the termination of his employment was an unlawful taking of his property by the Tribes without due process of law. It is well established that a reasonable expectation of continued employment may be a property interest and thus entitled to the protection of due process procedures. See *Roth v. Board of Regents*, 408 U.S. 564 (1972), and its progeny. We must first determine whether Finley has an interest protected by due process of law and, if so, what process is due. *LaCourse v. CCT*, 1 CCAR 2, 5, 1 CTCR 5 (1982) ("Only the Tribe can elucidate the meaning of these generic concepts [of due process and equal protection]...") *Bliek v. Palmer*, 102 F.2d 1472 (8th Cir. 1997).

The right to continued expectation of employment is secured by "existing rules or understandings. A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support (a) claim of entitlement to the benefit and that may (be) invoke(d) at hearing." *Perry v. Sinderman*, 408 U.S. 593, 601 (1972). We adopt this rule of law as guidance in this matter.

A. Employment status

Whether Finley has a protected interest in his continued employment is determined by his employment status at the time of his termination and the "rules and mutually explicit understandings" which may bolster his claim. The employees of CTSC are categorized as either full time, part time, temporary, on call, contract, emergency hire, or seasonal.

The two employment categories germane to this matter are "temporary" and "seasonal." As noted, a temporary employee is one who is hired for less than ninety days. Should the period of employment exceed ninety days, the employee automatically moves into the seasonal category. Temporary employees accrue no benefits and, by definition, have no expectation of continued employment. Seasonal employees accrue benefits such as health and disability insurance, participation in 401(k) retirement plans, and paid leave. Finley, a seasonal employee, was employed continuously by CTEC for over eighteen months and subsequently laid off and re-hired.

All employees, no matter how classified, are either exempt (ineligible for overtime compensation) or non-exempt (eligible for overtime compensation and whose duties meet criteria set by the Tribes or the federal wage and hour laws). It is because of the federal wage and hour laws that an employee's transfer to a new job classification is memorialized by a payroll information/job change sheet.

CTSC contends Finley lost his status as a seasonal employee each time he transferred to a new wage classification. It further argues he began each new wage classification as a temporary

employee in a probationary status. Despite this, and despite later testifying that newly hired temporary employees do not have the right to appeal termination, both Tillman and Pakootas informed Finley he had the right to appeal.

Tillman testified that all employees have the right to appeal disciplinary actions, including termination. According to Tillman, however, probationary employees, while having the right to appeal "in house" do not have the right to appeal to the Administrative Law Court. Ms. Pakootas interpreted the Policy and Procedures Manual in the same manner as Tillman. She explained she had written a letter to Finley stating he had the right to appeal to the Administrative Law Court, but that she had only done so because she thought the matter would be resolved before going that far.

Following the preliminary hearing, the Administrative Law Court, held that Finley was a seasonal employee at the time of his termination, but that he did not have the right to appeal because he was terminated during the probationary period following his being recalled on January 27, 2005.

B. Expectation of continued employment

We find it significant that seasonal employees transferring into another job classification do not lose the benefits accrued following their initial probationary period. Finley had worked continuously for eighteen months, was laid off for two months, recalled and laid off again, and recalled for the last time in on January 27, 2005. His benefits immediately began to accrue each time he was recalled. That is, he was not required to complete the probationary period before his benefits began to accrue. CTSC was unable to explain how or why Finley would continue to receive benefits such as FTO, 401(k) contributions, and health insurance, but would lose the right to appeal his termination during the probationary period following his recall.

Equally significant, the Manual provides that should an employee believe he has been disciplined or terminated unfairly, he may appeal the adverse action to the General Manager of the enterprise. Should the employee disagree with the General Manager's decision, he may appeal further to the Corporate Director of Human Resources. Should that decision be adverse, the employee may make a final appeal to the Colville Tribal Administrative Court. *See* Manual, Chapter XI(C)(3) - Discipline: Suspensions/Terminations/Appeals.

We conclude from Finley's record of employment that he had a reasonable expectation of continued employment - a protected property right. This is evidenced by the duration of his continuous employment, the timely recalls after lay offs, his increased responsibility on some projects, his good performance evaluations, the lack of disciplinary action, and the accrual of

benefits.

We further conclude, as did the trial court, that the Manual is confusing and ambiguous. Statutory construction principles mandate that ambiguous documents be construed against the drafter. Any ambiguity must favor Finley. Furthermore, the burden is on the employer, not the employee to make clear to the employee what his status and what his rights are. *See, Schmolke v. Ho-Chunk Casino,* 29 ILR 6012 (2001).

Section XI of the Manual does not deny a seasonal, non-probationary, employee the right to an appeal. The Administrative Law Court erred in finding that Section VI.J.1 of the Manual states "all employees" have an initial review period; it states all "new employees" have an initial review period. Finley is not a new employee. Finley has a right to hearing on his appeal whether his termination was warranted.

CONCLUSION

Accordingly, the Order Denying Appeal is REVERSED and the case is REMANDED for a hearing on the merits of Finley's termination from employment with CTSC.

IT IS SO ORDERED.

Steve MARCHAND, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP05-016, 4 CTCR 26

8 CCAR 43

[Elizabeth Fry, spokesperson for Appellant.
Joni Bray, Office of Prosecutor, spokesperson for Appellee.
Trial Court Case Number CR-2005-28170]

Argued March 17, 2006. Decided April 26, 2006.
Before Chief Justice Anita Dupris, Justice Gary Bass and Justice Howard E. Stewart.

Dupris, CJ

SUMMARY

The Defendant, Steve Marchand (Marchand) is charged by Criminal Complaint for Battery, Assault and Reckless Endangerment, with a Domestic Violence enhancement, in violation of CTC §§3-1-4, 3-1-3, 3-1-11, 5-5-54, respectively. The parties initially had a plea agreement, not yet accepted by the Court, but accepted by both parties. The Prosecutor notified Marchand and his Spokesman that she learned new information relevant to the Marchand's actions, including (1) a statement by a witness in a dependency case that Marchand's children were traumatized by his actions; and (2) that the victim objected to the plea agreement terms. With this "new" information the Prosecutor withdrew her plea agreement offer. Marchand sought to have the agreement specifically enforced at the Change Of Plea hearing on December 2, 2005. The Trial Court found, on record, that the Prosecutor's withdrawal of the agreement was proper because of new information. Marchand asked for an Elder's Panel to discuss whether the Prosecutor should be held to the agreement based on a custom of keeping one's word. The Court denied the request, finding that an Elder's Panel was not necessary to decide if there was a custom or tradition regarding keeping one's word.

Marchand filed the Interlocutory Appeal herein on December 9, 2005, pursuant to COACR 6-A[18] and COACR 7-A(b),[19] specifically raising as issues (1) the denial of the Elder's

[18] 6-A. NOTICE OF INTERLOCUTORY APPEAL. (a) A party shall initiate an interlocutory appeal by filing a written Notice of Interlocutory Appeal (NOIA) with the Court of Appeals within five (5) days from the entry of the written order of the Trial Court. The opposing party has

Panel, and (2) denial of his request for specific performance of the plea offer which was withdrawn. The Prosecutor did not file an objection to the Appeal. The Judge submitted a written order on her ruling On December 21, 2005, after the Interlocutory Appeal was granted.[20] For reasons stated below, we deny the Appeal and Remand the case to the Trial Court.

ISSUES

(1) Did the Trial Court err in denying an Elder's Panel to discuss whether the Prosecutor is a tribal leader who should be held to her word? and

(2) When may the Prosecutor withdraw a plea agreement after it has been accepted by a defendant?

STANDARD OF REVIEW

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

De novo review means we look at everything the Trial Judge had to review when she made her decision, and not at any new information. The test is whether there a reasonable basis for the Judge's ruling, based on the facts and law she before her and not whether we have held differently under the same circumstances.

ELDER'S PANEL

Marchand recognizes that in its December 21, 2005 Order, the Trial Court did make a

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five (5) days after receipt of the NOIA in which to file a response with the COA on whether they oppose or agree with the interlocutory appeal. Failure to file this statement may cause the NOIA to be granted by the COA.

19 7-A. GROUNDS FOR INTERLOCUTORY APPEAL. (b) The issue presented involves a controlling issue of law as to which there is substantial ground for difference of opinion and that an intermediate appeal from the decision may materially advance the ultimate termination of the litigation...

20 Marchand asked the Judge for a written Order on her ruling, but the Trial Judge submitted one only after directed to do so by this Court, after the Interlocutory Appeal was granted. The Interlocutory Appeal may not have been granted in the first place if we had the Trial Court's Order when we first reviewed the case. It is important for the Trial Court to finalize all substantive rulings in writing in order to preserve judicial economy in both Courts.

finding of tradition regarding acting honorably and with respect. The Trial Court held:

> "It is common knowledge and an accepted tribal traditional cultural value and belief that one is expected to honor his word. It is one of the many basic teachings and beliefs - central to who we are as Indian people - that when we speak, we speak the truth and we honor our word - our word is our honor. Core values shared by tribal people bind us together as a people and define who we are. These basic values and beliefs include, but are not limited to: a close relationship with the Creator; a respect and reverence for all He has created; honesty; integrity; personal accountability; closeness and love of family and community; humility; and a strong sense of sharing, caring, and cooperation. As Indian people, we shouldn't need an Elders' Panel to tell us that those are Colville tribal customs and traditions. These teachings and beliefs should be so deeply imbedded in us and so central to who we are that there is no question that tribal custom and tradition require a person to keep their [*sic*] word." Order from Change of Plea Hearing Denying Request for Elders Panel, (Order) December 21, 2005 at pp 2-3.

Marchand asks us to allow him to ask an Elder's Panel to extend this tradition to include a finding that the Prosecutor is like a traditional "chief," and as such can never withdraw a plea proposal in that tribal "chiefs" did not go back on their words. In *Smith v. CCT*, 4 CCAR 58 (1998), we held a request for an Elder's Panel cannot be a "fishing expedition." The party asking for it has the burden of proof to show, through extrinsic evidence, that there is a genuine custom or tradition question for the Panel to discuss. *Id*. at 61. In this case we have crossed into the "fishing expedition" prohibited in *Smith*.

Marchand argues it is required of a tribal leader ("chief") to follow through on what she has offered. He offers excerpts from anthropological data to support this assertion. The information offered discusses the traits of a good leader, and the role of the leader in guiding his people. It discusses the pacifist traits of the San Poils and the Nespelems. It does not discuss a person like the Prosecutor, so it does not support an assertion that a prosecutor-type person could have existed in our past.

Marchand argues the Prosecutor is like a "whipping man" and "chief" combined. By asserting it without a further showing that the Prosecutor's position would come from such roots is the fishing expedition. Marchand hopes the Elder's Panel would find the modern day Prosecutor is such a leader. It is not the role of an Elder's to decide key facts in a case. It is the

role of the Panel to give guidance on what is a custom or tradition (our primary law) when the fact-finder, *i.e.* the Trial Judge, is unsure what such a custom or tradition would be in the given circumstances. Marchand's arguments for an Elder's Panel are too tenuous to meet the *Smith* test.

Reasonable judges may differ. The Trial Judge's Order states adequate findings, based on limited record before it, for denying the Elder's Panel. The Judge's decision is not an abuse of her discretion, nor is it clearly erroneous. For these reasons Marchand has not met his burden.

STANDARDS FOR WITHDRAWING PLEA PROPOSAL

Our Court recognizes broad prosecutorial discretion. *See, Mellon v. CCT,* 8 CCAR 01 (2005).[21] The Prosecutor's Office, in drafting plea proposals, has a policy of following Washington State standards in deciding when to withdraw such proposals. Notice of this policy is embodied on the form used by the Prosecutor's Office, stating *State v. Bogart*, 57 Wn.App. 353 (1990) applies. *Bogart* states, citing *State v. Wheeler*, 95 Wn.2d 799, 850 (1981): "Absent a guilty plea or some other detrimental reliance by the defendant, the prosecutor may revoke any plea proposal." *Id*. at p 356.

Marchand does not dispute the controlling rule of law of broad prosecutorial discretion nor the current Prosecutor's Office policy of following State law. It is Marchand's assertion that neither the federal nor the State standard need apply if an Elder's Panel were to find that the Prosecutor, as a "Chief," were required to keep her word, no matter the circumstances. The custom or tradition would override the current standards followed by the Prosecutor.

The question of searching for an applicable custom or tradition has been already been addressed, *supra*. The real question remaining is, are the standards the Prosecutor applies when withdrawing an offered plea proposal, as recognized by the Trial Court, adequate as a matter of law? This is a question of first impression for our Court. Based on the reasoning below we hold that the standards are adequate as a matter of law.

Even though the Trial Judge stated in her Order that she would not address the issue of when a Prosecutor can withdraw an plea proposal issue she did enter findings she considered in analyzing the prosecutor's withdrawal of the guilty plea:

(1) "The Tribal Prosecutor based her initial decision to enter into the

[21] Both parties discussed *Mellon* in the context of allowing the Prosecutor to withdraw plea proposals. This is not what *Mellon* recognized. *Mellon*, relying on *Wyate v. U.S.*, 470 US 598 (1985) for guidance, stands for the proposition that the Prosecutor's has broad discretion to decide who to prosecute. *Id* at 10. In *Mellon* the Prosecutor withdrew an offered deferred prosecution, not a proposed plea agreement.

Agreement on incomplete or inaccurate information available to her at the time...";

(2) "As soon as the Prosecutor became aware of new information/allegations, and the fact that the alleged victim was opposed to the Agreement, she advised the Defendant that she was withdrawing her offer."; and

(3) "The Defendant did not sign the guilty plea. The Court did not accept the guilty plea. The Plea Bargain Agreement was not offered to the Court, accepted by the Court, nor entered by the Court." Order p 2.

We first look to the standards used by the Prosecutor's Office. As a matter of policy, it has adopted a State standard. That is, the plea proposal is subject to withdrawal up to the time the Court has accepted a defendant's guilty plea, or the defendant has relied on the proposal to his detriment. *Bogart* at 356.[22]

This standard comports with the federal standard as found in *Mabry v. Johnson*, 467 US 504 (1984) in which the Supreme Court held that the Prosecutor has broad discretion to withdraw a plea proposal up to the time the Court has accepted the guilty plea of the defendant. The Supreme Court found no due process violations ("The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty. **Error! Hyperlink reference not valid.**Here respondent was not deprived of his liberty in any fundamentally unfair way." *id* at 511). The Court went on to say that the effect of not enforcing guilty plea left the defendant in same situation he was before the plea was offered: he is still presumed innocent unless proven otherwise; he still has due process rights to a fair trial; he still does not have to not speak against himself, and so on. The Court found no substantial prejudicial effect to the defendant by not requiring Prosecutor to stand by the agreement. *Id*.

The Trial Judge's assessment follows the general rules announced in both *Bogart* and *Mabry* by accepting the unilateral action of the prosecutor to withdraw the plea before the defendant actually entered it on record and had it accepted by the Court on record. In this case, Marchand had notice that the Prosecutor could withdraw the plea proposal unilaterally. As stated before, our standard of review is not that the answer must be totally right; it must be supportable by the record.

This Court recognizes prosecutorial discretion. (*Mellon*). Our criminal court system is

[22] Marchand asserts he detrimentally relied on the plea proposal; there are no facts of such a reliance in the record that would support an interlocutory review of the issue. This argument must first be developed before the Trial Court before it can have a final review in this Court. It is not a subject for an interlocutory appeal.

based largely on the westernized system (*e.g.* Arraignments, pleas entered, presumption of innocence, jury trials). It is far from a customary decision-making role as found in our history. Marchand has not met his burden in showing that a tradition or custom should be considered in this arena. Quite the contrary, if the Prosecutor's Office is deprived of its discretion to withdraw plea offers when the circumstances dictate such a decision, it would result in a more burdened judicial system. The safety net for defendant's who should have the agreements enforced is already defined in the standards adopted by the Prosecutor's Office under *Bogart*, in following *Wheeler*: (1) those defendants who have entered a guilty plea in Court; or (2)who have detrimentally relied on the offer. Neither of these circumstances have been shown in this case.

HOLDING AND ORDER

Based on foregoing, we hold (1) the Interlocutory Appeal request for an Elder's Panel to discuss whether the Prosecutor is a "tribal leader" or "chief" is DENIED; and (2) there is no abuse of discretion by the Trial Court in not requiring the Prosecutor to reinstate the plea proposal. This Interlocutory shall be DISMISSED and the matter is REMANDED to the Trial Court for further action consistent with this Opinion.

It is SO ORDERED.

Lisa A. LOUIE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP04-015, 4 CTCR 27

8 CCAR 49

[Leoni Reinbold for Appellant.
Joni Bray, Office of Prosecuting Attorney, for Appellee.
Trial Court Case Number CR-MD-2002-25132]

Before Chief Justice Anita Dupris, Justice Earl L. McGeoghegan, and Justice Howard E. Stewart

Dupris, CJ

SUMMARY OF TRIAL COURT PROCEEDINGS

Appellant, Lisa Louie (Louie), was charged criminally with one count of Abduction in violation of Colville Tribal Law and Order Code §3-1-1 (Code).[23] The charge arose from an allegation that Louie violated a civil custody order dated April 29, 2002 in which the Tribal Court gave temporary custody of Louie's son to his father, Mathew Pakootas (Pakootas). The civil court records indicate a series of custody orders for Louie and Pakootas regarding their son, as early as December, 2001. Three different trial judges handled the civil case since it was opened in 2001, including the trial judge who conducted the criminal trial.[24]

Louie asked to be allowed to present a defense of necessity, alleging her minor son was being abused in Pakootas' home and she removed him in order to prevent further abuse. She argued she had no other legal alternative. Louie also alleged at her trial that she did not have the requisite intent to commit the crime of Abduction because she did not have notice of the hearing on April 29, 2002. In a civil case, the Trial Court entered an order on April 29, 2002 which

[23] "Any person who shall willfully take away or detain another person against his will so as to interfere substantially with his liberty, or knowingly and without the consent of the lawful custodian, shall take away, entice, or detain a child from the custody of his lawful custodian when he lacks lawful permission or authority to do so, shall be guilty of Abduction. Abduction is a Class A offense."

[24] Chief Judge Aycock entered an order on record on December 13, 2001 (signed on February 25, 2002) giving custody to Pakootas and visitation to Louie. On January 22, 2002 Judge Aycock entered a temporary custody order again giving Pakootas custody and Louie visitation rights. Judge Gabourie entered an order on record on February 26, 2002 giving Louie and Pakootas joint custody and shared physical custody with detailed visitation for both parents. On April 29, 2002 Judge Gabourie entered an order giving temporary custody to Pakootas. Judge Gabourie entered an order on record on May 28, 2002 (signed on June 20, 2002) giving custody to Pakootas and no visitation to Louie. Judge Abbott entered an order on record on March 3, 2003 giving Pakootas custody and supervised visitation to Louie. Chief Judge Aycock entered a bail hearing order restraining Louie from contacting Pakootas or their son pending the trial on the Abduction charge. On May 28, 2004 Judge Abbott granted a temporary restraining order against Louie contacting either Pakootas or their son.

changed a custody order for the child in question. The initial orders gave both Louie and Pakootas joint custody of their son. The Court entered a temporary order on April 29, 2002 giving sole custody of the child to Pakootas. The order was entered without Louie being present at the hearing.

The Court denied Louie's request to present a defense of necessity. The Court also made findings on record, but not in a written order, that Louie received adequate notice of the temporary custody hearing of April 29, 2002, and, therefore, could not argue she did not have such notice. The jury found Louie guilty of the charge of Abduction on August 12, 2004; she was sentenced on October 1, 2004 and filed a timely appeal on the same day.

COURT OF APPEALS SUMMARY

The appellant raised the following issues on appeal:

1. Did the Trial Court err by denying the defense of necessity?
2. Did the Trial Court err by not allowing the appellant to present evidence on alleged child abuse?
3. Did the Trial Court err when the Judge made the comment "I will not allow you to mislead the jury" during the appellant's opening remarks?
4. Did the Trial Court err in the process it used to select which juror would be excused at the end of the trial as the alternate juror?

After reviewing the record, the arguments of the spokesmen, and the applicable law, we found that the issues for our consideration can be stated in the following two:

1. Did the Court err by not allowing Louie to present a defense of necessity?[25]; and
2. Were the remarks the Trial Judge made to Louie's Spokesman, Daniel Gargan, (Gargan) throughout the trial such that would constitute reversible error?

We will not rule on the jury selection question. Louie did not present any legal authority on the issue. All seven jurors selected were subject to both preemptive challenges and challenges for cause by both parties. There is no showing of prejudice to Louie nor any showing of reversible error on the record.

[25] The issue of whether the appellant should have been allowed to argue she believed her child was being abused in his father's home forms a basis for the defense of necessity, and, therefore is not a separate issue.

As set out in the opinion below, we find first that Louie should have been able to present a defense of necessity to the jury. Secondly, we find that, upon a review of the whole record, Louie has shown that the Judge evidenced a bias against her Spokesman, Gargan, to a point which constitutes reversible error. We reverse and remand.

STANDARD OF REVIEW

The first issue, whether the Judge erred by denying Louie the right to argue the defense of necessity is a question of law, and *de novo* review is required. *Colville Confederated Tribes vs. Naff,* 2 CTCR 08, 22 ILR 6032 2 CCAR 50 (1995); *Wiley, et al v. Colville Confederated Tribes,* 2 CTCR 09, 22 ILR 6059, 2 CCAR 60 (1995); *Palmer v. Millard, et al,* 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996); *Pouley v. CCT,* 4 CCAR 38, 2 CTCR 39, 25 ILR 6024, (1997); *In Re The Welfare of R.S.P.V.,* 3 CTCR 07, 26 ILR 6039, 4 CCAR 68, (1998).

The issue Appellant raised regarding the Judge's conduct towards Louie's Spokesman, Gargan, necessitates a review of the whether there are sufficient facts to support the allegation of bias against Gargan to constitute reversible error. That is, was the conduct of the Judge towards the Spokesman such that it created an appearance of impartiality, which could have influenced the Jury? This is a mixed question of fact and law, which we could review either under the clearly erroneous standard, or *de novo*. *See, Naff, supra*.

If administration of justice favors the Court of Appeals, we review *de novo*. If it favors the Trial Court, we review under the clearly erroneous standard. *Id.*. In this instance the administration of justice favors the Trial Court. The Trial Judge's role in a jury trial is both administrative and decision-making. The Judge must impanel a jury and make sure the jury understands its responsibilities; rule on evidence and applicable laws; and generally ensure the trial is conducted fairly in front of a jury. He must made quick decisions throughout a jury trial, without the convenience of time that is afforded the Court of Appeals' Justices who review the decisions made. We review the last issue under the clearly erroneous standard.

DISCUSSION

A. DEFENSE OF NECESSITY

Although the arguments of both parties in their briefs seem to rest on whether or not the defense of necessity is allowable in the Colville Tribal Court, the true question is whether Louie should have been able to argue it in this case. The Court recognized the defense of necessity by accepting *State v. Gallegos,* 73 Wash. App. 664, 871 P.2d 621 (1994) as a guiding principle of

the defense. The test in *Gallegos* is not substantially different from the one Louie argues should apply, *i.e.* that found in *State v. Justesen*, 121 Wash. App. 83, 86 P.3d 1259 (Div. 1, 2004).[26] Both jurisdictions require the defendant to show she had a belief there was no other alternative but to take the child. The Trial Court did not err in using the *Gallegos* standards as a guideline.

The defense of necessity was addressed once before in this Court in *CCT v. Naff, supra*. There the defendant was charged with a civil complaint for shooting elk on her property in violation of the Tribes' Fish and Wildlife Code. Naff argued the defense of necessity, stating the elk were eating her cattle's hay, which impacted her livelihood. She argued that the Fish and Wildlife Department officers did not stop the elk from entering Naff's property so she shot the elk because she had no other alternative. *Id.* at pp52-54. This Court upheld the Trial Court's finding of necessity, finding "...the elk were an immediate threat... and the killing was done to prevent severe and immediate threat to life and property of the defendant. The destruction of the animals was done in direct response to the severe, immediate threat to life and property and that the defendant took every reasonable step necessary to alleviate the severe immediate threat...." *Id.* at p55.

Naff establishes the test for defense of necessity as one requiring (1) an immediate threat to the defendant or his property; and (2) the act was done in direct response to, and to prevent the severe and immediate threat; and (3) the actor took every reasonable step necessary to alleviate the severe immediate threat before taking the act in question. In addition to these requirements of the defense of necessity, *Gallegos, supra*, found that the defense is not available when either the defendant brought about the compelling circumstance or where the defendant has a legal alternative. *Gallegos* at p. 650. We hold that these five requirements for establishing the defense of necessity, from both the *Naff* and the *Gallegos* decisions, comprise the standards to follow in assessing whether the defense of necessity applies in cases before our Courts.

We were required to glean the trial record to find the Judge's rulings on the issue of whether Louie should be allowed to argue the defense of necessity. There is no written ruling on the motions filed in our records.[27] It appears from the Judge's written notes on the day of the trial

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[26] In *Justesen* the Defendant was convicted of custodial interference after she hid her daughter in another state for 18 months because she believed the father was molesting the child. The necessity defense was allowed even though there was evidence that no molestation occurred. The Court held, *inter alia*, "A defendant who can prove by a preponderance of the evidence that, among other things, she reasonably believed the child was in danger of imminent physical harm, has a complete defense to a charge of custodial interference." at 86

[27] In her brief Louie refers to an order entered by the Trial Court on February 23, 2005, where the Judge formalized her ruling on the issue of the defense of necessity. Neither party has submitted this order to us; it was entered after this Appeal was filed. For these reasons we will not consider the February 23, 2005 order as part of the record we review herein.

that she relied on *Gallegos*, *supra* as guidance[28] to deny Louie's request to be allowed to present a defense of necessity. She denied the defense of necessity after taking judicial notice that Louie had adequate notice of the temporary custody order of April 29, 2002 in the civil court case, and had adequate legal alternatives in the civil court. We must first ascertain when is it appropriate to use the doctrine of judicial notice in criminal jury trials.

Judicial Notice

A general rule of common law in westernized courts is that the judge decides what is the law of a case and the jury decides what are the facts of a case. 2 John W. Strong, *et al.,* McCormick's on Evidence § 328 (5th ed. 1999) (McCormick). This is the expectation and practice in the Colville Tribal Court, too. For example, each jury panel is instructed with the language "You are the finders of fact...." Appellee argues that common law rules of evidence may be dispensed with at the Court's discretion. *See* Code §2-1-171.[29] Taking judicial notice "is merely another way of saying that the usual forms of evidence will be dispensed with if knowledge of the fact can be otherwise acquired." *Shapleigh et al v. Mier*, 299 U.S. 468, 475, 57 S. Ct. 261, 81 L. Ed. 355 (1937) [cites omitted]. As a general rule taking judicial notice is an acceptable practice under the laws of the Tribes.

We address whether it was acceptable to take judicial notice in this case. Here, the Court took judicial notice of two important facts. First, the Court noted that Louie did receive adequate notice of the hearing on April 29, 2002, the order from which forms the basis of the criminal complaint herein.[30] Second, the Court took judicial notice of the fact that Louie had another legal alternative to her action of taking her child out of the area. Both facts go to proof of the elements of the charge of Abduction, which states, in relevant part:

> "Any person who shall willfully take away or ... detain a child from the custody of his lawful custodian when he lacks lawful permission or authority to do so, shall be guilty of Abduction." (emphases added).

The elements of the crime of Abduction, under the fact pattern herein, necessarily include proof

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[28] *See* Judge's Notes, Appellate Court Record, Tab #6.

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

[30] The Order of the April 29, 2002 hearing does not state Louie received notice of the hearing; it states she was not present. The Court's Order states: "The Court is concerned about the Petitioner [*sic*] removal from school without notice to Respondent, *contrary to the intention of the Court's previous order*. [emphasis added]. The Court also ordered: "Petitioner is ordered to provided [*sic*] the clerk of court with her current address immediately."

of (1) Pakootas' lawful custody of the child; and (2) removal from his lawful custodian by Louie; and (3) said removal was without lawful permission or authority. Each of these elements are facts to be proved beyond a reasonable doubt by the Tribes. Fact-finding is generally within the province of a jury.

For guidance we look to the federal courts' interpretations regarding judicial notice, with the caveat that Federal Evidence Rule 201 (Rule 201) gives the federal courts direction on what can and cannot be given judicial notice. [31] "Federal Rule of Evidence 201(b) specifies what matters are the proper subject of judicial notice: A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *U.S. v. Herrara-Ochoa*, 245 F.3d 495, ___ (5th Cir. 2001).

We find the federal courts disfavor using judicial notice in criminal jury trials. In *U.S. v. Boyd*, 289 F.3d 1254 (10th Cir. 2002) the court stated:

> "In applying FRE 201, we are mindful that '[i]f a court takes judicial notice of a fact whose application is in dispute, the court removes the weapons [of rebuttal evidence, cross-examination, and argument] from the parties and raises doubt as to whether the parties received a fair hearing.' *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1083 (7th Cir. 1997). ...'[T]he effect of taking judicial notice under Rule 201 is to preclude a party from introducing contrary evidence and, in effect, directing a verdict against him as to the fact noticed.'"

In a case in which the defendant was charged with being in the United States illegally, the federal district court took judicial notice of (1) a pretrial hearing in which the defendant admitted being found in the United States; and (2) a suppression hearing in which an officer testified he detained the same defendant in El Paso, Texas. The prosecution did not present any evidence at the trial that the defendant was found in the United States, which is an element of the offense of which he was charged. The Court of Appeals found:

> Taking judicial notice of the trial court record arguably infringes on Herrara's Sixth Amendment right to confront witnesses. ...Taking judicial notice in this case of an essential element of the crime... potentially

[31] The Colville Courts do not have written rules of evidence. The Trial Court does not have written procedural rules. Many of the questions that come before us could be addressed at the trial level if it adopted its own rules of procedure and evidence.

> infringes on Herrara's right to have each element proved beyond a reasonable doubt.... there is no ... clear adjudicative fact in the instant case, as the question of whether or not Herrara was "found in" the United States on or about the date of the indictment is readily disputed nor is it capable of determination by resort to sources whose accuracy cannot be reasonably questioned. [cites omitted] *U.S. v. Herrara-Ochoa*, 245 F.3d 495, _____ (5th Cir. 2001)

There are instances in which a court takes judicial notice of adjudicative facts[32] in a jury trial. *See United States v. Bello, 194 F. 3d 18 (1st Cir. 1999)* (Court of Appeals upheld District Court's decision to take judicial notice of the site of the assault crime, *i.e.* a federal penitentiary, as being within the jurisdiction of the Court in that its location was not subject to dispute.) Courts may also take notice of "undisputed matters of public record," such as official court orders, but not the truth of the facts in the orders, especially when such facts are disputed. (*Lee v. City of Los Angeles*, 250 F.3d 668, ___ (9th Cir. 2001)).

Finally, when a court is taking judicial notice, it must give notice to the parties of what it is taking judicial notice of, and give the parties an opportunity to present evidence to the contrary. A jury must be given instructions that it may accept or reject the evidence of which the court has taken judicial notice when it weighs all the evidence. *Id*. at ____; *see, also*, *Shapleigh*, *supra*, at 475; *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 301-302. 57 S.Ct. 724, (1937) ("...notice.... does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable...Such at least is the general rule, to be adhered to in the absence of exceptional conditions."[cites omitted]); and *Garner et al v. Louisiana*, 368 U.S. 157, 173, 82 S. Ct. 248 (1961) ("...unless an accused is informed at the trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon.").

In sum, we learn that (1) taking judicial notice in a criminal jury trial is disfavored, especially when the Court takes judicial notice of facts that would prove or disprove an element

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32 "Those facts that must be found beyond a reasonable doubt by trier of fact before there can be a conviction." *Sundberg v. State, Alaska* , 667 P.3d 1268, 1271 (___).

"'Adjudicative facts,' of which trial court may take notice if fact is not subject to reasonable dispute, are those to which law is applied in process of adjudication; they are facts that, in jury case, normally go to jury." *Grason Elec. Co. v. Sacramento Mun. Utility Dis.*, D.C. Cal., 571 F.Supp. 1504, 1521 (____).

of the offense charged; (2) Courts may take judicial notice of public records, as the Judge did herein, but only to prove the existence of the orders, and not the proof of the facts therein, especially when the facts are subject to dispute; and (3) when a Court is going to take judicial notice in a criminal jury trial, the Judge should (a) give notice to the parties of what she is going to take judicial notice so the parties may provide rebuttal evidence; (b) allow the parties to present such rebuttal evidence; and (c) instruct the jury that the judicially-noted evidence may be accepted or rejected, and given whatever weight the jury sees fit, as with other evidence. These requirements are accepted in the general legal community; we now hold these requirements to apply to our Courts.

In the instant case, the judge did not follow these generally accepted tenets of judicial notice. She established, as a matter of law, two important elements of the criminal charge against Louie by finding that (1) the Court Order of April 29, 2002 showed that Louie had adequate notice that she would be in violation of a "lawful" court order if she removed her child from the custody of Pakootas; and (2) to show that Louie had legal alternatives available to her which would preclude the defense of necessity. Further, the Court did not give notice to the parties of her intent to take judicial notice of said facts, and she did not allow Louie to present evidence to rebut the facts. Finally, the Court is not a party to the action, so the Court cannot have exhibits. The judge took judicial notice of the civil orders she entered, in which she found that she made the correct findings regarding adequate notice, an issue for the jury.[33] For these reasons the Trial Court abused its discretion in not allowing Louie to present a defense of necessity, and we reverse on this ground.

B. BIAS AGAINST DEFENDANT'S SPOKESMAN

Louie states the Judge's admonition to Gargan not to "mislead the jury,"and the Judge's tone and demeanor towards him evinced a bias against her and her Spokesman, such that it constitutes reversible error. The Prosecutor disagrees; neither party submitted much in the way of legal authority for us to consider on this issue. After reviewing the record, however, we agree with Louie. If in fact it were just the one comment the Judge made to Gargan about not misleading the jury, there would be no showing of error. However, during the trial, both in front of the jury and outside of the jury's hearing, the Judge made several comments to Gargan

[33] The Court submitted two exhibits, marked "Court's exhibits" for consideration by the jury. They were civil court orders dated March 3, 2003 and May 28, 2004 respectively, signed by the Judge conducting the criminal trial. The orders were offered by the Court on the issues of custody and notice, it appears.

regarding his conduct and presentation . For example:

1. During his opening statement, Gargan stated that he would show Louie and Pakootas always had joint custody and visitation. He states further that the problem with one of the hearings was that Louie did not receive any notice, and that she had the right to notice and an opportunity to be heard, absolutely to be heard.

At this juncture in his presentation the Judge interrupted him and stated: "I'll correct you. The Court did send out notice and it was her duty to keep the court apprised of her whereabouts... you may present in your opening statement facts or evidence, however you are not to mislead the jury...."

2. On cross-examination of Pakootas, Gargan started to ask him about a 1999 Guardian Ad Litem report.

The Judge said: "Ms. Bray [prosecutor], do you have any objections?"

Bray objected, stating the report was outside the time period they were referring to; the Judge denied admission of the report without stating a reason.

3. At the close of the Tribes' case Gargan moved for a directed verdict, arguing that his client had no notice of the April 29, 2002 hearing, and, therefore, could not intend to violate the order. The Judge denied the Motion, finding that parties of a custody hearing have a duty to keep the Court apprised of their addresses. The Judge then stated that even if Louie had no service of the April 29th hearing, she was present at the April 26th hearing, which order gave residential custody of Oscar to Pakootas from February 26-April 14, 2002.

4. Gargan renewed his request to be allowed to argue the defense of necessity.

The Judge made the comments that she was not going to allow Gargan to essentially waste time by arguing with the Court. She stated that he has done this in other cases and that she wasn't going to allow it in this case.

Gargan stated was trying to make a Motion to Reconsider, but was not allowed to finish. The Judge interrupted him and said this was not an opportunity to argue with the Court. Gargan stated he was not trying to argue with the Court, but felt it was appropriate to renew his motion because the Tribes presented new evidence.

The Judge stated tersely "the ruling stands."

5. On direct examination of his client, Gargan asked her about the circumstances of her arrest and transport to the Colville Reservation for arraignment. Louie explained she was informed she was arrested on a material witness warrant; that she was held in custody for 32 days, sent from Lewiston to Spokane, from Spokane to Okanagan, and finally from

Okanagan to Court in Nespelem. She was arraigned and held without bail.

At this juncture in Louie's testimony the Judge interrupted and asked "Is that relevant?" In other words, the Court made an objection, *sua sponte*, then stated "the comments about the detention will be stricken and the jury is instructed not to consider it."

In reviewing the record, we find the Judge's actions were not reasonable, and did evince partiality or prejudice on the part of the Judge towards one of the parties. We have set out five separate instances which can be considered irregular behavior for a Judge, especially in a jury trial, but applicable in other hearings as well. We found the judge (1) chastised the spokesman in front of his client and the jury, arguing with him, too; (2) made evidentiary objections *sua sponte* on at least two occasions; and (3) introduced two pieces of documentary evidence as "court's exhibits."

Further, when listening to the record, the Judge's tone and demeanor towards Gargan evinced a bias against him. (*e.g.* telling him she will not allow him to waste time arguing like he always does). This bias is clearly shown in the record, and if we saw it, there is a good probability the jury saw it. By making objections for the Tribes on at least two occasions the Judge evinced a bias for the Tribes.

Any one of the instances stated above would not rise to a finding of bias; considering them collectively, all happening in the same trial before the same jury, does rise to a showing of clearly erroneous behavior on the part of the trial Judge. For these reasons the verdict must be vacated, and the matter remanded.

ORDER

Based on the foregoing, we find the Trial Court committed reversible errors both in disallowing Appellant Lisa Louie, to present a defense of necessity, and in evincing a bias against her Spokesman, Daniel Gargan, and for Appellee Colville Tribes. The guilty verdict entered herein is VACATED, and this matter is REVERSED and REMANDED for a new trial, consistent with the rulings in this Opinion.

It is so ORDERED.

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CTEC GAMING COMMISSION, Appellant,

vs.

Marianne MOSQUEDA, Appellee.

Case No. AP06-004, 4 CTCR 28

8 CCAR 61

[Elizabeth Fry, Omak WA, Spokesman for Appellant.
Marianne Mosqueda, appeared pro se.
Trial Court Case No. AD-2005-25007]

Argued June 16, 2006. Decided July 10, 2006.
Before Chief Justice Anita Dupris, Justice Gary Bass and Justice Howard E. Stewart.

Dupris, C.J., for the panel.

SUMMARY

This is an interlocutory appeal of a denial of an Affidavit of Prejudice brought pursuant to CTC §1-1-143. For reasons stated below, we find the Trial Judge who reviewed the Motion and Affidavit should have made a more detailed inquiry regarding whether there were sufficient facts to support the Appellant's allegations of potential bias on the part of Judge Aycock because (1) Judge Aycock has already heard an employment case regarding the same parties, and ruled in favor of the Appellee; and (2) some of the same facts alleged in the first hearing in which Judge Aycock had made a ruling will form a basis for the Appellant's allegations in the instant case.

Discussion

On April 19, 2006 CTEC filed an Affidavit and Motion to Recuse Judge Aycock from the employment appeal case at the trial level, alleging "Marianne Mosqueda, the Petitioner herein, has appeared before Judge Steve Aycock in an employment matter against this same Respondent. The matter has turned into a termination case. Information from the prior proceeding will come up in the fact-finding hearing in this case."

On April 26, 2006 Associate Judge Connie Johnston entered an Order Denying Motion to Disqualify Judge. She based her decision on three (3) grounds:

(1) it was untimely, having been filed 3 ½ months after the initial hearing in the case;

(2) the initial Order entered by Judge Aycock on January 3, 2006 constituted a discretionary ruling by the Judge, which is "trial action." CTC §1-1-143 requires that the Affidavit of Prejudice be filed before any trial action is taken; and

(3) Insufficient facts were alleged, which do not establish or set forth a basis for the motion to disqualify Judge Aycock.

A review of our rulings on Affidavits of Prejudice show that we have five (5) cases in which we have set some standards for such affidavits. From a review of these cases we find first that the standard of review is clearly erroneous. *See, Louie v. CCT*, 7 CCAR 46 (2004) ("The clearly erroneous standard applies here when we review the facts upon which the judge relied to deny the Affidavit..."). The decision to disqualify a judge is within the sound discretion of the reviewing judge, and is not automatic. *See, St. Peter v. CCT*, 1 CCAR 1, 1 CTCR 72 (1993) .

Any decision to disqualify a judge requires a careful review of the affidavit filed and a particularized inquiry into the fact alleged in each case. See, *In Re L.S.-L & R.S.-L, Minors v. CCT, et al*, 5 CCAR 46, 3 CTCR 33 (2001) Although additional fact-finding is not necessary upon every review of an Affidavit of Prejudice, one must be given in circumstances when "...the Affidavit contains serious allegations and very little fact....[D]ue process and judicial economy require the judge to consider whatever evidence can be offered for or against recusal." *See, Cleparty v. CCT*, 2 CCAR 19 (1993). "Each reason will, by its very nature, be unique to each party filing the Affidavit, dealing with the party's relationship with the Judge." *See, In Re L.S.-L & R.S.-L, Minors v. CCT, et al*, 5 CCAR 46, 3 CTCR 33 (2001), and *Ortiz & Louie v. CCT*, 7 CCAR 07, 4 CTCR 0 (2003) ("Applying basic fundamentals of due process, we hold that a fact finding should be held, whether by hearing or by sworn affidavits, to allow the parties an opportunity to put forth facts concerning their allegations in the Motion.")

HOLDING

When we reviewed the record below there was no indication that a fact-finding had taken place at the Trial Court in the instant case. Our records show that Judge Aycock has held two (2) status or pre-trial hearings regarding the termination of Ms. Mosqueda from her employment with CTEC. We assume this is the only record Judge Johnston had to review when she made her decision.

The Affidavit submitted by CTEC alleges Judge Aycock had already heard some of the evidence to be presented in the termination hearing. What CTEC failed to allege in its writtn affidavit was that the fact-finding was a separate case previously heard by Judge Aycock, in which the Judge found for Ms. Mosqueda and against CTEC. The case number of the hearing has not been submitted to us. Ms. Mosqueda confirmed on record that Judge Aycock did handle another employment appeal she filed against CTEC, in which she prevailed.

If we only look at the instant case, Judge Johnston's ruling that "[i]nsufficient facts were alleged, which do not establish or set forth a basis for the motion to disqualify Judge Aycock," is

not erroneous. However, the record does not appear to reflect that Judge Johnston considered the other case CTEC was referring to when it filed its Affidavit. It is important that the affiant state with particularity and clarity all the facts on which it is basing its request for recusal. This was not done herein.

The lack of clarity in CTEC's Affidavit should not preclude a review of all of the relevant facts, however. "[D]ue process and judicial economy require the judge to consider whatever evidence can be offered for or against recusal." *See*, *Cleparty v. CCT*, *supra*, at p20. The fact that Judge Aycock has made factual rulings regarding Ms. Mosqueda's employment with CTEC, and the conduct of Ms. Mosqueda which gave rise to the first fact-finding hearing being a part of the facts alleged in the instant case, warrant a more particularized review by Judge Johnston[34].

For the reasons stated above, we find cause to GRANT the interlocutory appeal, to REVERSE the decision to deny the Affidavit of Prejudice, and to REMAND for a more detailed inquiry regarding the allegations supporting the Affidavit, either by a review of sworn affidavits or a fact-finding hearing.

It is SO ORDERED.

[34] Our ruling below is dispositive, so we will not issue an Opinion on whether Judge Johnston's rulings finding (1) the motion was untimely; and (2) "trial action" had already taken place. We will not issue "guidelines" for the Trial Court to follow regarding Affidavits of Prejudice. We have previously held "...the issuance of guidelines for deciding on Motions for Disqualification is one for the trial court or should be made by the legislative body of the Tribe and not this Court." *Ortiz & Louie v. CCT*, 7 CCAR 07, 10, 4 CTCR 04 (2003).

Eldon L. WILSON, Appellant,

vs.

Rory GILLILAND, Appellee.

Case No. AP04-008, 4 CTCR 29

8 CCAR 64

[Daniel T. Gargan, Spokesman, appeared for Appellant.
James R. Bellis, Office of Reservation Attorney, appeared for Appellee.
Trial Court case no. CV-OC-2002-22404]

Argued December 17. 2004. Decided July 21, 2006.

Before Theresa M. Pouley, Presiding Justice, Justice David C. Bonga and Justice Elizabeth Fry

Pouley, A.J.

SUMMARY

Appellant Eldon Wilson appeals the April 5, 2004 "Order From Trial" affirming his dismissal from employment and finding that there was no violation of due process in the procedure used in the dismissal. Appellant asserts the Trial Court erred in finding he was afforded the due process because the Tribes improperly employed dismissal procedures under the Police Department Policy and Procedures and not the Colville Tribal Employment Policies and Procedures. Appellee argues Appellant was provided with due process and that in any event the Tribes are immune from suit.

Based on the reasoning below the Court of Appeals finds that the Trial Court was correct in applying the facts and law before it and therefore AFFIRMS the decision of the Trial Court.

FACTS

The parties and Trial Court agree that Appellant has been a valuable longtime employee of the Colville Confederated Tribes. *Trial Court Order,* page 7. The issue in this case arises from a change in Appellant's employment status in 2002 and his subsequent dismissal from that employment. Apellellant was appointed as the Law and Justice Administrator of the Tribes in the late 1990's. In 1998, the Tribes' Executive Director, Lou Stone, fired several program managers including Appellant. The Colville Business Council ("CBC") transferred Apellant into a newly created position. The position was subsequently abolished. In October of 1999, he was assigned to the Detention Facility project, which was a grant funded position, from 1999 to 2003. The Colville Business Council then created and assigned the job of Detention Project Administrator to Appellant.

In February of 2002, the Law and Justice Committee recommended to the CBC that

Appellant and his staff should be under the supervision of the Chief of Police rather than directly under the Committee. Appellant attended the meeting and was asked if he was "all right" with the change and Appellant did not object.

Subsequently, the CBC passed Resolution 2002-167 in March of 2002. The Resolution states, in pertinent part,

> The Correctional facility, its present employees[35] will be placed under and operate under the Colville Tribal Police Department. All employees will also adhere to sections of its policies and procedures manual that apply. The Detention facility and its employees will fall under the police department's chain of command and report to their appropriate supervisors in the Corrections chain of command. The Facility Administrator or Corrections Commander will report directly to the Chief of Police or designee.
> *Trial Record, Exhibit B.*

Appellant then resumed work reporting to Assistant Chief of Police Cory Orr. Appellant was not given a Colville Tribal Police Department Manual and was not oriented to the Department nor did Appellant request a Manual. On July 29, 2002, Appellant was placed on Administrative leave with pay and by letter dated August 8, 2002, Appellant's employment was terminated effective August 12, 2002. *See Exhibit F*, Trial Court record. Appellant timely appealed the termination as required under the Police Manual on August 15, 2002 to Appellee and then timely appealed the Appellee's decision to the Hearing Board, also required by the Police Manual. *See Exhibit G, Trial Court record*. An appeal hearing was held on September 20, 2002, as provided by the Police Department Manual, by a panel of three persons. The Appeal panel sustained four of the five grounds for termination and therefore upheld Appellant's termination. *See Exhibit H, Trial Court record*.

Appellant appealed to the Colville Tribal Court raising a variety of due process violations. The Trial Court affirmed the decision of the Appellee. Appellant appeals to this Court claiming 1) an improper modification of the conditions of Appellant's employment; 2) a violation of due process and *ex post facto* clauses; and 3) an error in denial of a default motion. Appellee replies that Appellant did receive "due process", that additional "pre-deprivation due process" is not required, and that the Tribes sovereign immunity bars this action. Numerous continuances before this Court, not detailed here, were properly requested and granted. Oral

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[35] The original signed resolution says "and future employees". However, this distinction has no practical or legal effect to the decision in this matter.

arguments were held on December 17, 2004.

DISCUSSION

I. Standard of Review.

We review the Trial Court's findings under a clearly erroneous standard to determine if the findings support the Trial Court's conclusions of law. In this case, the Trial Court properly limited its review to determining whether the administrative hearing violated the Colville Indian Civil Rights Act. This court, thus, must determine whether the Trial Court was clearly erroneous when it ruled that Appellant was provided with sufficient due process under the Civil Rights Act. *CTC v. Orr,* 5 CCAR 1 (1998); *CCT v. Naff,* 2 CCAR 50 (1995).

II. Did the Trial Court err when it affirmed the dismissal of Appellant and found that he was properly afforded due process under Colville Tribal Law?

The central argument of Appellant is that he was denied due process when his employment was terminated under the Police Department's policies and procedures. Appellant points to no error in the process he received, no lack of fairness in the review of the termination, but simply argues he is entitled to a "different" procedure. For the reasons stated in this opinion, this Court does not agree and affirms the decision of the Trial Court.

Appellant argues that due process requires consideration of three factors: "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used; and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail". Appellant's opening brief, quoting, *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). The Court agrees this legal standard is appropriate in reviewing due process claims. As then Judge Dupris found in *Swan v. CBC*, CV92-12121 (Colv. Tr. Ct 1992), "Due process is 'that which is due': notice and the opportunity to be heard The *Mathews* standard provides an appropriate definition of factors to consider in determining what process is "due".

In this case, the Trial Court judge was "not persuaded that there were due process violations" in the limited review under the Civil Rights Act. The Trial Court then identified an extensive process under which Mr. Gilliland's decision to terminate Appellant provided all the tenants of due process. Appellant was provided with notice of the official action, notice of the procedure to be used to review the decision, an opportunity for a hearing, an opportunity for an appeal of the original action before a three person panel which included an opportunity to call

witnesses, present evidence and cross-examine witnesses, and an opportunity to appeal the completeness of the process to the Colville Tribal Court and Colville Tribal Court of Appeals. These extensive procedures certainly meet the requirement of due process under Tribal law. Furthermore, the probable value of any additional procedures is low and a substantial burden to the Government would be very high—all without any likely benefit identified by Appellant.

Appellant next argues that he was not given notice of the actual process, namely under the Police Policy Manual, and thus should be entitled to a "different" process. The undisputed facts in the record are that the Police Manual applied by CBC Resolution 2002-167. (Tr. Ct. Order, page 8). When adoption of the resolution was considered, Appellant was present and did not object (Tr. Ct. Record, Testimony of Deb Louie at 10:04:51). He was provided actual notice of the Resolution which informed of the applicability of the Police Manual (Tr. Ct. Ex. B, "cc: Eldon Wilson"). The procedures of the Manual were applied as required (Tr. Ct. Order, pages 10-11). This is all the "process that was due". We find as the Court in *Swan* did: "[j]ust because one disagrees with the decision does not mean due process was not provided."

III. The Tribes did not violate the Civil Rights Act requirement that they shall not pass any "bill of attainder or ex post facto law".

Appellant next argues that failure to orient the appellant on applicable policies violates the prohibition against *ex post facto* laws and constitutes an illegal bill of attainder. Appellee responds that such prohibition only applies to actions by the legislature finding certain people "guilty" or retroactively changing their criminal punishment. The Court agrees with Appellee that these protections do not apply in this employment case. We agree with the United States Supreme Court that:

> These clauses of the Constitution are not of the broad, general nature of the Due Process Clause, but refer to rather precise legal terms which had a meaning under English law at the time the Constitution was adopted. A bill of attainder was a legislative act that singled out one or more persons and imposed punishment on them, without benefit of trial. Such actions were regarded as odious by the framers of the Constitution because it was the traditional role of a court, judging an individual case, to impose punishment.

U.S. v. Brown, 381 U.S. 437, 440 (1965). There is no precedent in any cited law nor in any cultural principles to apply these principles beyond criminal proceedings and this Court declines to do so in this case.

IV. Appellant's remaining arguments of Modification of Employment Contract and Request for a Default Judgment are new arguments on appeal and are stricken.

Appellant originally requested the court to reverse the Trial Court claiming the actions of

the Tribe improperly unilaterally changed his employment contract. 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. Appellant requested reconsideration and submitted the argument to Court for the appeal. The Court denies the reconsideration.

Appellant similarly argues for the first time in the 2nd Opening Brief that he is entitled to a default judgment. Appellant failed to identify it as an issue on appeal, did not identify the record to review and did not identify it as an issue on the initial hearing. Thus, under COACR 5(c) the Court will not entertain such issues.

Regardless of whether the argument is stricken, these arguments highlight the reason behind the rule disallowing new arguments on appeal. Both arguments would require the finding of specific facts and evidence which were not developed at the Trial Court level. The facts found by the Trial Court actually support that there was no unilateral change of employment. The Trial Court found that Appellant had notice both at the meeting adopting the resolution and the resolution itself, had a hearing and had an appeal on the termination and this was all with actual notice that the Police Manual was to apply.[36]

V. The Court issues no ruling on the issue of sovereign immunity because it is unnecessary in light of the Court other rulings.

Appellee agues that sovereign immunity limits both the type of review and the remedies available if the Appellant prevails. The Court issues no ruling on this issue because it is unnecessary in light of its opinion affirming the Trial Court's decision.

It is therefore ORDERED that:

The decision of the trial court is AFFIRMED. This matter is remanded to the Trial Court for action consistent with this order.

[36] Appellant argues that the Police Department had an affirmative obligation to provide a Manual and failed to meet their requirement. However, at oral argument, Appellant conceded that section 1.03.00 does not require issuance of the Manual but places duties on the officer *when* a Manual is issued. This Manual was available to Appellant.

Randy ZACHERLE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP06-006, 4 CTCR 30, 33 ILR 6087

8 CCAR 70

[Tena Foster, Office of Public Defender, for Appellant.
Joni Bray, Office of Prosecuting Attorney, for Appellee.
Trial Court Case No. CR-2006-29043]

Initial Hearing held July 21, 2006. Decided July 31, 2006.

Before Justice Gary Bass, Presiding; Justice Dave Bonga; and Chief Justice Anita Dupris.

Dupris, CJ

SUMMARY

Final Judgment at the trial level was entered May 17, 2006. The Appeal herein was filed on May 31, 2006. The Appeal was filed within the time allowed by our Court Rules. The statutory definition of "Time" found at CTC §1-1-366 does not exclude weekends and holidays in counting ten (10) days or more. The Appellee, through its Spokesman, Joni Bray, Tribal Prosecutor's Office, filed a Motion to Dismiss the Appeal in our Court, arguing the statutory definition of "Time" superceded our Court Rules. She did not ask for a hearing on her Motion to Dismiss.

The Appellant filed a Motion to Stay Execution and for Bond at the trial level. Ms. Bray objected, offering her arguments regarding the constitutionality of the Court of Appeal's Court Rules (COACR) to the Trial Court, and asked the Trial Judge to deny because the Appeal was not "perfected" as being untimely filed. Chief Judge Aycock agreed with the Appellee and found cause to deny the stay of execution, holding that for the purpose of staying executions of judgment pursuant to CTC §1-1-285, the Court of Appeals' rules "are not Rules of Court. Appeals must be timely filed under CCT [*sic*] 1.1.283, not COACR 6(a)."

For reasons stated below, we find (1) the Court of Appeals' Court Rules do comply with the laws of the Tribes; (2) the Trial Court exceeded its jurisdiction in deciding whether or not the appeal was perfected; and (3) the Appeal is timely filed.

We reverse the Trial Court's holdings that our rules are invalid and remand to the Trial

Court for a new hearing on the Stay of Execution and Bond consistent with our rulings.

ISSUES

A. Are the Court of Appeals' Court Rules invalid as violating of the laws of the Tribes?

B. Did the Trial Court exceed its jurisdiction in deciding the appeal was not perfected?

DISCUSSION

Chief Judge Aycock was asked to rule on whether the Appeal filed herein was "perfected," which is a prerequisite to mandatory stay of judgment in criminal cases. CTC §1-1-285.[37] He recognized that the question of whether an Appeal is perfected is a question for the Court of Appeals, and not the Trial Court. ("This Court and the Court of Appeals have both held that it is up to the Court of Appeals to determine if the appeal has been perfected.... ", Order Denying Stay, entered July 3, 2006 and signed July 7, 2006). It appears he felt compelled to answer the question anyway, which was pending before the Court of Appeals on the Tribes' Motion to Dismiss. He held:

> "However, in this case, neither of the parties nor the Court of Appeals has filed anything from the Court of Appeals indicating that they have determined that this appeal has been perfected. However, no stay under CTC 1-1-285 is required unless the appeal is perfected. Thus, this Court has no alternative than to determine if the appeal is perfected." *Id.*

In his discussion of the applicability of the Court of Appeals' Court Rules, Judge Aycock reviewed the following statutory laws: CTC §§ 1-1-142, Rules of Court, Procedures[38]; 1-1-283[39],

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37 Unless otherwise provided by this Chapter, in any case where a party has perfected his right of appeal as established by this Code or by Rules of Court, a stay of execution of judgment shall be granted....(emphasis added).

38 The time and place of court sessions, and all other details of judicial procedure not prescribed by the regulations of this Code shall be governed by Rules of Court promulgates as herein provided. It shall be duty of judges of the Court to make recommendations to the Council for enactment or amendment of such Rules of Court as they believe to be in the interests of improved judicial procedures. Rules of Court, enacted, or amended in the above manner, will be made part of this Code, but failure to so codify them shall not affect their validity. [emphasis added]

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

Notice of Appeal; 1-1-285[40], Stay of Execution; and 1-1-366, Definition of Time.[41] He concluded, after reviewing these statutory provisions, as well as the Constitutional mandate that he "enforce and interpret" the laws of the Tribes and that the Court of Appeals' Court Rules did not comply with the statutes of the Tribes.

A. Are the Court of Appeals' Court Rules invalid as violating of the laws of the Tribes?

Based on the reasoning below, we hold the Court Rules comply with the laws of the Tribes, and as such are not invalid. We first looked at the history of the Court Rules. We started working on court rules in 1996, soon after our appointment under the new Constitutional Amendment X which established the courts as a separate branch of the government.

In 1998 we sent our draft of the Court of Appeals rules to, *inter alia*, each member of the Business Council as well as each member of the Colville Tribal Court Bar, giving them notice that these were the rules we wanted to adopt, and asked for comments.

We did not receive any comments from the Business Council, neither on the rules specifically nor the assertion that we were going to pass them as our Court Rules. For the next two years we worked on the rules. In May, 2003 we sent a copy of our final product to each judge, member of the Bar, and each Councilman, stating that unless there were further concerns or comments we would enact the Rules on June 15, 2003. The Court Rules were adopted under the Court of Appeals inherent and statutory authority to develop procedures for practice before it.

The Trial Court Judge stated he had a Constitutional duty to interpret the Code. We also have a Constitutional duty to enforce and interpret the laws. We interpreted the laws regarding rule-making and enacted our rules accordingly. We gave adequate notice to the Tribal Council and its attorneys, as well as the lower court and all practitioners.

The Code recognizes it is the Courts' duties to "to make recommendations to the Colville Business Council (CBC) for enactment or amendment of such Rules of Court as they believe to be in the interests of improved judicial procedures." (CTC §CTC 1-1-142). Further, the statute recognizes three areas in which it is within the province of the Courts to provide

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40 Unless otherwise provided by this Chapter, in any case where a party has perfected his right of appeal as established by this Code or by Rules of Court, a stay of execution of judgment shall be granted....(emphasis added)

41 In computing any period of time prescribed under this Code, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which even the period of time prescribed runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday. When the period of time prescribed or allowed is less than is less than seven (7) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

procedural rules: (1) time; (2) place; and (3) all other details of judicial procedure not prescribed by the regulations..." (*Id*). "Failure of the CBC to codify the rules does not affect their validity." (*Id*.) (emphasis added).

This approach to enactment without action by the CBC appears to be modeled on the federal system of rule-making. In *U.S. v. Robinson*, 361 US 220 (1960) the Supreme Court discussed this method. It said:

> Under the Act of June 29, 1940, 54 Stat. 688, as amended (now 18 U.S.C. 3771), this Court was authorized to prescribe Rules of Criminal Procedure to and including verdict, which would become effective upon passive acceptance by Congress. Under that Act and the previous authority (the Act of February 24, 1933, 47 Stat. 904 - now 18 U.S.C. 3772), and with the aid of an advisory committee, this Court promulgated the Federal Rules of Criminal Procedure. Rules 32 through 39 were made effective by order of the Court... (emphasis added).

Our statute also allows for "passive acceptance" by our Legislators. In 2003 the Council, its attorneys, the Reservation Attorneys Office, all the members of the Bar, and all of the Judges were given copies of the rules with the understanding that they would by adopted by this Court unless there were objections or further comments by any of those given notice. No one objected to our interpretation of the law based on CTC §1-1-142. Our rules are procedural in nature. It is an area long-recognized in jurisprudence to be within the responsibility of the judiciary.

Judge Aycock's reliance on CTC §1-1-366 [Definition Section] (Definition of "Time," adopted in 1982) is misplaced. The Constitutional Amendment separated the Courts from the Council and established a Judicial Branch of government. Some of the Code provisions pre-date this Constitutional Amendment, and were written when the Courts were legislative courts. The laws must be interpreted to give more weight to the latter, more specific laws. We cannot find any authority which would give more weight to a general definition section than to this Court's ability to interpret laws as instructed under the Constitution.

There are many laws still in the Code which are now in conflict with what constitutional courts' powers and responsibilities are or should be. It is our duty to interpret them in light of all of the laws, and not give them the narrow reading given by the Trial Court. It is our responsibility to establish uniform procedural rules for all those who file cases in our Court. "Courts have both the inherent and statutory power to define the procedures to be used by judges,

practitioners and the public to implement judicial jurisdiction. See, Weinstein, Rule-making by the Courts, The Improvement of the Administration of Justice 127-135 (Klein, ed., 6th ed. 1981)." *Reservation Service v. Albert,* No. SC-CV-05-94 (Navajo 03/16/1995).

The Code provides that we can define "perfection of appeal" by Rules of the Court (CTC §1-1-285); it provides we can establish the requirements for perfecting an appeal (CTC §1-1-283); it recognizes that "time" is procedural requirement we can address in a court rule (CTC §1-1-142). Our Court Rules are valid both under the written laws of the Tribes and within our inherent powers as a separate branch of the government.

B. Did the Trial Court exceed its jurisdiction in deciding the appeal was not perfected?

Based on the reasoning below, we hold the Trial Court did exceed its jurisdiction in deciding whether the Appeal had been perfected. The Trial Court has jurisdiction to decide the Stay of Execution and Bond. If the appellant has not proved to the Trial Judge the matter was perfected, the statute allows him to deny the stay of execution. It does not give him jurisdiction over the legal issue of perfection of appeal.

Final Judgment at the trial level was entered May 17, 2006. The Appeal herein was filed on May 31, 2006. The Appeal was filed within the time allowed by our Court Rules. The Trial Judge first found "This Court and the Court of Appeals have both held that it is up to the Court of Appeals to determine if the appeal has been perfected." (Order Denying Stay entered July 7, 2006, at p4). He recognizes his lack of jurisdiction on the issue of perfection of appeal. Then he creates his own Hobson's choice by stating: "However, in this case, neither of the parties nor the Court of Appeals has filed anything from the Court of Appeals indicating that they have determined that this appeal has been perfected....Thus, this Court has no alternative than to determine if the appeal is perfected." (*Id*)

First, our Court Rule 6(e) states when the appeal is perfected: "An appeal is perfected when all of the applicable elements of this rule [6] are met." The requirements include the 10-day after final judgment requirement; the information needed in the Notice of Appeal; and bond/waiver of bond when required by the Code. Both the Trial Court and the parties have a copy of these court rules, including Rule 6(e), which tells them when an appeal is perfected.

Ms. Bray, on behalf of the appellee, filed a Motion to Dismiss the Appeal in our Court but never asked for a hearing on the motion. We hold Court every third Friday of the month. Both parties have had notice that this case was on the July docket for an Initial Hearing. It is the

practice of this Court to address any preliminary matters at the Initial Hearing that have not been dealt with before that date. Prior to the Initial Hearing Ms. Bray filed an objection to a stay of the judgment at the trial level and made the same arguments that our Court Rules did not apply regarding timeliness of filing, thereby negating a perfection of an appeal. In other words, it was a collateral attack on the issue pending before us.

The Trial Judge has jurisdiction to decide bond and stay of execution. He had constructive notice under Court of Appeals Court Rule 6 that, at a minimum, we have established a preliminary finding the appeal was perfected in that we opened the case and set it for an Initial Hearing. He should have declined on the question of perfection of appeal since the issue was already pending before us. If his concern was that the defendant/Appellant was a danger to the community, he had the authority to address this concern in setting bail or finding cause to deny bail.

Even if Chief Judge Aycock felt he had no alternative but to deny the stay because the Appellant failed to show him the appeal was perfected, he went too far in deciding whether our Rules were invalid. He overstepped his jurisdiction.

Based on the foregoing, we hold (1) the Court of Appeals' Court Rules comply with the laws of the Tribes; (2) the Trial Court exceeded its jurisdiction in deciding whether or not the appeal was perfected; and (3) the Appeal is timely filed.

We REVERSE the Trial Court's holdings that our rules are invalid and REMAND to the Trial Court for a new hearing on the Stay of Execution and Bond consistent with our rulings.

In Re GORR
Caroline Marchand, Appellant,
vs.
Colville Confederated Tribes, David Gorr , J. G., Appellees.
Case No. AP05-014, 4 CTCR 31
8 CCAR 76

[Mike Larsen, Office of Public Defender, Spokesman for Appellant.
Evelyn Van Brunt, Office of Prosecuting Attorney, Spokesman for Appellee Tribes; Tim Liesenfelder, Spokesman for Appellee D. Gorr; and Lane Throssell, Office of Legal Services, Spokesman for Appellee, J. G.
Trial Case Number MI-2005-25029]

Argued June 16, 2006. Decided October 9, 2006.
Before Chief Justice Anita Dupris, Justice Edythe Chenois and Justice Conrad Pascal

Dupris, CJ for the Panel,

SUMMARY

By Court Order entered on October 10, 2005, J.G., a minor, was found to be a Minor-In-Need-Of-Care (MINOC) only as to his mother, Caroline Marchand. The hearing regarding his father, David Gorr, was continued for lack of personal service on the father. The Trial Court found that Caroline Marchand was not able to properly care for J.G. because of her illegal drug use, which had a negative impact on the child. Caroline Marchand filed a timely appeal herein, alleging the decision of the Trial Court was contrary to the law and evidence, and further alleging irregularity in the proceedings.[42]

Briefs were submitted only from the Appellant by her attorney, Michael Larson, CCT Public Defender's Office, and J.G.'s attorney, Lane Throsell, CCT Legal Office. Neither the Appellee, CCT's Children and Family Services' (CFS) Spokesman, the CCT Prosecutor's Office, nor the father's attorney, Timothy Leisenfelder, submitted briefs. Oral arguments were held before the Court of Appeals on June 16, 2006.[43]

Based on the reasoning below, we hold the Trial Court erred in finding J.G. a MINOC as to his mother in that the evidence presented did not meet clear, cogent, and convincing proof as required by the law. We reverse and remand.

Facts

On August 30, 2005, Appellee CFS filed a Petition for Minor-In-Need-Of-Care for J.G., a minor. CFS alleged "The minor has not been, or cannot be provided with adequate food, clothing, shelter, medical care, education or supervision by her [*sic*] parent, guardian or custodian necessary for their [*sic*] health and well-being."[44] Specifically CFS alleged, as facts to support

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[42] The minor, through his counsel, also filed an appeal, AP05-015, alleging judicial misconduct. He later withdrew the appeal.

[43] Only the minor's attorney presented arguments. CFS's failure to file a brief precluded it from presenting arguments. The Appellant's attorney failed to appear until after the arguments were heard; the father's attorney neither filed a brief nor appeared.

[44] It appears to be a form petition; the section above was checked; other sections not checked include the language: "[ ] The minor has been subjected to injury, sexual abuse, or negligent treatment or maltreatment by a person who is legally responsible for the minors' health, welfare and safety are harmed thereby; ...[ ] The minor has been committing delinquent acts as a result of parental pressure, guidance, or approval;[ ] The minor has been committing status offenses."

This language is taken from CTC §5-2-30(l), definition for minor-in-need-of-care. CTC §5-2-30(m) states: "'Negligent treatment or maltreatment' shall mean an act or omission which evinces a serious disregard of consequences of such magnitude as to constitute a clear and present danger to the minor's health, welfare and safety...."

its petition against Appellant Caroline Marchand, that:

> "The mother tested positive for cocaine and THC on August 15, 2005 at a temporary custody hearing.
>
> The mother was seeking custody of the minor from the father, David Gorr, who has legal custody.
>
> Temporary custody was granted to the Tribes on August 22, 2005.
>
> The father and mother agreed to do a voluntary placement agreement, which was scheduled for August 30, 2005. Neither parent showed for the hearing."

No other allegations were made regarding Appellant's fitness as a parent.

At a MINOC hearing on September 29, 2005, the Trial Court accepted evidence regarding the minor's school attendance problems and his involvement in a delinquency act which was being addressed by the state court. Further, a CFS caseworker testified to an incident when he went to the Appellant's house, alleging she wouldn't let the caseworker into the house, and her speech was slurred. There is nothing to indicate in the record that the child was with Appellant at that time. Finally, the Judge, *sua sponte*, gave judicial notice to an on-going civil custody case between the parents, stating its record evinced a "pattern/history of alcohol and illegal drug use." None of the alleged facts regarding the child's behavior nor the pattern of alcohol or drug abuse was set out in the Petition for MINOC.

The Trial Court made ten separate findings of fact[45] in support of her legal conclusion the minor is a MINOC. Those relevant to this Appeal are:

> "2. Mother stipulated her urinalysis on August 15, 2005 was positive for cocaine and THC. She admits to the use but testified it was only once for medicinal purposes for pain control. She testified she hasn't used it since. She testified she has a prescription for Vicodin now.
>
> 3. [Caroline Marchand] stated she would not take a drug test today.
>
> 4. [Caroline Marchand] testified the minor has been staying mostly with her for the last year. She testified the minor sometimes spends time with his Dad....

[45] The Judge entered fourteen findings of fact, but the last four are actually conclusions of law. They will be addressed as such.

> 6. The minor's school attendance and grades are poor. [Caroline Marchand] testified [the father] would take the minor to Inchelium for days at a time and that he also missed some school due to illness....
>
> 8. [A CFS caseworker] visited Caroline Marchand's residence on September 13, 2005. He was not invited into the home. He testified it appeared Caroline Marchand's speech was slightly slurred and that she was somewhat unsteady on her feet. He thought she was intoxicated. He did not smell alcohol on her breath, however. He does not have any training in alcohol abuse.
>
> 9. The minor got in trouble in July for breaking into a fireworks stand. He was hanging out with some older boys, ages 11 to 15.... Caroline Marchand testified she was unaware of this incident. This was the first time she heard of it."

The Trial Court then entered legal conclusions that Caroline Marchand was not able to properly care for J.G. because of her cocaine and marijuana use, which has a negative impact on the child. The Judge stated further:

> "There are no exceptions under tribal law or under any resolution for the medicinal use of cocaine or marijuana. Both are illegal drugs. Drug and alcohol abuse is a prevalent problem on the reservation. The Court cannot condone the use of these illegal drugs."

The Trial Court found it was in the minor's best interests to be found a MINOC.

Issue

> **DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY FINDING THE MINOR TO BE A MINOC AS TO HIS MOTHER BASED ON THE EVIDENCE PRESENTED?**

Other issues have been raised, but because of our findings herein, we do not need to rule on them.[46]

[46] The other issues are: Did the Trial Court Judge commit reversible error by considering evidence not supported by the allegations in the

Standard of Review

We review findings of fact under the clearly erroneous standard, and errors of law *de novo*. *Colville Confederated Tribes vs. Naff,* 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995); *Wiley, et al v. Colville Confederated Tribes,* 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (1995); *In Re The Welfare of R.S.P.V.,* 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998).

Further, when reviewing MINOC findings, in order to overturn the Trial Court, we must find an abuse of discretion. *In Re The Welfare of J.L.V., J.M.V., & L.B.*, 8 CCAR 23, 27; 4 CTCR 21; 32 ILR 6142 (2005) ("The determination of the best interests of the child is a highly factual inquiry which will not be disturbed on appeal without a showing of abuse of discretion.").

Discussion

Appellant argues that the only evidence presented regarding her drug use was her own testimony, when she stipulated she had tested positive for cocaine and THC on August 15, 2005. She also stated it was a one-time use for pain control. She asserts there was no evidence from the Tribes to show the minor had been adversely affected by her actions, and in fact, the evidence showed the minor was not at Appellant's home during the time she used the drugs. Further, Appellant argues, the Tribes did not present evidence showing a detrimental impact on the minor because of the one-time drug use by Appellant, nor did the Tribes showed the one-time use of the drugs affected Appellant's ability to properly parent the minor.

As to the evidence on the minor's poor school attendance, and the one home visit by the caseworker, Appellant argues these allegations were not in the Petition for MINOC, and she did not have adequate notice they would be considered at the MINOC hearing.

Appellee/minor child, argued that we should accept evidence not referred to in the Petition for MINOC because the Juvenile Code is to be construed liberally in order to protect the best interests of the child. During Oral Arguments he agreed that the findings did not support clear, cogent and convincing evidence the minor was a MINOC, however.

The Trial Court found, as relevant facts, that:

(1) on a specific date Appellant tested positive for cocaine and THC;

(2) Appellant asserts it was a one-time use;

(3) Appellant refused to take a drug test on the day of the MINOC hearing;

MINOC Petition in the Adjudicatory Hearing, in violation of Appellant's due process rights? Did the Trial Court violate Appellant's due process rights by taking judicial notice, *sua sponte*, of a pattern of alcohol/drug abuse found in a civil custody case involving the parents? Did the Trial Court Judge err in making her decision based, in part, on her personal views of illegal drugs and drug activity on the Reservation?

(4) the minor had poor school attendance, which was explained by Appellant as relating to (a) illness, and (b) his father taking him out of school for extended periods of time;

(5) the minor had been involved in a delinquency act, of which Appellant testified she did not know happened until Court that day; and

(6) a caseworker with no training in alcohol abuse, and who did not smell any alcohol, observed Appellant one day with slurred speech.

The Trial Judge also referred to a non-MINOC custody case involving the parents herein, as well as to her personal opinion regarding drug use on the Reservation. Neither of these findings are relevant to a finding of MINOC.

The Court concluded Appellant was not able to properly care for the minor because of her cocaine and marijuana use in that her drug use "has a negative impact on the child." The Court found it in the best interests of the minor to be adjudicated a minor-in-need-of-care. Again, the Trial Judge's legal conclusions regarding a non-MINOC custody case and the Judge's personal views on use of illegal drugs are not relevant legal conclusions.

The sole purpose of an Adjudicatory Hearing is to hear evidence that gave rise to the MINOC petition. If the evidence proves by clear, cogent and convincing evidence the minor is a MINOC, the Petition is to be granted. CTC §5-2-261, **Adjudicatory Hearing—Proof**. CFS alleged the minor was a MINOC as defined in CTC §5-2-30(l)(3): "'Minor-in-need-of-care' shall mean a minor who has: ...(3) Not been or cannot be provided with adequate food, clothing, shelter, medical care, education or supervision by his parent...necessary for his health and well–being...." The minor-in-need-of-care definition also includes children who are abandoned; who are abused, and/or neglected; who are committing delinquency offenses with parental approval, guidance or pressure; and who are committing status offenses.[47] None of these four latter situations were alleged in the Petition for MINOC.

This Court has recognized the importance best interest standard for MINOC decisions, as well as factors for the Trial Court to consider when assessing whether it is in the best interests of a minor to be declared a MINOC. (*See, In re the Welfare of L.S., M.S., and C.S.*, 3 CCAR 72, 74 (1997) (the "Welfare of child is paramount consideration in determining the best interests of the child."); *In Re The Welfare of J.L.V., J.M.V., & L.B.*, 8 CCAR 23, 26 (2005) (standards for best interests.... are in the "Purpose and Construction" section of the Juvenile Code.[48]) We held the list of factors in the "Purpose and

[47] CTC §5-2-30(1), (2), (4), and (5).

[48] "1. The appropriateness of care, guidance and control given to a child....; 2. Preserving and strengthening the child's family which may include considerations of the harm suffered by the child in severing family relations....; 4. The appropriateness of the home environment including the availability of a safe and stable home, and the effect of abrupt changes in that environment....; and (7) The attributes of the child including his or her age, physical well-being, and depending on the age of the child perhaps the child's wishers and certainly any harm to be suffered by the child by a substantial change in circumstances...."[cites omitted] at p27

Construction" was not exhaustive, but illustrative of the type of factors to consider. *Id* at 27.

There must be clear and convincing evidence of parental neglect or abuse before a child can be adjudicated a minor-in-need-of-care. CTC §5-2-261. "Clear and convincing evidence is such that the 'proponent's assertion is highly probabl[e], and is such as to cause the court to be convinced 'without hesitation.'" *In Re The Welfare of R.S.P.V.*, 4 CCAR 68, 72, 26 ILR 6039 (1998). Further, each relevant fact must correlate to a legal conclusion. *In Re the Welfare of A.T. and J.T., Minors*, 8 CCAR 32, 35, 32 ILR 6139 (2005) ("By reviewing the Findings of Fact and Conclusions of Law in the Order of the Adjudicatory Hearing we should be able to make a direct correlation between the allegations in the Petition and the proof of said allegations at the Adjudicatory Hearing.").

Here, we have three (3) facts relating to drugs: that Appellant tested positive for them once, two (2) months prior to the adjudicatory hearing; that she stated it was a one-time use, and she now has a prescription drug for pain; and that Appellant refused to take a drug test before the hearing. Giving the most deference to the findings, none of these "facts," nor the sum total of them established that Appellant's one-time drug use makes it highly probable she is unable to parent her child adequately. We hold there was no clear, cogent and convincing evidence regarding the effect of Caroline Marchand's one-time drug use on her fitness or ability to parent J.G., a minor.

The facts found regarding J.G.'s poor school attendance show Caroline Marchand testified the minor was ill, and the minor's father took him out of school for extended periods of time. This is not clear, cogent and convincing evidence to show it is highly probable Caroline Marchand is an unfit parent.

The facts found regarding J.G. committing delinquency acts cannot show a high probability that Caroline Marchand is unfit to parent. She testified she hadn't even heard of the incident until the date of the hearing. There is no finding of fact that Caroline Marchand did know and failed to provide adequate supervision. There is no other relevant fact found by the Trial Court which can support a legal conclusion of clear, cogent and convincing evidence that Caroline Marchand is unable to provide adequate supervision for J.G.. For these reasons we hold the Trial Court erred in finding J.G. a minor-in-need-of-care as to his mother, Caroline Marchand, in that the facts do not support a finding of minor-in-need-of-care by clear, cogent and convincing evidence. This matter shall be reversed and remanded.

The parties raised the issues of the Trial Judge improperly taking judicial notice of a civil case involving the parents herein, as well as the Trial Judge improperly interjecting her personal views of the drug problems on the Reservation. These are legitimate concerns. We have set out a standard for the Trial Court to follow when taking judicial notice in criminal cases. *See, Louie v. CCT*, 8 CCAR 49, 57-58, 4 CTCR 27 (2006). Without further analysis, we hold these same standards should be applied to juvenile cases, too, in that important parental rights are being affected.

It is improper for a judge to interject her personal opinion on matters before her. It affects the appearance of fairness, and may support a finding by this Court of partiality and bias. We will not analyze the Trial Judge's statements herein under the abuse of discretion standard because we have found reversible error already.

Based on the forgoing, we now hold the Trial Court committed reversible error in finding J.G. a minor-in-need-of-care as to his mother based on evidence that does not rise to clear, cogent and convincing proof. We REVERSE and REMAND for Orders consistent with this Opinion.

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Jennifer STONEROAD-WOLF, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case No. AP06-012, 4 CTCR 32
8 CCAR 84

[Elizabeth Fry, Spokesperson for Appellant.
Chad Marchand, Office of Prosecuting Attorney, spokesperson for Appellee.
Trial Court Case No. CR-2006-29120]

Interlocutory Appeal. Decided October 11, 2006.

Before Chief Justice Anita Dupris, Justice David C. Bonga and Justice Conrad Pascal

DUPRIS, CJ

SUMMARY

Jennifer Stoneroad-Wolf, Appellant, was arraigned on May 15, 2006 on the charge of Battery. A jury trial was set within ninety (90) days of the arraignment, *i.e.* on June 22, 2006, as provided by CTC §2-1-102. On May 30, 2006, Appellant requested, and was granted, a continuance of the jury trial. It was reset for July 13, 2006, still within the ninety (90) days, which ended August 14, 2006.

On July 10, 2006, only three (3) days before the jury trial, Appellee, Colville Tribes, moved for continuance on the basis that one of the prosecutor's was on maternity leave and the other one had a conflict of interest in that she was related to the defendant/Appellant. Appellant objected and asserted her speedy trial right. The continuance was granted. Appellant's spokesman was not available on August 10, 2006, so the trial was set for August 17, 2006, three (3) days beyond the expiration of ninety days from the date of the arraignment.

On August 14, 2006, three (3) days before the scheduled jury trial, Elizabeth Sandoval-Marchand, Deputy Prosecutor, once again asked for a continuance, stating the Tribes was not ready to go to trial in that Evelyn Van Brunt, deputy prosecutor, was on maternity leave until October. She stated further that Jonnie Bray, the other deputy prosecutor, had a conflict of interest. There were apparently two other deputy prosecutors in the office, Ms. Sandoval-Marchand and Chad Marchand (who represents Appellee herein), but no reference was made to either of them or their ability to go forward on the trial at the hearing on August 14,

2006.[49] Defendant objected to the continuance and asserted her speedy trial right again. She also moved to dismiss the case.

The Judge denied the motion to dismiss and granted the Prosecutor's motion to continue on the basis of Ms. Van Brunt's unavailability until October, 2006. There are no written orders on either motion.[50] The defendant filed a timely Notice of Interlocutory Appeal on August 21, 2006, asking that we direct the Trial Court to dismiss the case because it set the next jury trial on October 19, 2006, sixty-six (66) days beyond the end of the 90-day limit, without a waiver from the defendant and in violation of her right to a speedy trial.

We directed the parties to file briefs on two (2) issues: (1) whether the issue raised by Appellant met the requirements of an Interlocutory Appeal; and (2) whether the Trial Court erred in continuing the trial beyond the 90-day limit in violation of Appellant's right to speedy trial. We grant the Appeal, and for reasons stated below, reverse and remand.

ISSUE 1.

The first issue, whether the Interlocutory Appeal met the requirements of our Court Rules regarding Interlocutory Appeals, was not adequately briefed by either party. Appellant set out the standards for review found in COACR 7-A[51] but made no arguments for which provision supported her Interlocutory Appeal. Appellee argued none of the grounds applied and the question would be moot by the time the Court of Appeals heard and considered the Appeal.

The main issue presented, *i.e.* the parameters of Appellant's right to a speedy trial, is a significant question under the particular facts of this case, which is discernible from the sparse

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49 In his brief to this Court Mr Marchand offers explanations why neither he nor Ms. Sandoval-Marchand were able to prosecute the case on August 17, 2006. A review of the hearing record reveals that none of these explanations were presented to the Trial Court for its consideration when it assessed good cause to continue the jury trial. Since the Trial Court did not consider the explanations at the trial level, we will not consider them herein.

50 Upon a review of the Trial Court file the only documents that reflect the matter is continued are (1) a computer-generated report of action sheet showing the next court date; and (2) a Promise to Appear document signed by the Defendant/Appellant acknowledging the next scheduled date. We had to review the oral record of the hearing to ascertain the basis of the Judge's ruling for continuing the case beyond the 90-day limit. The record indicates the Judge states he finds "good cause" to continue it, without further elaboration. He then asks if Ms. Van Brunt is available in October, and then sets the next jury trial on October 19, 2006, apparently to accommodate Ms. Van Brunt.

51 7-A. GROUNDS FOR INTERLOCUTORY APPEAL. The following are grounds for interlocutory appeal: (a) the Trial Court has committed an obvious error which would render further proceedings useless; or (b) The issue presented involves a controlling issue of law as to which there is a substantial ground for difference of opinion and that an intermediate appeal from the decision may materially advance the ultimate termination of the litigation; or (c) The Trial Court has so far departed from the accepted and usual course of judicial proceedings as to call for a review by the COA; or (d) it is a significant question of law under the Colville Tribal Constitution.

record and briefs of the parties. For this reason alone we grant review. Inadequate briefing by the Spokesmen in a case should not, by itself, deter this Court from reviewing important questions of law regarding criminal defendants.

ISSUE 2.

The second issue is whether the Trial Court violated Appellant's right to a speedy trial by setting the trial sixty-six (66) days beyond the end of the 90-day limit provided for in the statutory laws of the Tribes. We find, under the particular facts of this case, the Trial Court did violate Appellant's right to a speedy trial and reverse and remand.

DISCUSSION

A. Standard of Review

There are no questions of fact in this case. The issue of what constitutes a violation of the speedy trial rule is a question of law; we review *de novo*. *See Colville Confederated Tribes vs. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995); *Wiley, et al v. Colville Confederated Tribes*, 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (1995); *In Re The Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998). In a *de novo* review we look at the reasonableness of the Trial Judge's decision based on the facts and law he had before him at the time of the ruling. *See, Marchand v. CCT*, 8 CCAR 43, 45, 4 CTCR 26 (2006).

B. Discussion

Appellant argues we should apply the rule in *Stensgar v. CCT*, 2 CCAR 20, 1 CTCR 76, 20 ILR 6151 (1993) to find the Trial Court violated her right to a speedy trial. *Stensgar* analyzes the applicability of the right to a speedy trial to a right to be sentenced within the sixty-day rule set by statute.[52] The factors determining whether a right to a speedy sentencing was violated considered by this Court in *Stensgar* were first found in *Barker v. Wingo*, 407 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973). *See*, *Stensgar* at pp 24-25. The factors are: (1) length of delay; (2) the reason for the delay, *i.e.* whether the government or the defendant caused the delay; (3) whether or not the defendant asserted his right; and (4) prejudice to the defendant. *Id.* An assessment of "prejudice to the defendant" includes an analysis of "(a) prevention of oppressive

[52] CTC 2-1-103 [at the time of the decision it was CTC 2.4.04] Sentencing. Upon a plea of "guilty," the judge may impose a sentence at once or at a later date not to exceed sixty (60) days at his discretion.

The sixty-day rule also applies to sentencing after a defendant is found guilty by trial. *See* CTC 2-1-176.

pretrial incarceration; (b) minimization of anxiety and concern of the accused; and (c) limitation of the possibility that the defense will be impaired." *Id*.

Appellee recognizes the factors relied on in our decision in *Stensgar*, but argues we should apply the standards found in a Washington State Supreme Court case, *State v. Carson*, 128 Wash.2d 805, 912 P.2d 1016 (1996). Both *Stensgar* and *Carson* require the defendant to first show she asserted her right to a speedy trial. *Carson* relies on a court rule that allows for a deviation from the sixty-day rule based on unforeseen or unavoidable circumstances. *See* Washington CrR 3.3(d)(8).[53] *Carson* at 1021. The Washington Supreme Court recognized that "unavailability of counsel may constitute unforeseen or unavoidable circumstances to warrant a trial extension...." *Id*.

The Trial Court does not have an analogous court rule to the State's CrR 3.3(d)(8). The State's court rules do not apply to our Courts.[54] We already have case law which sets out standards to review on the issue of what constitutes a speedy trial violation. For all these reasons we limit our review to our existing laws.

On August 14, 2006 the oral record shows the Trial Judge had the following relevant facts before him:

1. Prosecutor Sandoval-Marchand stated the Tribes was not ready to go to jury trial in the instant case as scheduled on August 17, 2006 and moved for a continuance.

2. Sandoval-Marchand stated the reason was that Prosecutor Van Brunt was not available, and would not be available until October, 2006.

3. Prosecutor Bray could not take the case because of an earlier-declared conflict of interest.

4. The defendant objected to a continuance, asserting her right to a speedy trial, and moved to dismiss the case.

The Judge did not hear arguments on either motion. He stated on record he found "good cause" to continue the trial, and asked when Ms. Van Brunt would be available in October, 2006. There is no written Order from the Trial Court on either motion.

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[53] "When a trial is not begun on the date set because of unavoidable or unforeseen circumstances beyond the control of the court or the parties, the court, even if the time for trial has expired, may extend the time within which trial must be held...."

[54] We have recognized the ability of our Courts to promulgate court rules regarding, *inter alia*, time requirements. *See Zacherle v. CCT*, 8 CCAR 70, 4 CTCR 30 (2006). The Trial Court has not promulgated any procedural rules, to our knowledge.

In its arguments to uphold the Trial Court's decision, Prosecutor Chad Marchand presented this Court with several alleged facts, and an affidavit of Ms. Van Brunt, supporting his assertions that the delay was unforeseeable and unavoidable, the test used in *Carson, supra.* These facts are not in the oral record of August 14, 2006 below, so we cannot assess if the alleged facts were considered by the Trial Judge in his decisions on the motions before him. For these reasons we cannot consider them now. *See, Colville Tribal Credit v. Gua*, 5 CCAR 23, 3 CTCR 23, 26 ILR 6183 (1999).

In *Stensgar* we found that delays beyond the statutory limit were not favorably looked upon. *Stensgar* at pp 21, 26. Our statutes delineating what are known as the sixty-day and ninety day rules for hearing trials and sentencings support what is commonly known as the "speedy trial" rule. This rule is applicable in our Courts under CTC §1-5-2: Civil Rights of Persons Within Tribal Jurisdiction ("The Confederate Tribes of the Colville Reservation in exercising powers of self-government shall not: (f) Deny to any person in a criminal proceeding the right to a speedy and public trial...."(emphasis added).) and CTC §2-1-178: Civil Rights ("All accused persons shall be guaranteed all civil rights secured under the Tribal Constitution and federal laws specifically applicable to Indian Tribal Courts.") which makes applicable to our Courts the Indian Civil Rights Act, 25 U.S.C. §1302(8) ("No Indian tribe in exercising powers of self-government shall... (6) deny to any person in a criminal proceeding the right to a speedy and public trial..." (emphasis added)).

We review the reasonableness of the Trial Court's decision to continue for good cause based on the standards set out in *Stensgar, supra*. The first question is whether continuing a trial sixty-six days beyond the ninety-day limit, *i.e.* the length of the delay, is reasonable.[55] We already know Appellant asserted her right to a speedy trial, and that the delay is caused by the Prosecutor's Office. Our final question is the prejudice, if any, to Appellant caused by the delay.

The record shows the trial is continued sixty-six (66) days beyond the end of the 90-day limit solely to accommodate one of the four prosecutors in the Tribes' Prosecutor's Office. The Trial Court did not seek any other information regarding the availability of other prosecutors or

[55] The Trial Judge has discretion to continue beyond the ninety-day limit for cause. *See* 2-1-102 (b): Time of Trial. ("When the defendant is summoned before the judge pursuant to a citation as provided herein, the defendant shall appear on the date indicated on the citation to hear the charges against him, post bail, enter a plea, and be assigned a trial date. Trial shall be set within ninety (90) days unless continued for cause or at the request of the defendant." (emphasis added)).

the Reservation Attorneys' Office to try the case before making its decision. The only other fact on record at the time was the conflict of interest between Jonnie Bray, Prosecutor, and Appellant. The Trial Court did not put on record any arguments for or against the Motion to Continue by the Prosecutor's Office, nor Appellant's Motion to Dismiss. The unavailability of one of at least three potential prosecutors, by itself, is not sufficient good cause to override Appellant's right to a speedy trial. It is not reasonable to continue the trial for another sixty-six days beyond the 90-day limit solely for the reasons on record.

The unreasonableness of the delay is only one factor to consider, however. We also review whether there is prejudice to Appellant because of the delay. First, although there is no pretrial incarceration factor to consider, Appellant does have restrictions on her liberty caused by bail. Appellant asserts she had a relative post her bail; it continues until the time of her trial. She is anxious to get this matter settled, "especially since she retrieved her four children from Oklahoma." (Appellant's Brief at page 9). Anxiety is subjective. It is reasonable to find Appellant would be anxious to resolve her legal problems in light of her responsibilities as a parent of four children. There is nothing in Appellee's brief to contradict this assertion. This prong of the test is met.

Finally, Appellant asserts a possibility of impairment to her case because of the delay. The U.S. Supreme Court, in analyzing this question, found "...excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a [speedy trial violation] claim with out regard to [the other factors],... it is part of the mix of relevant facts, and its importance increases with the length of delay." [cites omitted] *Doggett v. US,* 505 U.S. 647, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).

In his dissent in the *Doggett* opinion, Justice Thomas wrote "The [Speedy Trial] Clause is directed not generally against delay-related prejudice, but against delay-related prejudice to a defendant's liberty. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." (Citing to *United States v. MacDonald,* 456 U.S. 1, 8 (1982)) *Doggett,* at 662.

As done in *Stensgar, supra,* an analysis for a speedy trial violation is done on a

case-by-case basis. The answer to whether there is an prejudicial impairment to Appellant's ability to present her defense because of the delay between arraignment and trial date (154 days herein) lies in the considerations found between the majority in *Doggett* and the dissent in *Doggett*. That is, between a presumption of prejudice depending on the length of the delay, and a showing of prejudice based on incarceration, possibility of incarceration, and the disruption caused by, *inter alia*, the presence of unresolved criminal charges.

Appellant has alleged, and it has not been refuted by Appellee, that her defense may be impaired by the length of time between the arraignment and the trial. It is reasonable to find there is a disruption caused by the presence of unresolved criminal charges against her. Appellee asserted in its brief that there was no guarantee Appellant would have gone to trial on August 17, 2006 anyway. He cites to several other cases that may have taken priority. We have recognized prosecutorial discretion in choosing which cases to prosecute. (*See Mellon v. CCT*, 8 CCAR 01, 4 CTCR 17, 32 ILR 6021 and *Campbell v. CCT*, 8 CCAR 28, 4 CTCR 22, 32 ILR 6140). Such discretion includes knowing when to wait on prosecuting a case if there is no time on the docket. It does not include, once the case is filed, unlimited delays until the Prosecutor's Office has time to have a trial. A defendant's right to a speedy resolution is a protected due process right.

There is a stronger presumption of prejudice here in that the length of delay between the arraignment and trial date set is almost five (5) months. To disregard the 90-day limit rule for the reasons before the Trial Court at the hearing on August 14, 2006 ignores the statutory rule of law set by the Tribes' legislators.

A review of the record before the Trial Court on August 14, 2006, does not support a finding of good cause to delay the trial sixty-six days beyond the expiration of the 90-day limit as a matter of law. Appellant has met her burden in showing such a delay violates the standards established by the *Stensgar* rule. We hold this matter should be remanded for an Order to Dismiss without prejudice, unless the statute of limitations have run, which necessitates a dismissal with prejudice.

It is **SO ORDERED.**

BIG R CONSTRUCTION, Appellant,

vs.

Brian & Bonnie TIMENTWA, Appellees.

Case No. AP05-010, 4 CTCR 33

8 CCAR 91

[Appellant appeared pro se.
Appellees appeared pro se.
Trial Court Case No. CV-OC-2004-24381]

Argued July 21, 2006. Decided November 14, 2006.
Before Presiding Justice Earl L. McGeoghegan, Justice Edythe Chenois and Justice Theresa M. Pouley

McGeoghegan, Per curiam.

SUMMARY

In late March of 2004, the Appellant, Big R Construction/ Russell Womer (Big R), entered into a construction contract with Appellees, Brian and Bonnie Timentwa, for specific repairs and renovation: new framing and insulation, install windows, space for wood storage and related reconstruction and sheet rocking of the cement block foundation to their home. The estimate provided by Big R for the work was $6,373.00. A delay of one month was accepted by the Timentwas so Big R could complete another job. In June, Big R installed gutters on their home but additional work was delayed by Big R for a few more weeks to the dismay of the Timentwas. The basement work began near the end of July requiring the Timentwas' daughter and son to move out of the house while the work was being accomplished. Big R discontinued work on the house at the end of July. The Timentwas tried several times to have Big R complete the work and eventually hired Custom Building Services to redo and finish the Big R project for $42,370.00, which included work not part of the Big R estimate. The Timentwas sued to recover damages from Big R including damages for inconveniences (loss of financial advantage and for relocating their children for extended periods while work was being done on their home). At trial, Big R notified the Court that it had filed for Chapter 7 Bankruptcy. The Court went ahead with the trial and entered judgment against Big R for the full Timentwa claim, $36,373.00 plus costs for a total of $36,648.08.

This appeal is before the Court to assure the parties that substantial justice is done.

COURT OF APPEALS SUMMARY

The appellant raised the following issues on appeal:

1. Whether the Trial Court denied Big R substantial justice by failing to stay the proceedings pending Chapter 7 Bankruptcy?

2. Whether the Trial Court miscalculated the damages caused by Big R and awarded to the Timentwas?

As set out in the opinion below, we first find that the trial should have been stayed pending the Timentwa's creditor claims in Federal Bankruptcy Court. Notwithstanding the failure to stay, the Court failed to set forth its specific calculations of the damages caused by Big R. We remand to the Court below for reconsideration of the decision not to stay the proceedings pending bankruptcy and for an itemized calculation of the damages attributable to Big R.

STANDARD OF REVIEW

The first issue, whether the judge erred by denying Big R an automatic stay pending a Federal Bankruptcy filing is a question of law, and *de novo* review is required. *Colville Confederated Tribes vs. Naff*, 2 CTCR 08, 22 ILR 6032 2 CCAR 50 (1995); *Wiley, et al v. Colville Confederated Tribes*, 2 CTCR 09, 22 ILR 6059, 2 CCAR 60 (1995); *Palmer v. Millard*, et al, 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996); *Pouley v. CCT*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024, (1997); *In Re The Welfare of R.S.P.V.*, 3 CTCR 07, 26 ILR 6039, 4 CCAR 68, (1998).

The second issue Appellant raised regarding the judge's calculation of the damages necessitates a review of whether there are sufficient facts and findings for the judgment awarded. If administration of justice favors the Court of Appeals, we review *de novo*. If it favors the Trial Court, we review under the clearly erroneous standard. In this instance the administration of justice favors the Trial Court. The Trial Judge's role is both administrative and decision-making. We review the last issue under the clearly erroneous standard.

DISCUSSION

A. FEDERAL BANKRUPTCY

The Court found that Big R had filed for Chapter 7 Bankruptcy in United States Bankruptcy Court around April 2005 (prior to the trial), but because the parties were tribal members and Big R was a "100% Colville Business Enterprise", the Court did not automatically stay the proceedings pending action by the Bankruptcy Court and subsequently entered judgment against Big R. This finding was made without any consideration of the applicability of federal bankruptcy court orders in the tribal court and without considering whether as a matter of "comity" the Tribal Court should extend full faith and credit to the bankruptcy court order.

In *R.S.P.V. v. CCT Children and Family Services*, 4 CCAR 68, the Court allowed a

federal criminal judgment to be used as "clear and convincing proof" in a child dependency proceeding. The Court extensively analyzed the federal proceeding and concluded that it was proper for the trial court to give effect of the federal guilty plea in a child dependency proceeding. Similarly, in *Carson v. Barham*, 7 CCAR 17 2003), the Court gave effect to a state court proceeding and declined jurisdiction in a child custody proceeding as a matter of "comity". The Court went on to recognize the importance honoring the orders of other courts in certain circumstances, not as a diminishment of the Court or the Tribes sovereignty, but as an important exercise of sovereignty. The Court said: [to allow the case to moved to tribal court just because the child had an IIM account] "would encourage forum shopping and conflicting judgments between other courts and the Colville Tribal Court. This in turn would have the effect of obliterating judicial certainty and undermining cooperation among courts". *Id*. At 21.

In this matter, we find no evidence in the record regarding the bankruptcy except the statements of the parties. The Court did not include any Bankruptcy Court Orders as part of the record. The Trial Court did not address or weigh the issues of comity or full faith and credit. We know of no creditor actions that are not subject to the automatic stay provisions of federal bankruptcy regulations (monetary sanctions can apply) and no rationale is supplied explaining why the Tribal Court should not honor these automatic stay provisions. Notwithstanding the Court's well intentioned interpretation of the holding in *Confederated Tribes of the Colville Reservation v. Melvin White*, 139 F.3rd 1268 (9th Cir. 1998), the Court should have made a record of the Bankruptcy Court orders, have properly weighed the federal statute and its policy, and have addressed issues of comity before its summary ruling. In all likelihood, the actions probably should have been stayed and the Trial Court should have deferred action until the Federal Bankruptcy Court timely addressed whether the creditor claims of the Timentwas should be tried for a determination of the creditor's claim against the bankrupt Big R. Sovereignty of the Tribe is unaffected and fairness to all creditors is the reason to defer to Bankruptcy Court. We hold that the judge erred in failing to properly create a factual record and in failing to balance the legal issues before making its determination not to stay the Trial Court's proceedings until after the Bankruptcy matter was finished.

B. DAMAGES

The Court provided no detailed calculations or description of how it reached its damage award to the Timentwas. The judgment total appears to be excessive on its face and has Big R paying for almost the entire renovation/reconstruction project with little to no cost to the Timentwas. Big R estimated the Timentwa basement project to cost around $6,373.00. No

payments for materials, labor etc. were paid by the Timentwas to Big R. Big R expended monies to purchase materials and equipment, and expenses could be attributed to labor costs to Big R for partial work on the project by employees of Big R. Some damages to the Timentwa's basement foundation was found by the Court to be caused by Big R but were not distinguished from the pre-existing condition of the basement. The Custom Building Services estimate of $42,370.00 included improvements that may not have been part of the original Big R project. The Court did not specify whether any inconvenience damages were awarded to the Timentwas. No off-set for materials and equipment provided by Big R or the labor value of the work accomplished by Big R was used by the Court in its judgment. Absent specific calculations for damages awarded by the Court below, this Court cannot determine whether the damages awarded are fair to the parties and that substantial justice is done. We hold that the judge erred in her calculations for damages awarded.

CONCLUSION

We grant the appeal and REMAND for re-consideration of the application of the automatic stay provisions of federal bankruptcy regulations to tribal court actions, and for specific calculations for a damage award to the Timentwas.

Shawn DESAUTEL, Appellant

vs.

COLVILLE BUSINESS COUNCIL, Appellee.

Case No. AP06-009, 4 CTCR 34, 34 Indian L. Rep. 6001

8 CCAR 95

[Appellant appeared *pro se.*
Appellee appeared through counsel, Juliana Repp, Spokane WA.
Trial Court Case No. CV-OC-2005-25353]

Decided December 13, 2006

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

Nelson, J.

Appeal of order denying application for enrollment. The denial was based on the trial court finding the appellant, an adopted tribal member, was not eligible for enrollment under the provisions of the Enrollment Code. We affirm.

INTRODUCTION

The appellant parent's attempted to enroll him as a member of the Confederated Tribes of the Colville Indian Reservation (Tribes) shortly after his birth in 1965. The application for enrollment was denied on the grounds that he had insufficient blood quantum; his father was seven sixteenths Colville and his mother was non-Indian. To be qualified for enrollment, an applicant must be one quarter Colville blood.

In 1999, cousins of the appellant were successful in obtaining a court order changing their blood quantum based upon a finding that their father's blood quantum was one half Colville rather than seven-sixteenths. The cousins' father is a full brother to the appellant's father. In 2000, the appellant applied for enrollment based upon the blood correction order of the cousins. The Tribes responded by adopting him into the Tribes. The appellant neither timely appealed or objected to being adopted into the Tribes rather than being enrolled.

In 2004, the appellant made several attempts to re-open his 1965 enrollment application. The Tribes ignored his request. Consequently, he filed an action with the Tribal Court alleging "substantial, credible, new evidence" mandated the application be re-opened and that he be enrolled as of 1965. The Trial Court dismissed the complaint on the grounds that he was not eligible for enrollment.

ISSUE ON APPEAL

Our Initial Order noted two issues for consideration on appeal: 1) whether the trial court's written order of July 31, 2006 comports with its oral order of June 6, 2006 and 2) whether a past, denied application for enrollment should be re-opened for a subsequently adopted Tribal member on the allegation that a blood correction of a family member, also made subsequent to the denied application, constitutes substantial new evidence.

The appellant did not address in his brief whether the trial court's written order comports with its earlier oral order. Accordingly, that issue is considered waived. COACR 13(e)(2), CCT v. Meusy , 2 CTCR 54, 24 ILR 6248, 4 CCAR 37 (1997).

STANDARD OF REVIEW

The remaining issue is a question of law. Questions of law are reviewed under the non-deferential standard, *de novo* standard. *CTC v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032.

DISCUSSION

FACTS

The appellant was born August 5, 1965, to Edwin Rene DesAutel, an enrolled Colville member of seven sixteenths blood and Fern Mae Graybeal DesAutel, a non-Indian. An application for enrollment into the Tribes was submitted shortly after the appellant's birth. In order to be qualified for enrollment into the Tribes an applicant must possess one-quarter Colville blood. The parent's application for appellant's enrollment was denied on the grounds that he had insufficient blood quantum. The denial was not appealed.

In 1999, cousins of the appellant filed a blood correction action in Tribal Court.[56] The parties stipulated and the Court ordered that the blood quantum of the cousins be changed. The change was based on finding that Lawrence Victor DesAutel, full brother to appellant's father, was one half Colville rather than seven-sixteenths.

On July 15, 2000, the appellant filed an application for enrollment based upon the blood correction order in his cousins' favor. The Tribal Government Committee recommended the appellant be adopted into the Tribes with a blood quantum of one-quarter. The Business Council approved the recommendation and he was adopted into the Tribes on October 5, 2000. The Enrollment Office notified the appellant of his adoption on October 10, 2000. He did not appeal or object that he was adopted into the Tribes rather than enrolled as he requested.

Beginning March 25, 2004, the appellant initiated numerous inquiries to the Enrollment Office to re-open his 1965 enrollment application. The Enrollment Office did not respond to his inquiries.

Consequently, he filed a complaint[57] with Tribal Court in 2005 alleging the Tribes had failed to respond to his inquiries to re-open his 1965 application for enrollment and that the court order establishing the blood quantum of his uncle was "substantial, credible, new evidence" which mandated the application be re-opened.

The Tribes generally denied the allegations and asserted the defense that the Court lacked jurisdiction to hear the matter. The case was dismissed without prejudice.

The appellant then filed a new action that was substantially the same as its predecessor but added the allegation that the Trial Court had jurisdiction over the subject matter. The Trial

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[56] Sabrina V. DesAutel v. Confederated Tribes of the Colville Reservation, CV99-18146.

[57] DesAutel v. Colville Business Council, CV2005-25303

Court dismissed this action on the grounds that the appellant was not eligible for enrollment because 1) at the time of his birth his parents did not have a permanent residence on the reservation at the time of his birth and 2) the 2000 application was not made within six months of his birth.

The appellant timely filed this appeal to the dismissal of his complaint.

ARGUMENT

Blood correction of family member

The appellant contends the 2000 application should relate back to the 1965 application because of the "substantial, credible, new evidence" resulting from the court order issued in his cousins' blood correction action. Since the cousins' father is a full brother to the appellant's father, the appellant has taken the seemingly logical leap that his blood quantum should be automatically corrected by the Enrollment Office.

The blood correction of one family member on the official rolls , however, does not automatically result in the blood correction of another family member. See Pouley, et al. v. Colville Confederated Tribes, 2 CTCR39, 25 ILR 6024, 4 CCAR 38 (1997). Each blood correction must be initiated through Tribal Court in accordance with the provisions of CTC 8-1-240[58] and CTC 8-1-242[59].

As noted below, a blood correction of a family member could be "substantial, credible, new evidence" if used within the one year period following the denial of an enrollment application. The appellant's attempt to reopen his 1965 enrollment application on the grounds that his cousins' blood correction was "substantial, credible, new evidence" was untimely.

The 1965 enrollment application

The appellant contends there should not be two enrollment files - the application filed in 1965 and the application filed in 2004. He argues that the official enrollment file should be the one opened in 1965 because that was when his first application for enrollment was filed. This argument might carry weight if there were two open files.

58

CTC 8-1-240 **Blood Degree Corrections** **The following procedure shall be used in making corrections (increases or decreases) of all blood degrees presently listed on the roll of the Tribes. This procedure is established to provide for a fair and unbiased examination of all blood degree corrections requested by the Tribes or by any other person.**

59 CTC 9-1-242 **Form of Action and Procedure** An action for blood degree corrections shall be by civil complaint for blood degree correction in the Colville Tribal Court. The Tribal Code governing civil actions and Civil Rules of Court shall be applicable to this proceeding, except as specifically provided in this Chapter.

An applicant who has been denied enrollment by the Enrollment Committee may either request the Committee to reopen the application based upon "substantial, credible, new evidence" or appeal the denial enrollment to Tribal Court. " No appeal may be brought under this section unless it is filed within one (1) year of the decision of the Enrollment Committee to disenroll or deny enrollment". CTC 1-8-202.

We hold that the one year time limit for appealing an enrollment denial is applicable to the time limit in which "substantial, credible, new evidence" can be introduced to the Executive Department or the Enrollment Committee to reopen a final denial of enrollment.[60]

The 1965 enrollment file was effectively closed when the time for appeal or introduction of "substantial, credible, new evidence" expired.

The 2000 enrollment application

On July 26, 2000, the appellant filed an application for enrollment based upon the blood correction order entered for his cousins. His father's blood quantum had not been changed and remained at seven-sixteenths on the official rolls. Accordingly, he was not eligible for enrollment under the provisions of the Enrollment Code. Specifically, his parents did not reside on the Reservation at the time of his birth (CTC 8-1-80(a)(3) nor was the enrollment application filed within six months of his birth (CTC 8-1-080(b)(3).

Notwithstanding the foregoing, on September 25, 2000, the Tribal Government Committee recommended the appellant be adopted into the Tribes with a blood quantum of one-quarter. The Business Council approved his adoption into the Tribes on October 5, 2000, and, on October 10, 2000, the Enrollment Office notified him of the adoption. The appellant did not appeal or timely object of his adoption into the Tribes rather than enrollment as he requested.

CONCLUSION

In summary, the appellant's enrollment application filed in 1965 was denied. There was no appeal. Requests to reopen the file in 2004 were properly ignored because the "substantial, credible, new evidence" was untimely and the file had been closed.

The appellant's 2004 enrollment application was properly denied because his parents did not reside on the reservation at the time it was filed or was it filed within six months of the

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[60] CTC 8-1-125(h) **Determination Procedure of the Enrollment Committee** A final denial of enrollment shall not be reopened by the Tribes without a showing that the Applicant denied enrollment has available for immediate presentation substantial, credible, new evidence. A decision by the Executive Department or the Enrollment Committee that substantial, credible, new evidence does not exist to reopen an enrollment, shall be appealable only on that specific issue under the Subchapter on Appeals under this Chapter.

appellant's birth.

_____A Court ordered blood correction for a family member is not "substantial, credible, new evidence" for the purpose of reopening an enrollment file more than one year after an application has been denied.

_____Accordingly, the Order of Dismissal is AFFIRMED.

IT IS SO ORDERED:

Dupris, CJ

I concur with the decision to affirm the Trial Court in this matter. I write this short concurrence to clarify one point. The majority writes "His father's blood quantum had not been changed and remained at seven-sixteenths on the official rolls. Accordingly, he was not eligible for enrollment under the provisions of the Enrollment Code." (Memorandum Opinion Affirming Trial Court, at page 5) I do not find this "fact" in the Trial Court's findings, so I see no need to refer to it. We do not know, for a fact, that Appellant's father's blood quantum was or was not changed on the base roll. It is not in the Trial Court's findings. The Trial Court did find that, in 2000, Appellant met the criteria for adoption under the Enrollment Code, Chapter 8-1, because he was born off the Reservation and was not enrolled within six (6) months of his birth. *See*, "Order Granting Respondent's Motion to Dismiss," at p6 (July 31, 2006).

In 1965 Appellant's parents did not pursue an appeal on the denial of his enrollment. In 2000 Appellant was notified he was adopted into the Tribes as a member; he did not appeal the adoption in a timely fashion. It is for these reasons the Trial Court should be affirmed. It is my opinion we do not need to go into the underlying facts which are not relevant to this ruling.

Denver BUCKMAN, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP05-004, 4 CTCR 35, 34 Indian L. Rep. 6002

8 CCAR 101

[Neil Porter, Office of Public Defender, brief for Appellant. Michael Larsen, Office of Public Defender, argued for Appellant.
Esther Payne, Office of Prosecuting Attorney, appeared for Appellee.
Trial Court Case No. CR-2004-27389]

Argued August 19, 2005. Decided December 14, 2006.

Before Presiding Justice Earl L. McGeoghegan, Justice Edythe Chenois and Justice Theresa M. Pouley

McGeoghegan, P.J. for the Panel.

INTRODUCTION

Denver Buckman, appeals his judgment and sentence after jury trial guilty verdicts for Aggravated Assault and for Battery. We affirm the convictions for Aggravated Assault and for Battery. We affirm the Judgment and Sentence in part and vacate probationary terms of the Judgment and Sentence.

SUMMARY

Appellant, Denver Buckman, was charged and convicted by a jury of one count of Attempted Criminal Homicide and one count of Battery. Arising from incidents occurring on or about December 12, 2004, the Appellant was accused of using a screwdriver to stab one person in the jaw area, and of biting another person's arm. The Appellant asserted he was acting in self-defense. The trial court gave a separate instruction on self-defense in its Jury Instruction No. 8, which includes a provision that the Tribe must prove beyond a reasonable doubt that the force used by the defendant was not lawful. Appellant properly took exception to the instruction.

Appellant also claimed, in his closing argument, that Appellant's intoxication should be considered by the jury. The Tribes objected to Appellant's argument, the trial court sustained the objection and stated to the jury that intoxication did not mitigate the defendant's

accountability. Appellant did not ask for a jury instruction on voluntary intoxication. The Appellee argued in closing argument that "reasonable people do not use drugs or get intoxicated" and Appellant objected. The trial court sustained the objection and Appellant claims error from both of the rulings and the comments of the trial judge and the prosecutor.

After conviction, the trial court sentenced Mr. Buckman on the one count of Attempted Criminal Homicide and one count of Battery. It is not disputed that the maximum sentence allowed by Colville Tribal law is 360 days for a Class A Offense. The trial court sentenced Appellant to 720 days, $20.00 in court costs, and 2 years of probation which included checking in with the probation officer, mental health and chemical dependency evaluations and other requirements. There was no suspended jail time, no credit allowed for time spent in jail awaiting trial, nor suspended fines or costs in the judgment.

DISCUSSION

1.*The trial court did not err in giving a jury instruction for self-defense which included the proper requirement that the Tribe bear the burden of proving a lack of self-defense beyond a reasonable doubt.*

Appellant's first claim of error is that the trial judge improperly instructed the jury on the issue of self-defense. Although the Appellant admits a jury instruction requiring the Tribes to prove an absence of self-defense beyond a reasonable doubt was given, he claims it was not specific enough. The court does not agree.

The court reviews de novo alleged errors of law in jury instructions. *Waters v. CCT*, 4 CTCR 14 (2004). When a defendant properly raises the issue of self-defense, he is entitled to a jury instruction regarding self-defense and failure to gives an instruction constitutes reversible error. *Waters, supra; Louie v CCT, 2 CCAR 47 (1994).* The instruction itself must properly outline that the "absence of self-dense must be proved beyond a reasonable doubt by the government". *Louie v. CCT, 2 CCAR 47 (1994).*

The trial court, in Jury Instruction No. 8 properly outlined that it is a defense that the force used was "lawful" and that "force used is lawful to prevent or attempt to prevent an offense against the person" and "[t]he Tribes have the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the Tribes have not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty". *Trial Court record, Jury Instruction No. 8.*

This instruction accurately meets the requirements of *Louie* of placing the burden on the Tribes to prove an absence of lawful force beyond a reasonable doubt and thus, the jury

instruction was proper and the trial court did not err in not including the instruction in the "to convict" instruction.

2. *The defendant's claimed defense of "intoxication" was not improperly considered or commented on by the trial judge or prosecutor during the trial.*

Appellant claims three separate errors all related to defendant's claim of "intoxication". The first and second claims are that the trial judge erred in failing to give an instruction on voluntary intoxication and on improperly commenting that intoxication does not mitigate the accountability of the defendant. The third claim is that the prosecutor improperly commented on the intoxication claim in closing argument.

As an initial matter it must be noted that Appellant did not request a jury instruction on voluntary intoxication at any time during the trial. This makes the review particularly difficult because the record below was not properly developed for review on appeal. Nonetheless, Appellant did attempt to argue, in closing argument, that his intoxication mitigated his accountability for the crimes charged.

This court has not yet ruled on the availability of "voluntary intoxication" as a defense to a crime. The Tribal Code does not contain a provision allowing the defense. The Court is hesitant to create a defense not provided for in tribal law and declines to do so here.

However, intoxication may affect a defendant's ability to form the requisite intent to be convicted of a crime. Washington state law is instructive in this regard. To support an instruction on voluntary intoxication, a defendant must show that: 1)the crime charged has as an element a particular mental state; 2) there is substantial evidence of alcohol consumption and 3) there is substantial evidence in the record which shows that the alcohol consumption affected the defendant's ability to possess the required mental state. *State v. Hall,* 104 Wash.App.56, 62 (2000). In this case, the Appellant would not meet the criteria to support an instruction because he failed to show by substantial evidence that his consumption affected his ability to posses the required mental state. In fact, the record is directly to the contrary. The prosecutor specifically asked the defendant on cross-examination: Q: Is it your contention that because you abuse illegal drugs that you shouldn't be held accountable for your actions. A: It isn't because of that. It's because I reacted out of fear. . .". (Trial Record, 2:25:00). Despite the valiant efforts of defense counsel on re-direct examination, the record remains the same – Appellant himself believed his actions were as a result of his fear and not his intoxication. The court agrees with Appellee in this case, if there were insufficient facts to justify an instruction on intoxication, it certainly was not error for the court to sustain the objection in closing argument.

Similarly, claims of misconduct by the judge in commenting on the objection are also unpersuasive. Appellant argues persuasively that when he raised the issue of intoxication in his closing argument that the judge sustained the prosecutor's objection and then improperly commented that the jury could not consider intoxication as relevant to the matter. Upon review of the record, however, the trial judge did not disallow Appellant from arguing he did not have the requisite intent but rather stated correctly that defendant's accountability was not mitigated. On this record, the statement was not in error.

Finally, Appellant claims the prosecutor engaged in prosecutorial misconduct in his closing argument. As with the other arguments on intoxication, the prosecutor's statements do not rise to a level of misconduct that would require reversal of the decision of the jury in this case. Thus, this Court affirms the verdict.

3. *The trial judge did not err by not granting defendant credit for time served but did err in sentencing Appellant to the maximum sentence and adding two years of probation.*

Appellant claims the trial court committed two errors in sentencing the defendant. First, the trial court erred in failing to give defendant credit for time served awaiting trial. Second, that the Court erred in imposing the maximum jail time allowed by the law and then imposing two additional years of probation. Each argument will be dealt with in turn.

Sentencing is within the "strict" discretion of the trial judge under the tribal code and caselaw. *St. Peter v. Colville Confederated Tribes,* 2 CCAR 2 (1993). A sentencing decision is subject to appeal only for a "manifest abuse of discretion". *Id. At 15*. It is clear that the discretion to impose jail time and or a fine is vested with the trial judge. *Waters. v. CCT,* 1 CCAR 18 (1985). This discretion includes a judge's discretion in providing for or not providing for credit for any detention prior to trial. *Coleman v. CCT,* 3 CCAR 58 (1996). The trial court's discretion is limited only by applicable statutes and the Constitution and only when it is shown that a trial judge manifestly abused his discretion will an appellate court intervene. *St. Peter v. CCT,* 2 CCAR 2 (1993).

The first issue raised is whether the trial court "manifestly abused her discretion" and violated the Colville Tribal Civil Right Act (CTCT 1-5) or the federal Indian Civil Rights Act (25 U.S.C. 1301 et. seq.) when she failed to give Appellant credit for time served while awaiting a trial of the matter. After Appellant was found guilty of attempted homicide and assault, the trial judge issued a sentence in the case. Appellant was sentenced to "serve 720 day in jail with 0 days suspended. The defendant shall have credit for 0 days served. Remaining jail time shall be served by [X] straight jail time with no good time credit consecutive to other offenses." *Trial*

Court Judgment and Sentence, Page 2. The tribal code and the tribal constitution are silent on the issue of credit for time served while awaiting a trial. Although Appellant argues that the trial judge exceeded the maximum sentence by not allowing credit for time served on a pre-trial basis while awaiting trial, this Court disagrees. All decisions of this Court have unwaveringly protected the discretion of the trial judge in sentencing unless it is restricted by tribal code or the constitution. *St. Peter v. CCT,* 2 CCAR 2 (1993); *Louie v. CCT,* 2 CCAR 47 (1994); *Brown v. CCT,* AP 94-029 (1997); *Waters v. CCT,* 1 CCAR 18 (1985). In this case, where the tribal legislature does not restrict the judges discretion to grant or deny credit for pre-trial time served, this Court declines to do so.

The second issue is whether Appellant may be required to remain on probation after he has served the maximum jail sentence allowed by law with no remaining suspended sentence or fine. Appellant argues this sentence exceeds the trial courts authority and violated both the Colville Tribal Civil Rights Act and the federal Indian Civil Rights Act. Appellant was sentenced to 720 and in paragraph 4 of the Judgment and Sentence it states: "4. The Conditions of the suspended portion of the jail time and fine are: a. [X] Obtain a Chemical Dependency Evaluation and file that with the Court by 1 year after release. . . c. [X] Obtain a Mental Health Evaluation from a certified agency and file that with the Court by 90 days after release. . . d. [X] Not commit any further offenses for 2 years after release. . . e. [X] notify the Court of any changes in physical mailing address, and telephone number for 2 years after release. . . . f. [X] Be on formal probation for 2 years after release . . . h. [X] No consumption of alcohol or illegal drug use for 2 years after release. " *Trial Court Judgment and Sentence page 2-3.* It is undisputed that conviction carries a maximum sentence of 360 days for each charge for a total of 720 days.

Although there is no tribal law directly on this issue, federal law is instructive. The Third Circuit has held that under the Federal Rules of Criminal Procedure, "a sentence of probation imposed without a suspended sentence is an illegal sentence." *U.S. v. Guervemont,* 829 F.2d 422 (1987). Similarly the Seventh Circuit has held that "Just as a court cannot suspend imposition of sentence without placing the defendant on probation, it cannot impose probation without suspending imposition or execution of at least part of the sentence." *U.S. V. Makres, 851 F. 3rd 1016, 1018 (1988).* Although federal law is not binding on this Court, we find the reasoning sound and adopt the rule. As the *Makres* court explained, probation contemplates an approach where an offender may take an opportunity to be rehabilitated without institutional confinement. However, if the defendant abuses the opportunity then the court may impose some or all of the punishment suspended. The rule requires that probation must be accompanied by

suspension of part of the defendant's sentence. In essence, the court reserves some of its sentencing power in case the defendant fails to comply. Having the reserved sentencing power is imperative because "illegal sentences are essentially only those which exceed the relevant statutory maximum limits." *Guervemont, supra at 427.*

This Court finds that the trial court erred by imposing probation without a suspended sentence. In so doing, the trial court exceeded the statutory maximum limits..

CONCLUSION

1. The verdict of the jury and the judgment of the trial court are AFFIRMED.

2. The Judgment and Sentence entered by the trial court is AFFIRMED in part and VACATED in part. A sentence of 720 with no credit for time served awaiting trial is AFFIRMED. Any sentence including probationary requirements after Appellant served the maximum sentence is error and is hereby VACATED.

3. This case is remanded to the trial court to enter a judgment and sentence consistent with this opinion.

Susan GAMBRELL, Appellant

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP06-007, 4 CTCR 36, 34 Indian L. Rep. 6004

8 CCAR 107

[Tim Liesenfelder for Appellant.
Joni Bray for Appellee.
Trial Court Case No. CR-2005-28281]

Initial Hearing held July 21, 2006. Decided December 15, 2006.
Before Presiding Justice Conrad Pascal, Justice Edythe Chenois and Justice Dennis L. Nelson

Nelson, J. for the Panel

This matter came before the Court of Appeals pursuant to an Initial Hearing held on July 21, 2006. Appellant appeared through counsel, Tim Liesenfelder. Appellee appeared through counsel, Joni Bray. Before Justice Dennis L. Nelson and Justice Edythe Chenois.

SUMMARY

Appellant is asserting that she was denied due process in that she was not read her rights pursuant to *Miranda* prior to when a search warrant was executed and drug paraphernalia was found. Officers were executing a search warrant at Appellant's residence. One of the officers noticed that she was acting suspiciously while seated in a chair in the living room. He asked her to move from the chair and found a drug pipe that had been wrapped in tissue and hidden in the chair. Appellant is alleging that she should have been read her *Miranda* prior to the search so that she would have known that not only would anything she said been held against her, but also that her actions could also be used to incriminate her.

Appellee orally moved for a dismissal of the appeal on the basis that *Miranda* should not apply to actions of defendants. We agree. We grant Appellee's Motion to Dismiss, and remand this appeal.

DISCUSSION

Appellant argues that *Miranda v. Arizona*, 384 U.S. 436 (1966) applies not only to interrogations of defendants but also to their actions, which might incriminate them. The *Miranda* Court held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has

been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination. "By custodial interrogation, we mean questioning initiated by law enforcement officer after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.: *Id.* At 445. "The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, **but whether he can be interrogated.** (Emphasis added) *Id.* at 479.

In *Schmerber v. California*, 86 S. Ct. 1826, 384 U.S. 757 (1966), which involved the compulsory drawing of blood to determine blood-alcohol level, the Supreme Court went on to say that the prohibition of compelling a person to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communication from him but does not exclude his body as evidence when it may be material. The Court stated that the protection from self-incrimination offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk or to make a particular gesture.

The Navajo Tribe in *McCabe v. Navajo Tribe of Indians*, 1 Nav. R. 63 (1971), held that a defendant who was stopped for weaving along the highway, emitted a strong odor of liquor and could not exit his vehicle without help did not require a *Miranda* warning. It was the opinion of that Court that the warning was unnecessary because the facts were self-evident and the defendant had already incriminated himself by his actions rather than by his words.

In *Crow Tribe of Indians v. Big Man*, 2000 Crow 7 (2000), the Court stated that the Fifth Amendment's prohibition against compelling a defendant to be a witness against himself only covers "testimonial" evidence, i.e. the verbal and written communications by the defendant. The Crow Court, citing *Schmerber v. California* recognized that actions do not fall under the protections compelling *Miranda* warnings.

In the instant case, Appellant was not being questioned by the police officers. The officers were conducting a search of her residence. She was seated in a chair and an officer noticed that she was acting suspiciously. She appeared nervous. The officer investigated and found drug paraphernalia hidden in the cushion of her chair. She did not volunteer any verbal communication that the paraphernalia was present. We hold that the actions of the defendant leading to the evidence found during this search was not protected under the prohibition of self-incrimination and therefore did not require *Miranda* warnings.

Based on the foregoing, we AFFIRM the Trial Court's Order and Remand this case to the

Trial Court for action consistent with this Order.

Trudi TONASKET, Appellant/Appellee

vs.

CCT ENROLLMENT DEPARTMENT, Appellee/Appellant.

Case Nos. AP05-011/012, 4 CTCR 36

8 CCAR 109

[R. John Sloan Jr. for Appellant.
Juliana Repp for Appellee.
Trial Court Case No. CV-CT-2001-21174]

Oral Argument held October 20, 2006. Decided December 18, 2006.
En Banc Before: Presiding Justice David Bonga, Justice Dennis Nelson, Justice Howard Stewart, Justice Earl McGeoghegan, Justice Edythe Chenois, Justice Conrad Pascal, and Justice Gary Bass.

Bonga, J. for the Panel

PROCEDURAL HISTORY

Appellant filed a Petition for Blood Correction Under the Enrollment Ordinance on May 11, 2001. In support of the Petition Appellant filed a number of documents that included three Resolutions of the Confederated Tribes governing body. A trial date was set and the parties submitted volumes of evidence. A hearing was held on the petition and supporting evidence by the Trial Court that lasted over several days during 2002. The Trial Court found that the Petitioner had not proven by clear and convincing evidence that a blood correction should be granted. The Trial Court also reserved ruling on legal issues that had been identified. The Trial Court issued its ruling on what it believed was the "controlling" legal issue in 2005. The Trial Court's decision on the legal issue was signed on August 29, 2005. This appeal was timely filed on September 8, 2005.

STANDARD OF REVIEW

The issue before us is a question of law; we review the matter *de novo*. *Colville Confederated Tribes vs. Naff*, 2 CTCR 08, 22 ILR 6032 2 CCAR (1995); *Wiley, et al v. Colville Confederated Tribes*, 2 CTCR 09, 22 ILR 6059, 2 CCAR 60 (1995); *Palmer v. Millard, et al,*

3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); Pouley v. CCT, 2 CTCR 39, 25 ILR 6024, 4 CCAR 38 (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.*, 3 CTCR 07, 26 ILR 6039, 4 CCAR 68, (1998).

STATEMENT OF RELEVANT FACTS

Petitioner's father, Henry S. Jerred, and mother, Lila Toulou Jerred (descendent of Louis Provo) are members of the Confederated Tribes of the Colville Reservation listed on the 1937 base roll.

Julia Kin-A-Waitsa, wife of Louis Provo, was a full-blood Colville.

The Confederated Tribes of the Colville Reservation is a non-treaty, federally recognized Indian Tribe that possesses the inherent attributes of a sovereign government that is able to make laws and control its internal affairs.

As a unique political community, the Confederated Tribes of the Colville Reservation has the power to determine its own tribal membership.

Tribal Resolutions 1981-85 and 1983-489 held that Louis Provo was full-blooded Indian.

JURISDICTION

This Court has personal and subject matter jurisdiction of this case pursuant to the Constitution of the Colville Confederated Tribes[61] and the Colville Tribal Code.[62] *Also see The Estate of Daniel Hoover-Jerry Thon, Personal Representative vs. Colville Confederated Tribe*, 6 CCAR 16 (2002) and *National Farmers Union Ins. Co. vs. Crow Tribe*, 471 U.S. 845, 12 ILR 1035 (1985).

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[61] AMENDMENT X – JUDICIARY – Article VIII Judiciary – Section 1. There shall be established by the Business Council of the Confederated Tribes of the Colville Reservation a separate branch of government consisting of the Colville Tribal Court of Appeals, the Colville Tribal Court, and such additional Courts as the Business Council may determine appropriate. It shall be the duty of all Courts established under this section to interpret and enforce the laws of the Confederated Tribes of the Colville Reservation as adopted by the governing body of the Tribes. The Business Council shall determine the scope of the jurisdiction of these courts and the qualifications of the judges of these courts by statute.

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

DISCUSSION

The Supreme Court has ruled that Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government, and, although no longer possessed of full attributes of sovereignty, remain a separate people with power of regulating their internal and social relations. *Santa Clara Pueblo v. Martinez*, 98 S.Ct. 1670, 436 U.S. 49 (1978). An integral component of that status is that an Indian tribe retains attributes of sovereignty over both their members and their territory to the extent that their sovereignty has not been withdrawn by federal statute or treaty. *Iowa Mutual Insurance Co. v LaPlante*, 480 U.S. 9, 107 S.Ct. 971.

"Indian tribes consistently have been recognized, first by the European nations, later by the United States as "distinct, independent political communities" qualified to exercise powers of self-government, ***not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty*** (emphasis added). This recognition was an integral part of accepted political theory and international laws concerning dominance of weaker by stronger nations; that is, a subject nation must yield to the overriding legislative authority of the dominant nation, and may depend upon the stronger nation for protection, but it is otherwise independent. Internal self-government was preserved, in consequence, although dealings with other nations and matters concerning trade and extinguishment of title to lands occupied by tribes became subject to the exclusive authority of the European nation claiming the territory. The United States followed the same principle, usually as successor to the European nations from which it obtained title to land." F.Cohen, *Handbook of Federal Indian Law*, 1982 ed, p.232

"Prior to the presence of the white man, the ancestors of the tribes and bands of the Colville Confederated Tribe occupied an area comprised of what is now Eastern Washington, Southern Central British Columbia, and portions of Idaho and Oregon.

In 1872, President Grant created the Colville Confederated Indian Reservation by Executive Order - without a treaty and without the consent of the tribes and bands of Indians (hereinafter Tribes) residing in the area. The original reservation was over three million acres in size, but was reduced to its present size of approximately one million four hundred thousand acres under an agreement dated May 9, 1891, when gold was discovered in the northern half of the Reservation.

The Reservation is located within portions of Okanogan and Ferry Counties in north central Washington State. Originally, all the land within the Reservation was held in trust for the Tribes. Lands were later allotted and homesteaded within the Reservation as a result of the

allotment policies of the early twentieth century. Approximately seventy-nine percent (79%) of the reservation lands are now held in trust for the Tribes and its members. The remainder is held by federal agencies or is owned in fee by Indians and non-Indians." *Hoover*, p.3-4

The Confederated Tribes of the Colville Reservation have had an official, continuous long-term relationship with the federal government. The relationship was officially acknowledged by the federal government, not by treaty, but when the reservation was established in 1872 by Executive Order in the territory of Washington.

The general legal rule is that Executive Order Indian Reservations possess the same attributes and application of rules as an Indian Reservation established by treaty. F.Cohen, *Handbook of Federal Indian Law* p.495-499 (1982 ed.). The United States Supreme Court while discussing Executive Order reservations has stated:

> ...Congress and the Executive have ever since recognized these as Indian Reservations...They have been uniformly and universally treated as reservations by map makers, surveyors, and the public. We can give but short shrift...to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive... *Arizona v California*, 373 U.S. 546 at 598, 10 L. Ed. 542 (1963).

Therefore the Confederated Tribes of the Colville Reservation are subject to and benefit from the same general laws that are applicable to treaty tribes.

In response to the Congressionally mandated Meriam report of 1928 Congress in 1934 passed the *Indian Reorganization Act* (IRA). 25 USC 461 et seq. The Act defined a policy of encouraging the development, or protecting the integrity, of tribal autonomy. A key aspect of the IRA was the development of Tribal self-government functions that included Constitutions. The opportunities made available to tribes under this act were immense. While the act did not provide them with powers they had not previously possessed, it did recognize these powers as inherent in their status and resurrected them in a form in which they could be used at the discretion of the tribe. Deloria & Lytle, *American Indians, American Justice,* p.14.

One standard provision in IRA constitutions that has been a particular target for amendment is the language requiring secretarial approval of tribal ordinances. The Supreme Court has acknowledged that this approval review is not required by the IRA itself, stating that "the Bureau of Indian Affairs…had a policy of including provisions for [S]ecretarial approval; but that policy was not mandated by Congress." *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198 (1985).

Even though the Confederated Tribes of the Colville Reservation (Tribes) failed to accept the IRA the Tribes did develop a Tribal Constitution with By-Laws that was approved, as required, by the Secretary of the Interior on April 19, 1938. The Constitution, united with the resolutions, establishes the authority of the Business Council. The Colville Tribal Business Council has consistently asserted its authority on each and every resolution under Article II Section 1 and Article V section 1(a) of the Constitution of the Confederated Tribes of the Colville Reservation. Throughout the history of the Constitution the Colville Tribal Business Council has legislated the law by resolutions.

The Tribal Constitution authority that "empowers the Colville Business Council to regulate membership." is codified in the Colville Tribal Code at CTC 8-1-1. In addition, CTC 8-1-2 provides that membership matters required to be proven must be proved to the satisfaction of the Tribal Court, Enrollment Committee or the Council by the appropriate standard of proof. Amendment IX of the Tribal Constitution first set forth clear and convincing evidence as the appropriate standard of proof when the amendment was approved in May, 1988. The standard of evidence prior to Amendment IX was by preponderance of the evidence.

In Resolutions 1981-85 and again with Resolution 1983-489, the Colville Business Council overwhelming decided to regulate Tribal membership and ruled that Louis Provo was 4/4 Colville. The Council made the determination based on findings of fact described in the resolutions and pursuant to their authority contained in Article V of the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation. [D 36(e); 36(h)].

It is the understanding of this Court that Article VII Sec 2 states the Business Council "shall have power to prescribe rules and regulations governing future membership…(a) ***that such rules and regulations shall be subject to the approval of the Sec of Interior"*** does not mean that each individual had to be approved by the Secretary of Interior, but rather the 'process' to get to the decision is reviewed. The Court finds further support with this interpretation by the 1981action of the Department of Interior that published new rules delineating the powers of the Interior Board of Indian Appeals (IBIA) which stated that "except as otherwise permitted by the Secretary or Assistant Secretary of Indian Affairs by special delegation or request, the Board shall not adjudicate: (1) Tribal Enrollment disputes…43 C.F.R. 4.330(b)(1)." This interpretation further supports the Court's belief that at the time of the passage of Resolution 1981-85 support for Tribal self-government was widely accepted.

"In matters of internal self-government within tribal territory, tribal powers are exclusive, and federal and state powers are inapplicable, unless such tribal powers have been limited by federal treaties, agreements, or statutes. Absent a limiting treaty or federal law, tribal powers

may be exercised unfettered by assertions of federal or state authority." *Cohen,* Ibid. It is the ruling of this Court that Resolution 1981-85 was valid and enforceable as an expression of the Confederated Tribes of the Colville Reservation sovereignty and powers of self-government. The Trial Court was in error when it ruled Resolutions 1981-85 and 1983-489 were invalid. This Court finds that the Resolutions, 1981-85 and 1983-489 were valid and enforceable governmental actions of the Confederated Tribes of the Colville Reservation and the trial court should have ordered the Enrollment Office to act accordingly.

In conclusion, the courts have consistently recognized that in the absence of express legislation by Congress to the contrary, an Indian tribe has complete authority to determine all questions of its own membership. It may thus by usage or written law, or by treaty with United State or intertribal agreement, determine under what conditions persons shall be considered members of the tribe. Felix S. Cohen, *Handbook of Federal Indian Law,* 1942 edition. P.133 In this case the Colville Confederated Tribes of the Colville Reservation under authority contained in Article V, Section 1(a) of the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians on February 26, 1938 and approved by the Commissioner of Indian Affairs on April 19, 1938; and under further authority contained in Article VII, Section 2 of the Constitution and By-Laws, adopted by the Confederated Tribes on May 20, 1949 and approved by the Commission of Indian Affairs on April 14, 1950 has determined that Louis Provo was 4/4 Colville Indian.

ORDER

IT IS HEREBY ORDERED THAT this matter is remanded back to the Trial Court with instructions to issue a new order granting Appellant's Petition for Blood Correction Under the Enrollment Statute in conformity with the Confederated Tribes of the Colville Reservation Resolutions 1981-85 and 183-489.

Clinton NICHOLSON, Appellant,

vs.

Bill BEDARD, Appellee.

Case No. Ap06-001, 4 CTCR 38

8 CCAR 115

[Appellant appeared in person and without counsel.
Appellee appeared in person and without counsel.

Trial Court Case No. CV-CR-2004-24224]
Argued June 16, 2006. Decided December 18, 2006
Before Chief Justice Anita Dupris, Justice Dennis L. Nelson and Justice Theresa M. Pouley
Pouley, J., for the Panel.

SUMMARY

Clinton Nicholson, the Appellant, is the owner of a company called "Rez-A-Rex." Rez-A-Rex was one of the only two established and approved wrecking and automobile dismantling yards on the Colville Indian Reservation in 2004. Appellant was granted a Special Use permit by the Colville Tribes for the business. The Colville Tribes Business Council by Resolution 2003-339 approved the permit for Clinton Nicholson's wrecking yard and Mr. Nicholson was issued an Indian Trader License on February 12, 2002, modified on June 24, 2004. Sometime in late 2003 and early 2004, Appellee Bedard began working with Mr. Nicholson.[63] The remaining facts are disputed. Appellee Bedard claims Appellant Nicholson agreed to enter into a partnership and claims damages from his failure to honor their agreement. Appellant Nicholson claims he was merely "trading" with Mr. Bedard and that Mr. Bedard is not entitled to any proceeds of the business. A trial was held on October 5, 2004 and an Order from the trial court was filed on December 5, 2005. The Court found that Appellee was entitled to a variety of damages from Appellant. Mr. Nicholson appealed. For the reasons stated in this opinion, this Court finds the decision of the trial court is clearly erroneous and therefore REVERSES the decision and REMANDS this case to the trial court.

ISSUES

The issues before this Court are twofold: 1) whether the trial court made substantial errors on procedural issues regarding the filing of the action and which party should have the burden of proof on which claim, and 2) whether the trial court applied the correct legal standards in determining both the relationship of the parties and the measure of damages.

DISCUSSION

The Court reviews the findings of fact under the clearly erroneous standard and issues of

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The trial court's findings of fact and conclusions of law neglect any mention of the time frame of the occurrence. Review of the trial exhibits show Mr. Bedard's name appearing on receipts in October of 2003 and the mutual restraining orders were filed in June of 2004. This court believes the events may have occurred between October through June of 2004 but the fact that this Court has to guess is telling of the lack of complete findings by the trial court.

law under a de novo review standard. *CCT v. Naff*, 2 CTCR 08 (1995); *Wiley v. CCT, et. al.* 2 CTCR 9 (1995); *Palmer v. Millard, et.al.,* 3 CCAR 27 (1996); *In re Welfare of R.S.P.V.,* 3 CTAR 07 (1998). We review the trial court's findings under a clearly erroneous standard to determine if the findings support the conclusion that an employment relationship exists. *CTEC v. Orr*, 5 CCAR 1 (1998).

At the outset, it must be noted that this case was difficult to review because the original processes used to initiate the action were various temporary restraining orders. The trial court failed to identify the primary claimant and cross-claimant. Because of this failure, she did not identify which party had the burden of proof on which issue. To make it even more difficult, no legal theory is properly identified by the trial court and because of this fatal defect, the facts are not properly used to support the legal theory or the proper remedy. This problem is further compounded by the fact that each of the parties is *pro se.* Although each litigant does an admirable job arguing the facts, neither propounds a particular legal theory in support of their contention except that both disagree with trial court's characterization of their relationship as "employer-employee"[64].

This Court reviewed a number of legal theories that could support the result of the trial court. However, because of the wholesale lack of application of proper legal conclusions, this Court cannot review whether the facts support the conclusion.[65] There may be a sufficient factual basis to meet the elements of a partnership, a contract, independent contractor or other legal theories like unjust enrichment. Each one of these theories has separate elements and separate measures of damages which must be identified by the trial court and then properly supported by the facts of this matter. Under the current record, however, there are no facts which support an employment relationship. Further, even if the theory was properly supported by the facts, a measure of damages of one-half of the profits is entirely inconsistent with an employment relationship. Simply stated, in its current posture, it is impossible to effectively review this matter without a remand to the trial court.

This Court finds the trial court's Order was clearly erroneous in that: (1) the trial court erred on procedural issues by erroneously interpreting the filing of the action and which party should have the burden of proof on which claim, and (2) the trial court applied the incorrect legal

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64 Mr. Bedard argues that the Court should uphold the trial court's judgment in his favor but at oral arguments specifically denies and believes the trial court was in error in finding their relationship was an employment relationship.

65 The trial court reviews the claims, decides that "quasi-contracts" does not apply but then declares in a sentence, with no explanation, that there "was an employer-employee relationship".

standards in determining both the relationship of the parties and the measure of damages. The total lack of identification of either the law or application of the facts to the law leaves this Court with a definite and firm conviction that a legal error has been made and the trial court should be reversed. The case is remanded to: 1) determine the proper legal theory under which Mr. Bedard may recover any damages or determine that no such theory exists; and 2) determine the proper legal theory and the proper facts to support the damages awarded in this matter.

ORDER

The decision of the trial court is REVERSED and REMANDED for proceedings consistent with this opinion.

Trudi TONASKET, Appellant/Appellee

vs.

CCT ENROLLMENT DEPARTMENT, Appellee/Appellant.

Case Nos. AP05-011/012, 4 CTCR 36

8 CCAR 118

(See 8 CCAR 109)

[R. John Sloan Jr. for Appellant.
Juliana Repp for Appellee.
Trial Court Case No. CV-CT-2001-21174]

Oral Argument held October 20, 2006. Decided December 18, 2006. Concurring opinion 12/28/06.
En Banc Before: Presiding Justice David Bonga, Justice Dennis Nelson, Justice Howard Stewart, Justice Earl McGeoghegan, Justice Edythe Chenois, Justice Conrad Pascal, and Justice Gary Bass.

Nelson, J.

I concur. I agree the Colville Business Council has authority to determine all questions of the Tribes' membership. I would add once membership or a justifiable expectation of membership exists, either cannot be taken away without due process.

The Business Council was the sole authority determining membership at the time of the

first enrollment application. The Bureau of Indian Affairs did not participate in the enrollment procedure nor did it determine who was or was not Indian. Approval by the Superintendent was to insure due process was followed during the enrollment process.

Consequently, the first and second resolutions effectively established Louis Provo as a full blooded Indian. Once this occurred, his qualified descendants were eligible for enrollment. In my opinion, the expectancy of enrollment should be considered a property right that cannot be taken away without due process.

Due process was ignored when subsequent resolutions were enacted negating the first two without the qualified descendants receiving notice of the proposed action by the Business Council and without having an opportunity to be heard.

Should the Council wish to change its position regarding Louis Provo's blood quantum, it should follow the disenrollment procedures set out in the Enrollment Code or use a procedure that guarantees Provo's qualified descendant's due process.