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.

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

[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.

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 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.

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[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.

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 pretrial incarceration; (b) minimization of anxiety and concern of the accused; and (c) limitation of the possibility that the

[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.

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.

In its arguments to uphold the Trial Court's decision, Prosecutor Chad Marchand presented

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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.

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 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

[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)).

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