

No. CA-02-002  
Pascua Yaqui Tribe Court of Appeals

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Pascua Yaqui Tribe, Plaintiff-Appellant,

v.

Belinda Baltazar, Defendant-Appellee.

ORDER

Tamara Walters, Esq., Pascua Yaqui Tribe, Office of the Prosecutor, Tucson, Arizona, for the Appellant

Maria M. Avilez, Esq., Pascua Yaqui Tribe, Office of the Public Defender, Tucson, Arizona, for the Appellee.

We reviewed the record and heard arguments in this case on June 30, 2006 and find as follows:

1) On October 30, 2001, the Tribal Court held a bench trial and acquitted the defendant of the criminal charge of assault and battery on a tribal official, 1 PYTC sec. 3.7(A), Final Order, Case No. CR-01-182 (Oct. 30, 2001);

2) On November 13, 2001, the Tribe filed an appeal of the judgment of acquittal alleging that a) the Tribal Court erred when it ruled that the Tribe had failed to prove beyond a reasonable doubt that the defendant had willfully struck a police officer, and b) that the Tribal Court's judgment of acquittal was not supported by the evidence;

3) On April 5, 2002, this Court accepted the Tribe's appeal and ruled on the merits as follows: "The Trial Court made an error of law when deciding that a push did not constitute a strike within the meaning of the Pascua Yaqui Tribal Code. Therefore, the matter is remanded, and the Trial Court is directed to vacate its initial ruling and to

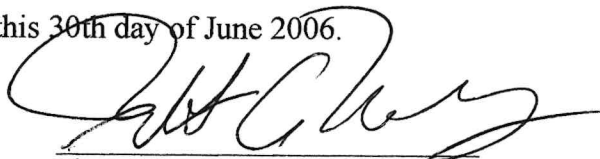
enter a judgment consistent with this decision.” Opinion and Order at 4 (Pascua Yaqui Tribe Court of Appeals, April 5, 2002);

4) On April 12, 2002, the defendant filed a motion asking this Court to reconsider its ruling, on the ground that the ruling violated the Pascua Yaqui Tribe Constitution, “Bill of Rights,” Article 1, Section 1, Clause C, which prohibits the Tribe from subjecting “any person for the same offense to be twice put in jeopardy”; and

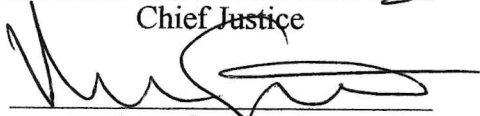
5) The Tribe does not oppose the motion and agrees that the ruling violates double jeopardy. We grant the motion for reconsideration and invalidate our April 5, 2002 Opinion and Order.

Accordingly, it is ORDERED that this Court’s April 5, 2002 Opinion and Order is vacated and held null and void. It is further ORDERED that the Tribe’s appeal that was filed on November 13, 2001 is dismissed with prejudice. The Tribal Court’s judgment of acquittal dated October 30, 2001 is final. Any orders entered by the Tribal Court after October 30, 2001 on this matter are hereby held null and void.

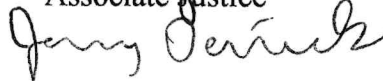
So ORDERED this 30th day of June 2006.



Chief Justice



Associate Justice



Associate Justice

IN THE PASCUA YAQUI COURT OF APPEALS

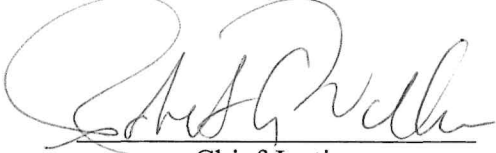
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PASCUA YAQUI TRIBE	)	Case No.: No. CA-02-002
Plaintiff/Appellant	)	
v.	)	ORDER
BELINDA BALTAZAR,	)	
Defendant/Appellee	)	
-----		

Tamara Walters, Esq., Pascua Yaqui Tribe, Office of the Prosecutor, Tucson, Arizona for the Appellant.

Maria M. Avilez, Esq., Pascua Yaqui Tribe, Chief Public Defender, Tucson, Arizona, for the Appellee.

Upon review of the record, this Court requests an appellate hearing be held in this case. Oral arguments have been scheduled for June 30<sup>th</sup>, 2006 at 10:50 AM. Arguments will be held in the courtroom at the Pascua Yaqui Tribal Court. Appellant and appellee will each have 15 minutes to present.

So ORDERED this 8<sup>th</sup> day of June, 2006.

  
\_\_\_\_\_  
Chief Justice

1 PASCUA YAQUI TRIBE  
2 OFFICE OF THE PROSECUTOR  
3 7474 S. Camino de Oeste  
4 Tucson, Arizona 85746  
5 (520) 879-6251

6 Tamara Walters, SBN 10510  
7 Chief Prosecutor  
8 Attorney for Appellant

CA-02-002  
*[Signature]*

9 **IN THE PASCUA YAQUI TRIBE COURT OF APPEALS**

10 **IN AND FOR THE PASCUA YAQUI RESERVATION, ARIZONA**

11 PASCUA YAQUI TRIBE, )  
12 Appellant, ) NO. CA-02-002  
13 ) (Tribal Court No. CR-01-182)  
14 Vs. )  
15 BALTAZAR, BELINDA, ) **OPPOSITION TO MOTION FOR**  
16 Appellee. ) **RECONSIDERATION**  
17 )  
18 )  
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29 COMES NOW The Pascua Yaqui Tribe, Appellant, by and through  
30 counsel undersigned, and hereby opposes Appellee's Motion for  
31 Reconsideration for the reasons set forth herein.

32 **I. The Court of Appeals' decision should stand.**

33 Appellee argues that the Court of Appeals' decision was  
34 untimely and the Trial Court's decision must stand. Appellant  
35 opposes Appellee's strict interpretation of the rule.

36 Pursuant to Section 1.11 of the Rules of Appellate  
37 Procedure, the Court of Appeals may order proceedings in  
38 accordance with its own discretion, even without a motion from a  
39 party. (Suspension of Procedures)

40 Pursuant to Section 1.29, The Court of Appeals shall have  
41 the discretion to promulgate Rules and Procedures which  
42 supplement and clarify the Procedures set forth therein.

43 Section 1.27(A) allows the Court of Appeals to enter any  
44 decision that it deems, in its discretion, to serve the best  
45

1 interests of justice.

2 It was the intent of the Court of Appeals to render a  
3 written decision in this case, as they did so on April 5, 2002.  
4 It was the intent of the Court of Appeals to not allow the  
5 decision of the Trial Court to stand and take immediate effect,  
6 as demonstrated in their decision. This Court found that the  
7 Trial Court made an error of law and remanded the matter back to  
8 the Trial Court and directed it to vacate its initial ruling and  
9 to enter a judgment consistent with its decision. The Court of  
10 Appeals has the discretion to suspend the time frame to render  
11 its decision. It would serve the best interests of justice for  
12 the decision of the Court of Appeals to stand.

13 The Court of Appeals has previously suspended timeframes to  
14 meet the ends of justice. In Juan Morales v. Pascua Yaqui Tribe,  
15 CA-01-006, this Court did not set a bond within seven (7) days of  
16 the receipt of the Notice of Appeal. Appellant Morales argued in  
17 that case that the Court of Appeals was prohibited from setting  
18 bond after the seven day period, based upon a strict  
19 interpretation of the rule. However, this Court, in its  
20 discretion, suspended the timeframe for requiring a criminal bond  
21 under PYRAP Section 1.18, so the interests of justice would be  
22 better served. (See Paragraph Number 2, Page 2, Interim Order  
23 dated August 24, 2001, attached hereto as Exhibit A.)

24 **II. There is no violation of double jeopardy.**

25 The Appellee is raising the same arguments raised in her  
26 Responsive brief. Appellee makes an untrue argument when she  
27 says that the Trial Court ruled that Appellee's actions of  
28

1 pushing Officer Olivo were not "wilfull". The Trial Court never  
2 made such a statement, nor was there any supporting evidence on  
3 the record that Appellee's push was not wilfull, i.e. accidental  
4 or unintentional. The only word the Trial Court emphasized was  
5 "strike". The Trial Court did not make a finding that Appellee's  
6 push was not wilfull, but that the push was not a strike. This  
7 Court has held that the push was a strike.

8 Therefore, there will be no re-evaluation of the evidence  
9 presented at trial, or additional evidence to be considered by  
10 the Trial Judge, or no new trial. There will be no evaluation of  
11 the sufficiency of the evidence or the evidence at all, only a  
12 correction of a legal error in the definition of the word  
13 "strike". Under the circumstances of this case, there will be no  
14 double jeopardy or violation of the Constitution of the Pascua  
15 Yaqui Tribe.

16 **III. This Court has jurisdiction.**

17 This argument has also been fully addressed by Appellant in  
18 its Reply to Appellee's Brief and Motions to Dismiss. This Court  
19 does have jurisdiction to hear this appeal, pursuant to Section  
20 1.12 of the PYRAP. The Court of Appeals shall have jurisdiction  
21 to hear all appeals from any order of the Trial Court, and  
22 nothing herein shall limit the power of the Court of Appeals to  
23 review any Order of the Trial Court. There is no restriction, as  
24 Appellee claims, to specifically bar claims of double jeopardy.  
25 The Tribe has been given express statutory authorization to bring  
26 this appeal after the amendment to the Rules of Appellate  
27 Procedure.  
28

1 **IV. Conclusion.**

2 Appellee's Motion for Reconsider should be denied and this  
3 matter should be remanded to the Trial Court for Sentencing.

4 **Respectfully submitted this 18th day of April, 2002.**

5  
6 OFFICE OF THE PROSECUTOR  
7 PASCUA YAQUI TRIBE

8 

9 Tamara Walters  
10 Chief Prosecutor  
11 Attorney for Appellant

12 Original and four copies of the foregoing delivered/mailed  
13 This date to:

14 Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

15 Copy delivered/mailed to:

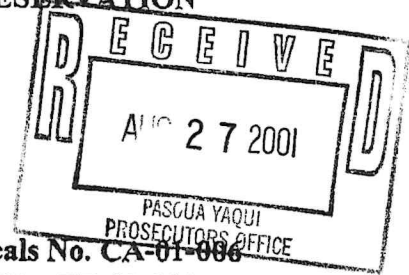
16 Maria Avilez  
17 Chief Public Defender  
18 7474 S. Camino de Oeste  
19 Tucson, Arizona 85746  
20 Attorney for Appellee

21 By: 

22  
23  
24  
25  
26  
27  
28

**EXHIBIT A**

**IN THE PASCUA YAQUI COURT OF APPEALS  
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION**



MORALES, JUAN )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 PASCUA YAQUI TRIBE, )  
 )  
 Appellee. )

**Court of Appeals No. CA-01-006  
(Tribal Court No. CR-01-111)**

**INTERIM ORDER**

This Court received Notice of Appeal filed on August 13, 2001. The Appellant requested, among other things, a stay of execution of sentence and motioned to stay the appeal pending this Court's decision on Appellant's Request for Trial De Novo. This Court also received by separate pleading also filed August 13, 2001, the Appellate's Request for Trial De Novo and Request for Pre-Trial Conference.

We note that the Appellant requests a trial de novo for only Count 2 in the Tribal Court case number CR-01-111. This Court recognizes that the Constitution of the Pascua Yaqui Tribe, Article VII, Section 5, provides for the right of a trial de novo in a criminal matter. However, the trial de novo is not defined in the Constitution. As a result, this Court, pursuant to Pascua Yaqui Rules of Appellate Procedure (PYRAP) Section 1.24, will need to consider the propriety of a trial de novo for the requested Count 2.

Because the Appellant also timely filed his request for appeal along with his request for a trial de novo, this Court recognizes that the briefing requirements triggered by the filing of the Notice of Appeal continue to run.

In addition, this Court also recognizes that the request for a trial de novo is a matter of first impression within the Pascua Yaqui Court of Appeals and feels that the interests of justice will be better served pending a full consideration of this matter if the Appellant's sentence is stayed during that time. However, this Court hesitates to allow an individual who was apparently released on bond and charged with the crime underlying this de novo request and appeal while out on said bond, to be released upon his own recognizance.

Therefore, this Court orders the following:

1. The briefing requirements of PYRAP Section 1.22, are temporarily suspended pending a determination by this Court as to the propriety of a trial de novo in this matter, provided that should Appellant's request for a trial de novo be denied by this Court or withdrawn

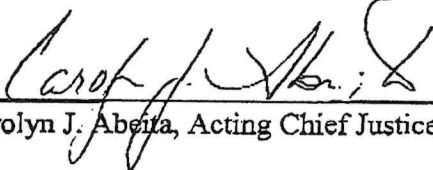
by the Appellant, that the briefing schedule shall resume upon this Court's written notice to the Appellant.

2. The Court, in its discretion, suspends the timeframe for requiring a criminal bond under PYRAP Section 1.18. The execution of the Appellant's sentence is hereby stayed pending this Court's determination on the propriety of a trial de novo and/or a resolution of the matter on appeal provided that Appellant tender to the Clerk of the Court by close of business on September 4, 2001, an amount of \$1,000 in cash or cashier's check, as an appeal bond.

3. The stay of execution granted by this Court shall dissolve by the terms of this Order if the Appellant fails to pay the appeal bond by the deadline specified.

4. The Appellant's request for a pre-trial conference is granted and the Court shall notify all parties of the date and time of the pre-trial conference to address the propriety of a trial de novo.

IT IS SO ORDERED this 24<sup>th</sup> day of August 2001.

  
\_\_\_\_\_  
Carolyn J. Abeita, Acting Chief Justice

1 Pascua Yaqui Public Defender  
7474 S. Camino de Oeste  
2 Tucson, Arizona 85746

3 María M. Avilez, SBN 017116  
4 COUNSEL FOR: Appellee

APR 12 10:53

CA-02-002  
*[Handwritten signature]*

5 IN THE APPELLATE COURT OF THE YAQUI NATION  
6 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

6	PASCUA YAQUI TRIBE,	)	
7	Appellant,	)	Case No.: CA-02-002
8	vs.	)	(Tribal Court No. CR-01-182)
9	BALTAZAR, BELINDA,	)	MOTION FOR RECONSIDERATION
10	Appellee	)	

11 COMES NOW, Appellee, by and through counsel undersigned and  
12 hereby requests this Court to enter reconsider its Ruling dated April  
13 5, 2002. This Motion is based on the following Memorandum of Points  
14 and Authorities.

15 Dated this 12<sup>th</sup> day of April 2002.

*[Handwritten signature]*  
17 María M. Avilez  
Chief Public Defender

18 MEMORANDUM OF POINTS AND AUTHORITIES

19 I. Procedural Background

20 On August 14, 2001 The Tribe charged Appellee with one count of  
21 Assault and Battery on a Tribal Official in violation of Pascua Yaqui  
22 Tribal Code (PYTC), Title 1, Section 3.7(A).<sup>1</sup> Following a bench trial,  
23 the trial court acquitted Appellee of the charge.<sup>2</sup> The court found,  
24 "...after hearing sworn testimony from the Tribe's witness and after  
25 hearing the Defendant's testimony, the Tribe has not proven beyond a  
26

27 \_\_\_\_\_  
28 <sup>1</sup> See Criminal Complaint (Amended) No. CR-01-182 attached to Appellee's Motion  
to Dismiss Appeal in Response to Tribe's Notice of Appeal.

1 reasonable doubt that the Defendant committed the offense of count 1:  
2 Assault & Battery On A Tribal Official. The Court finds that the  
3 Defendant did not willfully strike Officer Olivo."<sup>3</sup> The Tribe filed a  
4 Notice of Appeal on November 13, 2001. The parties then filed various  
5 pleadings and briefs. The Tribe filed its Brief in Reply on December  
6 21, 2001. On April 5, 2002 this Court entered its Order, holding that  
7 the lower court made an error of law when it decided that a push did  
8 not constitute a strike under the Pascua Yaqui Tribal Code. This Court  
9 then remanded the matter to the lower court and directed the court to  
10 vacate its original ruling and to enter its judgment consistent with  
11 this Court's decision.

## 13 II. Law

14 Section 1.20 of the Pascua Yaqui Rules of Appellate Procedure  
15 (PYRAP) allows parties to file motions "as part of the Notice of  
16 Appeal or the Response to the Appeal or thereafter."<sup>4</sup>

17 Section 1.26(C) of the PYRAP mandates that, "If the Court of  
18 Appeals does not render a written decision within 90 calendar days of  
19 ... receipt of the Brief in Reply (where no oral argument is granted)  
20 the decision of the Trial Court stands and shall take immediate  
21 effect."<sup>5</sup>

---

27 <sup>2</sup> See trial court's Order, dated October 30, 2001, and attached to Tribe's  
28 Brief on Appeal.

<sup>3</sup> *Id.* Some emphasis mine.

<sup>4</sup> *Id.* Emphasis mine.

<sup>5</sup> *Id.*

1 Article 1, Section 1(C) of the Pascua Yaqui Constitution  
2 prohibits the Pascua Yaqui Tribe from "subjecting any person for the  
3 same offense to be twice put in jeopardy."<sup>6</sup>

4 **III. Argument**

5 A. The Trial Court's Order Stands And  
6 Took Effect Ninety Days After  
7 Receipt Of The Brief in Reply

8 The language of Section 1.26(C) is clear. Where the Court of  
9 Appeals "...does not render a written decision within 90 calendar days  
10 of ... receipt of the Brief in Reply (where no oral argument is  
11 granted) the decision of the Trial Court stands and shall take  
12 immediate effect."<sup>7</sup> In this matter, the Tribe filed its Brief in Reply  
13 on December 21, 2001. Deputy Court Clerk Ofelia Ochoa faxed the Reply  
14 Brief to this Court on December 21, 2001 at 12:35 p.m.<sup>8</sup> This Court  
15 issued its written decision on April 5, 2002 - fifteen days after the  
16 trial court's decision took final effect pursuant to the mandate in  
17 Section 1.26(C). Thus, the trial court's order should stand under the  
18 PYRAP mandate.

19 This Court should reconsider its ruling, and thereby follow the  
20 mandate in the PYRAP.  
21

22 B. The Tribe's Appeal and This Court's Ruling  
23 Violate Appellee's Constitutional  
24 Protection Against Double Jeopardy

25 The Tribe's appeal and this Court's ruling violate the PY  
26 constitutional prohibition against double jeopardy. In this instance,  
27

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28 <sup>6</sup> Pascua Yaqui Constitution, *id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Attachment A.

1 jeopardy attached, "when the judge began to receive evidence."<sup>9</sup> After  
2 hearing the evidence, the trial court found that the Tribe had failed  
3 to meet its burden of proof beyond a reasonable doubt, thereby  
4 acquitting her of the charged offense. The trial judge made "...a  
5 determination on the merits ... [and] addressed the sufficiency of the  
6 evidence to support the crime charged and found it fatally lacking.  
7 Accordingly, the constitutional protections against double jeopardy  
8 bar the ... [Tribe's] appeal."<sup>10</sup>

10 Double jeopardy protections bar the government's appeal where  
11 such appeal would require that the "...decision of the factfinder  
12 would have to be overturned, e.g., the trial judge's ruling of not  
13 guilty."<sup>11</sup> The government's appeal is so barred because, "[a]n  
14 acquittal on the merits by the sole decisionmaker in the proceeding is  
15 final and bars retrial on the same charge."<sup>12</sup>

16 The Tribe should have been barred from appealing the trial  
17 court's judgment of acquittal in this matter. An acquittal,  
18 "...whether based on a jury verdict of not guilty or on a ruling by  
19 the court that the evidence is insufficient to convict, may not be  
20 appealed and terminates the prosecution..."<sup>13</sup> Further, "the law  
21 attaches particular significance to an acquittal. To permit a second  
22 trial after acquittal, however mistaken the acquittal may have been,  
23

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25 <sup>9</sup> *Government of the Virgin Islands v. Briggs*, 155 F.Supp.2d 455, 457 (2001),  
26 citing to *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564, 570, 97 S.Ct. 1349,  
51 L.Ed.2d 642 (1977).

27 <sup>10</sup> *Briggs*, *id.* at 458.

27 <sup>11</sup> *Briggs*, *id.*

28 <sup>12</sup> *Briggs*, *id.*, citing to *Arizona v. Rumsey*, 467 U.S. 203, 211, 104 S.Ct.  
2305, 81, L.Ed.2d 164 (1984).

1 would present an unacceptably high risk that the Government, with its  
2 vastly superior resources, might wear down the defendant so that even  
3 though innocent, he may be found guilty."<sup>14</sup> See also *Smalis v.*  
4 *Pennsylvania*, 476 U.S. 140, 145-46, 106 S.Ct. 1745, 90 L.Ed.2d 116  
5 (1986) agreeing that "the Double Jeopardy Clause bars a postacquittal  
6 appeal by the prosecution not only when it might result in a second  
7 trial, but if reversal would translate into further proceedings of  
8 some sort, devoted to the resolution of factual issues going to the  
9 elements of the offense charged."<sup>15</sup>

10  
11 In this matter, the trial judge made her ruling only after  
12 hearing the testimony of the Tribe's witness and of the Defendant.  
13 She, and only she, was in the position to be able to hear and weigh  
14 the credibility of the witnesses. She made a factual finding in the  
15 Defendant's favor on the essential elements of "willful" and  
16 "striking." The determination that a ruling of a judge is an acquittal  
17 is based on whether the ruling "...actually represents a resolution,  
18 correct or not, of some or all of the factual elements of the offense  
19 charges."<sup>16</sup> The trial judge's ruling satisfies this requirement. She  
20 ruled not only that Appellant did not *strike* the officer, but that she  
21 did not do so *willingly*. Thus, her factual finding bars this appeal.

22  
23 This Court's ruling directly violates the Appellee's  
24 constitutional right against double jeopardy in that this Court finds  
25

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26  
27 <sup>13</sup> *United States v. Scott*, 437 U.S. 82, 91, 98 S.Ct. 2187, 2194 (1978)  
(citations omitted).

<sup>14</sup> *Scott*, *id.* at 91, 2194. Citations and internal quotation marks omitted.

28 <sup>15</sup> *Smalis*, *id.* Citations and internal quotation marks omitted. Emphasis mine.

<sup>16</sup> See footnote 7, *supra*, *Martin Linen Supply Co.*, 430 U.S. at 571. Emphasis mine.

1 that "...the record shows that Defendant admits to pushing Officer  
2 Olivo...."<sup>17</sup> The ruling further directs the lower court to vacate its  
3 initial ruling and to enter a judgment consistent with the ruling.  
4 This reversal thus translates into "...further proceedings of some  
5 sort, devoted to the resolution of factual issues going to the  
6 elements of the offense charged...."<sup>18</sup> Neither this Court, nor the  
7 lower court should entertain a RE-determination of what the facts  
8 below actually were.  
9

10 This Court should reconsider its ruling, and thereby uphold the  
11 Appellee's constitutional right against double jeopardy.

12 C. This Court Lacked Jurisdiction  
13 To Hear This Appeal

14 This Court lacked jurisdiction to hear the Tribe's Appeal. No  
15 statutory authority exists that would allow the Tribe's appeal in  
16 violation of the PY Constitution. The drafters of the PY Code and  
17 Constitution obviously recognized the need to protect against  
18 governmental violations of safeguards afforded under the PY  
19 constitutional protections prohibiting double jeopardy.

20 Although Section 1.12 in the PYRAP grants this Court jurisdiction  
21 to hear "all appeals from any Order of the Trial Court," the PY  
22 constitutional provision prohibiting double jeopardy supercedes that  
23 section in the PY Tribal Code, especially where an appeal by the Tribe  
24 would violate that provision. Further, it surely was not the intent of  
25 the drafters of the PYRAP to create a statutory provision that would  
26

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27  
28 <sup>17</sup> See this Court's Opinion and Order dated April 5, 2002.

<sup>18</sup> See *Smalis, supra*, and footnote 14.

1 overrule and violate the PY Constitution. The PYRAP do not provide,  
2 and would do so only in violation of the constitution, that any party  
3 may appeal in violation of the PY Constitution. Where, as in this  
4 matter, the trial court has acquitted a person charged with a criminal  
5 offense upon a finding that the Tribe failed to meet its burden of  
6 proof beyond a reasonable doubt, the Tribe must not be afforded a  
7 second opportunity to convict the person. To allow such appeal would  
8 certainly violate double jeopardy protections in the PY Constitution  
9 and would create a dangerous precedent of eliminating the rights of  
10 the people. Therefore Appellant did not have the right to appeal the  
11 acquittal of Appellee in this jurisdiction in this matter under the  
12 PYRAP.  
13

14 This Court should reconsider its ruling, and decline jurisdiction  
15 in this matter.

#### 16 **IV. Conclusion/Relief Requested**

17 The decision of the trial court took immediate effect on March  
18 21, 2002, which was the 90<sup>th</sup> day after the Tribe's Reply Brief was  
19 filed and faxed to this Court. Section 1.26(C) of the PYRAP mandates  
20 that the trial court's decision shall stand and take immediate effect  
21 upon that date.  
22


23 The Tribe's appeal and this Court's ruling violate the PY  
24 constitutional prohibition against double jeopardy. Once jeopardy  
25 attached and the merits of the case are heard and decided by the lower  
26 court, that ruling may not be appealed by the Tribe nor reversed at  
27 the appellate level, even if the resolution is viewed as incorrect by  
28 this Court.

1 This Court lacked jurisdiction to hear the Tribe's Appeal. The  
2 constitutional provision prohibiting double jeopardy supercedes any  
3 statutory provision, which would allow a violation of the  
4 constitution. The People of the Pascua Yaqui Tribe deserve to have the  
5 rights guaranteed to them enforced. This Court should decline to take  
6 jurisdiction on the Tribe's Appeal.  
7

8 Based on the foregoing, this Court should reconsider its April 5,  
9 2002 Ruling.

10 RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of April 2002.

11   
12 María M. Avilez  
Chief Public Defender

13 ORIGINAL and four copies of the foregoing delivered  
14 this date to: 

Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

15 COPY of the foregoing delivered this date to

16 Tamara Walters  
17 Chief Prosecutor  
18 7474 S. Camino de Oeste  
Tucson, AZ 85746  
Attorney for Appellant  
19  
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IN THE PASCUA YAQUI COURT OF APPEALS  
IN AND FOR THE PASCUA YAQUI TRIBE

The PASCUA YAQUI TRIBE,	)	
	)	
Appellant,	)	
	)	Case No. CA-02-002
v.	)	(TC CR-01-182)
	)	
BALTAZAR, BELINDA,	)	OPINION AND ORDER
	)	
Appellee.	)	

R., Monette, Chief Justice, for a unanimous Court.

This case arose originally in a prosecution of Ms. Belinda Baltazar for striking a police officer. In her oral testimony the Defendant admitted to pushing the officer but maintained that she did not strike the officer. The lower court found that the Defendant did not strike the officer and ruled the Defendant not guilty. On 13 November 2001, the prosecution filed a notice of appeal and on 4 December 2001, the prosecution filed a Brief on Appeal. On 11 December 2001, the defense filed a motion to dismiss the appeal even though such response was not due until 18 December 2001. On 14 December 2001, the defense filed a Brief in Response to the prosecution's Brief on Appeal. On 19 December 2001, the defense filed a motion for a Ruling on the Pleadings, claiming that the prosecution failed to meet a deadline of 18 December 2001, or seven days from the defense's Motion to dismiss. On 21 December 2001, the prosecution filed a Response to the defense's Brief in Response, Motion to Dismiss, and Motion for Ruling on the Pleadings. On 2 January 2002, the defense filed a Reply to the Prosecution's Response.

## PART 1. Procedural Issues.

Both sides in this case have created an interesting procedural thicket, which the Court declines to enter. First, Appellant argues in the filing of December 21<sup>st</sup> that Appellee filed an untimely response to the appeal because the Brief in Response exceeded a seven day deadline purportedly triggered by the filing of the Notice of Appeal. Second, Appellee argues in the filing of December 19<sup>th</sup> that Appellant filed an untimely Reply to Appellee's December 11<sup>th</sup> Motion to Dismiss because the Reply exceeded a seven day deadline purportedly triggered by the Motion to Dismiss. Both parties are incorrect.

In the first matter, the fourteen day clock for Appellee's Response does not begin to run upon the service of a Notice of Appeal that is unsupported by a brief. Rather, the fourteen day clock begins to run when the Appellant has served the Brief on Appeal. In this case, because the Brief on Appeal was served on December 4<sup>th</sup>, the Appellee's Brief in response was timely filed on December 11<sup>th</sup>. Incidentally, then, Appellant assumed that the Motion to Dismiss was incorporated into Brief in Response and responded to the Motion to Dismiss, the Brief in Response, and the Motion for Ruling on the Pleadings. Granted, while the Court agrees that the Motion to Dismiss should have been made as part of the Brief in Response or thereafter, the Court cautions Appellant about assuming that a responsive filing deadline is extended simply because a later filing incorporates, implicitly or explicitly, an earlier independent filing.

Second, regarding Appellee's claim of untimely filings by Appellant, the Motion to Dismiss by Appellee must have been filed either with the Response to the Appeal or thereafter. While Appellee declares this provision of the PYRAP "ambiguous," this

Court fails to see the ambiguity. Again, Section 1.20 of the PYRAP states that motions may be made as part of the Notice of Appeal, which Appellee did not, and for that matter could not, do. Section 1.20 also says that motions may be made as part of the Response to the Appeal, which Appellee did not do. Section 1.20 also states that the motions may be made thereafter the Response to the Appeal, which Appellee did not do. Rather, Appellee attempted to trigger the running of a clock by filing a motion out of sequence. Appellee's Motion to Dismiss must have been filed with the Brief in Response filed on December 14<sup>th</sup>, or thereafter. Appellant then had seven days to file a Reply. Thus, Appellant's reply brief, filed on December 21<sup>st</sup>, is timely filed.

#### PART 2. Substantive Issues.

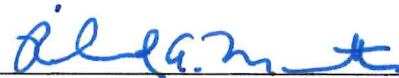
First, the Trial Court failed to separately state its "Findings of Fact" and "Conclusions of Law" as necessary in order for a party and an appellate court to adequately determine the basis for the Trial Court's ruling. If the Trial Court has not reduced a bench ruling and final order to writing as a matter of course, this writing must be done by the Trial Court upon a filing of a Notice of Appeal. In the matter at hand, the Trial Court apparently made a finding of fact that Defendant did not strike Officer Olivo. However, because the record shows that Defendant admits to pushing Officer Olivo, the basis for the Trial Court's finding seems to be a conclusion of law that a push does constitute a "strike" as that term is used in the PYTC Sec. 3.7(A).

This Court now holds that "Strike", as that term is used in PYTC Sec. 3.7(A), as a matter of law includes a "push". The reason for such a reading, aside from decorum, is the potentially grave results to a citizen if an officer should construe any such sudden motion to be accompanied by a gun or to be a lunge with a knife or other deadly object,

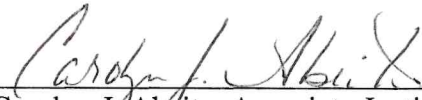
which may justify an officer's using deadly force in return. Likewise, if a citizen is allowed to push an officer, that officer might fail to respond to what she thinks is a mere push but what may in fact be a gunshot or a lunge with a knife, thus creating potentially grave results for an officer. Thus, the provision at issue shall be construed to provide maximum protection not only to officers, but also to the citizenry at large.

The Trial Court made an error of law when deciding that a push did not constitute a strike within the meaning of the Pascua Yaqui Tribal Code. Therefore, the matter is remanded, and the Trial Court is directed to vacate its initial ruling and to enter a judgment consistent with this decision.

IT IS SO ORDERED this 5<sup>th</sup> day of April, 2002.



Richard Monette, Chief Justice



Carolyn J. Abeita, Associate Justice



Carey Vicenti, Associate Justice

1 Pascua Yaqui Public Defender  
7474 S. Camino de Oeste  
2 Tucson, Arizona 85746

3 María M. Avilez, SBN 017116  
4 COUNSEL FOR: Appellee

02 JUL -2 AM 8:21  
CA 02-002  
DJ

5 IN THE APPELLATE COURT OF THE YAQUI NATION  
6 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

7  
8 PASCUA YAQUI TRIBE, ) Case No.: CA-02-002  
Appellant, ) (Tribal Court No. CR-01-182)  
9 vs. )  
10 BALTAZAR, BELINDA, ) REPLY TO APPELLANT'S RESPONSE  
Appellee ) TO MOTION TO DISMISS AND MOTION  
11 ) FOR RULING ON THE PLEADINGS  
12 )

13 Appellee, by and through counsel undersigned, hereby  
14 replies to Appellant's Response to Motion to Dismiss and Motion  
15 for Ruling on the Pleadings.

16 First, Appellant incorrectly asserts that Appellee's Motion  
17 to Dismiss is untimely. The PYRAP do not require that Motions in  
18 an appellate case be filed within seven days of the Notice of  
19 Appeal. The simple filing of a Notice of Appeal does not provide  
20 the party opposing an appeal with sufficient information that  
21 would lead to any particular motion. Section 1.20 of the PYRAP  
22 allows motions to be made, "...as part of the Notice of Appeal  
23 or the Response to the Appeal or thereafter." The only timeline  
24 in that section is seven days *for the party opposing the motion*.  
25 Appellee filed the Motion to Dismiss *one week after* Appellant  
26 filed the Brief on Appeal, and as soon as Appellee was aware  
27 that Appellant would appeal the sufficiency of the evidence in  
28 violation of the Double Jeopardy Clause of the Pascua Yaqui

1 Constitution. Therefore, Appellee's Motion to Dismiss is timely  
2 filed.

3 Second, the Appellant's Reply to the Motion to Dismiss is  
4 *untimely*. It is unfortunate, although irrelevant that counsel  
5 for Appellant did not review the file in time to notice that the  
6 Motion to Dismiss had been filed on December 11, 2001, giving  
7 her until December 18, 2001 to file a *timely* response pursuant  
8 to the mandate in Section 1.20. Appellant is mistaken that she  
9 would have seven days after the Appellee's Response Brief to  
10 respond to the Motion to Dismiss. Although Appellee incorporated  
11 the Motion in her Response Brief as part of her opposition to  
12 this Court having jurisdiction, *the Motion stands alone as a*  
13 *pleading filed prior to the Response Brief*. Therefore, Appellant  
14 was required to file her response to the Motion *no later than*  
15 *December 18, 2001*. Appellant's Response is therefore untimely,  
16 and under the PYRAP, this Court must consider the Motion to be  
17 unopposed.

18 Third, this Court should deny Appellant's request to  
19 "enlarge the time by three days."<sup>1</sup> If Appellant required an  
20 extension of time, the time to request such was prior to the  
21 passing of the deadline to respond. Appellant cites as cause for  
22 untimely responding to the Motion to Dismiss the fact that she  
23 was out of state until December 14, 2001. However, her office  
24 was aware of and received the Motion on December 11, 2001.  
25 Appellant still had four days after Counsel's return in which to  
26 file a response, or in the alternative, to seek an extension  
27 prior to the passing of the deadline. Appellant failed to do  
28

1 either. Counsel for Appellee, similarly, had been out of state  
2 when her office received the Appellant's Brief on Appeal.  
3 Counsel first became aware of the Brief on December 7, 2001.  
4 Appellee filed the Motion to Dismiss four days later, and the  
5 Response Brief only three days after the Motion. Surely  
6 Appellant could have found time to "timely" request this Court  
7 to grant a brief extension of time?

8 Fourth, Appellant erroneously asserts that double jeopardy  
9 considerations do not bar the government from bringing this  
10 appeal. Granted, not all appeals by the government are barred by  
11 double jeopardy considerations. For example, where a jury  
12 convicts a person, and the judge enters a verdict of acquittal  
13 over the jury's verdict, then a court of appeals may overturn  
14 the judge's decision and *reinstate* the jury's verdict without  
15 concern of double jeopardy and without reviewing the facts at  
16 trial. In such a case, the jury was the finder of fact. However,  
17 where the finder of fact has acquitted a person of the charges  
18 after hearing all of the evidence presented by both parties, as  
19 in this case, and has made findings of fact, this Court lacks  
20 jurisdiction to hear an appeal brought by the government. The  
21 tribe would have us believe that they may appeal pursuant to  
22 statutory authority even if such appeal is "...*contrary to a*  
23 *constitutional provision or not.*"<sup>2</sup> This is clearly an example of  
24 the abuse of government that the Constitution is aimed at  
25 preventing.

26  
27  
28  

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<sup>1</sup> See Appellant's Reply, page 3.

<sup>2</sup> See Appellant's Reply, page 4. Emphasis mine.

1 This Court should uphold the right against double jeopardy  
2 guaranteed to Appellee in the PY Constitution. This Court should  
3 refuse to hear this Appeal, thereby refusing to aid the  
4 government in violating the rights of the people deemed most  
5 basic by the Pascua Yaqui Tribe. Fundamental fairness requires  
6 that this Court decline to hear this Appeal based on  
7 constitutional mandates.

8 Fifth, Appellant incorrectly states that the relief  
9 requested would not violate double jeopardy. However,  
10 ultimately, Appellant is requesting that this Court (a) reverse  
11 the trial court's acquittal, (b) make findings of fact that  
12 would invalidate the findings of fact made by the trial judge,  
13 and (c) review the sufficiency of the evidence. Although  
14 Appellant's Reply attempts to allege that the lower court made  
15 an "error of the law," the Notice of Appeal and Brief on Appeal  
16 allege an error based on the "sufficiency of the evidence."<sup>3</sup>

17 Appellant failed to allege "error of the law that would  
18 affect the verdict" in its Brief on Appeal. However, Appellant  
19 now asserts that the basis for this Appeal is that the "trial  
20 court based its verdict on an error of law."<sup>4</sup> This comes only  
21 after reviewing the law cited to by Appellee in her Response  
22 Brief, which would disfavor a review of the sufficiency of the  
23 evidence after acquittal at the lower court level. Appellant's  
24

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25  
26 <sup>3</sup> See Notice of Appearance, "The Tribe contends that the Court's reasoning  
27 that the Tribe failed to prove beyond a reasonable doubt that Appellee  
28 willfully [sic] struck Officer Olivo was erroneous and not supported by the  
evidence presented at trial." *Id.* See also Appellant's Brief on Appeal, page  
4, "The Trial Court erred in its *finding* that Appellee did not willfully  
strike Officer Olivo. The Tribe did present sufficient evidence for a guilty  
verdict." *Id.* Emphasis mine.

<sup>4</sup> See Appellant's Reply, page 5.

1 Reply to Appellee's Response Brief is merely a new brief on  
2 Appeal and fails to "respond" to the law and issues mentioned in  
3 Appellee's Response Brief. Appellant must not be given unending  
4 chances at what relief it is requesting. If in the Brief on  
5 Appeal, Appellant requests that this Court review the  
6 sufficiency of the evidence, and later discovers that such  
7 cannot occur without a constitutional violation, then Appellant  
8 may not come back and try a new route. Even a brief review of  
9 the law would have led Appellant to discover that an appeal of  
10 an acquittal after a finding of facts by the trial judge cannot  
11 stand. This is a basic principle of law.

12 Appellant asks this Court to answer the question, "Did  
13 Appellee strike the Officer?"<sup>5</sup> Appellant disguises this request  
14 as an "error of law" by calling it such. However, this request  
15 basically asks this Court to make *findings of fact*, to act as a  
16 *fact-finder*, to *re-try* the Appellee. Appellant says that its  
17 request does not require this Court to find new facts, when  
18 indeed that is exactly what is requested of this Court. The  
19 lower court already found that the Appellee did *not willfully*  
20 *strike* the officer. Appellant asks this Court to reverse this  
21 and to find that Appellee indeed struck the officer. And yet the  
22 Appellant asserts that this is not asking for new findings of  
23 fact?


24 This Court must not upset the findings of the lower court.  
25 This Court must not upset the findings of the lower court. This  
26 Court must not allow the government to appeal Appellee's  
27 acquittal based on findings of fact. This Court must not  
28

1 entertain the notion that a statutory rule in the PYRAP would  
2 usurp the guarantees in the PY Constitution. The Constitution is  
3 supreme over any statute later enacted. Certainly it was not the  
4 intent of the drafters of the PYRAP to usurp constitutionally  
5 guaranteed rights? Yet, Appellant would have us believe so.

6 Appellee respectfully requests that this Court (1) grant  
7 her Motion to Dismiss Appeal, and thereby uphold the lower  
8 court's acquittal of Appellee and Appellee's constitutional  
9 right against double jeopardy, and (2) grant her Motion for  
10 Ruling on the Pleadings, thereby denying Appellant's untimely  
11 request for an extension of time.


12 RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of January 2002.

13  
14   
15 María M. Avilez  
16 Chief Public Defender

17 ORIGINAL and four copies of the foregoing delivered  
18 this date to: 

19 Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

20 COPY of the foregoing delivered this date to

21 Tamara Walters   
22 Chief Prosecutor  
23 7474 S. Camino de Oeste  
24 Tucson, AZ 85746  
25 Attorney for Appellant  
26  
27  
28

<sup>5</sup> Appellant's Reply, page 5.

1 PASCUA YAQUI TRIBE  
2 OFFICE OF THE PROSECUTOR  
3 7474 S. Camino de Oeste  
4 Tucson, Arizona 85746  
5 (520) 879-6251

6 Tamara R. Walters, Chief Prosecutor  
7 Arizona Bar #10510

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8 IN THE PASCUA YAQUI TRIBE COURT OF APPEALS  
9 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

10 THE PASCUA YAQUI TRIBE, )  
11 Appellant, )  
12 v. )  
13 BALTAZAR, BELINDA, )  
14 Appellee. )

Case No. CA-02-002  
(Tribal Court Case No. CR-01-182)

REPLY TO MOTION TO DISMISS APPEAL,  
REPLY TO MOTION FOR RULING ON MOTION  
TO DISMISS APPEAL, and REPLY TO  
APPELLEE'S BRIEF IN RESPONSE

15 COMES NOW the Pascua Yaqui Tribe, Appellant, by and through the attorney undersigned,  
16 and hereby replies to the Appellee's Motion to Dismiss Appeal, Motion for Ruling on Motion to  
17 Dismiss Appeal, and Appellee's Brief in Response as set forth in the following Memorandum of  
18 Points and Authorities.

19 RESPECTFULLY submitted this 21st day of December, 2001.

PASCUA YAQUI TRIBE  
OFFICE OF THE PROSECUTOR

*Tamara R. Walters*  
TAMARA R. WALTERS  
Chief Prosecutor

23 MEMORANDUM OF POINTS AND AUTHORITIES

24 I. The Court should deny Appellee's Motion to Dismiss Appeal.

25 A. The Motion to Dismiss Appeal is untimely.

26 Appellant timely filed its Notice of Appeal on November 13, 2001, putting Appellee on notice  
27 that Appellant was claiming that the Trial Court made a legal error in its interpretation of the  
28

1 language of the Code for Assault and Battery on a Public Official, and as a result of this legal error,  
2 found that Appellant failed to prove beyond a reasonable doubt that Appellee struck Officer Olivo,  
3 contrary to the evidence presented at Trial. Appellee did not oppose the filing of the Notice of  
4 Appeal within a 7 day period of the Notice being filed, or any timely period after the Notice of Appeal  
5 was received by Appellee. Appellant then timely filed its Brief on Appeal on December 4, 2001.  
6 Then on December 11, 2001, Appellee filed a Motion to Dismiss Appeal in Response to Tribe's  
7 Notice of Appeal. This was almost a month after the Notice of Appeal was filed and the briefing  
8 process begun. Appellee's Motion to Dismiss was not timely filed.

9 **B. Appellant's Reply to the Motion to Dismiss Appeal is not untimely.**

10 Appellee filed its Brief in Response on December 14, 2001, incorporating therein in several  
11 sections and arguments the Motion to Dismiss Appeal in Response to Tribe's Notice of Appeal.  
12 The Motion to Dismiss Appeal is nothing more than an argument properly raised in Appellee's Brief  
13 in Response, and was filed in connection with the Response. Appellant has seven (7) calendar days  
14 after being served a Brief in Response to submit a Brief in Reply. Appellant is timely filing its Reply  
15 to the Response and incorporated Motion to Dismiss within the seven (7) day period. Section 1.22  
16 of the Pascua Yaqui Rules of Appellate Procedure ("PYRAP").

17 Section 1.20 of the PYRAP states that motions may be made as part of the Notice of Appeal  
18 or the Response to the Appeal or thereafter. Any party opposing a motion must respond to a motion  
19 within seven (7) days after service of the motion or the Court of Appeals will consider the motion to  
20 be unopposed. The Motion to Dismiss Appeal was made as a part of the Response to the Appeal and  
21 not part of the Notice of Appeal, as it was made after the Brief on Appeal was filed and in  
22 conjunction with the Response to the Appeal as it was incorporated by reference into the Response  
23 and was a primary argument raised in the Response. It was not filed thereafter. Therefore, Appellant  
24 had seven (7) calendar days from the date the Brief in Response was due to respond to the Motion  
25 to Dismiss.

26 Since the Motion to Dismiss was incorporated into the Brief in Response, and is really only  
27 an argument to be raised when it was in the Response, it is improperly labeled as a "motion".  
28 Appellant has the same reply to both documents that have a similar argument, and it only makes sense

1 that the reply would be incorporated into the Reply due seven (7) days from the service of the  
2 Response.

3 **C. In the event the Appellate Court deems the Reply to the Motion to Dismiss to be**  
4 **untimely, Appellant moves the Court to enlarge the time by three days to reply and accept**  
5 **Appellant's Reply to Motion to Dismiss as timely filed on December 21, 2001.**

6 Counsel for Appellant was out of state on training December 9<sup>th</sup> through the 14<sup>th</sup>. Counsel for  
7 Appellee was fully aware that counsel was gone and would have no notice of the Motion to Dismiss  
8 filed December 11<sup>th</sup> until December 17<sup>th</sup> when counsel would return to the office. When Counsel for  
9 Appellant returned to work, she had numerous trials, hearings and interviews set on December 17<sup>th</sup>  
10 and 18<sup>th</sup>, and did not have sufficient time to prepare a reply, even if it had been due December 18<sup>th</sup>.  
11 Appellee's deadline to file its response was December 18<sup>th</sup>. Appellant relied upon the interpretation  
12 of Section 1.20 and Section 1.22 set forth herein, and the fact that the Motion to Dismiss was  
13 incorporated into the Response Brief, and reasonably believed that the reply to both forms of the  
14 same pleading were due on December 21, 2001, seven (7) days after being served with the Response  
15 Brief.

16 The Court of Appeals, upon the motion of a party or upon its own motion may issue such  
17 interim decisions that will adequately protect the interests of the parties or the conditions for a just  
18 resolution of the case. Section 1.21 PYRAP. Under the circumstances and the arguments set forth  
19 herein, it is in the best interest of justice to deny Appellee's Motion to Dismiss Appeal and Motion  
20 for Ruling on the Pleadings, and to accept Appellant's Reply as timely filed or grant the extension of  
21 time file its Reply.

22 **D. Appellant opposes the Motion to Dismiss Appeal as the Appellant has a right to appeal**  
23 **any decision of the trial court and is not barred by double jeopardy in bringing an appeal**  
24 **pursuant to the Rules of Appellate Procedure.**

25 Appellee incorrectly argues that Appellant is barred from bringing this appeal as the Appellate  
26 Court lacks jurisdiction to hear this appeal. This is not correct. Section 1.12 of the PYRAP  
27 specifically states that The Court of Appeals shall have jurisdiction to hear **all** appeals from **any** order  
28 of the Trial Court, and nothing herein shall limit the power of the Court of Appeals to review **any**

1 Order of the Trial Court. (Emphasis added.) “Order” shall mean any decision, judgment, decree,  
2 or ruling of the Trial Court. Appellant is authorized by Code to bring this Appeal, on whatever  
3 grounds, and the Court has jurisdiction to hear it, even if the Court later finds that double jeopardy  
4 requires a dismissal, that determination cannot be made until the briefing has been completed and the  
5 Court of Appeals addresses the issues raised in the briefing process.

6 The PYRAP were recently amended, and in that amendment, the Tribe was given standing for  
7 the first time to file an appeal. The prior rules specifically excluded the Tribe from bringing an appeal.

8 The amended Rules of Appellate Procedure do not set forth any limitations or exceptions to the  
9 Tribe being able to bring an appeal. A case cited by Appellee, Government of Virgin Islands v.  
10 Briggs, 155 F.Supp.2d 455, 457 (D.Virgin Islands 2001), states that the government must have  
11 express statutory authorization before it can appeal an adverse ruling in a criminal case. Citing  
12 Government of the Virgin Islands v. Rodriguez, 1994 WL 383992, at 1(D.V.I. July 15, 1994). There  
13 is no requirement for a constitutional authorization, as Appellee is alleging. The appellate rules of  
14 the Virgin Islands has specific language allowing the government to appeal a decision, judgment, or  
15 order of a trial court dismissing an indictment or information as to any one or more counts, and  
16 prohibits the government from appealing where the constitutional prohibition against double jeopardy  
17 would bar further prosecution. The Pascua Yaqui Code has no such similar requirement and no  
18 specific language limiting the government from bringing an appeal, whether it may be contrary to a  
19 constitutional provision or not.

20 Appellee’s Motion to Dismiss is without merit and untimely. The argument is properly raised  
21 in the Brief in Response, not in a motion to dismiss. Even if this Court deems Appellee’s Motion to  
22 Dismiss to be unopposed, this Court cannot grant the Motion to Dismiss for lack of jurisdiction  
23 because to do so would be to violate the PYRAP. Furthermore, the double jeopardy issue is one to  
24 be decided by the Court after the conclusion of the briefing process and to dismiss the Notice of  
25 Appeal prior to that phase would be premature and inappropriate.

26 **E. The relief Appellant is requesting does not necessarily violate double jeopardy.**

27 The Pascua Yaqui Tribe, as a sovereign nation, adopted its Constitution of the Pascua Yaqui  
28 Tribe, which provides in Article I, Section 1 (c) that consistent with the provisions of this

1 constitution, the Pascua Yaqui Tribe in exercising its powers of self-government shall not subject any  
2 person for the same offense to be twice put in jeopardy. The Pascua Yaqui Courts are not bound to  
3 interpret the Pascua Yaqui Constitution and provisions of due process exactly as the Federal Courts  
4 have interpreted the Constitution of the United States and its due process provisions. The Tribe has  
5 no other protection against erroneous interpretations of the codes and legal errors by trial judges  
6 resulting in an acquittal than through the appeals process. There is a difference between reviewing  
7 solely the sufficiency of the evidence and reviewing errors of law that affect the verdict. In the case  
8 at hand, the trial court based its verdict on an error of the law, and Appellant is asking this Court to  
9 address that error of law and make a clarification on the definition of “strike” as used in the Code,  
10 and apply that definition to the facts of this case as presented at trial. The question is, did Appellee  
11 strike the officer. The evidence clearly showed that Appellee wilfully touched the officer. Would  
12 that touching be defined as a “strike” ? If so, the decision of the lower court should be overturned  
13 and a judgment of guilt properly imposed. The court would not have to order a new trial or put  
14 Appellee twice in jeopardy for the same offense as there would be no new fact finding. There should  
15 be a remedy for the Tribe to overturn an acquittal based upon an erroneous application of the law  
16 under certain circumstances that would not twice put the defendant in jeopardy.

17 **II. Appellant is requesting this court to define the term “strike” as set forth in the applicable**  
18 **code and apply that definition to the unlawful touching by appellee of the victim.**

19 Appellant relies on its arguments raised in its Brief on Appeal, and reiterates that the trial court  
20 did not find Appellee justified in her actions, nor did the trial court find that her actions were not  
21 willful. Rather, the trial court held that her actions did not constitute a “strike”, as the evidence was  
22 un-controverted that Appellee pushed the officer at least once, and Officer Olivo further testified that  
23 he was pushed hard more than once and punched in the chest area. Appellant is asking the Court of  
24 Appeals to define the term “strike” as used in the applicable code and what actions of force or  
25 violence it may include, and apply that definition to the facts of this case presented at trial. There is  
26 no definition of the term “strike” in the Tribal Code or local case law. Counsel has attempted to  
27 assist this Court in defining the term “strike” as used in PYTC Section 3.7(A)(1) by providing  
28 definitions of similar words or activity as used in dictionaries, statutes and case law interpretations.

1 Appellant believes that officers of the court or government officials are no different whether they  
2 are officials of a Tribal, City, State, or Federal government, and the intent of all governments is the  
3 same, that being to protect those officials employed in certain capacities.

4 Appellee incorrectly states that PYTC Section 3.7(A)(1) requires both a strike and a physical  
5 injury. The language specifically states that there can be a strike **or** a physical injury. Appellant did  
6 not charge a physical injury, only a strike to the officer, and therefore did not have to prove any  
7 physical injury.

8 **III. Conclusion.**

9 Appellant requests this Court to deny Appellee's Motion to Dismiss Appeal and Motion for  
10 Ruling on the Pleadings as (a) being untimely, (b) contrary to law as the Tribe does have jurisdiction  
11 to appeal any order for any reason or any result, (c) the reply was not untimely, or an extension of  
12 time to file is warranted, and (d) double jeopardy is not necessarily violated and can be determined  
13 only after the briefing process and a consideration of all facts and arguments presented and not  
14 prematurely.

15 Appellant requests this Court to define the term "strike" as it pertains to Section 3.7(A). This  
16 term is open for interpretation by the Court. Appellant further requests this Court to apply that  
17 definition to the facts presented in this case, and to overturn the verdict of acquittal as it would be  
18 done in a manner not in violation of the double jeopardy clause as to be applied under the Pascua  
19 Yaqui Constitution.

20 DATED this 21<sup>st</sup> day of December, 2001.

21 OFFICE OF THE PROSECUTOR  
22 PASCUA YAQUI TRIBE

23 

24 TAMARA WALTERS  
25 Chief Prosecutor

1 Original and four copies of the foregoing delivered/mailed  
2 this date to:


3 Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

4 Copy delivered/mailed to:

5 Maria Avilez  
6 Chief Public Defender  
7 7474 S. Camino de Oeste  
8 Tucson, Arizona 85746  
9 Attorney for Appellee

10 Sgt. Hector Olivo  
11 4881 W. Tarook  
12 Tucson, Arizona 85746  
13 Victim

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By  \_\_\_\_\_

1 Pascua Yaqui Public Defender  
7474 S. Camino de Oeste  
2 Tucson, Arizona 85746

3 María M. Avilez, SBN 017116  
4 COUNSEL FOR: Appellant

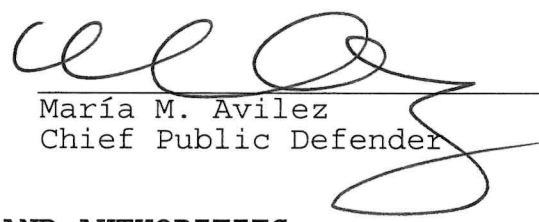
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*MA*

5 IN THE APPELLATE COURT OF THE YAQUI NATION  
6 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

7	PASCUA YAQUI TRIBE,	)	
8	Appellant,	)	Case No.: CA-02-002
9	vs.	)	(Tribal Court No. CR-01-182)
10	BALTAZAR, BELINDA,	)	MOTION FOR RULING ON THE
11	Appellee	)	PLEADINGS RE: MOTION TO DISMISS
12		)	APPEAL

13 COMES NOW, Appellee, by and through counsel undersigned and  
14 hereby requests this Court to enter its Ruling on the Motion to  
15 Dismiss Appeal based on Appellee's Motion. This Motion is based  
16 on the following Memorandum of Points and Authorities.

17 Dated this 19<sup>th</sup> day of December 2001.

18   
19 María M. Avilez  
20 Chief Public Defender

21 MEMORANDUM OF POINTS AND AUTHORITIES

22 I. Procedural Background

23 On August 14, 2001 The Tribe charged Baltazar with one  
24 count of Assault and Battery on a Tribal Official in violation  
25 of Pascua Yaqui Tribal Code (PYTC), Title 1, Section 3.7(A).<sup>1</sup>  
26 Following a bench trial, the trial court acquitted Baltazar of  
27  
28

1 the charge.<sup>2</sup> The Tribe filed a Notice of Appeal on November 13,  
2 2001. Appellee first responded by filing a Motion to Dismiss  
3 Appeal on December 11, 2001 and then by filing its Brief in  
4 Response on December 14, 2001. The Motion to Dismiss was  
5 delivered to the Tribe on December 11, 2001, immediately after  
6 it was filed.  
7

## 8 **II. Law**

9 Section 1.20 of the Pascua Yaqui Rules of Appellate  
10 Procedure (PYRAP) mandates that, where a party files a motion in  
11 an appellate case, "Any party opposing a motion **must** respond to  
12 a motion within seven (7) calendar days after service of the  
13 motion or the Court of Appeals **will** consider the motion to be  
14 unopposed."<sup>3</sup>  
15

## 16 **III. Argument**

17 The language of the Rule is unambiguous. Any response from  
18 the Tribe opposing Appellee's Motion to Dismiss **must have been**  
19 filed by the close of business on Tuesday, December 18, 2001.  
20 The Tribe has failed to respond in a timely manner. This Court,  
21 therefore, must consider the motion to be unopposed.  
22

## 23 **IV. Conclusion/Relief Requested**

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27 <sup>1</sup> See Criminal Complaint (Amended) No. CR-01-182 attached to Appellee's Motion  
to Dismiss Appeal in Response to Tribe's Notice of Appeal.

28 <sup>2</sup> See trial court's Order, dated October 30, 2001, and attached to Tribe's  
Brief on Appeal.

<sup>3</sup> *Id.* Emphasis mine.

1 Section 1.20 of the PYRAP mandate that the time for the  
2 Tribe to respond to Appellee's Motion to Dismiss has expired.  
3 Appellee respectfully requests this Court to enter its ruling  
4 based on the Appellee's Motion, and to consider the Motion  
5 unopposed pursuant to the PYRAP.  
6

7 RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of December 2001.

8   
9 María M. Avilez  
10 Chief Public Defender

11  
12 ORIGINAL and four copies of the foregoing delivered  
13 this date to:

14 Clerk of the Court, Pascua Yaqui Tribe Court of Appeals *tz*

15 COPY of the foregoing delivered this date to

16 Tamara Walters *tz*  
17 Chief Prosecutor  
18 7474 S. Camino de Oeste  
19 Tucson, AZ 85746  
20 Attorney for Appellant  
21  
22  
23  
24  
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26  
27  
28

1 Pascua Yaqui Public Defender  
7474 S. Camino de Oeste  
2 Tucson, Arizona 85746

3 María M. Avilez, SBN 017116  
4 COUNSEL FOR: Appellee

FILED

CA-02-002  
*[Signature]*

5 IN THE APPELLATE COURT OF THE YAQUI NATION  
6 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

7	PASCUA YAQUI TRIBE,	)	
8	Appellant,	)	Case No.: CA-02-002
9	vs.	)	(Tribal Court No. CR-01-182)
10	BALTAZAR, BELINDA,	)	APPELLEE'S BRIEF IN RESPONSE
11	Appellee	)	
12	_____ )		

13 COMES NOW, Appellee, by and through counsel undersigned,  
14 pursuant to Section 1.22 of the Pascua Yaqui Rules of Appellate  
15 Procedure ("PYRAP"), and hereby files her Brief in Response  
16 within the time limits therein specified.

17 **I. JURISDICTIONAL STATEMENT**

18 This Court lacks jurisdiction to hear the Tribe's Appeal in  
19 this case because there is no statutory authority, which would  
20 allow the Tribe to appeal in violation of the PY Constitution.

21 This argument is more fully set out in Appellee's Motion to  
22 Dismiss Appeal in Response to Tribe's Notice of Appeal, filed on  
23 December 11, 2001, which is hereby incorporated by reference.<sup>1</sup>

24 **II. FACTS OF THE CASE<sup>2</sup>**

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28 \_\_\_\_\_  
<sup>1</sup> See Attachment A, Motion to Dismiss Appeal in Response to Tribe's Notice of Appeal.

1 On August 10, 2001, Belinda Baltazar (Appellee) requested  
2 law enforcement to respond to her house because a thirteen-year-  
3 old neighbor had assaulted her eight-year-old daughter. Upon  
4 arrival at her home, Officer Hector Olivo was already at her  
5 home. Appellee entered her home, and Officer Olivo informed her  
6 that he had already spoken with the neighbor/aggressor and the  
7 girl's mother. He had also already spoken with the remaining  
8 witnesses, Appellee's daughter (the victim) and the adult sister  
9 who was taking care of the daughter for Appellee. *There were no*  
10 *other witnesses at Appellee's house to question.* He did not  
11 indicate to Appellee that his investigation required further  
12 information from her or anyone else in her home.  
13  
14

15 After this, Officer Olivo informed Appellee that he would  
16 not make an arrest in the matter. This made Appellee upset  
17 because a teenager had assaulted her young child, yet an arrest  
18 was not to be effected on the teen. At this point, Appellee  
19 began requesting the officer to leave her home. She was upset to  
20 the point of being in tears and specifically told the officer  
21 that she had called him to "protect and serve" her daughter, and  
22 that since he was not doing so, she wanted him out of her house.  
23 She repeated her request that he leave several times, however,  
24 the officer refused to leave. The officer just stood inside the  
25  
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27

28 <sup>2</sup> Facts cited to herein are based on facts elicited at Appellee's Trial on  
October 30, 2001 and the court's ruling therein as indicated in the Trial

1 doorway, staring at Appellee. She felt that he was taunting her.  
2 She repeatedly tried to close the door but was unsuccessful  
3 because he had his foot in the way, holding the door open.  
4

5 After several attempts to get the officer to leave, after  
6 informing him that he was no longer welcome in her home,  
7 Appellee pushed the officer one time out of the door and her  
8 house. A second officer arrived and Officer Olivo directed him  
9 to take Appellee into custody.  
10

11 At the trial, Officer Olivo testified that his only purpose  
12 for being at Appellee's house was because Appellee had requested  
13 such. He testified that he had already questioned all witnesses  
14 at Appellee's house. He agreed that Appellee wanted him out of  
15 her house and that he **refused to** leave at her request. He  
16 further testified that he was wearing a bulletproof vest on the  
17 alleged date of incident, per office policy. And, he testified  
18 that **he sustained no physical injuries** from his allegation that  
19 she hit him around the strap area of his bulletproof vest.  
20

21 After hearing all of the testimony from the witnesses, the  
22 Court found that the Tribe failed to prove beyond a reasonable  
23 doubt that Appellee had committed the offense of Assault &  
24 Battery On A Tribal Official. The Court found that the Defendant  
25 did not willfully strike Officer Olivo.  
26

27 The Tribe filed a Notice of Appeal on November 13, 2001.  
28

1 III. LAW AND AUTHORITIES

2 Double Jeopardy protections in the PY Constitution bar the  
3 Tribe's Appeal of Appellee's acquittal after a  
4 determination on the merits addressing the sufficiency of  
5 the evidence.

6 Article 1 Section 1(C) of the PY Constitution prohibits the  
7 Tribe from "subjecting any person for the same offense to be  
8 twice put in jeopardy."<sup>3</sup> See Appellee's Motion to Dismiss Appeal  
9 in Response to Tribe's Notice of Appeal, filed on December 11,  
10 2001, attached and incorporated by reference.<sup>4</sup>

11 Review of the sufficiency of the evidence in this case is  
12 determined in the light most favorable to the verdict.

13 The Tribe incorrectly interprets the standard on review of  
14 the sufficiency of the evidence. The standard is more correctly  
15 stated as, "Upon finding of *guilt* by the jury [or finder of  
16 fact], all reasonable inferences from the evidence are to be  
17 resolved in *favor of the ... verdict*."<sup>5</sup> Therefore, *if* Appellee  
18 had been *convicted* by the trial court, and *if* she had appealed  
19 that conviction, then "[t]he general rule governing appellate  
20 review of ... [her] verdict of guilty ... [would have been] that  
21 the evidence must be viewed in the light most favorable to the  
22 government and the verdict must be upheld if it is supported by  
23 substantial evidence. All reasonable inferences ... [would be]

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27 <sup>3</sup> *Id.*

28 <sup>4</sup> See FN 1 *supra*.

<sup>5</sup> *United States v. Madden*, 482 F.2d 850, 851 (1973) and *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

1 resolved in favor of the verdict."<sup>6</sup> However, this standard of  
2 review of the sufficiency of the evidence does not apply in this  
3 case, where Appellee was acquitted after a trial on the merits.

4 The Tribe asserts correctly, however, the standard that  
5 would apply if the Appellee had been **convicted** and if Appellee  
6 were the party appealing the lower court's ruling: "...on review  
7 of the sufficiency of the evidence **to support a criminal**  
8 **conviction** ... after viewing all of the evidence in the *light*  
9 *most favorable to the government.*"<sup>7</sup> However, when the trier of  
10 fact enters a verdict in favor of the defendant, Appellee here,  
11 upon the merits and makes factual findings, thus acquitting her  
12 of the charges, not only does the standard asserted by the Tribe  
13 not apply, but more importantly, appellate review must not  
14 occur.<sup>8</sup>

15 Again, this Court lacks jurisdiction to hear an appeal by  
16 the Tribe in this matter. If this Court determines that it  
17 indeed has jurisdiction and that the Double Jeopardy Clause of  
18 the PY Constitution would not bar the Tribe's Appeal, therefore  
19 denying Appellee's Motion to Dismiss, then all reasonable  
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27 <sup>6</sup> *United States v. Mesteth*, 528 F.2d 333, 334 (1976), *United States v. Madden*,  
28 FN 4 *id.*, and *Glasser v. United States*, FN 4 *id.* Emphasis mine.

<sup>7</sup> See Tribe's Brief on Appeal, page 5. Emphasis mine.

<sup>8</sup> See Appellee's Motion to Dismiss Appeal in Response to Tribe's Notice of Appeal, FN 1 *supra*.

1 inferences from the evidence must be resolved in *favor of the*  
2 *verdict*.<sup>9</sup>

3 IV. ARGUMENT

4 A. DOUBLE JEOPARDY PROTECTIONS IN THE PY CONSTITUTION BAR  
5 THE TRIBE'S APPEAL OF APPELLEE'S ACQUITTAL AFTER A  
6 DETERMINATION ON THE MERITS ADDRESSING THE SUFFICIENCY  
7 OF THE EVIDENCE.

8 See Appellee's Motion to Dismiss Appeal in Response to  
9 Tribe's Notice of Appeal, filed on December 11, 2001, attached  
10 and incorporated by reference.<sup>10</sup>

11 B. THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLEE DID  
12 NOT WILLFULLY STRIKE OFFICER OLIVO.

13 1. The Trial Court received all of the evidence presented  
14 and made findings of fact.

15 Following a bench trial, and after hearing sworn testimony  
16 presented by both parties, the trial court correctly acquitted  
17 Appellee of the charge. The court found that the Tribe failed to  
18 prove beyond a reasonable doubt that Appellee committed the  
19 alleged offense and that she "did not willfully *strike* Officer  
20 Olivo."<sup>11</sup> This ruling came only after both parties indicated to  
21 the court that we were ready to proceed, after opening  
22 statements were presented, after all witnesses were sworn in,  
23 testified, and were cross examined, and closing arguments were  
24 presented.  
25  
26

---

27 <sup>9</sup> See FN 5 above.

28 <sup>10</sup> See FN 1 *supra*.

1 The lower court did not err in acquitting Appellee.

2 2. The finder of fact is responsible for determining  
3 the credibility of the witnesses and the weight that the  
4 evidence is to be given.

5 When dealing with the sufficiency of the evidence, "it is  
6 for the finder of fact... [the judge in this case]... to  
7 determine the credibility of witnesses and the weight of the  
8 evidence."<sup>12</sup> The judge in the lower court in this matter did not  
9 merely hear the testimony of the witnesses. She was in the  
10 unique position to observe their demeanors. She alone, as the  
11 finder of fact observed the witnesses as they gave testimony.  
12 She saw their facial expressions, heard the expressions and  
13 emotions during their respective testimony, and is in the best  
14 position to determine whose testimony was more credible. **The**  
15 **transcript does not reflect these aspects of the witnesses'**  
16 **testimony.** The transcript also does not reflect the stammering,  
17 stuttering, and hesitance in the Officer's testimony that the  
18 judge heard. The judge obviously weighed the testimony of both  
19 witnesses, and placed more credibility in the Appellee's  
20 testimony that in that of Officer Olivo. It is for the trier of  
21 fact, the judge in this case, to determine the credibility of  
22  
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27 <sup>11</sup> See Trial Court's Order dated October 30, 2001, attached to Tribe's Brief  
28 on Appeal.

<sup>12</sup> *United States v. Madden*, 482 F.2d 850, 851 (1973). Citing to *United States*  
*v. Cole*, 449 F.2d 194, 197 (8<sup>th</sup> Cir. 1971), cert. denied, 405 U.S. 931, 92  
S.Ct. 991, 30 L.Ed.2d 806 (1972)

1 witnesses, to resolve conflicts in the evidence, and to make  
2 reasonable inferences from the evidence.<sup>13</sup>

3 The lower court did not err in acquitting Appellee.

4 **3. The Tribe cites to authorities that are irrelevant to**  
5 **and/or distinguishable from this matter.**

6 a. Cases

7 Most of the cases relied upon by the Tribe dealt with  
8 defendants who were convicted at trial and appealed their  
9 convictions, or the trial judge entered a judgment of acquittal  
10 after a jury verdict of guilt and the government appealed.<sup>14</sup> On  
11 the contrary, in this case, the defendant - Appellee here - was  
12 acquitted in this matter, and not after a guilty verdict. One  
13 case cited to, decided by the Court of Appeals of Kentucky in  
14 1893 is one ruling that an action for *civil personal injury*  
15 survives the death of the Plaintiff.<sup>15</sup> The matter at hand is a  
16 criminal case. In another case, the federal officer fell and  
17 suffered a cut chin.<sup>16</sup> In another case, the defendants beat the  
18 federal officer "about the head and shoulders with their fists  
19  
20  
21

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24 <sup>13</sup> See also *U.S. v. Orozco-Santillan*, 903 F.2d 1262 (9<sup>th</sup> Cir. 1990) holding  
25 that the reviewing court is to respect the province of the jury [trier of  
26 fact] to determine the credibility of witnesses, to resolve evidentiary  
27 conflicts, and to draw reasonable inferences from proven facts by assuming  
28 that the jury resolved all such matters in a manner supporting the verdict.

<sup>14</sup> See Tribe's Brief on Appeal, pages 8-10, *United States v. Masel*, *United States v. Feola*, *United States v. Bell*, *United States v. Frizzi*, *United States v. Corbitt*, *United States v. Brooks*, *United States v. Abraham*, and *United States v. Sommerstedt* (citations omitted).

<sup>15</sup> See Tribe's Brief on Appeal, page 8, *Perkins v. Stein* (citation omitted).

<sup>16</sup> *United States v. Frizzi* (citation omitted).

1 for two to three minutes."<sup>17</sup> Further, this same case cites to  
2 another case ruling that, while *serious injury* is not required,  
3 *injury by violent means is required*.<sup>18</sup> In the matter at hand, the  
4 officer suffered no injuries.<sup>19</sup>

5  
6 The lower court did not err in acquitting Appellee.

7 b. Federal Statutes

8 The Tribe cites to cases "reviewed after the enactment of  
9 18 U.S.C. Sec. 111...."<sup>20</sup> That section confers federal  
10 jurisdiction over prosecutions for convictions of the numerated  
11 offenses against certain federal officers while in the  
12 performance of their official duties.<sup>21</sup> The section is aimed at  
13 protecting *federal officers*, not tribal officers. The Tribe  
14 agrees, however, that the statute does not mirror the language  
15 in the PY Tribal Code.<sup>22</sup> Although caselaw interpreting Section  
16 111 indicates that an injury is required,<sup>23</sup> the statute itself  
17 does not mention such a requirement. On the contrary, the  
18 language of Section 3.7(A)(1) of the PYT Code clearly requires  
19 bodily injury: "Any Indian who shall willfully strike ... [a]

---

23 <sup>17</sup> See Tribe's Brief on Appeal, page 10, *United States v. Abraham* (citation  
24 omitted).

<sup>18</sup> *United States v. Marcello*, 423 F.2d 993, 1010-1011.

25 <sup>19</sup> See Trial Transcript, page 17. "Avilez, M: Okay, so but physically you  
26 sustained no physical injuries?" "Olivo, H: No."

<sup>20</sup> See Tribe's Brief on Appeal, page 9.

<sup>21</sup> See *U.S. v. Feola*, 420 U.S. 671, 683-84, 95 S.Ct. 1255, 1263 (1975)

27 (Congress' intent in enacting the section was filling gap in state  
28 substantive law as well as insuring a federal forum for the trial of offenses  
involving federal officers.).

<sup>22</sup> See Tribe's Brief on Appeal, page 8.

1 tribal official ... *or otherwise inflict bodily injury* ... shall  
2 be guilty of an offense."<sup>24</sup> This language clearly indicates that  
3 bodily injury is a necessary element to convict a person on the  
4 charge. In other words, a person must inflict bodily injury  
5 either by willfully striking someone or by some other means. The  
6 facts in this case as elicited at trial do not support that  
7 Officer Olivo received an injury. When asked on cross-  
8 examination if he had sustained any physical injury, Officer  
9 Olivo responded unequivocally, "No."<sup>25</sup> Further, he testified that  
10 he was wearing a bulletproof vest per office policy on the date  
11 of the alleged incident, and that Appellee allegedly hit him on  
12 the chest area near the strap area of the vest.<sup>26</sup>

15 Section 111 is irrelevant in this case. The PY Tribe has  
16 its own law and elements required to meet a burden beyond a  
17 reasonable doubt in this case. Clearly the Tribe did not meet  
18 its burden, as found by the trial judge.

20 If this Court accepts the federal statute cited to by the  
21 Tribe as relevant to the case at hand, then this Court should  
22 also consider as relevant 18 U.S.C.A. § 3731. This section  
23 allows appeals by the United States "...in a court of appeals  
24 from a decision, judgment, or order of a district court  
25  
26

27 <sup>23</sup> See FN 18, *supra*, *United States v. Marcello*, 423 F.2d 993, 1010-1011.

28 <sup>24</sup> *Id.*

<sup>25</sup> See Trial Transcript, page 17.

<sup>26</sup> *Id.*

1 dismissing an indictment ... or granting a new trial after  
2 verdict or judgment ... *except that no appeal shall lie where*  
3 *the double jeopardy clause of the United States Constitution*  
4 *prohibits further prosecution.*"<sup>27</sup> Although the PYT Code does not  
5 have a statute defining this parameter, Article 1 Section 1(C)  
6 of the PY Constitution prohibits the Tribe from "subjecting any  
7 person for the same offense to be twice put in jeopardy."<sup>28</sup> See  
8 Appellee's Motion to Dismiss Appeal in Response to Tribe's  
9 Notice of Appeal, filed on December 11, 2001, attached and  
10 incorporated by reference.<sup>29</sup>  
11  
12

13 The lower court did not err in acquitting Appellee.

14 c. Dictionaries

15 The definitions listed by the Tribe do not control the  
16 meaning of terms in the legal arena. The Tribe acknowledges that  
17 the PY Tribal Code does not define "willful" or "strike."<sup>30</sup> This  
18 fact lends more support to the lower court's determination and  
19 interpretation of the evidence presented on the charge. This  
20 fact also provides support for this Court to uphold the lower  
21 court's determination that the Tribe's case was fatally lacking  
22 and did not suffice to find the Appellee guilty beyond a  
23 reasonable doubt.  
24  
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27 <sup>27</sup> *Id.*

28 <sup>28</sup> *Id.*

29 See FN 1 *supra*.

30 See Tribe's Brief on Appeal, page 6.

1           The Tribe cites to irrelevant, non-legal definitions of the  
2 terms above found in Webster's dictionaries. The Tribe did not  
3 include definitions for the legal words and terms as laid out in  
4 Black's Law Dictionary - the "standard of authority for legal  
5 definitions since 1891."<sup>31</sup> Black's includes in its definition of  
6 "willful," "[p]remeditated; malicious; done with evil intent, or  
7 with a bad motive or purpose..." and states that "[a]n act ...  
8 is 'willfully' done, if done voluntarily and intentionally and  
9 with the *specific intent* to do something that the law  
10 forbids...."<sup>32</sup>

13           In the case at hand, the trial court found that the  
14 Appellee did not commit a willful act.<sup>33</sup> Further, the Appellee  
15 testified that she had revoked her consent for the officer's  
16 presence in her house by requesting *several times* that he leave.  
17 She had called for the officer's presence to "protect and serve"  
18 her daughter, and when she no longer felt he was "protecting and  
19 serving" her daughter, she requested that he leave. The officer  
20 was at her house because she had requested his presence, not  
21 because she was a suspect in a crime. When he refused to leave,  
22 he was no longer in her house with her consent and no longer  
23 acting within the scope of his official duties. She then pushed  
24 him out of the door with her only intent being to get him out of  
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28 <sup>31</sup> Black's Law Dictionary, preface iii (6<sup>th</sup> ed. 1990).

<sup>32</sup> *Id.*, at 1599. Emphasis mine.

1 her house.<sup>34</sup> Appellee did not harbor the *specific intent* to  
2 strike Officer Olivo - her only intent was for him to leave her  
3 home, not to strike or to cause injury.

4 The Tribe relies on Section 3.8 Battery of the PY Code.  
5 However, Appellee was not charged with violating that section.<sup>35</sup>  
6 Black's Law Dictionary does not define "strike" but defines  
7 "battery" as an "[i]ntentional and wrongful physical contact  
8 with a person without his ... consent that entails some injury  
9 or offensive touching."<sup>36</sup> In this case, the evidence presented  
10 did not support a finding an intentional infliction of injury.  
11

12 The Tribe then defines "push" pursuant to Webster's  
13 Dictionary and equates the definition to that of the word in the  
14 PY Code, "strike."<sup>37</sup> Appellee agrees with the Tribe, though, that  
15 a "push" has as its purpose an intent "to move" someone or  
16 thing.<sup>38</sup> Appellee's intent was to move Officer Olivo out of her  
17 house when his presence was no longer required and when he  
18 repeatedly refused to leave at Appellee's repeated requests.  
19

20 The lower court did not err in acquitting Appellee.  
21

## 22 **V. Conclusion**

23  
24

---

25 <sup>33</sup> See FN 11, *supra*.

26 <sup>34</sup> See Trial Transcript, pages 20-22 and 26.

27 <sup>35</sup> See Amended Criminal Complaint, attached to Appellee's Motion to Dismiss  
Appeal in Response to Tribe's Notice of Appeal, FN 1 *supra*.

28 <sup>36</sup> Black's Law Dictionary, *supra*, at 152 (citing to *Mason v. Cohn*, 108 Misc.2d  
674, 438 N.Y.S.2d 462, 464). Emphasis mine.

<sup>37</sup> See Tribe's Brief on Appeal, page 6-7.

<sup>38</sup> *Id.*, at page 6.

1 This Court lacks jurisdiction to review this matter and  
2 therefore should deny review of this case for the purposes more  
3 fully set out in Appellee's Motion to Dismiss Appeal in Response  
4 to Tribe's Notice of Appeal, filed on December 11, 2001, which  
5 is hereby incorporated by reference.<sup>39</sup>  
6

7 If this Court determines that it indeed has jurisdiction to  
8 hear this Appeal in violation of the PY Constitution, then  
9 review of the sufficiency of the evidence should be in the light  
10 most favorable to the verdict. The lower court correctly found  
11 the Appellee not guilty, thereby acquitting her of the  
12 allegations charged.  
13

14 Before finding that the Tribe had failed to prove beyond a  
15 reasonable doubt that the Appellee had committed an offense, the  
16 lower court received all of the evidence as presented by both  
17 parties. The court then correctly considered the credibility of  
18 the witnesses, along with the weight to afford the evidence  
19 presented. As the trier of fact, the trial judge was uniquely  
20 situated so as to observe the witnesses during their testimony.  
21 Only after this did the trial judge acquit Appellee.  
22  
23

24 The Tribe relied on authorities that were either irrelevant  
25 to and/or distinguishable to Appellee's case. The Tribe was  
26 unable to cite to any case in which an acquittal based on the  
27

---

28 <sup>39</sup> See Attachment A, Motion to Dismiss Appeal in Response to Tribe's Notice of Appeal, FN 1 *supra*.

1 merits was overturned on appeal. The caselaw does not support  
2 appeals by the government where double jeopardy protections bar  
3 such appeals.

4  
5 In addition to the caselaw that the Tribe relied upon, the  
6 Tribe relied on a federal statute, 18 U.S.C. §111, which  
7 purposed to provide a federal forum to try offenses involving  
8 federal officers. The Tribe neglected to inform this Court,  
9 however, of another federal statute, 18 U.S.C. § 3731. This  
10 statute allows appeals by the federal government, except in the  
11 case where the double jeopardy clause would prohibit further  
12 prosecution.


13  
14 Finally, the Tribe relied on definitions of words as  
15 defined in Webster's dictionaries, not on standard authority for  
16 legal definitions. Appellee did not "willfully strike" Officer  
17 Olivo. She did not push Officer Olivo maliciously intent, or  
18 with evil intent. Further, she harbored no *specific intent* to  
19 cause an injury, to strike, or to batter Officer Olivo. She  
20 merely wanted him out of her home as evidenced by her repeated  
21 requests for him to leave his home. Officer Olivo was at  
22 Appellee's home at her request. His presence was no longer  
23 necessary when he was asked to leave. His presence beyond this  
24 time was without Appellee's consent, and once his investigation  
25 had ended made him a private citizen, acting outside of his  
26 official capacity. The fact that he wore a uniform at the time,  
27  
28

1 in and of itself does not convey official status, nor are  
2 actions taken while in uniform automatically indicate official  
3 actions. **The lower court did not err in acquitting Appellee.**

4 Accordingly, Appellee hereby respectfully requests that her  
5 Motion to Dismiss this Appeal be granted, thereby protecting  
6 Appellee's Constitutionally guaranteed rights. In the  
7 alternative, Appellee respectfully requests that this Court  
8 uphold the lower court's ruling and acquittal of Appellee.  
9


10 RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of December 2001.  
11

12   
13 María M. Avilez  
14 Chief Public Defender

15 ORIGINAL and four copies of the foregoing delivered  
16 this date to: 

17 Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

18 COPY of the foregoing delivered this date to

19 Tamara Walters   
20 Chief Prosecutor  
21 7474 S. Camino de Oeste  
22 Tucson, AZ 85746  
23 Attorney for Appellant  
24  
25  
26  
27  
28

**ATTACHMENT**

1 Pascua Yaqui Public Defender  
7474 S. Camino de Oeste  
2 Tucson, Arizona 85746

3 María M. Avilez, SBN 017116  
4 COUNSEL FOR: Appellee

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5 IN THE APPELLATE COURT OF THE YAQUI NATION  
6 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

7  
8 PASCUA YAQUI TRIBE,  
Appellant,

9 vs.

10 BALTAZAR, BELINDA,  
11 Appellee

) Case No.: CA-02-002  
) (Tribal Court No. CR-01-182)  
)  
) MOTION TO DISMISS APPEAL IN  
) RESPONSE TO TRIBE'S NOTICE OF  
) APPEAL  
)

12  
13 COMES NOW, Defendant, by and through counsel undersigned,  
14 pursuant to Section 1.20 of the Pascua Yaqui Rules of Appellate  
15 Procedure, and hereby moves this Court to dismiss the Tribe's  
16 Appeal on the basis that an appeal in this matter would violate  
17 Defendant's constitutional protections against double jeopardy.  
18 Further, this Court lacks jurisdiction because there is no  
19 statutory authority allowing the Tribe to appeal in violation of  
20 the PY Constitution. The following Memorandum of Points and  
21 Authorities supports this Motion.

22 RESPECTFULLY SUBMITTED this 11<sup>TH</sup> day of December 2001.

23   
24 María M. Avilez  
Chief Public Defender

25 MEMORANDUM OF POINTS AND AUTHORITIES

26 I. Procedural Background

27 The Tribe charged Baltazar with one count of Assault and  
28 Battery on a Tribal Official in violation of Pascua Yaqui Tribal

1 Code (PYTC), Title 1, Section 3.7(A).<sup>1</sup> The Tribe alleged that  
2 Baltazar, "...an Indian... on or about August 10, 2001 at  
3 approximately 4:45 p.m., at or near 7841 S. Maala Mecha Voo'o,  
4 willfully struck Officer Hector Olivo."<sup>2</sup>  
5

6 Following a bench trial, the trial court acquitted Baltazar  
7 of the charge.<sup>3</sup> The court found, "...after hearing sworn  
8 testimony from the Tribe's witness and after hearing the  
9 Defendant's testimony, the Tribe has not proven beyond a  
10 reasonable doubt that the Defendant committed the offense of  
11 count 1: Assault & Battery On A Tribal Official. The Court finds  
12 that the Defendant did not willfully strike Officer Olivo."<sup>4</sup>  
13

14 The Tribe filed a Notice of Appeal on November 13, 2001.

15 **II. Law**

16 Article 1, Section 1(c) of the Pascua Yaqui Constitution  
17 prohibits the Pascua Yaqui Tribe from "subjecting any person for  
18 the same offense to be twice put in jeopardy."<sup>5</sup>  
19

20 **III. Argument**

21 **A. The Tribe's Appeal Violates The Double Jeopardy**  
22 **Protections of the Constitution**

23 The Tribe's appeal violates the PY constitutional  
24 prohibition against double jeopardy. In this instance, jeopardy  
25

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26 <sup>1</sup> See attached Criminal Complaint (Amended) No. CR-01-182 filed August 14'  
27 2001.

<sup>2</sup> *Id.*

28 <sup>3</sup> See trial court's Order, dated October 30, 2001, and attached to Tribe's  
Brief on Appeal.

1 attached, "when the judge began to receive evidence."<sup>6</sup> After  
2 hearing the evidence, the trial court found that the Tribe had  
3 failed to meet its burden of proof beyond a reasonable doubt,  
4 thereby acquitting her of the charged offense. The trial judge  
5 made "...a determination on the merits ... [and] addressed the  
6 sufficiency of the evidence to support the crime charged and  
7 found it fatally lacking. Accordingly, the constitutional  
8 protections against double jeopardy bar the ... [Tribe's]  
9 appeal."<sup>7</sup>

10  
11  
12 Double jeopardy protections bar the government's appeal  
13 where such appeal would require that the "...decision of the  
14 factfinder would have to be overturned, e.g., the trial judge's  
15 ruling of not guilty."<sup>8</sup> The government's appeal is so barred  
16 because, "[a]n acquittal on the merits by the sole decisionmaker  
17 in the proceeding is final and bars retrial on the same charge."<sup>9</sup>

18  
19 The Tribe is barred from appealing the trial court's  
20 judgment of acquittal in this matter. An acquittal, "...whether  
21 based on a jury verdict of not guilty or on a ruling by the  
22 court that the evidence is insufficient to convict, may not be  
23

24  
25 <sup>4</sup> *Id.* Some emphasis mine.

26 <sup>5</sup> *Pascua Yaqui Constitution, id.*

27 <sup>6</sup> *Government of the Virgin Islands v. Briggs*, 155 F.Supp.2d 455, 457 (2001),  
citing to *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564, 570, 97 S.Ct. 1349,  
51 L.Ed.2d 642 (1977).

28 <sup>7</sup> *Briggs, id.* at 458.

<sup>8</sup> *Briggs, id.*

<sup>9</sup> *Briggs, id.*, citing to *Arizona v. Rumsey*, 467 U.S. 203, 211, 104 S.Ct. 2305,  
81, L.Ed.2d 164 (1984).

1 offense charges."<sup>13</sup> The trial judge's ruling satisfies this  
2 requirement. Thus, her factual finding bars this appeal.

3  
4 B. The Tribe's Appeal Must Be Dismissed Because  
5 This Court Lacks Jurisdiction To Hear This Appeal

6 This Court lacks jurisdiction to hear the Tribe's Appeal  
7 because no statutory authority exists that would allow the Tribe  
8 to appeal in violation of the PY Constitution. The drafters of  
9 the PY Code and Constitution obviously recognized the need to  
10 protect against governmental violations of safeguards afforded  
11 under the PY constitutional protections prohibiting double  
12 jeopardy.

13 Although Section 1.12 in the PYRAP grants this Court  
14 jurisdiction to hear "all appeals from any Order of the Trial  
15 Court," the PY constitutional provision prohibiting double  
16 jeopardy supercedes that section in the PY Tribal Code,  
17 especially where an appeal by the Tribe would violate that  
18 provision. Further, it surely was not the intent of the drafters  
19 of the PYRAP to create a statutory provision that would overrule  
20 and violate the PY Constitution. The PYRAP do not provide, and  
21 would do so only in violation of the constitution, that any  
22 party may appeal in violation of the PY Constitution. Where, as  
23 in this matter, the trial court has acquitted a person charged  
24 with a criminal offense upon a finding that the Tribe failed to  
25  
26  
27

28  

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<sup>13</sup> See footnote 7, *supra*, *Martin Linen Supply Co.*, 430 U.S. at 571.

1 appealed and terminates the prosecution...."<sup>10</sup> Further, "the law  
2 attaches particular significance to an acquittal. To permit a  
3 second trial after acquittal, however mistaken the acquittal may  
4 have been, would present an unacceptably high risk that the  
5 Government, with its vastly superior resources, might wear down  
6 the defendant so that even though innocent, he may be found  
7 guilty."<sup>11</sup> See also *Smalis v. Pennsylvania*, 476 U.S. 140, 145-46,  
8 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986) agreeing that "the Double  
9 Jeopardy Clause bars a postacquittal appeal by the prosecution  
10 not only when it might result in a second trial, but if reversal  
11 would translate into further proceedings of some sort, devoted  
12 to the resolution of factual issues going to the elements of the  
13 offense charged."<sup>12</sup>

14  
15  
16  
17 In this matter, the trial judge made her ruling only after  
18 hearing the testimony of the Tribe's witness and of the  
19 Defendant. She made a factual finding in the Defendant's favor  
20 on the essential elements of "willful" and "striking." The  
21 determination that a ruling of a judge is an acquittal is based  
22 on whether the ruling "...actually represents a resolution,  
23 correct or not, of some or all of the factual elements of the  
24  
25  
26

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27 <sup>10</sup> *United States v. Scott*, 437 U.S. 82, 91, 98 S.Ct. 2187, 2194 (1978)  
28 (citations omitted).

<sup>11</sup> *Scott*, *id.* at 91, 2194. Citations and internal quotation marks omitted.

<sup>12</sup> *Smalis*, *id.* Citations and internal quotation marks omitted.

1 meet its burden of proof beyond a reasonable doubt, the Tribe  
2 must not be afforded a second opportunity to convict the person.  
3 To allow such appeal would certainly violate double jeopardy  
4 protections in the PY Constitution. Therefore Appellant does not  
5 have the right to appeal the acquittal of Appellee in this  
6 jurisdiction in this matter under the PYRAP.  
7

#### 8 IV. Conclusion

9 The Tribe's Appeal must be dismissed because it would  
10 violate the double jeopardy protections of the PY Constitution.  
11 Further, the Tribe's Appeal is precluded by Tribal statutory  
12 law, which cannot possibly be interpreted as usurping the PY  
13 Constitutional prohibition against double jeopardy. The United  
14 States Supreme Court in *United States v. Martin Linen Supply Co.*  
15 held that, "Perhaps the most fundamental rule in the history of  
16 double jeopardy jurisprudence has been that a verdict of  
17 acquittal ... could not be reviewed, on error or otherwise,  
18 without putting [a defendant] twice in jeopardy, and thereby  
19 violating the Constitution."<sup>14</sup> See also *Green v. United States*,  
20 ruling that under the constitutional prohibition against double  
21 jeopardy, "...a verdict of acquittal is final, ending a  
22 defendant's jeopardy, and ... is a bar to a subsequent  
23 prosecution for the same offence ... even when not followed by  
24  
25  
26  
27


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28 <sup>14</sup> See footnote 7, *supra*, *Martin Linen Supply Co.*, 430 U.S. at 571. Emphasis  
mine. Citations and internal quotation marks omitted.

1 any judgment ... and the Government cannot secure a new trial by  
2 means of an appeal even though an acquittal may appear to be  
3 erroneous."<sup>15</sup>

4  
5 Accordingly, Appellee hereby respectfully requests that her  
6 Motion to Dismiss this Appeal be granted.

7 RESPECTFULLY SUBMITTED this 11<sup>TH</sup> day of December 2001.

8  
9   
10 

---

María M. Avilez  
11 Chief Public Defender

12 ORIGINAL and four copies of the foregoing delivered  
13 this date to:

14 Clerk of the Court, Pascua Yaqui Tribe Court of Appeals *AS*

15 COPY of the foregoing delivered this date to

16 Tamara Walters *AS*  
17 Chief Prosecutor  
18 7474 S. Camino de Oeste  
19 Tucson, AZ 85746  
20 Attorney for Appellant

21  
22  
23  
24  
25  
26  
27  
28 

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15 355 U.S. 184, 187-88, 78 S.Ct. 221, 223-24 (1957). Citations and internal  
quotation marks omitted.

IN THE PASCUA YAQUI TRIBAL COURT  
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

01 AUG 14 AM 9:51

PASCUA YAQUI TRIBE,  
Plaintiff,

v.

BALTAZAR, BELINDA  
Defendant.

No. CR-01-182

CR-01-182  
*[Signature]*

CRIMINAL COMPLAINT  
(Amended)

THE PASCUA YAQUI TRIBE, hereby complains and alleges, upon information and belief, that the above named defendant, an Indian, did commit the following offense(s):

COUNT 1: ASSAULT AND BATTERY ON A TRIBAL OFFICIAL: 1 PYTC §3.7(A)

On or about August 10, 2001 at approximately 4:45 p.m., at or near 7841 S. Maala Mecha Vood, willfully struck Officer Hector Olivo.

And such violation(s), upon conviction is, punishable under the Pascua Yaqui Tribal Codes.

DATED this 14<sup>th</sup> day of August 2001.

The undersigned hereby swears and affirms that this complaint is based upon information and belief, and the attached Affidavit and Verification.

*[Signature]*  
Complainant/Office of the Prosecutor

DEFENDANT: Belinda Baltazar  
ADDRESS: 7841 Maala Mecha Vood Tucson, Az. 85746  
DOB: 05/04/70      SSN: 600-12-5841      ORIGIN: Indian      ENR #: 2694U00012  
SEX: Female      HT: Unknown      WT: Unknown      EYES: Brown      HAIR: Brown

# **ATTACHMENTS**

1 PASCUA YAQUI TRIBE  
2 OFFICE OF THE PROSECUTOR  
3 7474 S. Camino de Oeste  
4 Tucson, Arizona 85746  
5 (520) 879-6251

6 Tamara Walters, SBN 10510  
7 Chief Prosecutor

RECEIVED  
CLERK OF COURT  
NOV 14 2001  
CA-02-002  
*ML*

8 **IN THE PASCUA YAQUI TRIBE COURT OF APPEALS**  
9 **IN AND FOR THE PASCUA YAQUI RESERVATION, ARIZONA**

10 PASCUA YAQUI TRIBE, )  
11 Appellant, ) NO. CA-02-002  
12 Vs. ) (Tribal Court No. CR-01-182)  
13 BALTAZAR, BELINDA, )  
14 Appellee. ) **BRIEF ON APPEAL**  
15 \_\_\_\_\_ )

16 COMES NOW The Pascua Yaqui Tribe, by and through counsel  
17 undersigned, and hereby files its Brief on Appeal within the time  
18 limits specified and the manner prescribed by the Court of Appeals  
19 Procedures Act of 2000, Section 1.22.

20 **A. JURISDICTIONAL STATEMENT**

21 Appellant is appealing an Order of the Trial Court made  
22 October 30, 2001 of an acquittal of the Defendant after Trial to  
23 the Court in Cause Number CR-01-182 on Count One: Assault and  
24 Battery on a Tribal Official, a copy of which is attached hereto as  
25 Exhibit A. The Court of Appeals shall have jurisdiction to hear  
26 all appeals from any Order of the Trial Court pursuant to the Court  
27 of Appeals Procedures Act of 2000, Section 1.12. The Court of  
28 Appeals has jurisdiction over this matter.

**B. FACTS OF THE CASE**

Officer Hector Olivo, a police officer with the Pascua

1 Yaqui Police Department, responded to Appellee's residence at  
2 7841 S. Maala Mecha at approximately 4:45 p.m. after Appellee  
3 called the police department and asked for an officer to respond.  
4 (Trial Transcript "TT" p. 8, 9, 21). Officer Olivo made contact  
5 with an alleged victim, Danielle Fuentes, daughter to Appellee, and  
6 Appellee's sister, Bonita Baltazar, at that address. Officer Olivo  
7 was invited into the house and was taking their statements as part  
8 of his official duty to investigate complaints. (TT p. 10, 11)  
9 While doing so, he heard yelling in the street and saw Appellee,  
10 intoxicated, arguing with the suspect's mother. Officer Olivo made  
11 several requests to Appellee to stop yelling and to go to her home.  
12 (TT p. 11, 12, 23) Eventually Appellee went to her house with  
13 Officer Olivo, and continued to yell. (TT p. 12) Officer Olivo  
14 attempted to explain to Appellee what had happened to her daughter  
15 but Appellee was so upset she turned her frustration to Officer  
16 Olivo and began yelling at him. (TT p. 12) Appellee then asked  
17 Officer Olivo if he was going to arrest the suspect and when  
18 Officer Olivo said not at this time, Appellee immediately started  
19 pushing Officer Olivo quite a few times in his chest area toward  
20 the door and told him to get the F- out of her house. (TT p. 12,  
21 13, 20) Appellee did not ask Officer Olivo to leave before she  
22 pushed him. Officer Olivo told Appellee to not push him or he was  
23 going to arrest her and Appellee continued to push Officer Olivo.  
24 Officer Olivo then told Appellee she was under arrest and when he  
25 was attempting to put hand cuffs on her, she swung around and  
26 punched Officer Olivo hard in the upper chest with a closed fist.  
27 (TT, p. 13, 21) Officer Olivo then removed his pepper spray to  
28

1 protect himself and a backup officer arrived and took Appellee into  
2 custody. (TT, p. 13)

3 Appellee testified that she had drunk about four beers  
4 prior to her arrival at her home. (TT, p. 26) When she arrived at  
5 her home, she had an argument with her neighbor and got loud. (TT,  
6 p. 27) Officer Olivo had to ask her two times to leave that  
7 argument and come into her house. (TT, p. 27) Appellee testified  
8 that she and Officer Olivo went into her house to discuss his  
9 investigation, and she did not have any objections to Officer Olivo  
10 being there at that time. (TT, p. 27, 28) Appellee testified that  
11 she was angry about what had happened to her daughter, and angry  
12 with Officer Olivo and wanted him out of her house if he was not  
13 going to make an arrest as she was demanding him to do. (TT, p.  
14 24, 28) Appellee admitted on the stand that she pushed Officer  
15 Olivo; "He told me. All cause I just pushed him that one time he  
16 goes you touch me again and I'm gonna arrest you so I stood back,  
17 I said it aint't touching you touching you." (TT, p. 29) Appellee  
18 futher demonstrated to the Court how she intentionally pushed  
19 Officer Olivo in the chest area with her hands. (TT, p. 31)

20 The evidence clearly shows that Appellee had been  
21 drinking, she was upset when she arrived at her house after  
22 learning that her daughter had been assaulted, she had an angry  
23 confrontation with the neighbor and continued to yell even after  
24 Officer Olivo asked her several times to go to her house. Once at  
25 her house, she was still angry and continued to yell about her  
26 daughter's situation, and then directed her anger at Officer  
27 Olivo because he told her he was not going to make an arrest right  
28

1 prohibits the criminal conviction of any person except upon proof  
2 of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S.  
3 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979). It is well established  
4 that on review of the sufficiency of the evidence to support a  
5 criminal conviction, the critical inquiry is whether the record  
6 evidence can reasonably support a finding of guilt beyond a  
7 reasonable doubt ... the relevant question being whether, after  
8 viewing all the evidence in the light most favorable to the  
9 government, giving the government the benefit of all reasonable  
10 inferences, any rational trier of fact could have found the  
11 essential elements of the crime beyond a reasonable doubt. Id.  
12 United States v. Gatewood, 786 F2d 821, 824 (8<sup>th</sup> Cir. 1986).

13 **Pascua Yaqui Tribal Code Provisions.**

14 Appellee was charged with a violation of 1 PYTC Sec.  
15 3.7 (A), Assault and Battery on a Tribal Official, specifically  
16 alleging that on or about August 11, 2001 at approximately 4:45  
17 p.m., at or near 7841 S. Maala Mecha Vood, willfully struck Officer  
18 Hector Olivo. The supporting Affidavit of Officer R. Arnold  
19 alleged that Appellee physically pushed and struck Officer H. Olivo  
20 in the chest.

21 Sec. 3.7(A)(1) pertains to battery on a tribal official,  
22 and Sec. 3.7 (A)(2) pertains to assault on a tribal official.  
23 Section 3.7(A) specifically states "Any Indian who shall (1)  
24 willfully strike any tribal official including police officers, or  
25 otherwise inflict bodily injury, or who shall by offering violence  
26 cause another to harm himself shall be guilty of an offense." The  
27 only definition in this Section is that of "Tribal Official", which

1 then as she was demanding him to do. Appellee then became so angry  
2 that she lost it and began deliberately pushing Officer Olivo in  
3 the chest and demanding that he leave her home if he was not going  
4 to make an arrest. Officer Olivo told her not to touch him again  
5 or he would arrest her, and Appellee continued to push Officer  
6 Olivo. Officer Olivo then told her she was under arrest and when  
7 he was attempting to secure her Appellee swung around and struck  
8 him with a closed fist in the chest intentionally. Appellee even  
9 admitted to intentionally pushing Officer Olivo. Considering the  
10 totality of the circumstances and the evidence presented at trial,  
11 Officer Olivo's testimony is credible and substantiated by  
12 Appellee's own testimony. The Tribe clearly set forth sufficient  
13 evidence beyond a reasonable doubt that Appellee willfully struck  
14 Officer Olivo and she should have been found guilty. The Court  
15 erroneously interpreted Section 3.7(A)(1).

16  
17 **C. THE TRIAL COURT ERRED IN ITS FINDING THAT APPELLEE DID NOT**  
18 **WILLFULLY STRIKE OFFICER OLIVO. THE TRIBE DID PRESENT**  
19 **SUFFICIENT EVIDENCE FOR A GUILTY VERDICT.**

20 Appellant filed its Notice of Appeal to the Court of  
21 Appeals on November 13, 2001, claiming that the Trial Court erred  
22 in it's finding that the Tribe did not prove beyond a reasonable  
23 doubt that Appellee willfully struck Officer Olivo (see Exhibit A  
24 attached hereto).

24 **D. LAW AND AUTHORITIES**

25 **Review of the sufficiency of the evidence in the light most**  
26 **favorable to the Tribe.**

27 The Due Process clause of the federal constitution

1 specifically includes police officers performing their official  
2 duties. There is no definition of "willfull" or "strike"

3 Section 3.8 Battery states "A. Any Indian who shall  
4 wilfully strike another person ... shall be deemed guilty of an  
5 offense." There is no definition of "willfull" or "strike" in this  
6 Section. However, in prior cases presented to the Pascua Yaqui  
7 Tribal Court, convictions have been returned as a "strike" for  
8 behavior such as kicking, pushing, slapping, punching, scratching  
9 spitting, and hair pulling.

10 "Willfully" is not defined in the Pascua Yaqui Tribal  
11 Code. Willful is defined by the Webster's II New Riverside  
12 Dictionary Revised Edition as something done deliberately. The  
13 term "wilfully" imports that the act was done designedly and  
14 intentionally. State v. Lehman, 131 Minn. 427, 155 NW 399, cited in  
15 6 Am Jur 2d, p. 79. Culpable mental states are defined in Title I,  
16 Chapter 4, Sex Offenses. Intentionally or with the intent to  
17 means, with respect to a result or to conduct described by a  
18 statute defining an offense, that a person's objective is to cause  
19 that result or to engage in that conduct [Sec. 4.1(A)(1)].

20 The Webster's II New Riverside Dictionary Revised Edition  
21 defines "strike" as 1. a. To hit with or as if with the hand. b. To  
22 inflict (a blow). The Webster's Dictionary defines "punch" as v.  
23 1. To hit sharply with the fist. N. 1. A blow with or as if with  
24 the fist. The Webster's Dictionary defines "push" as v. 1. To  
25 press forcefully against in order to move. 2. To move by exerting  
26 force: thrust. N. 1. The act of pushing: thrust or shove. The  
27 Tribe contends that by definition, a punch and a push is a strike

1 (blow/thrust) as set forth in 3.7(A)(1).

2           The Trial Court did not find that Appellee was justified  
3 in using physical force against the Officer, or that the Appellee  
4 did not act willfully, but that Appellant did not prove beyond a  
5 reasonable doubt that Appellee did willfully *strike* (the Court, in  
6 it's Order emphasized with italicized type the word "strike" only)  
7 the officer. The issue then is what is the definition of "strike"?  
8 The Tribe believes that Appellee did "strike" Officer Olivo, per  
9 his sworn testimony, when she pushed him in the chest several times  
10 with her hands, and when she punched him hard in the chest with her  
11 fist. Appellee, herself, testified that she was very angry with  
12 Officer Olivo and intentionally and willfully pushed him. The  
13 Tribe did present evidence beyond a reasonable doubt that Appellee  
14 willfully struck a police officer, and the Court should have found  
15 Appellee guilty of a Battery on a Tribal Official.

16           **Definition of battery and assault on a police officer under**  
17 **the Federal laws.**

18           The general view of the court appears to be that where a  
19 criminal statute only uses the terms "assault" or "battery" or  
20 "assault and battery," without defining them, they are to be  
21 understood in their common-law or general meaning. State v.  
22 Lehman, 131 Minn 427, 155 NW 399, cited in 6 Am Jur 2d p. 17.  
23 Assault and battery is traditionally defined as any unlawful  
24 touching of another which is without justification or excuse. The  
25 two crimes differ from each other in that battery requires physical  
26 contact of some sort, the unlawful application of force to the  
27 person of another, the actual infliction of violence on the person;

1 | whereas assault is committed without physical contact.

2 |           An early leading case discussing the origins, definition,  
3 | and nature of the doctrine of battery, held that the least touching  
4 | of another wilfully, or in anger, is a battery, but that a mere  
5 | gentle touching of another without any violence or design of harm  
6 | is not a battery. Cole v. Turner, 6 Mod 149, 87 Eng Reprint 907,  
7 | decided by Chief Justice Holt in 1704, cited in 6 Am Jur 2d, p. 10,  
8 | 11. The least touching of another's person, wilfully or in anger,  
9 | is a battery, since the law cannot draw the line between different  
10 | degrees of violence and therefore totally prohibits the first and  
11 | lowest stage of it, every man's person being sacred, and no other  
12 | person having a right to meddle with it, in any if even the  
13 | slightest manner. 3 W. Blackstone, Commentaries on the Laws of  
14 | England 120. Kirkland v. State, 43 Ind. 146. Any touching of a  
15 | person in an angry, revengeful, rude, or insolent manner; spitting  
16 | upon him; jostling him out of the way; pushing another against him;  
17 | throwing a squib or any other missile or water upon him; or  
18 | striking him, is a battery. Perkins v. Stein, 94 KY 433, 22 SW  
19 | 649, cited in 6 Am Jur 2d, p. 10. No required level of force is  
20 | required. Intentional spitting upon another person is a battery.  
21 | United States v. Masel, 563 F2d 322 (1977, CA7 Wis)

22 |           The Federal Code also has a specific crime for assaulting  
23 | federal officers, just as the Pascua Yaqui Tribal Code also has a  
24 | specific crime for assault and battery on tribal officials.  
25 | Although the language is not identical, the spirit is the same. In  
26 | the best interest of public policy, the goal of Congress in  
27 | enacting 18 USC Sec. 111 in 1934 was to give maximum protection to

1 federal officers. United States v. Feola, 420 U.S. 671, 684, 95  
2 S.Ct. 1255, 1263, 43 L.Ed.2d 541 (1975). Surely the drafters of  
3 the Pascua Yaqui Tribal Code also intended to give maximum  
4 protection to tribal officers. Battery has been defined as an  
5 intentional act of violence. Section 3.7(A)(1) only lists "strike"  
6 as the act of violence when there is no actual physical harm.  
7 "Strike" must then include any act of violence that is  
8 intentionally inflicted on an officer. It would not be just to  
9 hold that if one pushed or spit on an officer he would be not  
10 guilty of battery on an officer, but if one punched the officer it  
11 would be a battery on an officer.

12 A review of the federal cases reviewed after the  
13 enactment of 18 U.S.C. Sec. 111 indicates that a wide variety of  
14 violent acts towards federal officers have been upheld. In United  
15 States v. Bell, 767 F2d 405, 407 (8<sup>th</sup> Cir. 1985), the court held  
16 there was sufficient evidence to find Bell struck Officer Drag Wolf  
17 with his hand. It did not matter whether Bell used his fist or an  
18 open hand as this was immaterial, as the Officer was struck. In  
19 United States v. Frizzi, 491 F2d 1231, 1232 (1<sup>st</sup> Cir. 1974) the  
20 Court held that there was no required level of force and that  
21 spitting in the face of a mail carrier is a forcible assault. In  
22 United States v. Corbitt, 675 F2d 626, 629 (4<sup>th</sup> Cir. 1982) the court  
23 held that twice pushing away a narcotic's agent who sought to  
24 detain defendant's shoulder bag was forcible assault. In United  
25 States v. Brooks, 670 F2d 148 (11<sup>th</sup> Cir. 1982) the evidence  
26 established that defendant struck Lt. Pearson on the side of the  
27 head with his fist and violently struggled with the correctional  
28

1 officers as they escorted him to the administration detention area,  
2 and this was sufficient evidence for the jury to have concluded  
3 beyond a reasonable doubt that the defendant forcibly assaulted Lt.  
4 Pearson. In United States v. Abraham, 627 F2d 205 (9<sup>th</sup> Cir. 1980),  
5 defendants beat the FBI agent about the head and shoulders with  
6 their fists for two to three minutes. The fact that defendants are  
7 moderately built women and the agent a fairly large man did not  
8 detract from the conclusion that the amount of force used was  
9 sufficient to satisfy section 111. In United States v.  
10 Sommerstedt, 752 F2d 1494, 1497 (9<sup>th</sup> Cir. 1985), the defendant  
11 deliberately jolted an Assistant U.S. Attorney's left arm and  
12 shoulder with his left side. The Court of Appeals stated that this  
13 case illustrates why federal officers, in performing their duties,  
14 should have maximum protection from the wrongful use of any force  
15 directed against them. An Assistant U.S. Attorney is responsible  
16 for the prosecution of persons accused of federal offenses. While  
17 she was not physically injured by defendant's wrongful assault, if  
18 this incident goes unpunished, government counsel might conceivably  
19 be deterred from vigorously prosecuting criminal defendants to the  
20 best of her abilities.

21           These cases hold that an unlawful act of violence to  
22 cause a battery on a public official can be striking someone with  
23 a hand, spitting on someone, pushing someone, striking someone with  
24 a fist, and jolting someone with your body. In all of these  
25 incidences, the amount of force and lack of physical injury is  
26 immaterial. The definition of "strike" in Section 3.7(A)(1) of the  
27 Pascua Yaqui Code should include all of these acts of violence and

1 more. Appellee's violent actions toward Officer Olivo were no  
2 different from the actions of other defendants set forth above  
3 where a conviction was upheld.

4 **D. CONCLUSION AND REQUESTED RELIEF**

5 Appellant's request for relief is supported by the Codes of  
6 The Pascua Yaqui Tribe, and the case law of the United States. The  
7 Tribe presented sufficient evidence to show beyond a reasonable  
8 doubt that Appellee wilfully struck Officer Olivo when she pushed  
9 him even once, let alone multiple times, and also when she hit him  
10 with a closed fist. Each individual act of violence on behalf of  
11 Appellee is a "strike". Officer Olivo was conducting a legitimate  
12 police investigation at the request of Appellee and was acting in  
13 his official duties as a police officer. That status never ended  
14 and he had no right to be pushed or punched by Appellee. The  
15 purpose of Section 3.7 Assault and Battery on a Tribal Official is  
16 designed to protect Officer Olivo and other tribal officials in  
17 circumstances such as this one. A citizen cannot just decide to  
18 end an investigation and in anger push and punch an officer and not  
19 pay the consequences.

20 It is respectfully requested that the Court of Appeals  
21 overturn the decision of the Tribal Court and order that a guilty  
22 verdict be rendered and a sentencing date set.

23 ...  
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25  
26  
27

1 **Respectfully submitted this 4th day of December, 2001.**

2  
3 OFFICE OF THE PROSECUTOR  
PASCUA YAQUI TRIBE

4  
5 

6 Tamara Walters  
7 Chief Prosecutor

8 Original and four copies of the foregoing delivered/mailed  
9 This **date** to:

10 Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

11 Copy delivered/mailed to:

12 Maria Avilez  
13 Chief Public Defender  
7474 S. Camino de Oeste  
14 Tucson, Arizona 85746  
Attorney for Appellee

15 Sgt. Hector Olivo  
16 4881 W. Tarook  
Tucson, Arizona 85746  
Victim

17 By: 

**EXHIBIT A**

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE )  
Plaintiff, )  
VS. )  
BALTAZAR, BELINDA )  
Defendant. )

CASE NO: CR-01-182

ORDER

The above matter came before this Court for Trial hearing on this 30<sup>th</sup> day of October 2001. Present for the Tribe was Chief Prosecutor, Tamara Walters. The Defendant appeared with legal counsel, Maria Avilez.

The Court finds that Defense Counsel presented a preliminary motion to preclude a witness arguing that proper disclosure was not given. After hearing arguments the Court ruled in favor of the Defendant and precluded the Tribe's witness, Detective Jacob Garcia and the use of Detective Jacob Garcia's report. The Court finds that disclosure of the possible rebuttal witness was untimely and the sanction will be preclusion of the rebuttal witness and preclusion of the Detective's report. The Court finds that after hearing sworn testimony from the Tribe's witness and after hearing the Defendant's testimony, the Tribe has not proven beyond a reasonable doubt that the Defendant committed the offense of count 1: Assault & Battery On A Tribal Official. The Court finds that the Defendant did not willfully *strike* Officer Olivo.

IT IS ORDERED THAT the Defendant, Belinda Baltazar is found not guilty of count 1: Assault & Battery On A Tribal Official 1PYTC §3.7. This matter is hereby closed.

SO ORDERED ON THIS 30<sup>th</sup> DAY OF October, 2001.

Margaret A. Flores  
Judge, Pascua Yaqui Tribal Court

cc:  
 Defendant  Tribe  Defense Counsel  Other  
Date: 11.5.01  
Clerk: [Signature]

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1 PASCUA YAQUI TRIBE  
2 OFFICE OF THE PROSECUTOR  
3 7474 S. Camino de Oeste  
4 Tucson, Arizona 85746  
5 (520) 879-6251

6 Tamara Walters, SBN 10510  
7 Juvenile Presenting Officer

8 **IN THE PASCUA YAQUI TRIBE COURT OF APPEALS**  
9 **IN AND FOR THE PASCUA YAQUI RESERVATION, ARIZONA**

10 PASCUA YAQUI TRIBE, )  
11 Appellant, )  
12 Vs. )  
13 BALTAZAR, BELINDA, )  
14 Appellee. )

15 NO. CA-02-002  
16 (Tribal Court No. CR-01-182)

17 **NOTICE OF APPEAL TO THE**  
18 **COURT OF APPEALS**

19 COMES NOW The Pascua Yaqui Tribe, by and through counsel  
20 undersigned, and hereby timely files its Notice of Appeal to the  
21 Court of Appeals, asking appellate review of an Order of the  
22 Pascua Yaqui Tribal Court made October 30, 2001 finding Appellee  
23 not guilty and dismissing the charges. The Tribe contends that  
24 the Court's reasoning that the Tribe failed to prove beyond a  
25 reasonable doubt that Appellee wilfully struck Officer Olivo was  
26 erroneous and not supported by the evidence presented at Trial.

27 The Tribe is requesting a one-Justice appellate proceeding.

28 **Respectfully submitted this 13th day of November, 2001.**

OFFICE OF THE PROSECUTOR  
PASCUA YAQUI TRIBE



Tamara Walters  
Juvenile Presenting Officer

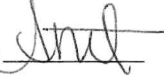
1 Original and four copies of the foregoing delivered/mailed  
2 This **date** to:

3 Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

4 Copy delivered/mailed to:

5 Maria Avilez  
6 Chief Public Defender  
7 7474 S. Camino de Oeste  
8 Tucson, Arizona 85746  
9 Attorney for Appellee

10 Attorney General, Pascua Yaqui Tribe  
11 7474 S. Camino de Oeste  
12 Tucson, Arizona 85746

13 By: 

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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE )  
Plaintiff, )  
VS. )  
BALTAZAR, BELINDA )  
Defendant. )

CASE NO: CR-01-182

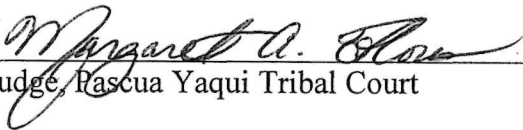
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SO ORDERED ON THIS 30<sup>th</sup> DAY OF October, 2001.

  
\_\_\_\_\_  
Judge, Pascua Yaqui Tribal Court

cc:  
 Defendant  Tribe  Defense Counsel  Other  
Date: 11.5.01  
Clerk: [Signature]

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