No. CA-03-004
Pascua Yaqui Tribe Court of Appeals

Charles Rosovich, Appellant,

v.

Pascua Yaqui Tribe, Appellee.

ORDER

Jacinta Figueroa, Esq., Chief Public Defender, Pascua Yaqui Office of Public Defender, Tucson, Arizona, for the Appellant.

T. Michael Andrews, Esq., Chief Prosecutor, and G. Allen Osburn, Esq., Deputy Prosecutor, Pascua Yaqui Prosecutor's Officer, Tucson, Arizona, for the Appellee.

This appeal is dismissed at the request of the Appellant's counsel, the Pascua Yaqui Tribe Public Defender's Office.

So ORDERED this 30th day of June, 2006.

Chief Justice

Associate Justice

Associate Justice

Nicholas A. Fontana
OFFICE OF THE PUBLIC DEFENDER
7474 South Camino de Oeste
Tucson, AZ 85746

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IN THE PASCUA YAQUI COURT OF APPEALS

CHARLES ROSOVICH, Appellant, vs. PASCUA YAQUI TRIBE, Appellee	Case No.: CA-03-004 **MOTION TO DISMISS APPEAL & VACATE HEARING**

COMES NOW counsel for Appellant Charles Rosovich, Sr., and respectfully moves this Court to enter an order dismissing the appeal and vacating the hearing set for Friday, June 30, 2006. Appellant Charles Rosovich, Sr., passed away on January 11, 2005. [Exhibit A].

DATED this 15th day of June, 2006.

PASCUA YAQUI PUBLIC DEFENDER

Nicholas A. Fontana
Chief Public Defender

ORIGINAL of the foregoing delivered this date to PYT Court of Appeals by: [illegible]

COPY of the foregoing delivered this date to PYT Prosecutor by: [illegible]

EXHIBIT A

Charles "Charlie" Rosovich

Born January 12, 1949 in Tucson, died January 11, 2005 in Tucson. He served in the US Navy from 1967 to 1971 where he received several medals and ribbons. Preceded in death by his brother, Daniel. Survived by his loving wife, Carmen; children, Charlie, David, Erica, Nicholas, Robert, Ricky, John, Sixto, Judith, Patricia and Crystal; parents, Dan and Rita; brothers, Ted, Jim and Michael; sisters, Cecila and Lisa and several nieces, nephews and other family members. Visitation Sunday, January 16, 2:00 p.m. to 9:00 p.m. with a Rosary at 7:00 p.m. at **SOUTH LAWN MORTUARY.** Mass Monday 10:30 a.m. at Santa Cruz Parish with burial at South Lawn Cemetery.

Dignity Memorial

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME
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CLERK

IN THE APPELLATE COURT OF THE YAQUI NATION

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION CA-03-004

CHARLES ROSOVICH, Appellant, vs. PASCUA YAQUI TRIBE, Appellee.	Case No.: CA-03-004 PASCUA YAQUI TRIBAL COURT Case No.: CR-03-009

APPELLANT'S RESPONSE BRIEF

Jacinta Figueroa, SBN 016487
Chief Public Defender
PASCUA YAQUI PUBLIC DEFENDER
7474 S. Camino de Oeste
Tucson, Arizona 85746

Attorney for the Appellant

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TABLE OF CASES AND AUTHORITIES

United States Supreme Court Cases:

United States Circuit Court of Appeals

State of Arizona

I. RESPONDENT FAILS TO RECOGONIZE THE NATURE OF THE ISSUES PRESENTED IN THIS APPEAL. THE ISSUES INVOLVE THE INTERPRETATION AND APPLICATION OF 1 PYTC § 3.7(A)(2), IN ADDITION TO THE ISSUE OF SUFFICIENCY OF THE EVIDENCE, WHICH ARE ISSUES SUBJECT TO *DE NOVO* REVIEW.

Respondent asserts that the Appellant agreed to waive a *de novo* trial, hence the correct standard of review is clear error. This reasoning is clearly flawed. Respondent sites the Ninth Court opinion in *United States v. Kohli*,[1] for the proposition that this Court must apply a standard of clear error. In *Kohli*, the Court addressed the issue on appeal regarding sentencing, and held the district court's factual findings underlying a sentence were subject to the standard of clear error on review.[2] The issues at hand do not involve sentencing and clearly the standard of clear error is not the proper standard of review in this instances. At issue is the interpretation and application of 1 PYTC §3.7 (A)(2). The issues presented to the Court are straight forward: 1) The definition of *willful*, which is critical to the interpretation and application of this section of the Code.; 2) Whether Post Traumatic Stress Disorder (PTSD) negated the required *mens rea* of willful – specific intent requirement under the generally accepted definition of willful; and, 3) Whether the Tribe proved the requisite elements of the offense under the proper interpretation and application of attempt - all issues subject to *de novo* review.[3] Moreover, in *United States v. Odom*[4], a case decided by the Ninth Circuit Court on May 20, 2003, the Court sited *Untied States v. Carranza*[5], and held claims of insufficient evidence were subject to de novo review.[6] The standard of review in this matter is clearly *de novo*.

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[1] *United States v. Kohli*, 110 F.3d 1475 (9th Cir. 1997).
[2] *Id.* at 1476.
[3] *United States v. Martinez-Jimenez*, 864 F.2d 664, 665 (9th Cir. 1989).
[4] *United States v. Odom*, 329 F.3d 1032 (9th Cir. 2003).
[5] *United States v. Carranza*, 289 F.2d 634 (9th Cir. 2002).
[6] *Odom* at 1034; *Carranza* at 641.

II. RESPONDENT'S ARGUMENT THAT THE COURT DID NOT ERR IN ITS INTERPRETATION AND APPLICATION OF 1 PYTC § 3.7 (A)(2) IS DEFFICIENT BASED ON THE EVIDENCE, ALONG WITH ITS ARGUMENT THAT THE APPELLANT ATTEMPTED TO MAKE AN AFFIRMATIVE DEFENSE OF INSANITY.

> A. The Respondent does not refute or dispute that the definition of *willful* under a criminal statute requires ***specific intent***. An element of the offense in which the Tribe failed to provide sufficient evidence to meet its burden of proof - beyond a reasonable doubt - to support a conviction in this matter.

The definition and elements of "willful" are critical to the interpretation and application of 1 PYTC §3.7 (A)(2), and it is an issue that must be resolved to determine whether the Appellant's conduct fell within the realm of the conduct intend to be punishable under 1 PYTC §3.7 (A) (2). Respondent appropriately asserts that the Appellant argued at trial and in opening brief *Black's Law Dictionary's* definition of willful. Respondent correctly asserts that the United States Supreme Court has tackled the definition of *willful.* Respondent sites the Supreme Court's opinion in *Bryan v. United States*[7], that *willfully* is a word of many meanings and is dependent upon the context. To put the Supreme Court's assertion in full contexts, Appellant points out that the Court in the same paragraph went further and stated, "Most obvious it differentiates between deliberate and unwitting conduct, but in criminal law it also typically refers to a culpable mental state of mind."[8] The Court quoting *Ratzlaf v. United States*[9], stated, "In other words in order to establish a "willful" violation of a statute, 'The Government must prove that the defendant acted with knowledge that his conduct was unlawful."[10] More

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[7] *Bryan v. United States*, 524 U.S. 184 (1998).
[8] *Id.* at 186.
[9] *Ratzlaf v. United States*, 510 U.S. 135 (1994).
[10] *Bryan* at *186.*

importantly, the Supreme Court siting a line of prior holdings[11] held were the *willfulness* requirement is ambiguous as applied, the Court will resolve any doubt in favor of the defendant.[12]

Respondent notes in its reply brief that the Appellant admitted that he knew that he was holding a golf club. But neither holding nor swing a golf club is unlawful conduct. The testimony was uncontested and established that the Appellant had used the club to chase away the vandals. Respondent notes that the Appellant heard the Officer's command and failed to "immediately" respond to those commands. Failing to respond "immediately" to a lawful command of the officer **may** constitute a different offense under the code, but it does not constitute willful attempt to commit a battery upon an officer.[13]

The Respondent further asserts based on the officer's testimony that the Appellant made verbal threats to the officer. Yet, Officer Wells never charged the Appellant with Threats and Intimidation, under the code, at the time of the arrest. Officers Andy Gastelum, Robert Valenzuela, and Elisabeth Esparza were on scene, but not one of these officers were called to testify in this matter. The Tribe relied solely on the testimony of one officer, Officer Wells, despite the contrary testimony of the Appellant and two of his witnesses. ***To support a conviction the evidence must do more than simply raise a suspicion of guilt; the evidence must be substantial.***[14]

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[11] *Hughey v. United States*, 495 U.S. 411, 422 (1990); *Crandon v. United States*, 494 U.S. 152, 160 (1990); *United States v. Bass,* 404 U.S. 336, 347-350 (1971).

[12] *Ratzlaf at* 135.

[13]

[14] *United States v. Taylor*, 113 F.3d 1136, 1144 (10th Cir. 1997).

B. Respondent fails to comprehend that PTSD applied to negate the requisite *mens rea* is not an attempt to make an insanity defense.

Respondent argues that the fact that Mr. Rosovich is receiving treatment and had taken his PTSD medications the night of the incident, he is barred from asserting that his PTSD, triggered by the events of that evening, negates the requisite *mens rea.* An argument legally and logically flawed. Respondent launches an argument that mental illness is not sufficient to assert an insanity defense. Respondent misstates the Appellant's evidence, which clearly illustrates that the Respondent failed to understand the Appellant's assertions regarding the requisite *mens rea.* The Appellant is not attempting to assert an affirmative defense of insanity. What Appellant is and has established, without any rebuttal evidence from the Respondent, is that he suffers from PTSD, which clearly negated the specific intent necessary to show that the Appellant acted willfully.

As sited in the Appellant's opening brief, the Ninth Circuit Court held in *United States v. Sayetsitty*,[15] that the government had the burden of proving beyond a reasonable doubt that the Defendant had the capacity to form the necessary specific intent, and the issue of whether the Defendant was too intoxicated to form the necessary specific intent.[16] In *United States v. Gracidas-Ulibarry*,[17] the Court noted that defenses such as voluntary intoxication, subjective mistake of fact, being unconscious, or being alseep at the time the act occurred can negate culpability only for specific intent crimes.[18]

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[15] *United States v. Sayetsitty, 107F.3rd 1405 (9th Cir. 1997)*
[16] *Id.* at 1411.
[17] *United States v. Gracidas-Ulibarry,* 231 F.3rd 1188 (9th Cir 2000).
[18] *Id.* at 1194.

In *Gasho v. United States*, the Court further held that a person is not criminally responsible unless criminal intent accompanies a wrongful act.[19] In this instance, the Appellant did not possess the requisite criminal intent, which would have accompanied an attempt to commit a battery upon Officer Wells.

III. RESPONDENCE RELIANCE ON *STATE V. MAY* IS MISPLACED. THE FACTS ARE DISTINQUISHABLE.

Respondent sites the Arizona definition of attempt as set forth in *State v. Galen*[20], which states: "a person attempts to commit a crime when acting with the culpability required for commission of the crime, he engages in conduct that constitutes a stubstantial step toward commission of the crime.[21] The Respondent relies on the interpretation of attempt as couched in the facts of *State v. May*[22]. The facts set forth in *May* are clearly distinguished from the facts before this court. In *May,* the Defendant went to his wife boyfriend's home and waited in a shed armed with a pistol. The Court held:

> "a person commits attempt if such person intentionally does anything which is a step in a course of conduct planned to culminate the commission of the offense.... When appellant went ... armed with a pistol under the circumstances inferring that he intended to place Carol May in reasonable apprehension of imminent physical injury, he completed a substantial step in his course and design to culminate in what would amount to an aggravated assault.[23]

In this instance, the Appellant was in his own home protection his property and had called police for assistance. The Appellant waved the club when he was attempting to show the officer the direction in which the vandals were headed. The officer exaggerated

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[19] *Gasho v. United States*, 39 F.3rd 1420 (9th Cir. 1994).
[20] *State v. Galen*, 134 Ariz. 590, 653 P.2d 243 (Az.App. 1983).
[21] *Id.*
[22] State v. May, 137 Ariz. 183, 669 P.2nd 616 (A. App 1983).
[23] *Id.* at 620.

the situation into something it was not, based on the ignorance and lack of skills. The Appellant's response was to walk away. But again the situation deteriorated based on the officer's actions – drawing his weapon and eventually pepper spraying the Appellant. Clearly the aggressor was the officer, not the Appellant. The Appellant did nothing that would qualify as a step in a course of conduct planned to culminate the commission of the offense at hand – willful attempt to commit a battery.

CONCLUSION

This Appeal addresses *Fear, Frustration and Futility*. Fear, because the Appellant, his family and friends will likely be chilled where otherwise innocent conduct has the potential of criminal charges where there is a miscommunication with law enforcement. The only protection against this is to require a definition in which *willful* and *attempt* require the requisite specific intent. Frustration, the obvious lack of communication and understanding between the Appellant and the officer, which subjected otherwise innocent conduct to scrutiny by police and ultimately criminal charges. The only remedy for a victim who is misunderstood by police, and ultimately charged with a crime is the protection of the Courts and the requirement that the Tribe prove the specific elements therein beyond a reasonable doubt. Futility, because the Appellant, Mr. Rosovich was not able to get Officer Wells to listen to him, to understand him and to protect his rights. The Appellant is entitled to have his rights protected by police, when they are called upon to assist. The Appellant and his family, as well as every tribal member, entrusted the police with this very important duty and responsibility.

The Appellant respectfully requests this Court replace the fear, frustration and futility with justice and fairness.

RESPECTFULLY SUBMITTED this 23r[d] day of June 2003

Jacinta Figueroa
Chief Public Defender

CERTIFICATE OF SERVICE

Original and four copies of the foregoing delivered this 23rd day of June 2003 to:

Clerk of the Court
Pascua Yaqui Tribal Court
7474 S. Camino de Oeste
Tucson, Arizona 85746

Copy of the foregoing delivered this day to:

Allen Osburn
Deputy Prosecutor
Pascua Yaqui Prosecutor's Office
7474 S. Camino de Oeste
Tucson, Arizona 85746

Jacinta Figueroa
Chief Public Defender

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

CASE NO. CA-03-004

CHARLIE ROSOVICH Appellant	)	
Vs.	)	CASE NO. CA-03-004
	)	Pascua Yaqui Tribal Court
PASCUA YAQUI TRIBE Appellee	)	Case No. CR-03-009

EXHIBIT LIST

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Attorneys for Appellee

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

CHARLIE ROSOVICH Appellant	)	
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	)	Pascua Yaqui Tribal Court
PASCUA YAQUI TRIBE Appellee	)	Case No. CR-03-009

APPELLEE REPLY BRIEF

OFFICE OF THE PASCUA YAQUI PROSECUTOR

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TRIBAL AUTHORITY

CASES

STANDARD OF REVIEW

On April 23rd, 2003 defendant agreed to waive a de novo trial before the Appellate Court. (See appendix B) As a result, the correct standard of review is clear error.[1] Evidence is sufficient to support a conviction unless, viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[2] This same test applies to both jury and bench trials.[3]

JURIDICTION

The Court of Appeals shall have jurisdiction to hear all appeals from any Order of the court.[4] Appellant timely filed a notice of Appeal from an order of the Pascua Yaqui Tribe Court dated February 4, 2003 finding the Appellant Guilty of Assault & Battery On a Tribal Official.

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[1] *United States v.Kohli*, 110 F.3rd 1475, 1476 (9th Cir. 1997)
[2] *United States v.Iriate-Ortega*, 113 F.3rd. 1022 (9th Cir. 1997)
[3] *United States. v. Mayberry*, 913 F.2nd 719, 721 (9th Cir. 1990)
[4] *Pascua Yaqui Court of Appeals Procedures Ace of 2000* Sec. 1.12

STATEMENT OF FACTS

On the evening of September 23, 2002 and again in the early morning hours of September 24, 2002 Officer Kevin Wells made contact with the Defendant, Charles Rosovich. On the first occasion of contact the Defendant spoke to Officer Wells about the possible threat of a fight in the area and the Defendant advised Officer Wells that he expected more trouble later in the evening. (TT,8-9,Ln 20-8) After midnight, on the second occasion of contact Officer Wells arrived at 7730 S. Cocoim, the Defendant's address, as part of an emergency response to a 911 hang-up. (TT,3,Ln 14-24) Upon arrival, Officer Wells' first action was to attempt to calm David Rosovich, the Defendant's son, who was shouting and running about. (TT,4,Ln 4-11) While Officer Wells was occupied with David Rosovich, the Defendant moved toward Officer Wells from the residence or direction of the residence. (TT,4,5,Ln 26-1) The Defendant had a golf club in hand (TT,5,Ln 2,14);(TT,18,Ln 13);(TT,34,Ln 1-2) and advanced toward the Officer. (TT,5,Ln 4);(TT,10,Ln 2) Officer Wells has been trained that within twenty-one feet, an individual with a knife can close the distance and attack an officer before the officer can draw and fire his or her weapon. (TT,5,Ln 10-12) The Defendant initially closed the distance to within seven to ten feet of Officer Wells. (TT,6,Ln 8) Officer Wells was in fear for his life. (TT,5,Ln 21-22) Officer Wells responded as per his training by drawing his weapon, pointing it at the Defendant and ordering the Defendant to drop the club. (TT,5,Ln 22-23);(TT,10,Ln 7-8) The Defendant heard the Officer's command to drop the club. (TT,20,Ln 19-21) The Defendant balled his fist up and stared at Officer Wells. (TT,5-6,Ln 26-2) The Defendant failed to immediately comply with the Officer's command. (TT,35,Ln 1-2);(TT,36,Ln 9-11);(TT,41,Ln 7-8) Officer Wells repeated his command to drop the golf club three times. (TT,6,Ln 17-18) The Defendant raised the golf club. (TT,6,Ln 18);(TT,20,Ln 16-17) Officer Wells responded to this higher threat level by moving his finger from the sideline of the receiver down to the

trigger. (TT,6,Ln 19) The Defendant then threw the golf club down. (TT,6,Ln 20-21);(TT,7,Ln 11-13);(TT,20,Ln 22-27);(TT,35,Ln 20-24) Officer Wells holstered his weapon and drew his baton. (TT,6,Ln 24-26) The Defendant clinched his fist and advised Officer Wells that he was going to "beat" the officer's "ass". (TT,6,Ln 21) The Defendant advanced on Officer Wells and Officer Wells stepped back. (TT,7,Ln 9) Officer Wells commanded the Defendant to stay where he was and get on the ground. (TT,6,Ln 26);(TT,7,Ln 10);(TT,10,Ln 8) The Defendant again advised that he was going to "beat" Officer Wells' "ass". (TT,7,Ln 10) The Defendant closed the distance a "step or two" to about six to seven feet. (TT,7,Ln 17-18) David Rosovich, the Defendant's son, stepped between the Defendant and Officer Wells. (TT,7,Ln 21) The Defendant then turned and walked toward the house with Officer Wells following. (TT,7,Ln 22) David Rosovich remained between Officer Wells and the Defendant; the Defendant then physically threw David Rosovich several feet to the side. (TT,8,Ln 3-4) Defendant Rosovich advised that he would beat Officer Wells "white punk ass." (TT,8,Ln 8) Officer Wells attempted to place the Defendant under arrest. (TT,8,Ln 9) The Defendant threatened violence and jerked back in a manner that caused Officer Wells to believe that the Defendant may strike the Officer. (TT,8,Ln 11-12) Officer Wells then pepper sprayed the Defendant while Officers, Andy Gastelum, Robert Valenzuela, and Elizabeth Esparza assisted in subduing the Defendant. (TT,8,Ln 13-14)

STATEMENT OF ISSUES

1. THE TRIAL COURT DID NOT ERR IN THE APPLICATION AND INTERPRETATION OF SEC. 3.7 9(A)(2) OF THE PASCUA YAQUI TRIBE LAW AND ORDER CODE WHEN IT CONCLUDED THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT A FINDING THAT THE DEFENDANT'S CONDUCT WAS WILLFUL.

2. WAS THE TRIAL COURT CORRECT IN FINDING THAT THE DEFENDANT "ATTEMPTED" TO COMMIT BATTERY ON A TRIBAL OFFICIAL.

A.

The Trial Court did not err in the application and interpretation of §3.7(A)(2) of the Pascua Yaqui Tribe Law and Order Code when it concluded that the evidence was sufficient to support a finding that the Defendant's conduct was willful.

The Pascua Yaqui Tribe Law and Order Code does not define the term "willful." Under federal law, the U.S. Supreme Court has recognized that the term has a broad meaning and is context dependent. In *Bryan v. United States*[5] the Supreme Court noted that "The word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears."[6] The Court observed that the word "often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental."[7] Citing *United States v. Philadelphia & R. Ry Co.,*[8] the Supreme Court recognized that the term willful may be defined as "conduct marked by **careless disregard** whether or not one has the right so to act." [Emphasis added]

Citing *Moscal v. United States*[9], Appellant argues that a definition from *Black's Law Dictionary* should be used. If *Black's Law Dictionary* is accepted, then Appellant should be obliged to use the definition as it was presented at trial.

The definition that was presented by the Appellant and accepted by the Trial Court reads as follows:

> Proceeding from a conscious motion of the will, voluntary, knowingly, deliberate, intending the result which actually comes to pass, designed, intentional, purposeful, not accidental or involuntary, premeditated, malicious, done with evil intent, or with a bad motive or purpose or **with indifference to the natural consequences**, unlawful, without legal justification, an act or omission willfully done if voluntary and intentionally and with a specific intent to fail to do something the law

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[5] *Bryan v. United States*, 524 U.S.184, 118 S.Ct.1939 (1998)
[6] *Id.*at 1944-45
[7] *Id.*at FN12
[8] *Byran* citing *United States v. Philadelphia & R. Ry Co.*, 223 Fed. 207, 210 (1915)
[9] *Moscal v. United States,* 489 U.S. 103, 116-117 (1990)

requires to be done. That is to say with bad purpose either to disobey or to disregard the law. [Emphasis added](TT,48,Ln 9-24)

Even under the Appellants more restrictive selection from *Blacks* however, the record is replete with evidence clearly demonstrating that the Trial Court correct to find that the Appellant had acted willfully beyond a reasonable doubt.

The Appellant admitted that he knew that he was holding a golf club. (TT,33,Ln 25-27) The Appellant knew that Officer Wells was a police officer. (TT,34,Ln 3-5) The Appellant remembers hearing the Officer's commands and failing to immediately respond to those commands. (TT,34,35,Ln 25-3) And the Appellant admits that when he finally did comply with the command to put the club down, that he did so by throwing it down. The Appellant's willfulness is most clearly demonstrated by the verbal threats against Officer Wells. Officer Wells testified the Appellant "told me he was gonna beat my ass" and that the Appellant "balled his fist up." (TT,5,Ln 26) Officer Wells further observed that the Appellant clinched his fist while threatening to "beat my ass." (TT,6,Ln 21) This evidence points to the Appellant's willful conduct, angry conduct, and knowledge of his own actions.

The Appellant next asserts that he suffers from Post Traumatic Stress Disorder (hereafter PTSD), and that this negates any willfulness. This assertion fails as Mr. Rosovich admitted that he was receiving treatment and in fact had taken his PTSD medications that evening. "Ok, well, I took my medications and stuff." (TT,14,Ln 10-13) Federally, under 18 U.S.C. § 17, the Insanity Defense is categorized as an Affirmative defense and merely having a mental disorder is not sufficient to assert that defense.

Section 17 reads:

§ 17. Insanity Defense

(a) Affirmative Defense.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of proof.—The defendant has the burden of proving the

defense of insanity by clear and convincing evidence.[10]

Even if the Appellant suffers from PTSD, no evidence was presented to show that his condition is severe, nor that the Defendant's condition prevented him from understanding the nature and quality or the wrongfulness of his acts.

Mr. Rosovich's testimony shows that he was aware of his surroundings and actions. The Appellant of his own volition chose to grab a golf club. (TT,15,Ln 19) The Defendant then chose to chase after the vandals. (TT,17,Ln 3) The Defendant shows that he was thinking clearly when he chose to stop chasing the vandals because he could see that they had an ax and a pipe. (TT,17,Ln 17) The Appellant shows further clear thought and willful action when he tries to explain to the Officer which direction the vandals ran. (TT,18,Ln 16) The Appellant admitted the he knew that he was not back in Vietnam. (TT,32,Ln 13-14)

The Appellant's admission is consistent with the evidence of the verbal threats against Officer Wells. Officer Wells testified the Appellant "told me he was gonna beat my ass" and that "I couldn't arrest him" (TT,7,Ln 10) This dialogue shows that the Appellant was well aware of his environment. The fact that Mr. Rosovich spoke to Officer Wells about the issue of arrest provides further evidence that he knew the nature and quality of his actions and environment. Mr. Rosovich advised the officer that he was gonna "beat my ass. I believe... white punk ass or something to that effect" (TT,8,Ln 8) The Appellant knew the nature of what he was doing, and he knew that it was wrong.

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[10] Act of Nov. 10, 1986, Pub.L.No.99-646 § 34(a), 100 Stat. 3599
18 USC. 20 (1986)

B.

The court did not err in it application of 1 PYT 3.7(A)(2) when it concluded that the Tribe had proven the necessary element of "Attempt"

The Pascua Yaqui Tribal Code does not have a definition of attempt nor is there a federal definition of attempt.[11] *Narcia*, indicates that where attempt is not defined, courts should look to state law.[12] The Pascua Yaqui Tribe although a sovereign nation, sits in the State of Arizona. Arizona law defining attempt is found in Arizona Revised Statute (ARS) 13-1001.[13] Thus, it is Arizona law that should be controlling on the definition of attempt and not *Blacks Law Dictionary*. Blacks Law Dictionary cited by Appellant for the definition of attempt was taken from a Missouri Court of Appeals case[14]. Although, *Blacks Law Dictionary* has been a respected authority in legal definitions for many years, it is not controlling law for the application of attempt. The reason being, the *Stewart* decision has been overruled by case law[15] and statute[16].

Arizona law regarding attempt is couched in the following language, a person attempts to commit a crime when acting with the culpability required for commission of

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[11] *United States v. Narcia*, 776 F. Supp. 491 (D. Arizona 1991)

[12] *Narcia*, at 492

[13] ARS 13-1001 Attempt,

A. A person commits attempts if acting with the kind of culpability otherwise required for commission of an offense, such person:

1) Intentionally engages in conduct which would constitute an offense if the attendant circumstance were as such person believed them to be

2) Intentionally does or omits to do anything which, under the circumstances as such person believed them to be, is any step in a course of conduct planned to collimate in commission of an offense; or

3) Engages in conducted to aid another to commit an offense, although the offense is not committed or attempted by the other person, provided his conduct would establish his complicity under chapter 3 if the offense were commuted or attempted by the other person.

[14] *State v. Stewart*, 537 S.W.2d 579,581 (Mo.App. 1976)

[15] State v. Walker, 743 S. W.2d. 99(Mo.App. 1988),

[16] RSMo Sec. 564.011 defining attempt. A person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which is a substantial step towards he commission of the offense. A "substantial step" is conduct which is strongly corroborative of the firmness of the actors purpose to complete the commission of the offense

the crime, he engages in conduct that constitutes a substantial step toward commission of the crime.[17] An example of the interpretation of attempt can be found in State *v. May.* [18] In *May*, the court held that the mere fact that the act of going to the house with a firearm and waiting in the shed to confront his wife with at weapon led to the charge and conviction of attempted aggravated assault.[19] The court looked at the defendant's action coupled with the defendant's statements. The defendant in *May* indicated that he was "going to end it for the three of them,"[20] and " God help me for what I was going to do."[21]

The evidence presented at trial in our case clearly shows that the Tribe had presented enough evidence that the appellant had attempted to commit Assault and Battery on a Tribal Official by both his action and words. According to the trial testimony, defendant came outside with a golf club in his right hand and was waving it about. (TT5,L1-3). Immediately, Officer Wells ordered the appellant to drop the golf club.(TT5,L21-23). However, the appellant did not comply with Officer Wells order and continued to advance on the officer. The appellant advanced from 20 feet to about 7 to 10 feet. (TT5,L25-27) Officer Wells continued to yell at the appellant to drop the golf club. The appellant then raised the club in which Officer Wells believed he was going to be struck.(TT6,L18). It is a reasonable assumption that a golf putter is between 3 to 5 feet long coupled with the average length of an arm being 2 to 4 feet long. This puts the putter within the zone of danger of being used as a lethal weapon which the officer was justified in taking appropriate action. Appellants words also constituted a threaten hostility. In the

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[17] *State v. Galen*, 134 Ariz. 590, 658 P.2d 243 (Az. App 1983)
[18] *State v. May*, 137 Ariz. 183, 669 P.2nd 616 (Az. App. 1983)
[19] May, at 184
[20] May, at 186

case at bar, appellant told Officer Wells that he was going to beat his ass(TT6,L21) and later emphasized that he was going to beat Officer Wells "punk white ass"(TT8,L8). All while approaching the defendant holding the golf club.

Appellant contends that he did not commit an attempted battery because he did not complete the specific overt act of battery. This is legally flawed because of the plain meaning of 1 PYT 3.7. This statute the trial court relied on does not require the defendant to complete the act. Specifically, (A)(2) says it's the act (or actions), threat or menacing conduct causes the police officer to reasonably believe the he/ she is in danger of receiving an immediate battery[22]. Here, the police officer indicated he was concerned for his safety.(TT7,L5) Concerned enough that Officer Wells had to draw his duty weapon to protect himself and went from placing his finger off the trigger to placing on the trigger.(TT6,L20).

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[21] May, at 186
[22] 1 PYT 3.7 Assault and Battery on a Tribal Officer

Conclusion

On September 23, 2002 Officer Kevin Wells of the Pascua Yaqui Police Department was dispatched to investigate a altercation at the home of Charlie Rosovich (Appellant) Officer Wells made contact with the appellant who was armed with a golf club and approaching Officer Wells in a aggressive manner. Appellant was given at least three opportunities to drop the golf club putter and to submit to the police officers authority. Instead, appellant threatened to kick the officer's ass and even raised the golf club up in a hostile manner requiring decisive maneuvers from being struck by the appellant. Clearly, Officer Wells had a firm belief that appellant's actions gave rise to a perceived threat or menacing conduct.

In sum, the Tribe is requesting this court to affirm the tribal courts finding that the appellant's actions were willful thus attempted to commit battery upon Officer Wells.

(A) (2) Willfully attempt to commit battery upon a tribal official or police officer by force or violence or any unlawful act, threat or menacing conduct which caused the tribal official or police officer to reasonably

Conclusion

On September 23, 2002 Officer Kevin Wells of the Pascua Yaqui Police Department was dispatched to investigate a altercation at the home of Charlie Rosovich (Appellant) Officer Wells made contact with the appellant who was armed with a golf club and approaching Officer Wells in a aggressive manner. Appellant was given at least three opportunities to drop the golf club putter and to submit to the police officers authority. Instead, appellant threatened to kick the officer's ass and even raised the golf club up in a hostile manner requiring decisive maneuvers from being struck by the appellant. Clearly, Officer Wells had a firm belief that appellant's actions gave rise to a perceived threat or menacing conduct.

In sum, the Tribe is requesting this court to affirm the tribal courts finding that the appellant's actions were willful thus attempted to commit battery upon Officer Wells.

(A) (2) Willfully attempt to commit battery upon a tribal official or police officer by force or violence or any unlawful act, threat or menacing conduct which caused the tribal official or police officer to reasonably believe that he she is in danger of receiving an immediate battery

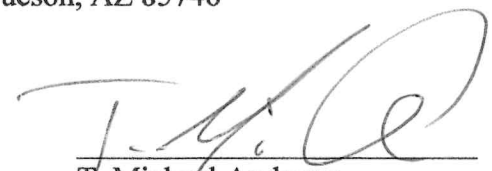
CERTIFICATE OF SERVICE

Original and four copies of the foregoing delivered this 16th day of June 2003 to:

Clerk of the Court

Pascua Yaqui Tribal Court
7474 S. Camino De Oeste
Tucson, AZ 85746

Jacinta Figueroa
Chief Public Defender
7474 S. Camino De Oeste
Tucson, AZ 85746



T. Michael Andrews
Chief Prosecutor

IN THE PASCUA YAQUI COURT OF APPEALS

CHARLES ROSOVICH, Appellant, v. PASCUA YAQUI TRIBE, Appellee	Case No.: No. CA-03-004 ORDER

Jacinta Figueroa, Esq., Chief Public Defender, Pascua Yaqui Office of Public Defender, Tucson, Arizona, for the Appellant.

T. Michael Andrews, Esq., Chief Prosecutor, and G. Allen Osburn, Esq., Deputy Prosecutor, Pascua Yaqui Prosecutor's Officer, 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 30th, 2006 at 10:10 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 8th day of June, 2006.

Chief Justice

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME
03 JUN -2 PM 4:59
DOCKET NO. CA-03-004
CLERK

CHARLIE ROSOVICH, Appellant,	)	
Vs.	)	CASE NO. CA-03-004
PASCUA YAQUI TRIBE, Appellee.	)	Pascua Yaqui Tribal Court Case No. CR-03-009

APPELLANT'S OPENING BRIEF

OFFICE OF THE PASCUA YAQUI
PUBLIC DEFENDER

Jacinta Figueroa
Chief Public Defender
State Bar No. 016487
Pascua Yaqui Public Defender
7474 S. Camino de Oeste
Tucson AZ 85746

Attorney for Appellant

TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

CASE LAW

TRIBAL AUTHORITY

OTHER AUTHORITY

II. JURISDICTIONAL STATEMENT

Pursuant to the Constitution of the Pascua Yaqui Tribe, Article VIII, § 5 and the Court of Appeals Procedures Act of 2000, § 1.12, codified under Title 10 of the Pascua Yaqui Judicial Titles and Codes, this court has the power of judicial review over any Order of the Pascua Yaqui Tribal Court. Appellant, Mr. Charles Rosovich, appeals an order of the Pascua Yaqui Tribal Court [February 4, 2003 Order entered in CR-03-009][1] in which the trial court found that the Tribe had proven guilt beyond a reasonable doubt as the testimony had shown that Mr. Rosovich *willfully attempted to commit battery* [emphasis added] upon a tribal officer. (Attachment A)

IV. STATEMENT OF FACTS

The evening of September 23, 2002, Officer Kevin Wells was dispatched to investigate a fight at the Rosovich residence located at 7730 S. Cocoim. The Appellant, Mr. Rosovich, spoke with Officer Wells, and he reported that his son, David Rosovich, was being harassed by unidentified individuals. (TT, 8-9) Mr. Rosovich informed the officer that he believed the individuals would likely return that evening and there would be more problems. (TT, 8-9 12-14) In fact, Mr. Rosovich specifically stated to the officer, "these guys are the type of people that come back around. They gonna start [sic] something...." (TT, 13) Mr. Rosovich suggested Officer Wells patrol the area because he knew it was not the end of the incident. (TT, 31)

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[1] During the drafting of Appellant's opening brief, counsel discovered that Pascua Yaqui Tribal Court Order, dated February 4, 2003, cites incorrectly the case number in this matter as CR 03-030. Attachment A.

Later that evening, Mr. Rosovich took his medications for Post Traumatic Stress Disorder (PTSD) and went to bed. Mr. Rosovich, a Viet Nam veteran, served three-and-a-half years in combat along the Makong River. He suffers from and is being treated by the Veterans Administration for severe PTSD. (TT, 24-28) At approximately 2:00 a.m., that evening, Mr. Rosovich was abruptly awakened by sounds of people yelling and violent commotion. (TT, 14-15, 37-38) Mr. Rosovich's son, David, ran into the bedroom yelling that the same individuals from the earlier incident that evening had returned and were smashing the windows of the vehicle parked in the front yard. The manner and circumstances under which Mr. Rosovich was awakened were reminiscent to his combat experience in Vietnam, which triggered the symptoms of PTSD.[2] (TT, 28)

Mr. Rosovich grabbed a golf club, and ran out of the house barefoot and wearing only cutoffs. He observed the individuals armed with a fire ax and a big pipe similar to a Swiss pipe. (TT, 16) The individuals were beating on the vehicle and breaking the windows. Mr. Rosovich immediately gave chase and the perpetrators ran down the alley. Mr. Rosovich soon gave up the chase and returned home. (TT, 15-17)

Officer Wells responded to the residence seconds behind Officer Esparza, and he noticed David in the yard yelling and pointing. (TT 4) Officer Wells had the impression that someone had damaged David's car and the perpetrators were getting away. (TT, 4)

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[2] According to Leonard Holmes, Ph.D, (*citing* American Psychiatric Association, 1994. *Diagnostic and Statistical Manual of Mental Disorders Fourth Edition*. Washington, D.C.), Viet Nam veterans with PTSD continue to reexperience their trauma. This can be in the form of nightmares, flashbacks and intrusive thoughts. For many veterans, reexperiencing may be caused by "triggers". Triggers are any object, place or event that reminds the veteran of his traumatic experience. This could be smells, weather, sounds or people. Many veterans have specific triggers that include the sound of helicopters, humid weather, sand and certain types of people. War veterans try to avoid these situations here they would be reminded of the these memories. Website: mentalhealth.aboutptsd.com,

While watching David, the officer noticed Mr. Rosovich, whom he had spoken to earlier, approximately 20 feet away from his location. (TT 4) Officer Wells saw the golf club in Mr. Rosovich's hand, and immediately went into "high threat level and drew his weapon" on Mr. Rosovich. (TT 5-6)

Medicated, frustrated and stressed, Mr. Rosovich began to point and wave the golf club in the direction of the alley and yelling to the officer "they went that way." (TT 18) He further informed the officer that the perpetrators were the boyfriends of his neighbors and the same guys from the earlier incident, in which Officer Wells had responded. (TT 20). David, pointing and speaking clearly, informed the officer that the perpetrators had run down the alley. (TT 40) Celena Rosovich, the Appellant's daughter, witnessed both her father and her brother attempting to get the officer's attention on the perpetrators who were getting away. (TT 45,46) Taking a defensive posture, Officer Wells chose to ignore the victims and focused all his attention on the golf club in Mr. Rosovich's hand. (TT, 5)

Mr. Rosovich was approximately twenty feet away from the officer when the officer drew his weapon and ordered Mr. Rosovich to stop. (TT, 5) Although the evidence is uncontested that Mr. Rosovich was gesturing with the golf club and pointing down the alley indicating where the perpetrators were located, the officer *thought* that Mr. Rosovich was going to try to swing the golf club at him. (TT, 6) The officer ordered Mr. Rosovich to stop; and, according to the officer's own testimony, Mr Rosovich "immediately stopped about seven to ten feet away" and "just stared at the officer". (TT, 5) The officer ordered Mr. Rosovich to drop the club and Mr. Rosovich continued to stare at the officer. (TT, 5) Still approximately seven to ten feet away from the officer,

Mr. Rosovich dropped the club and informed the officer that he and his family called the police for help. Mr. Rosovich stressed to that officer that his family were the victims and had done nothing wrong. (TT 21) Mr. Rosovich was confused, and he could not understand why the Officer Wells had his weapon drawn on him. This was the same officer who responded to the early incident and had been warned by Mr. Rosovich that the individuals would return. Mr. Rosovich continued to explain the individuals were getting away. (TT, 29)

Frustrated and feeling that the police had let him down, Mr. Rosovich turned and walked away from the officer toward his house. (TT, 31) The officer followed and informed Mr. Rosovich he was under arrest. (TT, 7) The officer reached for the Mr. Rosovich, who jerked back away from the officer. The officer responded by pepper spraying Mr. Rosovich and placing him under arrest. (TT, 8)

V. STATEMENT OF THE ISSUES PRESENT FOR REVIEW

At issue in this appeal is the application and interpretation of the Pascua Yaqui Judicial Titles and Codes, Title 1, § 3.7 (A) (2). The Appellant presents the following specific issues for review:

1. Whether the trial court erred and violated the Appellant's due process rights when it found the Appellant guilty beyond a reasonable doubt of willful attempt to commit a battery upon a tribal officer, where the Tribe failed to present sufficient evidence to support a guilty verdict under § 3.7 (A) (2) of the Code.

A. Whether the trial court err in the application and interpretation of § 3.7 (A) (2) of the Code when it concluded that the Tribe had provided sufficient evidence to support a finding that Appellant acted willfully?

B. Whether the trial court err in the application and interpretation of § 3.7 (A) (2) of the Code when it concluded that the evidence was sufficient to support that the Tribe had proven the necessary elements of attempt.

VI. STANDARD OF REVIEW

The interpretation and application of a statute is an issue of law that this Court reviews *de novo*.[3] In this instance, the trial court misinterpreted and misapplied the provisions of Pascua Yaqui Titles and Codes, Title 1, § 3.7 (A) (2). The Due Process clause of the federal constitution prohibits the criminal conviction of any person except upon proof beyond a reasonable doubt.[4] The trial court must enter a judgment of acquittal if no substantial evidence supports a conviction. "Substantive evidence is more than a mere scintilla and is such proof that a reasonable person could accept as adequate and sufficient to support a conclusion of guilt beyond a reasonable doubt." Evidence is sufficient if, viewed in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. A claim of insufficient evidence for a conviction is also subject to *de novo* review by this Court.[5]

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[3] *United States v. Martinez-Jimenez*, 864 F.2d 664, 665 (9th Cir. 1989).
[4] *Jackson v. Virginia*, 443, U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979).
[5] *United States v. Carranza*, 289 F.3d 634, 641 (9th Cir. 2002).

VII. ARUGUMENT

1. THE TRIAL COURT ERRED IN FINDING THE APPELLANT GUILTY BEYOND A REASONABLE DOUBT OF WILLFUL ATTEMPT TO COMMIT BATTERY UPON A TRIBAL OFFICER, WHERE THE TRIBE DID NOT PRESENT SUFFICIENT EVIDENCE FOR A GUILTY VERDICT.

The Appellant was charged with a violation of 1 PYTC Section 3.7, Assault and Battery on a Tribal Official, under subsection (A) (2), which states:

Any Indian who shall (2) *willfully attempt* to commit battery upon a tribal official or police officer by force or violence or any unlawful act, threatening or menacing conduct which causes the tribal official or police officer to *reasonably* believe that he/she is in danger of receiving an immediate battery. [6]

As previously stated the trial court did not issue a finding of facts, but the totality of the evidence presented at trial, including the credible testimony of the Appellant, Mr. Rosovich and two defense witnesses, was substantiated by the officer's own testimony. The evidence clearly showed that Mr. Rosovich and his family were the victims of a crime and called police for assistance. Officer Wells testified he arrived on scene soon after Officer Esparza, and he heard David Rosovich yelling something about somebody damaging his car and pointing in the direction of alley. Mr. Rosovich was also pointing and waving the golf club in the direction of the alley. The evidence showed that despite, the victims' attempts to get the Officer Wells' attention on the issue at hand - the perpetrator's getting away, the officer focused on the golf club and went into "high threat level."

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[6] Emphasis added.

The evidence is undisputable. Mr. Rosovich made no aggressive gestures or action of violence toward the officer. In fact, the officer testified that he drew his weapon and ordered Mr. Rosovich to stop, Mr Rosovich immediately stopped and just stared. Mr. Rosovich's conduct, waving the golf club, was an innocent attempt to point out the location of the perpetrators, not criminal conduct.

The evidence presented by the Tribe was not sufficient to support a finding of guilt beyond a reasonable doubt that Appellant *willfully attempted* to commit battery upon the officer. The evidence clearly would not lead a reasonable person to accept this evidence as adequate and sufficient to support a finding of guilt beyond a reasonable doubt. Mr. Rosovich should have been acquitted of the charges against him. The only plausible explanation for a conviction is that the trial court erred in the application and interpretation of § 3.7 (A) (2) of the Code.

A. The trial court erred in the application and interpretation of § 3.7 (A) (2) of the Pascua Yaqui Judicial Titles and Codes, when it concluded that the evidence was sufficient to support a finding that the Appellant's conduct was willful.

Although the Code fails to define the term *willful*, it is a well-established rule of law that when a criminal statute uses a common-law term, but fails to define the term, it is presume that the drafters intended to adopt the common-law definition therein.[7] Under the common-law definition of willful, "an act or omission is *willfully* done, if done voluntarily and intentionally, with the *specific intent* to do something the law forbids, or

[7] *Moskal v. United States,* 489 U.S. 103, 116-117 (1990); *United States v. Loera*, 923 F.2d 725, 727-728 (9th Cir. 1991).

with the *specific intent* to fail to do something the law requires to be done; that is to say, with the purpose to either disobey or to disregard the law".[8]

In the *United States v. Sayetsitty*,[9] the Ninth Circuit Court of Appeals, reversed the conviction of the Defendant, a Navajo Indian convicted in federal district court of aiding and abetting second-degree murder. The Court held that aiding and abetting requires a specific intent, which could be negated by voluntary intoxication. The Court further held that the Defendant was entitled to have a jury consider voluntary intoxication in order to determine whether the government had proven all the elements of the offense. The Court concluded that on an aiding and abetting theory, the government had the burden of proving beyond a reasonable doubt that the Defendant had the capacity to form the necessary specific intent, and the issue of whether the Defendant was too intoxicated to form the necessary specific intent.[10]

Specific intent is a requisite element of *willful* attempt to commit a battery. As in *Sayetsitty*, the government, being the Tribe, had the burden of proving that Mr. Rosovich had formed the requisite specific intent. The evidence clearly showed that Mr. Rosovich's conduct did not support a finding that he had formulated a specific intent to willfully attempt to commit a battery upon Officer Wells. It is undisputed that Mr. Rosovich's three-and-a-half years of combat experience in Viet Nam was traumatic - so traumatic that twenty-five years later he continues to be treated and medicated by the Veteran's Administration for sever PTSD. It is further supported by the evidence that the trauma he encountered the evening of the incident caused him to enter a disassociated

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[8] Black's Law Dictionary at 1599 [emphasis added] - "the standard authority for legal definitions since 1891"– preface iii. (6th ed. 1990).
[9] *United States v. Sayetsitty*, 107 F.1405 (9th Cir. 1997).

state, common among war veteran's suffering from PTSD. This is evident in the record and supported by the officer's testimony that Mr. Rosovich just stared and continued to stare when the officer drew his weapon.

In a disassociated state of mind, Mr Rosovich could not possibly form the requisite *mens rea,* the specific intent to commit a battery upon the officer. The evidence showed that he was involved in an event that was reminiscent of his experience in Viet Nam: people yelling, violent commotion, and confrontation with a uniform person with a weapon, which are triggers of PTSD. Although the burden is on the Tribe to prove that the Appellant's conduct was willful and done with requisite specific intent, the Tribe presented no evidence to refute Mr. Rosovich's testimony. According to the officer's testimony Mr. Rosovich waved the golf club, immediately stopped when he was order to do so and just stared. This conduct by no stretch of the imagination is conduct done with specific intent to accomplish the crime. Therefore, the trial court could not as a matter of law find that the Tribe had met its burden of proof to sustain a conviction.

B. The trial court erred in the application and interpretation of 3.7 (A) (2) of the Code when it concluded that the evidence was sufficient to support that the Tribe had proven the necessary elements of attempt.

Although the Pascua Yaqui Tribal Code does not define attempt, it is well understood by its common-law or general meaning. Black's Law Dictionary [11] - defines attempt as:

> *Criminal Law:* An intent to commit a crime coupled with an act taken toward committing the offense. An effort or endeavor to accomplish a crime, amounting to more than mere preparation or planning for it, which, if not prevented would have resulted in the

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[10] *Id.at* 1411-12.
[11] Black's Law Dictionary, preface iii (6th ed. 1990).

> full consummation of the act attempted, but which in fact does not bring to pass the party's ultimate design. The requisite elements of an "attempt" to commit a crime are: (1) an intent to commit it, (2) an overt act toward its commission, (3) failure of consummation, and (4) the apparent possibility of commission.[12]

In this instance, the trial court found that Mr. Rosovich willfully *attempted* to commit a battery upon a tribal officer. The first element of attempt requires that the Tribe prove that the Appellant had the intent to commit the criminal conduct. The common-law definition of attempt, requires a showing of specific intent.[13] When the defendant's conduct does not constitute a completed criminal act, a heightened intent requirement is necessary to ensure that the conduct is truly culpable, to separate wrongful from innocent conduct.[14] The heightened intent requirement resolves the uncertainty of whether the defendant's conduct was innocent, and not for the purpose of engaging in criminal conduct.

The evidence clearly shows that Mr. Rosovich did not *attempt* to commit a battery upon the officer. The evidence is unrefuted that Mr. Rosovich and his family where the victims of vandalism, and the Rosovich family had called, not once but twice within a twelve hour period, the police regarding an on-going situation. Mr. Rosovich's conduct was not criminal, it was innocent conduct. He was waving the golf club in an attempt to show the officer the direction the perpetrators were headed. The evidence clearly shows that Mr. Rosovich was initially twenty feet away from the officer waving his golf club and yelling that the perpetrators were headed downed an alley.

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[12] Id. at 127.
[13] *United States v. Hadley*, 918 F.2d 848, 853 (9th Cir. 1990); *United States v. Sneezer,* 900 F.2d. 177, 179 (9th. Cr. 1990) .
[14] *United States v. Bailey*, 44 U.S. 394, 405 (1980); *United States v. Sayetsitty*, 107 F.3d 1405, 1412 (9th Cir. 1997).

The Tribe's witness Officer Wells'testimony was that the Appellant never came closer than seven to ten feet from the officer and was just staring at the officer. Mr. Rosovich never rushed the officer or swung the golf club in the officer's direction. His conduct was clearly without criminal culpability - it was the conduct of a frustrated victim of a crime whose only intent was to see the perpetrators caught. Mr. Rosovich's conduct is clearly conduct not intended to be punishable under the Code.

The Tribe also has the burden of proving an overt act taken by the Appellant in an attempt to commit the crime. The evidence failed to show that Mr. Rosovich took any overt action towards the officer with the intent to commit a battery. Mr. Rosovich's testimony, along with the testimony of two witnesses, clearly established that Mr. Rosovich was waving his golf club in the direction of the alley. He did not take any overt action towards the officer, yet the officer drew his gun. Waving a golf club from twenty feet and staring at an officer from seven to ten feet does not constitute an overt action towards the commission of the offense.

There is no need to address the third and forth element of the offense since the Appellant neither formed the requisite intent nor engage in an overt act towards the commission of such an offense.

VIII. CONCLUSION

The evidence clearly showed that Mr. Rosovich and his family where victims. The Rosovich family had called, not once but twice within a twelve hour period, the police regarding an on-going situation. When Officer Wells responded arrived on the scene he had first-hand knowledge of the earlier incident. Officer Wells was the officer

who responded to the Rosovich's residence, and spoke directly with Mr. Rosovich, who warned the officer that the perpetrators would return and start trouble.

Surely, the court could only conclude based on these facts that the officer acted in haste and unreasonable in light of the information and first-hand knowledge that he had been provided earlier that evening by, Mr. Rosovich, the very person who called for his assistance. Any reasonable officer would have taken into account the earlier report, and would have heard the victims trying to tell him that the perpetrators were getting away down the alley. Yet, Officer Wells immediately reacted and through his own testimony went into "high threat level". Officer Esparza was on the scene but no evidence was presented that she felt threatened or drew her weapons. Any reasonable officer would not have drawn his gun and arrested the victim.

In sum, the trial court erred in finding that the Tribe had met its burden of proof in this case, because Mr. Rosovich's conduct could not have been construed, based on the evidence presented at trial, as a willful attempt to commit a batter upon a tribal officer under the Code. The trial court should have acquitted Mr. Rosovich. To allow this conviction to stand would be a miscarriage of justice. The Appellant ask this Court to reverse the trial court's finding of guilt.

RESPECTFULLY SUBMITTED this 2nd day of June 2003

Jacinta Figueroa
Chief Public Defender

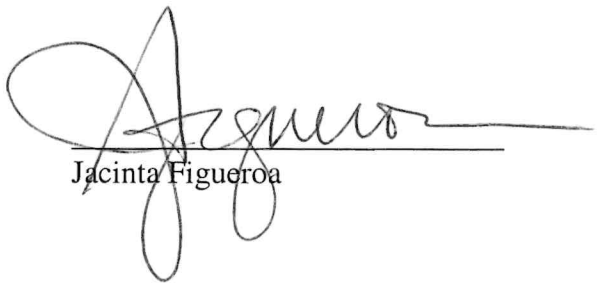
CERTIFICATE OF SERVICE

Original and four copies of the foregoing delivered this 2nd day of June 2003 to:

Clerk of the Court
Pascua Yaqui Tribal Court
7474 S. Camino de Oeste
Tucson, Arizona 85746

Copy of the foregoing delivered this day to:

Allen Osburn
Deputy Prosecutor
Pascua Yaqui Prosecutor's Office
7474 S. Camino de Oeste
Tucson, Arizona 85746



Jacinta Figueroa

ATTACHMENT (A)

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE)
Plaintiff)
VS.)
) **CASE NO: CR-03-030**
ROSOVICH, CHARLIE)
Defendant) ORDER

The above matter came before this Court for Trial hearing on this 4th day of February 2003. Deputy Prosecutor, Allen Osburn appeared for the Tribe. The Defendant appeared with Defense Counsel, Dan Anderson.

The Court finds after hearing sworn testimony from the Tribe's witness and from the Defendants witnesses' the Tribe has proven a reasonable doubt the defendant is guilty of the charge as the testimony showed that the defendant willfully attempted to commit battery upon a trial officer, Officer wells by force or violence or any unlawful act, threat, or menacing conduct which caused the police officer to reasonably believe that he was in danger or receiving an immediate battery. Defense Counsel moved the Court to stay the sentencing proceedings, as Defendant will appeal the conviction. The Tribe had no objections to the sentencing being stayed.

IT IS ORDERED THAT:

a. The Defendant is found guilty of the charge Assault on a Tribal Official. Sentencing in the above matter is stayed pending the appeal.
b. Defendant shall remain on the same conditions of release as ordered previously.

SO ORDERED THIS 4th DAY OF February, 2003.

J. M. Figueroa
Judge, Pascua Yaqui Tribal Court

cc:
✓Defendant ✓Tribe _PYLES _Probation Officer
Date: 2/11/03 Clerk:

FEB 2003
RECEIVED
TRIBAL PUBLIC DEFENDER

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME
03 MAY 12 PM 4:49
DOCKET NO. CA-03-004
CLERK

PASCUA YAQUI PUBLIC DEFENDER
7474 S. Camino de Oeste
Tucson, Arizona 85746

Jacinta Figueroa, SBN 016487
Chief Public Defender
COUNSEL FOR: Defendant

IN THE APPELLATE COURT OF THE YAQUI NATION

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

Charles Rosovich, Appellant, vs. PASCUA YAQUI TRIBE, Appellee.	Case No.: CA-03-004 NOTICE OF APPEAL

COMES NOW the above named Appellant, Charles Rosovich, by and through counsel undersigned, and hereby timely files a Notice of Appeal to the Appellate Court from the judgment entered in this action by the Pascua Yaqui Tribal Court on February 4, 2003, finding the Appellant, Charles Rosovich, guilty beyond a reasonable doubt of willful assault on a police officer. The Appellant contends that the Court's finding is erroneous and not supported by the evidence presented at trial. The Appellant also contends that the trial court err as a matter of law when it found that the Appellant acted willfully, an essential element of the offense, where the evidence showed that the Appellant suffers from Post Traumatic Stress Disorder (PTSD)

. . .

. . .

and clearly did not understand neither the nature nor the quality of his actions. This issue is a matter of law subject to de novo review.

Dated this 12th day of May 2003.

Jacinta Figueroa
Chief Public Defender

ORIGINAL of the foregoing delivered this date to Pascua Yaqui Tribal Court by:

COPY of the foregoing delivered this date to Prosecutor's Office by:

IN THE APPELLATE COURT OF THE YAQUI NATION

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

YAQUI TRIBAL COURT
FILED DATE AND TIME
03 APR 23 PM 3:30

DOCKET NO. CA-03-004
CLERK

ROSOVICH, CHARLES

Appellant,

vs.

PASCUA YAQUI TRIBE

Appellee.

ORDER UPON DE NOVO

PRE-TRIAL CONFERENCE

No. CA-03-004

On April 23, 2003, the parties met for a pre-de novo trial conference to determine whether, as required by the Pascua Yaqui Tribal Code Section 1.24(A), a de novo trial was warranted. After much discussion and a short recess, Defendant withdrew his request for a de novo trial by the Appellate Court.

The parties agreed, and the Court so rules, that the time clock for filing an appeal was tolled, and, at the request of Defendant, will begin to run beginning on 8:00 am on Wednesday April 30, 2003,[1] after which Defendant has no more than fourteen (14) calendar days to file a Notice of Appeal, and no more than twenty one (21) calendar days from the date of filing the Notice to file a Brief on Appeal. Appellee, the Tribe, shall have no more than fourteen (14) calendar days thereafter to submit a response. Then the Defendant/Appellant shall have no more than seven (7) calendar days to reply to Appellee's response.

The Order of the Trial Court entered on February 4, 2003, imposing a stay upon sentencing shall remain in effect pending a ruling on appeal. If Defendant fails to file an appeal in accordance with the requisite deadlines, the Trial Court shall proceed to sentencing Defendant.

Richard G. Marcotte
Chief Justice

[1] In other words, April 30th will serve in lieu of the date that the trial court's order was filed finding the Defendant guilty.

PASCUA YAQUI PUBLIC DEFENDER
7474 S. Camino de Oeste
Tucson, Arizona 85746

Daniel Anderson, SBN 18971
COUNSEL FOR: Defendant

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME
03 MAR -5 PM 3:21
DOCKET NO CA-03-004/CR-03-009
CLERK

IN THE APPELLATE COURT OF THE YAQUI NATION

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

Charles Rosovich, Appellant, vs. PASCUA YAQUI TRIBE, Appellee.	Case No.: CA-03-004/CR-03-009 DEFENDANT'S REQUEST FOR TRIAL DE NOVO BY COURT OF APPEALS

Appellant, by and through counsel undersigned, and pursuant to Article VIII, Sec. 5 of the Constitution of the Pascua Yaqui Tribe, and 1 PYTC Sec. 1.24, hereby requests a trial de novo from the Court of Appeals.

Appellant notes that a Notice of Appeal has already been filed. However, Appellant reserves the filing of Appellant's Brief until after the pre-hearing conference mandated in Sec. 1.24, on the ground that briefs by the parties would prejudice the issues in a trial de novo.

Dated this 5th day of March, 2003.

Daniel Anderson
Deputy Public Defender

ORIGINAL of the foregoing delivered this date to Pascua Yaqui Tribal Court and Prosecutor's Office by: DA

PASCUA YAQUI PUBLIC DEFENDER
7474 S. Camino de Oeste
Tucson, Arizona 85746

Daniel Anderson, SBN 18971
COUNSEL FOR: Defendant

YAQUI TRIBAL COURT
FILED DATE AND TIME
FEB 10 PM 2:11
DOCKET NO. CA-03004
BY

IN THE APPELLATE COURT OF THE YAQUI NATION

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

Charles Rosovich, Appellant, vs. PASCUA YAQUI TRIBE, Appellee.	Case No.: CA-03-004 NOTICE OF APPEAL

Notice is hereby given that the above named Charles Rosovich appeals to the Appellate Court of the Yaqui Nation from the judgment entered in this action by the Pascua Yaqui Tribal Court on the 4th day of February, 2003.

Dated this 10th day of February, 2003.

Daniel Anderson
Deputy Public Defender

ORIGINAL of the foregoing delivered this date to Pascua Yaqui Tribal Court by:

COPY of the foregoing delivered this date to Prosecutor's Office by:

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE)
Plaintiff)
VS.)
) **CASE NO: CR-03-030**
ROSOVICH, CHARLIE)
Defendant) ORDER

The above matter came before this Court for Trial hearing on this 4th day of February 2003. Deputy Prosecutor, Allen Osburn appeared for the Tribe. The Defendant appeared with Defense Counsel, Dan Anderson.

The Court finds after hearing sworn testimony from the Tribe's witness and from the Defendants witnesses' the Tribe has proven a reasonable doubt the defendant is guilty of the charge as the testimony showed that the defendant willfully attempted to commit battery upon a trial officer, Officer wells by force or violence or any unlawful act, threat, or menacing conduct which caused the police officer to reasonably believe that he was in danger or receiving an immediate battery. Defense Counsel moved the Court to stay the sentencing proceedings, as Defendant will appeal the conviction. The Tribe had no objections to the sentencing being stayed.

IT IS ORDERED THAT:

a. The Defendant is found guilty of the charge Assault on a Tribal Official. Sentencing in the above matter is stayed pending the appeal.
b. Defendant shall remain on the same conditions of release as ordered previously.

SO ORDERED THIS 4th DAY OF February, 2003.

J. M. Figueroa

Judge, Pascua Yaqui Tribal Court

cc:
✓Defendant ✓Tribe _PYLES _Probation Officer
Date: 2/11/03 Clerk: KM