

IN THE PASCUA YAQUI COURT OF APPEALS

PASCUA YAQUI TRIBE)
Plaintiff/Appellant) Case No.: CA-04-002
v.)
CELESTINE MOLINA,)
Defendant/Appellee)

ORDER

Micah Schmit, Chief Prosecutor, Pascua Yaqui Tribe Office of the Prosecutor, Tucson, Arizona, for the Appellant.

Nicholas A. Fontana, Chief Public Defender, Pascua Yaqui Tribe Office of the Public Defender, Tucson, Arizona, for the Appellee.

Upon review of the record and after hearing arguments, this Court finds as follows:

1) On March 17, 2004, the Tribe filed a criminal complaint charging the Appellee with one count of aiding and abetting, 1 PYTC Sec. 3.4;

2) On March 30, 2004, counsel for the Appellee filed his entry of appearance and a request for disclosure from the Tribe's prosecutor's office, pursuant to Article I, Secs. 1(f) and (h) of the Pascua Yaqui Tribe Constitution, and Rules 5.1 and 5.4 of Title 10 of the Pascua Yaqui Tribe Rules of Criminal Procedure;

3) The trial was set for the afternoon of July 13, 2004. On the morning of July 13, 2004, the Appellee filed a motion to dismiss the criminal complaint alleging that the Tribe had failed to comply with her discovery request;

4) On July 13, 2004, after hearing arguments on the motion to dismiss and reviewing the record before it, the Tribal Court dismissed the criminal complaint. Memorandum Opinion and Order of Dismissal, No. CR-04-110 (July 13, 2004). The court found from the record that the Tribe had disclosed nothing to the Appellee and thereby had failed to comply with Rule 5.1, which requires the Tribe to disclose certain materials and information that are within its control so that a defendant may use them to prepare a defense. Order, *id.*, at 2-3. Using *United States v. Brady*, 373 U.S. 83 (1963), as a guide, the Tribal Court ruled that the Tribe's failure to disclose relevant materials and information to the Appellee had violated the Appellee's right to due process which is guaranteed by the Pascua Yaqui Tribe Constitution and the Indian Civil Rights Act. Order, *id.*, at 3. In addition, the Tribal Court stated that the Tribe should file a written challenge to the defendant's discovery request if it wants to protect information or material from discovery. Order, *id.*, at 2-3;

5) In addition to dismissing the criminal complaint, the Tribal Court held the prosecutor in contempt and fined him \$50.00 for his failure to abide by the "disclosure rules" and as an "incentive" to abide by the Pascua Yaqui Tribe laws and criminal rules. Order, *id.*, at 4;

6) The Tribe filed a notice of appeal on July 21, 2004, alleging that the Tribal Court abused its discretion when it a) dismissed the charges without first finding that the failure to disclose had prejudiced the Appellee; b) dismissed the charges in spite of the fact that the Tribe had made disclosure to the Appellee; and c) held the prosecutor in contempt without providing him with due process (notice of the contempt charge and an opportunity to be heard on the charge);

7) The Tribe filed a motion, on July 21, 2004, to stay execution of the prosecutor's payment of the fine;

8) The Tribe filed its opening brief on August 25, 2004 and a "List of Exhibits" in support of its brief on August 26, 2004. The Rules of Appellate Procedure, Rule 1.22, requires an appellant to file his brief within "twenty-one (21) calendar days" of filing the notice of appeal; thus, the Tribe should have filed its brief no later than August 11, 2004. The Tribe's brief is late by fourteen (14) days; and

9) On September 10, 2004, the Appellee filed her response brief and a motion to strike the Tribe's "List of Exhibits," alleging that the exhibits were not part of the certified record of the trial court, and Exhibits B, C, G, H and K were not admitted into evidence by the trial court. We agree with the Appellee and strike the exhibits.

After reviewing the record and hearing arguments on June 30, 2006, we conclude that the Tribal Court did not abuse its discretion when it dismissed the criminal complaint and when it held the prosecutor in contempt and fined him \$50.00. We find that Rule 5.1 imposes a duty on the Tribe's prosecutor to disclose to the defendant all the information and materials that are within the prosecutor's possession or control that would help the defendant prepare his/her defense. Rule 5.1 also requires that the disclosure be made within ten days of arraignment.

The defendant does not have to file a motion requesting disclosure, because Rule 5.1 already gives notice and imposes a duty of disclosure on the prosecutor. In this case, the prosecutor, by failing to disclose relevant materials and information, violated Rule 5.1. In addition, he failed to comply with the Appellee's discovery request. The Tribal

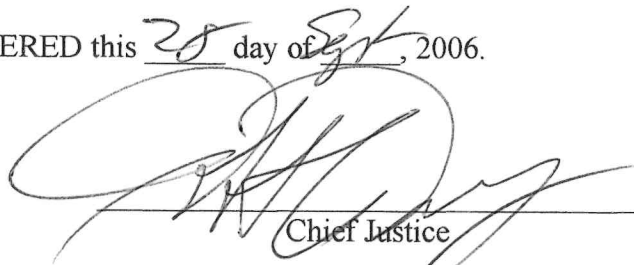
Court did not err when it ruled that the Tribe's failure to comply with the law violated the Appellee's due process rights.

The Tribal Court did not err when it held the prosecutor in contempt and fined him \$50.00, because the prosecutor was given notice twice (through Rule 5.1 and Appellee's discovery motion) of his duty to comply with discovery and he did not do so. Rule 5.5 gives the prosecutor notice of the possible sanctions when he/she does not comply with the discovery rules or a defendant's motion for disclosure. A prosecutor who knows that he has a duty to disclose, and knows of the consequences for failure to disclose, should not later attempt to excuse his contempt by claiming that his right to due process has been violated; especially, when the prosecutor's failure to obey the law has violated the due process rights of the criminal defendant.

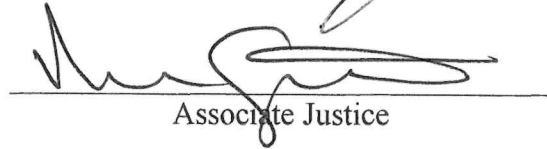
The Court recognizes that this case brings the first opportunity to address the Prosecutor's duty under Rule 5.1 of the Rules of Criminal Procedure. The Court upholds the power of the Tribal Court, both Trial and Appellate, to impose sanctions as necessary. However, this Court recognizes that the Prosecutors' Office has had a change in leadership and an improvement in operational standards. Therefore, we do not find it necessary to continue the contempt and the \$50 sanction upon the Prosecutor.

Accordingly, the Pascua Yaqui Tribal Court's order dismissing the criminal complaint is affirmed. The Motion to Strike filed by the Appellee on Sept, 10, 2004 is granted. The Motion to Strike filed by the Appellee on June 30, 2006, is granted. The orders of contempt and \$50 fine are reversed.

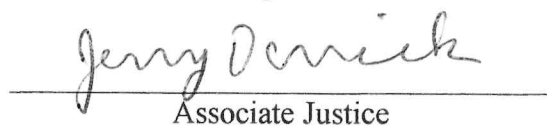
So ORDERED this 20 day of Sept, 2006.



Chief Justice



Associate Justice



Associate Justice

1 Nicholas A. Fontana
State Bar No. 014429
2 OFFICE OF THE PUBLIC DEFENDER
7474 South Camino de Oeste
3 Tucson, AZ 85746

CLERK OF COURT
JUN 30 AM 8:11
CASE NO. CA-04-110
RT

4 Attorney for Appellee

5
6 IN THE PASCUA YAQUI COURT OF APPEALS
7 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

8 PASCUA YAQUI TRIBE,) APPELLATE CASE NO. CA-04-002
9)
Appellant,) PASCUA YAQUI TRIBAL COURT NO.:
10) CR-04-110
vs.)
11) **MOTION TO STRIKE**
CELESTINE MOLINA,)
12)
Appellee.)

13
14 COMES NOW Appellee Celestine Molina, through undersigned counsel and pursuant to
15 Title 11, §§ 1.20 and 1.22 of the Pascua Yaqui Judicial Titles and Codes (Court of Appeals
16 Procedures Act of 2000), and respectfully moves this Court to enter an order striking the Appellant's
17 "Supplemental Citation of Legal Authority."

18
19 The grounds for this motion are set forth in the accompanying Memorandum of Points and
Authorities.

20 DATED this 30th day of June, 2006.

21
22 PASCUA YAQUI PUBLIC DEFENDER

23 *Nicholas A. Fontana*
24 _____
Nicholas A. Fontana
25 Chief Public Defender

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2 MEMORANDUM OF POINTS AND AUTHORITIES

3 I. FACTS.

4 Appellant filed a timely Notice of Appeal on July 21, 2004. On August 5, 2004, Appellee
5 received a copy of the transcript of the trial court proceedings.

6 On August 29, 2004, the Appellant filed a Brief on Appeal. The Appellee filed her Brief in
7 Response on September 10, 2004. The Appellant did not file a Brief in Reply.

8 On June 28, 2006, the Appellant filed a filed a fifteen (15) Supplemental Citation of Legal
9 Authority.

10 II. THE APPELLANT'S SUPPLEMENTAL CITATION OF LEGAL AUTHORITY IS A
11 VIOLATION OF TITLE 11, PASCUA YAQUI JUDICIAL TITLES AND CODES, §
1.22 AND MUST BE STRICKEN.

12 Title 11, § 1.22 of the Pascua Yaqui Judicial Titles and Codes, sets forth the rules governing
13 the filing of appellate briefs before the Pascua Yaqui Tribe Court of Appeals. It provides that after
14 filing a Notice of Appeal, the Appellant shall have twenty-one (21) calendar days to submit a Brief
15 on Appeal. *Id.* The Appellee is given fourteen (14) calendar days to submit a Brief in Response
16 after being served with the Brief on Appeal. *Id.* The Appellant then has seven (7) calendar days to
17 submit a Brief in Reply. *Id.* Title 11, Pascua Yaqui Judicial Titles and Codes, § 1.20 permits the
18 parties to file motions. There are no provisions in the Court of Appeals Procedures Act of 2000
19 that allow a party in an appeal to file a supplemental citation of legal authority.

20
21 Two days before the scheduled oral argument of this appeal, the Appellant filed a fifteen
22 (15) page Supplemental Citation of Legal Authority. The pleading fails to state any provision of the
23 law or the rules of the Court of Appeals that permit the filing of such a document. Pursuant to Title
24 11, Pascua Yaqui Judicial Titles and Codes, § 1.22, the Appellant had seven (7) calendar days in
25 which to file a Brief in Reply to the Appellee's Brief in Response. Nearly two years have passed
since the Brief in Reply was due.

CERTIFICATE OF SERVICE


ORIGINAL and four (4) copies of the foregoing delivered this 30th day of June, 2006, to:

Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7474 S. Camino de Oeste
Tucson, AZ 85746

COPY of the foregoing delivered this 30th day of June, 2006, to:

Yancy Jencsok
Deputy Prosecutor
Office of the Prosecutor for the Pascua Yaqui Tribe
7474 S. Camino de Oeste
Tucson, AZ 85757

BY:


Nicholas A. Fontana
Chief Public Defender

1 PASCUA YAQUI TRIBE
2 OFFICE OF THE PROSECUTOR
3 7474 S. Camino de Oeste
4 Tucson, AZ 85757
5 (520) 879-6251

6 Yancy A. Jencsok
7 Deputy Prosecutor

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

9 PASCUA YAQUI TRIBE,)
10 Plaintiff,)
11 vs.)
12 MOLINA, CELESTINE,)
13 Defendant.)

App. Case No. CA-04-002

Trial Case No. CR-04-110

**TRIBE'S SUPPLEMENTAL CITATION
OF LEGAL AUTHORITY**

14 The Tribe supplements the Brief on Appeal filed August 25, 2004 with the following
15 additional legal authority. Relevant portions of the Arizona Rules of Criminal Procedure and the
16 listed tribal codes are attached hereto:

17 Authority

Supplemented Page of Brief

18 **CASES**

19 ***Groundhog v. Keeler*,**
20 C.A.10 (Okla.) 1971, 442 F.2d 674 6 and 7

21 ***State v. Towery*,**
22 920 P.2d 290 (Ariz. 1996),
23 certiorari denied, 519 U.S. 1128,
24 denial of post-conviction relief affirmed, 64 P.3d 828,
reconsideration denied, certiorari dismissed, 539 U.S. 986 8 and 9

25 ***State v. Zuck*,**
26 658 P.2d 162 (Ariz. 1982) 8 and 9

27 ***Tom v. Sutton*,** C.A.9 (Wash.) 1976, 533 F.2d 1101 6 and 7

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STATUTES AND RULES

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Arizona Rules of Criminal Procedure, Rule 15.1 (prior to amendment in 2003) 8 and 9

Arizona Rules of Criminal Procedure, Rule 15.7(a) (prior to amendment in 2003) 8 and 9

Federal Rules of Criminal Procedure, Rule 16 8 and 9

The Absentee Shawnee Tribe of Oklahoma, Rule 212(a) 8 and 9

Blackfeet Tribal Law and Order Code Chapter 9, Rule 57 8 and 9

Cheyenne-Arapaho Tribes of Oklahoma Law and Order Code,
Title II, Subpart C § 212(a) 8 and 9

Confederated Salish and Kootenai Tribes (CSKT) Laws Codified § 2-2-804(1) ... 8 and 9

Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians,
Tribal Code § 3-3-13(a) 8 and 9

Code of the Eastern Band of Cherokee Indians, Chapter 15, Rule 7(f) 8 and 9

Federal Rules of Criminal Procedure, Rule 16 8 and 9

Rules of the Skokomish Tribal Court, Rule 3.01.087 (Criminal Rule 87) 8 and 9

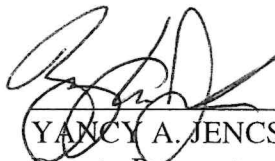
Tulalip Codes and Regulations, Ordinance 49, Law and Order Code § 2.8.4(1) 8 and 9

Winnebago Tribal Court Rules of Criminal Procedure, Rule 1B-313(1) 8 and 9

Yankton Sioux Tribal Rules of Criminal Procedure, Rule 13(A) 8 and 9

RESPECTFULLY SUBMITTED this 28th day of June, 2006.

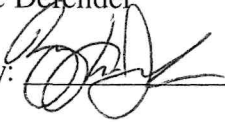
MICAH SCHMIT
CHIEF PROSECUTOR



YANCY A. JENCOK
Deputy Prosecutor, Counsel for Appellant

1 Original of and 5 copies delivered to:
2 Clerk, Pascua Yaqui Tribe Court of Appeals

3 Copy mailed/delivered to:
4 Pascua Yaqui Public Defender

5 On June 28, 2006 by:  _____

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Rule 14.3

Rule 14.3. Proceedings at arraignment

The court shall:

- a. Ascertain the defendant's plea of not guilty, guilty, or no contest. Unless he pleads guilty or no contest, the court shall enter a plea of not guilty on his behalf.
- b. Hear and decide motions concerning the conditions of release under Rule 7. Unless the arraignment is held in conjunction with the defendant's initial appearance before a magistrate under Rule 4.2, a contested release motion shall be heard only if 5 days prior notice of the motion has been given.
- c. Set the date for trial or pretrial conference.
- d. Advise the parties in writing of the dates set for further proceedings and other important deadlines.
- e. Advise the defendant of defendant's right to be present at all future proceedings, that any proceeding may be held regardless of the defendant's absence, or that defendant may be charged with an offense and a warrant issued for defendant's arrest.
- f. Advise the defendant of the right to jury trial, if applicable.

Amended May 7, 1975, effective Aug. 1, 1975; July 28, 1993, effective Dec. 1, 1993.

Committee Comment to 1993 Amendment

The 1993 amendment added subsections (e) and (f) to Rule 14.3 to expand the duties of the magistrate at the arraignment to include a duty to advise the defendant (1) of the right to be present at all proceedings, (2) that a proceeding may be held regardless of the defendant's absence, (3) that defendant may be charged with an offense and a warrant issued for defendant's arrest in the event of his or her non-appearance and (4) of the right to a jury trial, if applicable. Rule 14.3(c) was also amended to provide that either a trial date or a pretrial conference date may be set at the arraignment.

RULE 15. DISCOVERY

- Rule**
- 15.1 Disclosure by state.
 - 15.2 Disclosure by defendant.
 - 15.3 Depositions.
 - 15.4 General standards.
 - 15.5 Excision and protective orders.
 - 15.6 Continuing duty to disclose.
 - 15.7 Sanctions.
 - 15.8 Non-severability.
 - 15.9 Appointment of investigators and expert witnesses for indigent defendants.

RULES OF CRIMINAL PROCEDURE

Rule 15.1. Disclosure by state

a. Matters Relating to Guilt, Innocence or Punishment. No later than 10 days after the arraignment in Superior Court, or in limited jurisdiction courts, no later than the pretrial conference or 20 days after arraignment, whichever is earlier, or at such time as the court may direct, the prosecutor shall make available to the defendant for examination and reproduction the following material and information except as provided by Rule 39(b) within the prosecutor's possession or control:

- (1) The names and addresses of all persons whom the prosecutor will call as witnesses in the case-in-chief together with their relevant written or recorded statements;
- (2) All statements of the defendant and of any person who will be tried with the defendant;
- (3) The names and addresses of experts who have personally examined a defendant or any evidence in the particular case, together with the results of physical examinations and of scientific tests, experiments or comparisons, including all written reports or statements made by them in connection with the particular case;
- (4) A list of all papers, documents, photographs or tangible objects which the prosecutor will use at trial or which were obtained from or purportedly belong to the defendant;
- (5) A list of all prior felony convictions of the defendant which the prosecutor will use at trial;
- (6) A list of all prior acts of the defendant which the prosecutor will use to prove motive, intent, or knowledge or otherwise use at trial;
- (7) All material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce the defendant's punishment therefor, including all prior felony convictions of witnesses whom the prosecutor expects to call at trial.

b. Possible Collateral Issues. At the same time the prosecutor shall inform the defendant and make available to the defendant for examination and reproduction any written or recorded material or information within the prosecutor's possession or control regarding:

- (1) Whether there has been any electronic surveillance of any conversations to which the accused was a party, or of the accused's business or residence;
- (2) Whether a search warrant has been executed in connection with the case;

tion Courts. For misdemeanor and petty offenses triable in limited jurisdiction courts, materials disclosed by the parties pursuant to Rule 15.1 and Rule 15.2, or notices of their service, shall not be filed with the court unless they are filed as attachments or exhibits to other documents when relevant to the determination of an issue before the court. On motion of a party, victim, or on the court's own motion, for good cause, the court may order the general standard shall not apply and that discovery papers shall be filed with the court to the extent helpful or necessary to maintain efficient and appropriate case management.

Amended July 28, 1993, effective Dec. 1, 1993; May 31, 2000, effective Dec. 1, 2000.

Rule 15.5. Excision and protective orders

a. Discretion of the Court to Deny, Defer or Regulate Discovery. Upon motion of any party showing good cause the court may at any time order that disclosure of the identity of any witness be deferred for any reasonable period of time not to extend beyond 5 days prior to the date set for trial, or that any other disclosures required by this rule be denied, deferred or regulated when it finds:

(1) That the disclosure would result in a risk or harm outweighing any usefulness of the disclosure to any party; and

(2) That the risk cannot be eliminated by a less substantial restriction of discovery rights.

b. Discretion of the Court to Authorize Excision. Whenever the court finds, on motion of any party, that only a portion of a document or other material is discoverable under these rules, it may authorize the party disclosing it to excise that portion of the material which is nondiscoverable and disclose the remainder.

c. Protective and Excision Order Proceedings. On motion of the party seeking a protective or excision order, or submitting for the court's determination the discoverability of any material or information, the court may permit the party to present the material or information for the inspection of the judge alone. Counsel for all other parties shall be entitled to be present when such presentation is made.

d. Preservation of Record. If the court enters an order that any material, or any portion thereof, is not discoverable under this rule, the entire text of the material shall be sealed and preserved in the

record to be made available to the appellate court in the event of an appeal.

Amended July 28, 1993, effective Dec. 1, 1993.

Rule 15.6. Continuing duty to disclose

If at any time after a disclosure has been made any party discovers additional information or material which would be subject to disclosure had it then been known, such party shall promptly notify all other parties of the existence of such additional material, and make an appropriate disclosure.

Rule 15.7. Sanctions

a. If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with any provisions of this rule or any order issued pursuant thereto, the court may impose any sanction which it finds just under the circumstances, including, but not limited to:

(1) Ordering disclosure of the information not previously disclosed.

(2) Granting a continuance.

(3) Holding a witness, party, or counsel in contempt.

(4) Precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; and

(5) Declaring a mistrial when necessary to prevent a miscarriage of justice.

b. If the defendant fails to comply with Rule 15.2, the prosecution need make no further disclosure except material or information which tends to mitigate or negate defendant's guilt as to the offense charged as set forth in Rule 15.1(a)(7), or as ordered by the court.

Amended May 7, 1975, effective Aug. 1, 1975; July 28, 1993, effective Dec. 1, 1993.

Rule 15.8. Non-severability

Should the provisions of Rules 15.2(b) or (c) be found unenforceable, then the provisions of Rules 15.1(a)(1) (relating to witness statements), (b), and (c) shall also be inoperable, null and void.

Rule 15.9. Appointment of investigators and expert witnesses for indigent defendants

Text of Rule effective Dec. 1, 2002

a. An indigent defendant may apply for the appointment of an investigator and expert witness,

THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA
Criminal Procedure Rules

Section 212. Discovery and Inspection

(a) The police, or Attorney General, shall, upon request, permit the defendant or his attorney to inspect and copy any statements or confessions, or copies thereof, made by the defendant if such are within the possession or control of or reasonably obtainable by the police or prosecution. The police and prosecution shall make similarly available copies of reports of physical, mental or scientific test or examinations relating to or done on the defendant.

(b) The defendant or his attorney shall reveal by written notice to the Court and the Attorney General at least five (5) working days before trial the names and addresses of any witnesses upon whom the defense intends to rely to provide an alibi or insanity defense for the defendant. Failure to provide such notice will prevent the use of such witnesses by the defense unless it can be shown by the defense that prior notice was impossible or that no prejudice to the prosecution has resulted, in which case the judge may order the trial delayed or make such other orders as tend to assure a just determination of the case.

Blackfeet Tribal Law and Order Code
CHAPTER 9
RULES OF PROCEDURE, CIVIL AND CRIMINAL

Rule 57. Discovery.

At the request of the defendant, the Court may order the Trial Prosecutor to permit the defendant to inspect and copy:

1. written or recorded statements or confessions made by the defendant;
2. results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the case; and
3. any books, documents, or other evidence within the custody of the prosecution which would be material to the preparation of his defense. The Court shall also require the Tribal Prosecutor to disclose the names and addresses of all persons who will testify for the prosecution.

Cheyenne-Arapaho Tribes of Oklahoma [Law and Order Code]
TITLE II - LAW AND ORDER CODE - SUBPART C - CRIMINAL PROCEDURE

Section 212. Discovery and Inspection

(a) The police, or Attorney General, shall, upon request, permit the defendant or his attorney to inspect and copy any statements or confessions, or copies thereof, made by the defendant if such are within the possession or control of or reasonably obtainable by the police or prosecution. The police and prosecution shall make similarly available copies of reports of physical, mental or scientific test or examinations relating to or done on the defendant.

(b) The defendant or his attorney shall reveal by written notice to the Court and the Attorney General at least five (5) working days before trial the names and addresses of any witnesses upon whom the defense intends to rely to provide an alibi or insanity defense for the defendant. Failure to provide such notice will prevent the use of such witnesses by the defense unless it can be shown by the defense that prior notice was impossible or that no prejudice to the prosecution has resulted, in which case the judge may order the trial delayed or make such other orders as tend to assure a just determination of the case.

Part 8

Pretrial Motions and Discovery

2-2-801. Pretrial defenses and objections. (1) Except for good cause shown, any defense objection, or request which is capable of determination without trial on the general issues must be raised before trial by motion to dismiss or for other appropriate relief. All motions must be in writing and must be supported by a statement of the relevant facts upon which the motion is being made unless otherwise directed by the judge.

(2) Failure of a party to raise defenses or objections or to make requests that must be made prior to trial, except lack of jurisdiction or the failure of a complaint to state an offense which must be noticed by the court at any time during the pendency of a proceeding, constitutes a waiver of the defense, objection, or request. The court, for good cause shown, may grant relief from any waiver provided in this section.

(3) Motions in Limine should be made at least 5 days before trial, unless good cause is shown.

2-2-802. Suppression of evidence. (1) A defendant aggrieved by an unlawful search and seizure may move to suppress as evidence anything obtained by the unlawful search and seizure. The motion must be filed at least 10 days before trial, unless good cause is shown for waiving this time restriction.

(2) The motion must specify the evidence sought to be suppressed and the grounds upon which the motion is based.

(3) When the motion to suppress challenges the admissibility of evidence obtained without a warrant, the prosecution has the burden of proving, by a preponderance of the evidence, that the search and seizure were valid.

(4) If the motion is granted, the evidence is not admissible at trial.

2-2-803. Motion to suppress confession or admission. (1) A defendant may move to suppress as evidence any confession or admission given by her or him on the ground that it was not voluntary or that was otherwise obtained in violation of his or her rights.

(2) The motion must be filed at least 10 days before trial, unless good cause is shown for waiving this time restriction.

(3) If the allegations of the motion state facts which, if true, show that the confession or admission was not voluntarily made or was otherwise obtained in violation of the defendant's rights, the Tribal Court shall conduct a hearing on the merits of the motion. The prosecution must prove by a preponderance of the evidence that the confession or admission was not obtained in violation of the defendant's rights.

(4) The issue of admissibility of the confession or admission may not be submitted to the jury. If the confession or admission is determined to be admissible, the circumstances surrounding the making of the confession or admission may be submitted to the jury as bearing upon the credibility or the weight to be given to the confession or admission.

(5) If the motion to suppress is granted, the confession or admission may not be admitted into evidence by the prosecution at the time of trial. (Rev. 1-27-00)

2-2-804. Disclosure by prosecution. (1) At the time of the initial appearance, the prosecutor shall disclose to the defendant the name of the person, if any, against whom the offense was committed if not disclosed in the complaint.

(2) At the arraignment or as soon thereafter as practicable the defendant may request notice of all evidence the prosecutor intends to use in the prosecution case-in-chief at trial.

(3) Upon defendant's request, any of the following information or evidence which is within the possession, custody, or control of the Tribal Prosecutor is subject to disclosure and production and may be copied or photographed, as appropriate for the item, by the defendant:

(a) any relevant written or recorded statement made by the defendant while in the custody of the Tribes and of any person who will be tried with the defendant;

(b) the names, addresses, and statements of all persons whom the prosecutor may call as witnesses in the case in chief.

(c) the defendant's prior criminal record, if any;

(d) any books, papers, documents, photographs, tangible objects, drawings of buildings or places, or other physical or demonstrative evidence which is intended for use by the prosecution at trial;

(e) any written reports of or statements of experts who have personally examined the defendant or any evidence in the particular case, together with results of physical examinations, scientific tests or experiments, or comparisons; and

(f) all material or information that tends to mitigate or negate the defendant's guilt as to the offense charged or that would tend to reduce the defendant's potential sentence.

(4) At the same time, the prosecutor shall inform the defendant of, and make available to the defendant for examination and reproduction, any written or recorded material or information within the prosecutor's control regarding:

(a) whether there has been any electronic surveillance of any conversation to which the defendant was a party;

(b) whether an investigative subpoena has been executed in connection with the case; and

(c) whether the case has involved an informant and, if so, the informant's identity.

(5) Attorney work product of the Tribal Prosecutor's office is not subject to disclosure and production.

(6) The Prosecution shall provide written notice of any evidence of other crimes, wrongs, or acts, that it intends to offer under Rule 404(b) of the Federal Rules of Evidence, at least two weeks prior to the close of discovery. The notice shall describe the evidence in sufficient detail to inform the Defendant of the date, time, place, and witnesses to the alleged incidents, and shall also state the purpose for which such evidence shall be offered.

(7) The obligations imposed by this section are continuing.

2-2-805. Disclosure by defendant. (1) At any time after the filing of a complaint, the defendant, in connection with the particular offense charged, shall upon written request of the prosecutor and approval of the court:

(a) appear in a lineup;

(b) speak for identification by witnesses;

(c) be fingerprinted, palm printed, footprinted, or voiceprinted;

(d) pose for photographs not involving reenactment of an event;

(e) try on clothing;

Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians Tribal Code
TITLE 3 - OFFENSES

3-3-13 Discovery

(a) Upon request by the defendant, the tribal law enforcement officer or public safety officer shall disclose to the defendant the following material and information within his or her possession and control:

(1) The names and addresses of persons whom the Tribes intends to call as witnesses at trial, together with relevant written or recorded statements or memoranda of any oral statements made by such persons;

(2) Any written or recorded statements or memoranda of any oral statements made by the defendant or co-defendant if the trial is to be a joint trial;

(3) Any reports or statements of experts made in connection with the particular case, including results of examinations and of scientific tests, experiments and comparisons which the tribe intends to offer into evidence; or

(4) Any books, papers, documents, photographs, or tangible objects which the tribe intends to offer into evidence at trial or which were obtained from or belong to the defendant.

Code of the Eastern Band of Cherokee Indians
Chapter 15 - Criminal Procedure
Rule 7. Pretrial Proceedings

(f) Discovery.

(1) The Tribe. The Tribe shall maintain an "open file" policy. The defense may review the Prosecutor's file upon request. The Prosecutor is presumed to be in possession of CIPD reports and other evidence in the possession of the CIPD..

(2) The Defense. The defendant shall, at the request of the Prosecutor, provide the Prosecutor with a written summary of anticipated expert testimony pursuant to NC R.E. 701, et seq.

RULES OF THE SKOKOMISH TRIBAL COURT

3.01.087 Discovery (Criminal Rule 87)

(a) Upon request of the defendant, at or before trial, the tribe shall give the defendant the following:

(1) The names of witnesses the tribe intends to present;

(2) Copies of or access to any documents, photographs, results and reports of examinations or tests, and objects which are within the custody and control of the tribe and which the tribe intends to use as evidence against the defendant or which may be relevant to the accused person's defense;

(3) Copies or written summaries of any statements made by defendant which the tribe intends to offer as evidence against the defendant.

(b) If the defendant requests information as provided in subsection (a) of this rule, then defendant shall give the tribe, upon the tribe's request, the names of defendant's witnesses, and copies of or access to all evidence which defendant intends to use.

(c) Nothing in this rule shall require a party to provide the other with reports, memoranda, or other internal communications which were made by the party or by his/her representative solely in preparation for trial, except items specifically listed in this rule.

(d) A party who receives a request for information under this rule shall respond either with the information, with an indication when and where the information will be made available, or with an objection to the request within ten days after he or she receives the request. Failure to respond is grounds for a court order requiring response.

(e) If the parties disagree about whether a party is required to provide the information requested pursuant to this rule, the judge shall decide. The judge may impose reasonable conditions on the release of information requested under this rule.

Winnebago Tribal Court
RULES OF CRIMINAL PROCEDURE

Rule 1B-313 Discovery and inspection.

1. The police, or prosecutor, shall, upon request, permit the defendant or his/her attorney to inspect and copy any statements or confessions, or copies thereof, made by the defendant if such are within the possession or control of, or reasonably obtainable by the police or prosecution. The police and prosecution shall also make available copies of reports of physical, mental or scientific tests or examinations relating to or done on the defendant.

2. The defendant or his/her attorney shall reveal by written notice to the court and the prosecutor at least five working days before trial the name and addresses of any witnesses upon whom the defense intends to rely to provide an alibi or insanity defense for the defendant. Failure to provide such notice will prevent the use of such witnesses by the defense unless it can be shown by the defense that prior notice was impossible or that no prejudice to the prosecution has resulted, in which case the judge may order the trial delayed or make such other orders as tend to assure a just determination of the case. [TCR 86-79]

TITLE II
YANKTON SIOUX TRIBAL RULES OF CRIMINAL PROCEDURE

Rule 13. Discovery and Inspection

A. The police, or prosecutor, shall, upon request, permit the defendant or his attorney to inspect and copy any statements or confessions, or copies thereof, made by the defendant if such are within the possession or control or reasonably obtainable by the police or prosecution. The police and prosecution shall make similarly available copies of reports or physical, mental or scientific tests or examinations relating to or done on the defendant.

B. The defendant or his attorney shall reveal by written notice to the Court at least five (5) working days before the trial the names of any witnesses upon whom the defense intends to rely to provide an alibi defense for the defendant. Failure to provide such notice shall prevent the use of such witnesses by the defense unless it can be shown by the defense that prior notice was impossible or that no prejudice to the prosecution has resulted, in which case the judge may order the trial delayed or make such other orders as tend to assure a just determination of the case.

C. The Court shall, upon motion of either party, hold a pretrial conference before trial. The Court shall compel the attendance of the Defendant and his counsel at the conference. The prosecution and defendant may be required by the Court to exchange discoverable information at the conference. The Court shall at that time consider all pretrial motions and the Court may issue such orders as deemed proper to regulate the conduct of the trial.

IN THE PASCUA YAQUI COURT OF APPEALS

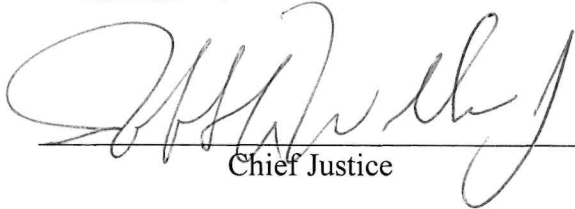
_____)	Case No.: No. CA-04-002
)	
PASCUA YAQUI TRIBE,)	
)	
Plaintiff-Appellant,)	
)	
v.)	ORDER
)	
CELESTINE MOLINA,)	
)	
Defendant-Appellee)	
_____)	

T. Michael Andrews, Chief Prosecutor, Pascua Yaqui Tribe Office of the Prosecutor, Tucson, Arizona, for the Appellant.

Nicholas A. Fontana, Chief Public Defender, Pascua Yaqui Tribe Office of the 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 30th, 2006 at 9:30 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

1 Nicholas A. Fontana
State Bar No. 014429
2 OFFICE OF THE PUBLIC DEFENDER
7474 South Camino de Oeste
3 Tucson, AZ 85746

CA-04-110
RP

4 Attorney for Appellee

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6 IN THE PASCUA YAQUI COURT OF APPEALS
7 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

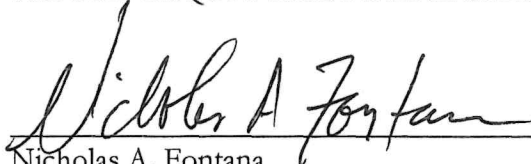
8 PASCUA YAQUI TRIBE,) APPELLATE CASE NO. CA-04-002
9)
Appellant,) PASCUA YAQUI TRIBAL COURT NO.:
10) CR-04-110
vs.)
11) **MOTION TO STRIKE**
CELESTINE MOLINA,)
12)
Appellee.)
13)

14
15 COMES NOW Appellee Celestine Molina, through undersigned counsel and pursuant to
16 Title 11, §§ 1.19 and 1.20 of the Pascua Yaqui Judicial Titles and Codes, and respectfully moves this
17 Court to enter an order striking the Appellant's "List of Exhibits."

18 The grounds for this motion are set forth in the accompanying Memorandum of Points and
19 Authorities.

20 DATED this 10th day of September, 2004.

21 PASCUA YAQUI PUBLIC DEFENDER

22 
23 Nicholas A. Fontana
24 Interim Chief Public Defender
25

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. FACTS.

3 Appellant filed a timely Notice of Appeal on July 21, 2004. On August 5, 2004, Appellee
4 received a copy of the transcript of the trial court proceedings. The Clerk of the Court of Appeals
5 has not convened a meeting of the parties or certified the record on appeal.

6 On August 29, 2004, the Appellant filed a Brief on Appeal and "List of Exhibits." The "List
7 of Exhibits" include the criminal complaint and affidavit, motions filed with the court, and the
8 transcript of the trial court proceedings. The Appellant also included several documents that were
9 never offered or admitted as evidence in the trial court proceedings. For example, Exhibits B, C, G,
10 and H, which are described as "disclosure sheets," were never offered or admitted as evidence.
11 Most distressing is the inclusion of Exhibit K – a complete copy of the police reports. Exhibit K
12 was neither offered or admitted into evidence.

13 II. THE APPELLANT'S "EXHIBIT LIST" IS NOT A CERTIFIED RECORD OF THE
14 TRIAL COURT PROCEEDINGS AND MUST BE STRUCK FROM THE
15 APPELLATE RECORD.

16 Certification of a record on appeal is governed by Title 11, § 1.19 Pascua Yaqui Judicial
17 Titles and Codes, the Pascua Yaqui Rules of Appellate Procedure (hereinafter "PYRAP 1.19"). Rule
18 1.19 reads:

19 [u]pon completion of the transcript, if one has been produced, or within ten (10)
20 calendar days of the receipt of the Notice of Appeal, the Clerk of the Court of
21 Appeals shall convene a meeting with the Appellant(s) and Appellee(s) to determine
22 whether the appropriate documentation and evidence is contained within the record.
23 Upon inclusion of appropriate documents and evidence, the Clerk shall certify the
24 record complete and shall forward the record to the Court of Appeals. Thereafter,
25 nothing may be added to the record.

26 The rule does not allow the parties to individually prepare and submit a record to the Court of
27 Appeals. The "List of Exhibits" filed by the Appellant is in complete violation of Rule 1.19.

28 The Clerk of the Court of Appeals has prepared a transcript of the trial court proceedings
29 and distributed it to the parties. However, the Clerk of the Court of Appeals has not convened a

1 meeting of the parties or certified the record on appeal. As a result, there is no certified record on
2 appeal before this Court. The Appellant's filing of a "List of Exhibits" is not only impermissible
3 under the Pascua Yaqui Rules of Appellate Procedure, it is a violation of the rules and must be
4 stricken from the appellate record.

5 III. APPELLANT'S "LIST OF EXHIBITS" CONTAINS DOCUMENTS WHICH WERE
6 NEVER OFFERED OR ADMITTED INTO EVIDENCE BEFORE THE TRIAL
7 COURT AND MUST BE STRUCK FROM THE APPELLATE RECORD.

8 Rule 1.19 of the Pascua Yaqui Rules of Appellate Procedure does not contain a list of items
9 to be included in the certified record on appeal. Since the rules refer to the creation of a transcript
10 of the proceedings before the trial court, it can be assumed that the transcript would be part of the
11 record on appeal. In addition to a transcript of proceedings before the trial court, a record on
12 appeal typically contains the original papers and exhibits filed in court and docket entries prepared
13 by the trial court clerk. *See, e.g.,* Fed.R.App.P. 10(a); Ariz.R.Crim.P. 31.8(a)(1) (record on appeal
14 includes certified transcript, all documents, papers, books and photographs introduced into
15 evidence, and all pleadings and documents in the file).

16 Assuming *arguendo* that the Appellant's filing of a "List of Exhibits" is permissible, it is clear
17 that the Appellant included documents which were never offered or introduced into evidence before
18 the trial court. The "Disclosure sheets," Exhibits B,C,G, and H were neither offered as evidence or
19 introduced as evidence before the trial court. Since these documents were not introduced into
20 evidence, they cannot properly be considered for inclusion in the record on appeal. Most disturbing
21 is the Appellant's inclusion of Exhibit K, a copy of the police reports. If the Appellant had
22 attempted to introduce the police reports into evidence during the trial court proceedings, the trial
23 court most certainly have sustained a hearsay objection to their admission. *See* Title 12, Pascua
24 Yaqui Judicial Titles and Codes, Rule of Evidence 5.3(f)(2). This Court must not allow the
25 Appellant to make inadmissible, un-offered, un-admitted documents a part of the record on appeal.

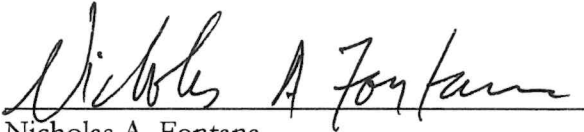
1 IV. CONCLUSION.

2 The Appellant's "Exhibit List" is not a certified record, contains documents that were not
3 entered into evidence as well as inadmissible evidence. The Appellant's submission of this
4 document is a gross violation the Pascua Yaqui Rules of Appellate Procedure.

5 WHEREFORE Appellee Celestine Molina respectfully moves this Court to enter an order
6 striking the Appellant's "Exhibit List" from the appellate record.

7 DATED this 16th day of September, 2004.

8 PASCUA YAQUI PUBLIC DEFENDER

9
10 
11 Nicholas A. Fontana
12 Interim Chief Public Defender
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CERTIFICATE OF SERVICE


ORIGINAL and four (4) copies of the foregoing delivered this 10th day of September, 2004, to:

Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7474 S. Camino de Oeste
Tucson, AZ 85746

COPY of the foregoing delivered this 10th day of September, 2004, to:

T. Michael Andrews
Chief Prosecutor
Office of the Prosecutor for the Pascua Yaqui Tribe
7474 S. Camino de Oeste
Tucson, AZ 85746

BY:


Nicholas A. Fontana
Interim Chief Public Defender

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

CA-04-002
PH

PASCUA YAQUI TRIBE,

Appellant,

vs.

CELESTINE MOLINA,

Appellee.

) APPELLATE CASE NO. CA-04-002
)
) PASCUA YAQUI TRIBAL COURT NO.:
) CR-04-110
)
)
)
)
)
)
)

BRIEF IN RESPONSE

Nicholas A. Fontana
State Bar No. 014429
OFFICE OF THE PUBLIC DEFENDER
7474 South Camino de Oeste
Tucson, AZ 85746

Attorney for Appellee

STATEMENT OF JURISDICTION

This Court has pursuant to the provisions of Article VIII, § 5 of the Constitution of the Pascua Yaqui Tribe, and Title 11, Pascua Yaqui Judicial Titles and Codes, §1.12.

STATEMENT OF FACTS

Appellee Celestine Molina, an eighteen-year-old member of the Pascua Yaqui Tribe, was arrested at her home by an officer of the Pascua Yaqui Law Enforcement Services on March 9, 2004. [Probable Cause Affidavit, filed 3/17/04]. On March 17, 2004, the Appellant filed a criminal complaint in the Pascua Yaqui Tribal Court charging the Appellee with one count of aiding and abetting in violation Title 1, Pascua Yaqui Judicial Titles and Codes, § 3.4. [Criminal Complaint, CR-04-110, filed 3/17/04].

Counsel for the Appellee filed a notice of appearance on March 30, 2004. [Notice of Appearance, CR-04-110, filed 3/17/04]. The Appellee also filed a request for disclosure on March 30, 2004. [Request for Disclosure, CR-04-110, filed 3/17/04].

The Appellee appeared before the Pascua Yaqui Tribal Court for her initial appearance on March 31, 2004. [Order, CR-04-110, filed 3/31/04]. The lower court found that there was probable cause to proceed with the matter and set the case for arraignment. [Id.]. The Appellee was arraigned on April 7, 2004, entered a plea of not guilty, and requested that the matter be set for a pretrial hearing. [Order, CR-04-110, filed 4/7/04]. At the pretrial hearing on May 18, 2004, the Appellee requested that the case be set for trial. [Order, CR-04-110, filed 5/18/04]. The trial was scheduled for the afternoon of July 13, 2004. [Id.].

On July 13, 2004, the Appellee filed a motion to dismiss. [Motion to Dismiss (Disclosure Violation), CR-04-110, filed 7/13/04]. The trial court heard arguments on the Appellee's motion to dismiss prior to the trial. [Transcript of Trial Court Proceedings, CR-04-110, filed 7/13/04,

hereinafter “Transcript at _____”]. At the conclusion of arguments, the trial court found that the Appellant failed to respond to the Appellee’s request for disclosure, failed in its affirmative obligation to provide disclosure, and had violated the Appellee’s rights under the Pascua Yaqui Judicial Titles and Codes. [Memorandum Opinion and Order of Dismissal, CR-04-110, filed 7/13/04, at 3, hereinafter “Dismissal Order at 3”]. The trial court also found that the Appellant had violated the Appellee’s right to due process as guaranteed by the Indian Civil Rights Act, 25 U.S.C. § 1302, *et seq.* [Dismissal Order at 2].

The trial court ultimately ordered that the case be dismissed due to the Appellant’s failure to comply with the provisions of Title 10, Pascua Yaqui Judicial Titles and Codes, Rule 5.1, and imposed of a sanction of fifty dollars (\$50.00) pursuant to the provisions of Title 10, Pascua Yaqui Judicial Titles and Codes, Rule 5.5. [Dismissal Order at 4].

The Appellant filed a Notice of Appeal on July 21, 2004. [Notice of Appeal to the Pascua Yaqui Court of Appeals, CA-04-002, filed 7/21/04]. The Clerk of the Court of Appeals completed a transcript of the proceedings before the trial court on August 5, 2004. [Transcript of Proceedings, CR-04-110, filed 7/13/04]. On August 26, 2004, the Appellant filed its Brief on Appeal. [Brief on Appeal, CA-04-002, filed 8/26/04].

STATEMENT OF ISSUES

1. Whether the trial court erred in finding that the Appellant's failure to provide disclosure violated Title 10, Pascua Yaqui Judicial Titles and Codes, Rule 5.1.
2. Whether the trial court erred in finding that the Appellant's failure to provide disclosure violated the Appellee's due process rights as guaranteed by the due process clauses of the Indian Civil Rights, 25 U.S.C. § 1302, *et seq.*, and Article 1, § 1(h) of the Constitution of the Pascua Yaqui Tribe.
3. Whether the trial court erred in imposing a sanction, pursuant to Title 10, Pascua Yaqui Judicial Titles and Codes, Rule 5.5, against the Appellant as an incentive for future compliance with Title 10, Pascua Yaqui Titles and Codes, Rule 5.1.

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THAT THE APPELLANT VIOLATED TITLE 10, PASCUA YAQUI JUDICIAL TITLES AND CODES, RULE 5.1.

A. Standard of Review.

The Pascua Yaqui Constitution and Pascua Yaqui Judicial Titles and Codes are silent regarding the standards of review to be applied by the Pascua Yaqui Court of Appeals. In other tribal jurisdictions, appellate courts give great deference to the factual determinations of trial courts because of the trial court's ability to observe the demeanor and evaluate the credibility of witnesses. *Coin v. Mowa*, No. AP-005-95 (Hopi 3/23/1997), 1997.NAHT.0000006 at ¶ 37 <http://www.tribalresourcecenter.org>; *United States v. Robinson*, 94 F.3d 1325, 1327 (9th Cir. 1996) (findings of fact reviewed for clear error). Questions of law are generally subject to de novo review on appeal. *Coin, supra*, at ¶ 39; *United States v. Sanchez-Lopez*, 879 F.2d 541, 550 (9th Cir. 1989).

B. The Record Reveals that the Appellant Failed to File a Disclosure Statement or Written Response to the Appellee's Request for Disclosure.

The Appellant filed the Criminal Complaint and Probable Cause Affidavit on March 17, 2004. Between the filing of the complaint and the trial, the Appellant did not file a single document with the trial court. The Appellant did not file a notice of disclosure or any other pleading with the trial court. The record demonstrates that after filing the Complaint, the Appellant essentially did nothing.

By way of contrast, the Appellee filed a Request for Disclosure on March 30, 2004. [Request for Disclosure, CR-04-110, filed 3/17/04]. The Appellee specifically requested that the Appellant disclose:

1. the names and addresses of all persons whom the prosecutor will call as witnesses in the case-in-chief together with their relevant written or recorded statements, as well as their prior criminal history;
2. all statements of the Defendant and any person who will be tried with the Defendant;
3. the names and addresses of experts who have personally examined the defendant or any evidence in the case, together with the results of physical examinations and/or scientific tests, experiments or comparisons, including all written reports or statements made by them in connection with the case and all relevant chain of custody documents;
4. A list of all papers, documents, photographs or tangible objects which the prosecutor will use at trial and all relevant chain of custody documents;
5. A list of all papers, documents, photographs or tangible objects which were obtained or purportedly belonged to the Defendant that the prosecutor intends to use at trial and all relevant chain of custody documents;
6. A list of all prior convictions of the Defendant which the prosecutor will use to prove motive, intent, or knowledge, or otherwise use a trial;
7. All materials or information which tends to mitigate or negate the Defendant's guilt as to the offense charged, or which would tend to reduce his or her punishment thereof, including all prior felony convictions and/or convictions for crimes of moral turpitude of any witnesses whom the prosecutor expects to call at trial.

[Request for Disclosure, CR-04-110, filed 4/30/04]. The Appellant never filed a response or objection to the Appellee's Request for Disclosure.

C. The Trial Court Correctly Held that the Appellant Failed to Comply with Title 10, Pascua Yaqui Judicial Titles and Codes, Rule 5.1.

Title 10, Pascua Yaqui Judicial Titles and Codes, Rule 5.1(A), provides that:

No later than ten (10) days after the arraignment, the prosecutor shall make available to the defendant for examination and reproduction the following material and information within the prosecutor's possession or control:

- (1) The names and addresses of all persons whom the prosecutor will call as witnesses in the case-in-chief together with their relevant written or recorded statements;
- (2) All statements of the defendant and of any person who will be tried with the defendant;

- (3) The names and addresses of experts who have personally examined a defendant or any evidence in that particular case, together with the results of physical examinations and of scientific tests, experiments or comparisons, including all written reports or statements made by them in connection with a particular case;
- (4) A list of all papers, documents, photographs or tangible objects which the prosecutor will use at trial or which were obtained from or purportedly belong to the defendant;
- (5) A list of all prior convictions of the defendant which the prosecutor will use to prove motive, intent, or knowledge or otherwise use at trial;
- (6) All material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce his or her punishment therefore, including all prior felony convictions of witnesses whom the prosecutor expects to call at trial.

Rule 5.1 is intended to provide for the just determination of criminal proceedings.

Title 10, Pascua Yaqui Judicial Titles and Codes, Rule 1.2. It must be construed not only to preserve the public welfare, but to secure fairness in administration and the protection of the fundamental rights of the accused. *Id.* As a general rule, if the language of a statute is unambiguous, the plain meaning controls. *Robinson, supra*, 94 F.3d at 1328.

There is nothing ambiguous about Rule 5.1. It is more than a suggestion or recommendation. As the trial court correctly held, "[t]he intent of the disclosure law is clear, that *the prosecutor has the affirmative duty* to provide the defendant all information . . . [t]he rules of discovery and disclosure are designed to prevent trials by ambush, because courts in their decisions affecting persons' liberties in criminal cases should be able to decide cases based on what facts are revealed rather than on what facts are concealed." [Dismissal Order at 2, emphasis added].

Not only did the Appellant fail to file a disclosure statement as required by the plain language of Rule 5.1, the Appellant ignored the Appellee's Request for Disclosure. Absent

the filing of a disclosure statement or response to the Appellee's Request for Disclosure, the trial court had no choice other than to find that the Appellant violated the provisions of Title 10, Pascua Yaqui Judicial Titles and Codes, Rule 5.1.

D. The Trial Court's Order Dismissing the Charge Must be Affirmed.

The Pascua Yaqui Court has inherent and statutory authority to issue and enforce orders, and to devise rules of procedure. Article VIII, § 1, Constitution of the Pascua Yaqui Tribe; Title 1, Pascua Yaqui Judicial Titles and Codes, § 1.21, Title 10, Pascua Yaqui Judicial Titles and Codes, Rule 5.1(E).

Rule 5.5 of Title 10 of the Pascua Yaqui Judicial Titles and Codes states:

[i]f at any time during the course of a proceeding, it is brought to the attention of the court that a party has failed to comply with any provisions of these discovery rules or any order issued pursuant thereto, the court may impose any sanction which it finds just under the circumstances, including, but not limited to:

- (1) Ordering disclosure of the information not previously disclosed;
- (2) Granting a continuance;
- (3) Holding a witness, party, or counsel in contempt of court;
- (4) Precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; and
- (5) Declaring a mistrial when necessary to prevent a miscarriage of justice.

(emphasis added). The Pascua Yaqui Court is obligated "to compel obedience to its judgments, orders, and process, and to the orders of a judge of the Court, in an action or proceeding pending therein." Title 1, Pascua Yaqui Judicial Titles and Codes, § 1.21(d).

As the trial court noted, the Appellant not only failed in its affirmative duty to provide a disclosure statement, the Appellant failed to file a written response to the Appellee's Request for Disclosure. [Dismissal Order at 3]. Any sanction other than dismissal would have not only made a mockery of Rule 5.1, but would have rewarded, rather

than sanctioned, the Appellant for its failure to comply with the law. If the lower court's order is not affirmed, not only will the Appellant be free to continue to disregard the rules of procedure, the Pascua Yaqui Court will be deprived of the power to enforce its orders and ensure compliance with its rules.

II. THE LOWER COURT PROPERLY HELD THAT THE APPELLANT'S FAILURE TO PROVIDE DISCLOSURE VIOLATED THE DUE PROCESS CLAUSES OF THE INDIAN CIVIL RIGHTS ACT, 25 U.S.C. § 1302, *ET SEQ.*, AND ARTICLE 1, § 1(H) OF THE CONSTITUTION OF THE PASCUA YAQUI TRIBE.

In the order dismissing the charges against the Appellee due to the Appellant's failure to provide disclosure, the trial court recognized that although the provisions of the United States Constitution do not apply to tribes, the provisions of the Indian Civil Rights Act and Pascua Yaqui Code guarantee defendants in tribal courts the right to due process of law. [Dismissal Order at 2]. In ordering the dismissal of the charge, the trial court was guided by the principles set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the United States Supreme Court held that the government's failure to provide exculpatory information or material related to a defendant's guilt or punishment upon request, resulted in the denial of a defendant's fundamental right to due process of law irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87. In this case, the Appellant failed to file a disclosure statement or respond to the Appellant's Request for Disclosure.

Other tribal courts have been confronted with the issues raised in this appeal. In *Puyallup Tribe v. LaPointe*, No. 94-3075 (Puyallup 8/29/94), 1994.NAPU.0000005 <http://www.versuslaw.com>, the court considered whether the Tribe's failure to provide disclosure to a defendant in a criminal case was a violation of due process of law. The court found that the Tribe failed to respond to the Defendant's written demand for disclosure. *Id.* at ¶¶ 12, 13, and 15. The court began its analysis by recognizing that in order for a fair trial to occur, there must be full disclosure of the evidence to the defendant. *Id.* at ¶ 19. Quoting *United States v. Agurs*, 427 U.S. 97, 106 (1976), the court stated:

Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known to the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond by furnishing the information or by submitting the problem to the trial judge. *When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.*

LaPointe, supra, at ¶ 20. The court held that the failure to disclose requested discoverable information, necessary for the preparation of a competent defense, violates due process and makes a fair trial impossible. *Id.* at ¶ 21. As a result of the due process violation, the court dismissed the charges against the defendant with prejudice. *Id.* at ¶ 24.

The facts of the present are nearly identical to those set forth in *LaPointe*. The Appellant failed to file a disclosure statement or respond to the Appellee's Request for Disclosure. As the trial court recognized, the Appellant's conduct (or lack thereof) resulted in the violation of the Appellee's right to due process of law. Just as the court recognized in *LaPointe*, the trial court recognized that the only appropriate remedy for such a violation was dismissal of the charge.

III. THE TRIAL COURTS IMPOSITION OF A FINANCIAL SANCTION FOR THE APPELLANT'S FAILURE TO COMPLY WITH TITLE 10, PASCUA YAQUI JUDICIAL TITLES AND CODES, RULE 5.1, WAS PROPER UNDER TITLE 10, PASCUA YAQUI JUDICIAL TITLES AND CODES, RULE 5.5.

In addition to dismissing the charge against the Appellee, the trial court imposed a sanction in the amount of fifty dollars (\$50.00) against the Appellant. [Dismissal Order at 4]. The sanction was imposed pursuant to the provisions of Title 10, Pascua Yaqui Judicial Titles and Codes, Rule 5.5. As previously discussed, Rule 5.5 allows the trial court to impose any sanction it finds just to remedy a disclosure violation. In imposing the sanction, the trial court stated that the sanction was intended to provide the Appellant with an incentive to comply with the laws, rules, and regulations of the Pascua Yaqui Court in the future.

The Pascua Yaqui Court has inherent and statutory authority to issue and enforce orders, and to devise rules of procedure. Article VIII, § 1, Constitution of the Pascua Yaqui Tribe; Title 1,

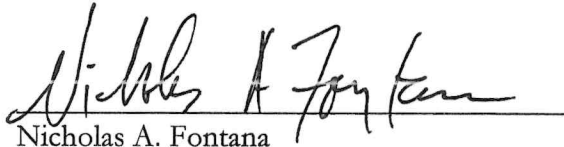
Pascua Yaqui Judicial Titles and Codes, § 1.21, Title 10, Pascua Yaqui Judicial Titles and Codes, Rule 5.1(E). Rule 5.5 provides the trial court with broad discretion to fashion sanctions were are just and appropriate to address discovery violations. Given the Appellant's failure to comply with the rules of the Pascua Yaqui Court in a case where the Appellee was facing the possibility of incarceration, a fifty-dollar fine is remarkably modest, especially if it will encourage the Appellant to comply with the law in future.

CONCLUSION

For all of the above and foregoing reasons, the Appellee respectfully moves this Court to enter an order affirming the trial court's order dismissing the charges against the Appellee and affirming the imposition of a financial sanction against the Appellant.

DATED this 16th day of September, 2004.

PASCUA YAQUI PUBLIC DEFENDER



Nicholas A. Fontana
Interim Chief Public Defendant
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that the original and four (4) copies of the Brief in Response were delivered
this date to:

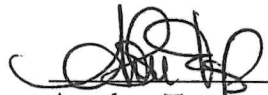
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7474 South Camino de Oeste
Tucson, AZ 85746

and that one copy of the Brief in Response was delivered this date to:

T. Michael Andrews
Chief Prosecutor
Office of the Prosecutor of the Pascua Yaqui Tribe
7474 South Camino de Oeste
Tucson, AZ 85746

DATED this 10th day of September, 2004.

PASCUA YAQUI PUBLIC DEFENDER



Anselma Torres
Legal Secretary

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

CA-04-002
[Signature]

6 T Michael Andrews, SBN 018219
7 Chief Prosecutor

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-04-002
12 Vs.) (Tribal Court No. CR-04-110)
13 Celestine Molina,)
14 Appellee.) **BRIEF ON APPEAL**

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

19 **A. JURISDICTIONAL STATEMENT**

20 Appellant is appealing an Order of the Trial Court made
21 July 13, 2004 of a dismissal of charges after a motions hearing in
22 Cause Number CR-04-110 on Count One: Aiding and abetting, a copy of
23 which is attached hereto as (exhibit A). The Court of Appeals
24 shall have jurisdiction to hear all appeals from any order of the
25 Trial Court pursuant to the Court of Appeals Procedures Act of
26 2000, Section 1.12. The Court of Appeals has jurisdiction over
27 this matter.
28

1 **B. FACTS OF THE CASE**

2 On March 9, 2004 the defendant Celestine Molina, was
3 arrested for contributing to the delinquency of a minor. The
4 defendant was cited and released on this charge. On March 16,
5 2004, police reports and affidavits were received by the
6 prosecutors Office. G. Allen Osburn, Deputy Prosecutor filed
7 aiding and abetting charged against said defendant. On March 25,
8 2004, defendant received police reports from the Pascua Yaqui
9 Prosecutors Office and was signed for by Celestine Molina. (see
10 exhibit B). On March 26, 2004 defendant again received
11 additional disclosure including affidavit and complaint. (see
12 exhibit C) On March 30, 2004, the Prosecutors Office received a
13 notice of appearance (see exhibit D) from defense counsel
14 Nicholas Fontana and a request for disclosure. (see exhibit E)
15 On March 30, 2004, the Prosecutors office disclosed the same
16 previously disclosed paperwork to Mr. Fontanna. On March 31,
17 2004 an initial appearance was conducted with Chief Judge
18 Cornelia Cruz. At this hearing, there was no mention of any
19 disclosure issues. (see exhibit F) On April 5, 2004, defense
20 council received an alternative prosecution plea proposal. (see
21 exhibit G) On April 6, 2004 a modified Alternative Prosecution
22 Plea was disclosed. (see exhibit H) Once again, the defense made
23 no mention of any disclosure issues. On April 7, 2004 an
24 arraignment was held, the defendant was present as was defense
25 counsel. (see exhibit I) At this hearing, there was no mention
26 of any additional disclosure or requests. Finally on May 18,
27 2004, a pre-trial conference was held in front of Judge Cruz; no
28

1 disclosure, or lack of disclosure, issues were raised. (see
2 exhibit J) A trial date of July 13, 2004 was set. On the day
3 of trial, Defense counsel notified the Deputy Prosecutor that
4 there was a problem in that he did not have all the disclosure
5 i.e., witness list and priors for the witnesses, prior to trial.

6 The Deputy Prosecutor advised defense counsel that there were no
7 prior convictions for any of the witnesses and that he had all
8 the witnesses in the police report, namely the police officer and
9 one lay witness. (see exhibit K) On July 13, 2004, defense
10 counsel Nicholas Fontana untimely filed a motion to dismiss based
11 on lack of disclosure. Additionally, Deputy Prosecutor G. Allen
12 Osburn, filed a subsequent disclosure addendum outlining the
13 witness originally identified in the police report. On July 13,
14 2004 Judge Stoof, Pascua Yaqui Associate Tribal Court Judge
15 dismissed the complaint and fined Deputy Prosecutor G. Allen
16 Osburn \$50.00 for contempt. (see exhibit L)

17 **C. TRIAL COURT'S ABUSE OF DISCRETION**

18 Appellant filed its Notice of Appeal to the Court of
19 Appeals timely on July 20, 2004, claiming that the Trial Court
20 abused its discretion by dismissing the charges and holding in
21 contempt Deputy Prosecutor G. Allen Osburn and finding said
22 Prosecutor \$50.00 (see Exhibit F attached). Traditionally,
23 Appellate courts will not disturb the findings of the trial court
24 unless there has been abuse of discretion. State v O'Dell, 202
25 Ariz. 453, 46 P.3d 1074 (App. 2002).

1 I)THE TRIAL COURT ERRED IN ITS FINDING THAT APPELLENT VIOLEDED
2 PASCUA YAQUI CRIMINAL PROCEDURE RULE 5.1 (PROSECUTORS
3 DISCLOSURE RULE)

4 Generally, a trial courts ruling on a motion to dismiss
5 or suppress evidence will not be overturned absent an abuse of
6 discretion. State v. Rosengren, 199 Ariz. 112, 14 P.3d 303 (App.
7 2000). The appellate courts defer to the trial courts factual
8 findings unless clearly erroneous. Mack v. Cruikshank, 196 Ariz.
9 541, 2 P.3d 100, (App.1999). The appellate courts are not bound by
10 it legal conclusions. State v Hackman, 189 Ariz. 505, 943 P.2d 865
11 (App. 1997).

12 The trial court based its dismissal on *Rules 5.1 and 5.5*
13 *Pascua Yaqui Rules of Criminal Procedure*, which provides as
14 follows:

15 A) Matters relating to guilt, innocence or punishment. No later
16 then 10 days after arraignment, the prosecutor shall make
17 available to the defendant for examination and reproduction
18 the following material and information within the prosecutors
19 possession or control:

- 20 1) The names and addresses of all persons whom
21 the prosecutors will call as witnesses in the
22 case-in chief together with their relevant
23 written or recorded statements;
- 24 2) All statements of the defendant and of any
25 person who will be tried with the defendant;
- 26 3) The names and addresses of experts who have
27 personally examined a defendant or any
28

1 evidence in that particular case, together
2 with the results of physical examinations and
3 of scientific tests, experiments or
4 comparisons, including all written reports or
5 statements made by them in connection with
6 the particular case;

7 4) A list of all papers, documents, photographs
8 or tangible objects which the prosecutor will
9 use at trial or which were obtained from or
10 purportedly belong to the defendant;

11 5) A list of all prior conviction of the
12 defendant which the prosecutor will use to
13 prove motive, intent or knowledge or
14 otherwise use a trial.

15 6) All material or information which tends to
16 mitigate or negate the defendant's guilt as
17 to the offense charged or which would tent to
18 reduce his or her punishment therefore,
19 including all prior felony convictions of
20 witnesses whom the prosecutor expects to call
21 at trial.

22 Rule 5.5 provides as follows:

23 If at any time during the course of the
24 proceeding, it is brought to the attention of the
25 court that a party has failed to comply with any
26 provisions of the discovery rules or any order issued
27 pursuant thereto, the court may impose any sanction
28

1 which finds just under the circumstances, including,
2 but not limited to:

- 3 1) Ordering disclosure of the information not
4 previously disclosed;
- 5 2) Granting a continuance;
- 6 3) Holding a witness, party, or counsel in
7 contempt of court;
- 8 4) Precluding a party from calling a witness,
9 offering evidence , or raising a defense not
10 disclosed; and
- 11 5) Declaring a mistrial when necessary to prevent
12 a miscarriage of justice.

13 The above listed rules DO NOT (emphasis added) by
14 its own terms provide for dismissal. The entire record in this
15 case contains no prior order requiring any additional disclosure.
16 In fact, defense counsel never mentioned any disclosure issues to
17 the tribe or the court prior to July 13, 2004. Consequently, this
18 court abused its discretion by granting a dismissal when clearly
19 there wasn't a prior order in which the tribe has failed to comply.
20 State v O'Dell, 202 Ariz. 453, 46 P.3d 1074 (App. 2002)

21 The trial court further dismissed the charges pursuant to
22 Brady v. Maryland, 373 U.S. 83 (1963). Brady is rooted in the due
23 process clause and its purpose is to protect a defendant's right to
24 a fair trial by ensuring the reliability of the verdict against
25 him. United States v. Coppa, 267 F. 3d 132 (2nd Cir. 2001). Under
26 Brady, the Tribe is required to disclose all plainly exculpatory
27 evidence within its possession and violates due process if it fails
28

1 to do so. Arizona v. Youngblood, 488 U.S.57, (1993)

2 Hence, the tribe did not violate Brady. From the record and
3 attached exhibits (exhibits A-M) the tribe had disclosed all
4 information within its control to defendant within the 10 day
5 requirement. The disclosure that was provided included a police
6 report, affidavit and complaint. Specifically in the police
7 report. (exhibit K) is listed all potential witness, including
8 names and addresses. In addition to witnesses, Police officers were
9 also listed as well. The defendant should not be allowed to come
10 before the court the day of trial and say they did not receive any
11 disclosure when it was clear that the defendant and defense counsel
12 had the same information as the tribe. In Youngblood, a dismissal
13 of charges can only be considered when the government has acted in
14 bad faith in either failing to preserve evidence, which results in
15 destroyed evidence, or not complying with a prior court ruling
16 which prejudice the defendant. Youngblood citing State v Walker,
17 185 Ariz. 228, 914 P.2d 1320 (App. 1995) Neither was accomplished
18 in the case at bar.

19 As previously mentioned, defendant received all
20 disclosure that was going to be used against him, there was not a
21 previous court ruling, as such there was no prejudice found to the
22 defendant. It is not the Tribe's responsibility to provide a
23 defense for the defendant. The Tribe's responsibility is to make
24 sure that defendant has all the evidence the tribe will use against
25 them at trial. This was done in this case.

1 ***b. Trial court erred in creating new disclosure procedure.***
2

3 The Trial court further based the dismissal on standard
4 practices and procedures with which there was no compliance.
5 (exhibit L pg,2 L24,). Specifically, the trial court indicated
6 that it is the standard of practice to meet and confer with defense
7 counsel and for the parties to file their written response to the
8 disclosure request. (exhibit L pg 2 LN 24-27) The trial court went
9 on to say, "by submitting such a written response to the defendants
10 request for disclosure, where disclosure is challenged by the
11 prosecutors office the prosecutors office would show its good faith
12 efforts to comply with the rules of disclosure and provide written
13 proof that it has made all due diligence in its compliance to
14 produce all information under its possession or control". (Exhibit J
15 pg 3 Ln10-13).

16 It is a ridiculous and non legal assertion to imply a standard
17 of conducting disclosure as a supporting element to dismiss a case.
18 To be perfectly clear, standards should be based on the rule of law
19 not "made up standards" that the trial court asserts as fact then
20 randomly apply such standards in a way to influence a self
21 proclaimed rule. Rule 5.1 explicitly discusses how disclosure is
22 to be completed by the parties. Rule 5.1 does not require that the
23 tribe file a response to disclosure motions by defense counsel.
24 This standard that the trial courts wants to accepts as law does
25 not exist in the rules. The concept of meeting with the parties
26 and conferring, although a positive step, does not exist under Rule
27 5.1 or any other criminal rule. Rule 5.1 says in pertinent part,
28

1 the tribe "shall make available" disclosure. It does not mean
2 filing a disclosure response to the court or defense counsel. The
3 court has clearly abused its discretion by imposing a judicially
4 activist assertion. Accordingly, members of the bench should pride
5 themselves on the reluctance to play an activist judicial role
6 infringing upon the legislative prerogatives. Butler v. Keller, 110
7 S. Ct 1212, 1227 (1990)

8
9 **II) Trial court erred in holding Tribe in contempt and**
10 **sanction Deputy Prosecutor G.Allen Osburn \$50.00 without due**
11 **process.**

12
13 Tribal court judge violated Deputy Prosecutor's due process
14 by failing to give specific notice of the contempt charges, the
15 time of the hearing, and depriving him of a fair opportunity to
16 be heard on the merits of the charges. Goss v. Lopez, 419 U.S.565
17 (1975). The Supreme Court held that at a minimum, due process
18 requires both notice and the right to be heard before any
19 "deprivation of life, liberty or property by adjudication. Id at
20 579. Clearly established Supreme Court precedent specifically
21 requires that notice be given of contempt proceedings, even in
22 instances of direct contempt, when there is delay between the
23 time that the contempt occurred and the proceedings themselves.
24 United Mine Workers of America v. Bagwell, 512 U.S. 821, 832
25 (1994). Courts have also been concerned where the contempt
26 charged has in it the element of personal criticism. Mayberry v.
27 Pennsylvania, 400 U.S. 455 (1971). Similarly, when a judge has

1 become personally embroiled with the alleged contemnor, it is
2 compelling proof that the judge fails to represent the impersonal
3 authority of law, and therefore, the judge must ask a judicial
4 colleague to preside over the contempt proceedings. Offutt v
5 U.S., 348 U.S.11 (1954) Furthermore, clearly established Supreme
6 Court precedent holds that the balance of interests weighs even
7 more strongly in favor of having a different judge preside over
8 contempt hearing. Mayberry at 463.

9 The facts of the present case constitute the precise type of
10 situation in which the Supreme Court held that a Judge must
11 recuse himself and should have given the Tribe notice and an
12 opportunity to be heard to challenge the courts assertion of
13 contempt. The trial court did not give any consideration for due
14 process concerns. The decision to hold Deputy Prosecutor G.
15 Allen Osburn in contempt was based not on a traditional
16 contemptible situation vis a vis, disrupting court procedure,
17 disrespecting court personnel or knowingly violating a court
18 order. Instead, the trial court decided to use this contempt
19 power as an "incentive" to follow new procedures. (exhibit J pg
20 ln) This is an absolute abuse of power and an abuse of
21 discretion. To hold an officer of the court in contempt for an
22 "incentive" and not base the court's decision on courtroom
23 demeanor or behavior leaves little doubt as to the trial court's
24 lack of impartiality in the contempt proceedings. The trial court
25 should have recused itself and had another judge handle the
26 contempt issue. Litte v. Kearns County Superior Court, 294 F.3d
27 1075 (9th Cir. 2002).

1 It is respectfully requested that the Court of Appeals
2 overturn the decisions of the Tribal Court and order the case
3 reinstated for prosecution and to vacate the finding of contempt
4 and the \$50.00 fine.

5 ...
6
7
8
9

10 Respectfully submitted this 25th day of August, 2004.
11

12 OFFICE OF THE PROSECUTOR
13 PASCUA YAQUI TRIBE

14  FOR

15 T. Michael Andrews
16 Chief Prosecutor

17
18 Original and four copies of the foregoing delivered/mailed
19 This date to:

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

21 Copy delivered/mailed to:

22 Nick Fontanna
23 Public Defender
24 7474 S. Camino de Oeste
25 Tucson, Arizona 85746
26 Attorney for Appellee

27 Attorney Generals Office
28 Tucson, Arizona 85746

Pascua Yaqui Tribal Court
By:

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

6 T Michael Andrews, SBN 018219
7 Chief Prosecutor

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CA-04-002
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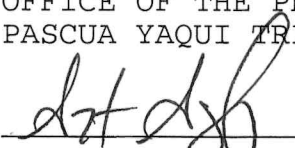
8 **IN THE PASCUA YAQUI TRIBE COURT OF APPEALS**
9 **IN AND FOR THE PASCUA YAQUI RESERVATION, ARIZONA**

10 PASCUA YAQUI TRIBE,)
11 Appellant,) NO. CA-04-002
12 Vs.) (Tribal Court No. CR-04-110)
13 Celestine Molina,)
14 Appellee.) **LIST OF EXHIBITS**
15 _____)

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

21 **Respectfully submitted this 26th day of August, 2004.**

22 OFFICE OF THE PROSECUTOR
23 PASCUA YAQUI TRIBE

24 
25 _____
26 T. Michael Andrews
27 Chief Prosecutor
28 Attorney for Appellant

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

Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

Copy delivered/mailed to:

Public Defender
7474 S. Camino de Oeste
Tucson, Arizona 85746
Attorney for Appellee

Attorney General's Office
7474 S. Camino De Oeste
Tucson, Arizona 85746

By: *JR*

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LIST OF EXHIBITS

- 1
- 2
- 3 A. Complaint and affidavit
- 4 B. Disclosure sheet, dated 3/25/04, indicating police
- 5 reports
- 6 C. Disclosure sheet, dated 3/26/04, indicating criminal
- 7 complaint and affidavit
- 8 D. Notice of appearance, filed by defense counsel, dated
- 9 3/30/04
- 10 E. Request for disclosure filed by defense counsel, dated
- 11 3/30/04
- 12 F. Initial hearing order, dated 3/31/04
- 13 G. Disclosure sheet, dated 4/5/04, indicating Alternative
- 14 prosecution plea (APP) disclosed to defense counsel
- 15 H. Disclosure sheet, dated 4/6/04, indicating a modified APP
- 16 plea to defense counsel
- 17 I. Order of the court dated 4/7/04
- 18 J. Order of the court dated 5/18/04
- 19 K. Police reports
- 20 L. Memorandum and Order of dismissal dated 7/13/04
- 21 M. Transcript of hearing dated 7/13/04
- 22
- 23
- 24
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- 26
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EXHIBIT A

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

<p>PASCUA YAQUI TRIBE, Plaintiff,</p> <p>Vs.</p> <p>CELESTINE DOMINIQUE MOLINA, Defendant</p>	<p>CR 04-110 <i>[Signature]</i></p> <p>COURT USE ONLY</p>
	<p>Case Number: 040309-902</p>
<p>PROBABLE CAUSE AFFIDAVIT</p>	

AFFIDAVIT

1. I, ANDRES GASTELUM, being a duly authorized law enforcement officer of the Pascua Yaqui Indian Tribe and for the Pascua Yaqui Indian Reservation, do hereby swear and affirm as follows:

- A. I am the arresting officer in this case; OR
 I am a law enforcement officer and make this statement on information and belief.

2. SUSPECTED PARTY (Defendant)

Name: CELESTINE DOMINIQUE MOLINA

Driver's license number:
PY Enrollment number: 2694U06746
Date of Birth: 02/04/1986

is is not an enrolled member of the Pascua Yaqui Tribe.

3. The defendant was arrested cited long formed without a warrant on 03/09/2004 at 2205 A.M. P.M.

4. I have probable cause to believe that the defendant committed the following offense(s) at 7791 S. PITAYA (address) which is within the exterior boundaries of the Pascua Yaqui Indian Reservation:

PYC / ARS , Title 3, Chapter 3, Section 3.16, CONTRIBUTING TO THE DELIQUENCY OF A MINOR

PYC / ARS , Title , Chapter , Section ,

PYC / ARS , Title , Chapter , Section ,

PYC / ARS , Title , Chapter , Section ,

PYC / ARS , Title , Chapter , Section ,

PYC / ARS , Title , Chapter , Section ,

PYC / ARS , Title , Chapter , Section ,

PYC / ARS , Title , Chapter , Section ,

5. I believe that the defendant committed the above-listed offense(s) because: (Summarize facts to support probable cause claim)

At the above-stated date and time and at the above-referenced location within the exterior boundaries of the Pascua Yaqui Indian Reservation I did witness the following:

ON THE ABOVE DATE AND TIME I GOT INFORMATION THAT A RUNAWAY JUVENILE WAS AT THIS RESIDENCE. I MADE CONTACT WITH THE ABOVE LISTED PERSON WHO TOLD ME THAT ALEJANDRA HERNANDEZ 17 YOA WAS NOT AT THIS ADDRESS. I SPOKE WITH ANOTHER PERSON WHO TOLD ME THAT IF ALEJANDRA WAS NOT AT HOME THAT SHE WOULD BE AT THIS ADDRESS. I WENT BACK AND ASKED TO SPEAK WITH CELESTINE'S FATHER. AFTER A SHORT PERIOD OF TIME ALEJANDRA CAME OUT OF THE BACK OF THE HOUSE. ALEJANDRA WAS AT THE HOUSE WHEN CELESTINE TOLD ME THAT SHE WAS NOT THERE.

The information contained herein is true and accurate to the best of my knowledge and belief.

6. I request that the Court make a probable cause determination that the defendant may be continued in custody pending further proceedings.

AG-T326

Signature of Officer

Date

SUBSCRIBED AND SWORN BEFORE ME ON March 10, 2004

Isabelle M. Quintero
Notary Signature

My Commission expires: March 27, 2007

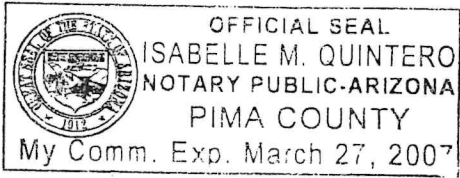


EXHIBIT B

PYT PROSECUTOR DISCLOSURE

4725 E. Tatakusim Bldg C
Tucson, Arizona 85746

THE PASCUA YAQUI TRIBE

vs.

Case Number- *CR-04-110*

Celestine Molina

PROSECUTOR/ LAY ADVOCATE: _____

WITNESS & ADRESSES: _____

POLICE REPORTS & SUPPLEMENTS _____

PROPERTY SHEETS: _____

LAB REPORTS: _____

BOOKING SHEETS: _____

PHOTOGRAPHS: _____

VIDEO TAPES _____

Please contact Lily Romero or Sonia Laventure at 879-6251 in order to view the photographs and or videotapes if they exist or to make arrangements to have any item duplicated at your expense

OTHER:

ADDITIONAL DISCLOSURE CONTACT INFORMATION

ADDRESS:

PHONE:

.....

Defendant/Defense Attorney Signature: *Celestine Molina*

Date and time: *March 25, 04 3:00pm.*

5 Page(s)

184rs old

EXHIBIT C

PYT PROSECUTOR DISCLOSURE

4725 E. Tatakusim Bldg C
Tucson, Arizona 85746

THE PASCUA YAQUI TRIBE
vs.

Case Number- *CR-04-110*

Celestine Moline

PROSECUTOR/ LAY ADVOCATE: _____

WITNESS & ADDRESSES: _____

POLICE REPORTS & SUPPLEMENTS _____

PROPERTY SHEETS: _____

LAB REPORTS: _____

BOOKING SHEETS: _____

PHOTOGRAPHS: _____

VIDEO TAPES _____

Please contact Lily Romero or Sonia Laventure at 879-6251 in order to view the photographs and or videotapes if they exist or to make arrangements to have any item duplicated at your expense

OTHER: *Criminal Complaint + Affidavit*

ADDITIONAL DISCLOSURE CONTACT INFORMATION

ADDRESS:

PHONE:

.....

Defendant/Defense Attorney Signature: *Celestine Moline*

Date and time: *2/26/04 3:25 pm*

4 Page(s)

JH
3/26/04

EXHIBIT D

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

3 Nicholas A. Fontana, Esq.
State Bar No. 014429
4 Attorney for Defendant

MAR 29 2:50
CR04-110
NA

5
6 IN THE PASCUA YAQUI TRIBAL COURT
7 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

8
9 PASCUA YAQUI TRIBE,
10 Plaintiff,

11 vs.

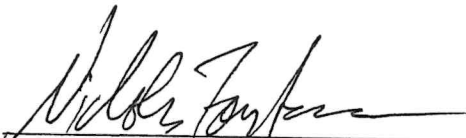
12 MOLINA, CELESTINE,
13 Defendant.


)
)
) Case No.: CR-04-110

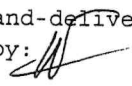
) NOTICE OF APPEARANCE
)
)
)
)

14
15 Pursuant to 1 PYTC § 1.26, the Pascua Yaqui Public Defender, by
16 and through counsel undersigned hereby enters his appearance in this
17 case on behalf of defendant.

18 Dated this 30TH day of March, 2004.

19
20 
21 Nicholas A. Fontana
Deputy Public Defender

22 COPY of the foregoing hand-delivered this date
PY Ct. In-box by: 

23
24 COPY of the foregoing hand-delivered this date
PY Prosecutor's In-Box by: 

25
26
27 Received
MAR 31 2004

28 PROSECUTOR

EXHIBIT E

1 4. A list of all papers, documents, photographs or tangible objects which the prosecutor
2 will use at trial and all relevant chain of custody documents;

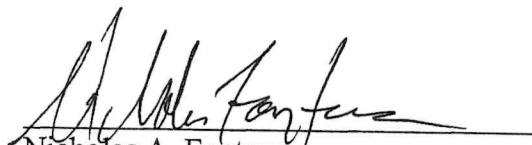
3 5. A list of all papers, documents, photographs or tangible objects which were obtained
4 or purportedly belonged to the Defendant that the prosecutor intends to use at trial and all
5 relevant chain of custody documents;


6 6. A list of all prior convictions of the Defendant which the prosecutor will use to prove
7 motive, intent, or knowledge, or otherwise use a trial;

8 7. All materials or information which tends to mitigate or negate the Defendant's guilt
9 as to the offense charged, or which would tend to reduce his or her punishment thereof, including
10 all prior felony convictions and/or convictions for crimes of moral turpitude of any witnesses
11 whom the prosecutor expects to call at trial.
12

13 RESPECTFULLY SUBMITTED this 30th day of March, 2004.

14
15 PASCUA YAQUI PUBLIC DEFENDER

16
17 
18 Nicholas A. Fontana
19 Deputy Public Defender
20 Attorney for Defendant

21
22 ORIGINAL of the foregoing delivered this date
23 To PY Tribal Court by: 


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

EXHIBIT F

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE)
Plaintiff)
VS.)
Molina Celestine)
Defendant)

NO. CR-04-110

INITIAL HEARING ORDER

In compliance with Rules 3.9 and 3.10 of the Pascua Yaqui Rules of Criminal Procedure, defendant appeared before this Court on March 31, 2004 for Initial hearing.

Present were: Allan Osburn for the Tribe; the defendant with legal counsel Nicolas Fontana.

The Court FINDS: that probable cause exist to believe defendant may have committed the offense of Aiding and Abetting; that defense counsel moves the Court for a separate arraignment hearing; that the Tribe makes release recommendations and defense counsel has no objections to the release recommendations.

IT IS ORDERED:

Defendant shall be released upon posting bond of \$ _____

Defendant shall be held without bond.

Defendant shall be released on his/her own recognizance.

Defendant shall be released to the custody of _____ who shall be responsible for defendant's appearance at further hearings.

Defendant will be notified of the Arraignment date.

ARRAIGNMENT hearing is scheduled for WEDNESDAY, APRIL 7, 2004 AT 2:30 P.M.

THIS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

Other: defendant shall obey all laws and appear for all hearings.

SO ORDERED THIS 31st DAY OF March, 2004.

Cornelia S. G.
Judge, Pascua Yaqui Tribal Court

Date: 3.31.04

Tribe Defendant/Counsel C/S supervisor Other

PN
Clerk

FILED
APR 1 2004
CLERK

EXHIBIT G

PYT PROSECUTOR DISCLOSURE

4725 E. Tatakusim Bldg C
Tucson, Arizona 85746

THE PASCUA YAQUI TRIBE

vs.

Case Number-

CR-04-110

Celestine D. Molina

PROSECUTOR/ LAY ADVOCATE: _____

WITNESS & ADRESSES: _____

POLICE REPORTS & SUPPLEMENTS _____

PROPERTY SHEETS: _____

LAB REPORTS: _____

BOOKING SHEETS: _____

PHOTOGRAPHS: _____

VIDEO TAPES _____

Please contact Lily Romero or Sonia Laventure at 879-6251 in order to view the photographs and or videotapes if they exist or to make arrangements to have any item duplicated at your expense

OTHER: *APP Plea / Authorization For Release*

ADDITIONAL DISCLOSURE CONTACT INFORMATION

ADDRESS:

PHONE:

.....

Defendant/Defense Attorney Signature: *Walter Jones*

Date and time: *4/5/04 @ 2:10 p.m.*

EXHIBIT H

PYT PROSECUTOR DISCLOSURE

4725 E. Tatakusim Bldg C
Tucson, Arizona 85746

THE PASCUA YAQUI TRIBE

vs.

Case Number-

CR-04-110

Celestine S. Molina

PROSECUTOR/ LAY ADVOCATE: _____

WITNESS & ADDRESSES: _____

POLICE REPORTS & SUPPLEMENTS _____

PROPERTY SHEETS: _____

LAB REPORTS: _____

BOOKING SHEETS: _____

PHOTOGRAPHS: _____

VIDEO TAPES _____

Please contact Lily Romero or Sonia Laventure at 879-6251 in order to view the photographs and or videotapes if they exist or to make arrangements to have any item duplicated at your expense

OTHER: APP Plea/ Modified

ADDITIONAL DISCLOSURE CONTACT INFORMATION

ADDRESS:

PHONE:

.....

Defendant/Defense Attorney Signature: [Signature]

Date and time: 4/6/04 @ 10:30 am

EXHIBIT I

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

PASCUA YAQUI TRIBE, <div style="text-align: right;">Plaintiff,</div> Vs. MOLINA, CELESTINE D., <div style="text-align: right;">Defendant</div>	COURT USE ONLY
	Case Number: CR-04-110
ORDER	

Present: On this 7TH day of APRIL, 2004 CELESTINE D. MOLINA appeared ~~in~~ ~~person~~ for ARRAIGNMENT hearing ~~in~~ ~~person~~ with legal counsel NICHOLAS FONTANA. ALLEN OSBURN appeared for the Tribe.

THE COURT FINDS:

THE DEFENDANT, THROUGH HER LEGAL COUNSEL, WAIVED READING OF HER RIGHTS AND READING OF THE CRIMINAL COMPLAINT FILED 3-17-2004. A NOT GUILTY PLEA IS ENTERED TO COUNT 1; AIDING AND ABETTING, 1 PYTC SEC. 3.4. TRIBE HAS NO OBJECTION TO RELEASE CONDITIONS AS OUTLINED IN ORDER OF 3-31-2004.

IT IS ORDERED THAT:

A PRE TRIAL HEARING DATE WILL BE SET. DEFENDANT IS RELEASED ON THE SAME TERMS AND CONDITIONS AS SET FORTH IN THE ORDER OF 3-31-2004..

This matter is hereby scheduled for PRE TRIAL HEARING on MAY, 18TH, 2004 AT 3:30 A.M. P.M. *YFS*

THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

SO ORDERED THIS 7TH DAY OF APRIL, 2004.



 Judge, Pascua Yaqui Tribal Court

Cc: Date: 4.13.04
Tribe v Def/Prosec
RL

EXHIBIT J

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE)
Plaintiff)
VS.)
Molina Celestine D.)
Defendant)

NO. CR-04-110

ORDER

The above matter came before the Court for Pre-trial hearing on this 18th day of May, 2004. Alan Osburn appeared for the Tribe; the defendant appeared with legal counsel Nicolas Fontana.

The Court finds that the parties have no motions to present and that legal counsel moves the Court to set this matter for trial hearing; that the same conditions of release shall apply.

IT IS ORDERED THAT trial shall be held on **TUESDAY, JULY 13, 2004 AT 2:00 P.M.** and defendant shall continue being released on her own recognizance, shall obey all laws and appear for all hearings.

THIS IS THE ONLY NOTICE OF HEARINGS YOU WILL RECEIVE.

SO ORDERED THIS 18th DAY OF May, 2004.

Cornelia D. G.
Judge, Pascua Yaqui Tribal Court

Cc: 5-19-04
Date
Tribe Defendant Counsel Other
[Signature]
Clerk

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EXHIBIT K



PASCUA YAQUI POLICE DEPARTMENT
DETAIL INCIDENT REPORT

Incident #: 040309-902

LAW INCIDENT:

Nature: RUNAWAY JUVENILE Location: IN DISTRICT
Address: 7320 S. CAMINO RAHUM
TUCSON, ARIZONA 85746
Offenses: RUN-A-WAY JUVENILE
OBSTRUCTING JUSTICE
Received By: YVETTE VALENCIA How Received: TELEPHONE
Agency: PASCUA YAQUI POLICE DEPARTMENT
Responding Officers: ANDRES GASTELUM
Responsible Officer: ANDRES GASTELUM
When Reported: 21:05:05 03/09/2004
Disposition: CLEARED BY JUVENILE ARREST on 03/09/2004
Occurred Between: 02:00:00 03/09/2004 and 21:05:11 03/09/2004
CAD: 12705

COMPLAINANT:

Name: HERNANDEZ, BERNADETTE Name Number: 27391
Race: YAQUI ENROLLED Sex: FEMALE DOB: 04/26/1962 SSN:
DL #: DL State:
Address: 26701 S. CANOA / 7320 S. CAMINO RAHUM
AMADO, ARIZONA 85645
OTHER: (520)991-8246 OTHER: (520)225-6245
OTHER: (520)908-9666

ARRESTEE:

Name: HERNANDEZ, ALEJANDRA M Name Number: 27390
Race: YAQUI ENROLLED Sex: FEMALE DOB: 07/07/1986
Hair: BLUE Eyes: BROWN Height: 5'05" Weight: 100
SSN: DL State: DL #:
Address: 7320 S. CAMINO RAHUM
TUCSON, ARIZONA 85746
HOME: (520)908-9666
Arrest Date: 22:05:00 03/09/2004 Agency: PASCUA YAQUI POLICE DEPARTMENT
Type: CUSTODY WO / WARRANT Arresting Officer: ANDRES GASTELUM
Disp: JUV HANDLED WITHIN DEPT Judicial Age Status: JUVENILI
Offense: MISSING PERSON Time/Date: 22:05:00 03/09/2004
Statute: 8-303.C2 Type: STATE STATUTE
Class: JUVENILE STATUS Court:
Location: 7791 S. PITAYA Law:

31
03.10.04





PASCUA YAQUI POLICE DEPARTMENT
 DETAIL INCIDENT REPORT

Name: **MOLINA, CELESTINE DOMINIQUE** *2694U06746* Name Number: **5980**
 Race: **YAQUI ENROLLED** Sex: **FEMALE** DOB: **02/04/1986**
 Hair: **BLACK** Eyes: **BROWN** Height: **5'06"** Weight: **125**
 SSN: **600-44-0405** DL State: DL #:
 Address: **5380 W. VAKA MOA**
TUCSON, ARIZONA 85746
 HOME: (520)908-2022

Arrest Date: **22:05:00 03/09/2004** Agency: **PASCUA YAQUI POLICE DEPARTMENT**
 Type: **CUSTODY WO / WARRANT** Arresting Officer: **ANDRES GASTELUM**
 Disp: **ADLT CITED AND RELEASED** Judicial Age Status: **ADULT**

Offense: **JUVENILE PROBLEM** Time/Date: **21:05:00 03/09/2004**
 Statute: **3.16** Type:
 Class: **TRIBAL CODE** Court:
 Location: **7791 S. PITAYA** Law:

Name: **HERNANDEZ, ALEJANDRA M** Name Number: **27390**
 Race: **YAQUI ENROLLED** Sex: **FEMALE** DOB: **07/07/1986**
 Hair: **BLUE** Eyes: **BROWN** Height: **5'05"** Weight: **100**
 SSN: DL State: DL #:
 Address: **7320 S. CAMINO RAHUM**
TUCSON, ARIZONA 85746
 HOME: (520)908-9666

Arrest Date: **22:05:00 03/09/2004** Agency: **PASCUA YAQUI POLICE DEPARTMENT**
 Type: **CUSTODY WO / WARRANT** Arresting Officer: **ANDRES GASTELUM**
 Disp: **JUV HANDLED WITHIN DEPT** Judicial Age Status: **JUVENILI**

Offense: **MISSING PERSON** Time/Date: **22:05:00 03/09/2004**
 Statute: **8-303.C2** Type: **STATE STATUTE**
 Class: **JUVENILE STATUS** Court:
 Location: **7791 S. PITAYA** Law:

Name: **MOLINA, CELESTINE DOMINIQUE** Name Number: **5980**
 Race: **YAQUI ENROLLED** Sex: **FEMALE** DOB: **02/04/1986**
 Hair: **BLACK** Eyes: **BROWN** Height: **5'06"** Weight: **125**
 SSN: **600-44-0405** DL State: DL #:
 Address: **5380 W. VAKA MOA**
TUCSON, ARIZONA 85746
 HOME: (520)908-2022

Arrest Date: **22:05:00 03/09/2004** Agency: **PASCUA YAQUI POLICE DEPARTMENT**
 Type: **CUSTODY WO / WARRANT** Arresting Officer: **ANDRES GASTELUM**
 Disp: **ADLT CITED AND RELEASED** Judicial Age Status: **ADULT**

Offense: **JUVENILE PROBLEM** Time/Date: **21:05:00 03/09/2004**
 Statute: **3.16** Type:
 Class: **TRIBAL CODE** Court:
 Location: **7791 S. PITAYA** Law:



PASCUA YAQUI POLICE DEPARTMENT
DETAIL INCIDENT REPORT

HOMICIDE VICTIMS:

OTHER PEOPLE:

OTHER

Name: VALENZUELA, ALICIA "SUGAR"

Name Number: 27393

Race: YAQUI ENROLLED

Sex: FEMALE

DOB: 02/18/1985

SSN:

DL #:

DL State:

Address: 7851 S. PITAYA

TUCSON, ARIZONA 85746

PROPERTY INFORMATION:

VEHICLE INFORMATION:



PASCUA YAQUI POLICE DEPARTMENT
DETAIL INCIDENT REPORT

NARRATIVES:

CAD

Complainant:

Last Name: HERNANDEZ

First Name: BERNADETTE

Call Comments:

A. GASTELUM

COPIES TO:

TRIBAL PROSECUTOR'S OFFICE

MIKE MCKENNA PYPD

VICTIM SERVICES

LAW ENFORCEMENT FILES

ON 03/09/2004, AT 2105 HOURS I WAS DISPATCHED TO 7320 S. CAMINO RAHUM IN REFERENCE TO A RUNAWAY JUVENILE. UPON ARRIVAL I MADE CONTACT WITH THE REPORTING PARTY BERNADETTE HERNANDEZ. BERNADETTE TOLD ME THAT HER DAUGHTER ALEJANDRA M. HERNANDEZ (DOB 07/07/1986) LEFT SOMETIME AFTER 0200 HOURS THIS MORNING.

BERNADETTE TOLD ME THAT SHE WENT TO WAKE ALEJANDRA FOR SCHOOL AT APPROXIMATELY 0630 AND ALEJANDRA WAS NOT AT HOME. BERNADETTE WAITED ALL DAY TO SEE IF ALEJANDRA WOULD CALL AND SHE NEVER DID. BERNADETTE GAVE ME TWO ADDRESSES WHERE ALEJANDRA MAY BE.

I FIRST RESPONDED TO 7791 S. PITAYA. WHILE AT THIS HOUSE I MADE CONTACT WITH CELESTINE D. MOLINA. I ASKED CELESTINE IF SHE HAD SEEN ALEJANDRA. SHE TOLD ME "NO". CELESTINE TOLD ME THAT SHE HAD NOT SEEN ALEJANDRA SINCE SUNDAY. WHILE SPEAKING WITH CELESTINE SHE WOULD NOT LOOK ME IN THE EYE AND KEPT LOOKING AWAY. I TOLD HER THAT ALEJANDRA WAS A RUNAWAY AND TOLD HER THAT IF SOMEONE WAS HIDING HER THAT THEY WERE ALSO SUBJECT TO ARREST. I AGAIN ASKED HER IF SHE HAD SEEN ALEJANDRA AND AGAIN SHE TOLD ME "NO".

I RESPONDED TO 7851 S. PITAYA. I MADE CONTACT WITH ALICIA "SUGAR" VALENZUELA. FIRST I ASKED ALICIA IF SHE HAD SEEN ALEJANDRA. SHE TOLD ME THAT THE LAST TIME SHE HAD SEEN HER WAS APPROXIMATELY 6:00 P.M. TODAY. I ASKED HER IF SHE WAS AT HER HOUSE AND SHE TOLD ME "NO". I ASKED ALICIA IF SHE MIGHT KNOW WHERE ALEJANDRA MIGHT BE. ALICIA TOLD ME THAT IF ALEJANDRA WAS NOT AT HOME SHE WOULD BE WITH CELESTINE. I ASKED HER IF SHE KNEW IF SHE WAS THERE RIGHT NOW AND SHE REPLIED "I DON'T KNOW". I ALSO TOLD ALICIA THAT ALEJANDRA WAS A



PASCUA YAQUI POLICE DEPARTMENT
DETAIL INCIDENT REPORT

RUNAWAY AND IF SOMEONE WAS HIDING HER THAT THEY WERE ALSO SUBJECT TO ARREST. ALICIA AGAIN TOLD ME THAT ALEJANDRA WAS NOT AT HER HOUSE. DURING OUR CONVERSATION ALICIA APPEARED SURE OF WHAT SHE WAS SAYING AND MADE EYE CONTACT WITH ME. IT APPEARED THAT SHE HAD NOTHING TO HIDE.

I RESPONDED BACK TO 7791 S. PITAYA. I KNOCKED ON THE DOOR. AN UNKNOWN MALE SUBJECT ANSWERED THE DOOR. I ASKED THIS SUBJECT IF ALEJANDRA WAS HERE. HE HESITATED AND RAISED HIS ARMS STATING "I DON'T KNOW". I ASKED HIM IF HIS FATHER WAS HOME AND HE SAID YES. AFTER A SHORT PERIOD OF TIME PASSED ALEJANDRA CAME TO THE DOOR FROM THE HALLWAY OF THE HOUSE. I ASKED HER TO COME OUT. ONCE OUTSIDE I TOOK ALEJANDRA INTO CUSTODY. OFFICER TODECHEENE TOOK ALEJANDRA TO HER PATROL VEHICLE AND SECURED HER.

CELESTINE CAME BACK OUT AND I TOLD HER THAT I KNEW ALEJANDRA WAS HERE THE FIRST TIME. CELESTINE LOOKED DOWN AND STATED "YES". I ASKED CELESTINE HOW OLD SHE WAS AND SHE TOLD ME THAT SHE IS "EIGHTEEN". AT THIS TIME I TOOK CELESTINE INTO CUSTODY. BOTH FEMALES WERE TRANSPORTED TO THE PASCUA YAQUI POLICE STATION. CELESTINE WAS LATER CITED AND RELEASED FOR PYTC 3.16 (CONTRIBUTING TO THE DELINQUENCY OF A MINOR). AFTER SPEAKING WITH ALEJANDRA THE DECISION TO HOLD HER FOR COURT THE FOLLOWING MORNING WAS MADE.

I SPOKE WITH ALEJANDRA AND TOLD HER THAT HER MOTHER WAS GOING TO COME FOR HER. SHE TOLD ME THAT IF SHE HAD HER CHOICE SHE WOULD RATHER STAY IN CUSTODY. I ASKED HER WHY AND SHE SAID THAT SHE DOES NOT WANT TO BE AT HOME. ALEJANDRA TOLD ME THAT IF I RELEASE HER SHE WILL LEAVE AGAIN. I ASKED HER WHY SHE WOULD DO THAT AND SHE SAID "I DON'T WANT TO BE THERE". AGAIN SHE TOLD ME THAT IF I RELEASE HER THAT SHE WILL LEAVE ONCE EVERYONE WAS ASLEEP.

I CONTACTED BERNADETTE AND INFORMED HER OF THE SITUATION. ALEJANDRA IS TO BE HELD FOR COURT THE FOLLOWING MORNING.

NOTHING FURTHER AT THIS TIME

AG *T-326*

OFFICER A. GASTELUM T-326 PYPD

ARREST INFORM/ION

Name: CELESTINE DOMINIQUE MOLINA

DOB: 02/04/86

ENR# 2694406746 SS# 600440405

Location of Arrest:

7791 S. PITAYA

Time Of Arrest 2205

Date Of Arrest: 03/09/04

Arresting Officer RASTELIN

DSN # T-326

Charges:

1. 3-16 CONTRIBUTING DELIVERY OF MARIJUANA

2. _____

3. _____

4. _____

Cite and Release Yes [] No []

ST-2105

DN# 040309-902

ARREST INFORMATION

Name: ALETANDRA MANUELA HERNANDEZ

DOB: 07/07/86

ENR# 2694406857 SS# 601280945

Location of Arrest:

7791 S. PITAYA

Time Of Arrest 2205

Date Of Arrest: 03/09/04

Arresting Officer RASTELIN

DSN # T-326

Charges:

1. 4-1c PAS J.V. IN NEED OF

2. CONTACT

3. _____

4. _____

Cite and Release Yes [] No []

ST 2105

DN# 040309-902

EXHIBIT G

EXHIBIT L

1 IN THE PASCUA YAQUI TRIBAL COURT

2 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

3 PASCUA YAQUI TRIBE,) No. CR-04-110
4 PLAINTIFF,)
5 vs.) MEMORANDUM OPINION AND
6 MOLINA, CELESTINE,) ORDER OF DISMISSAL
7 DEFENDANT)

7 The defendant, Celestine Molina, appeared with her counsel, Nicholas Fontana, as did
8 Allen Osburn for the Tribe, on July 13, 2004 for trial. The court considered the defendant's
9 motion for dismissal based on the Tribe's alleged failure to disclose.

10 The court, after hearing the motion and argument, reviewing the Pascua Yaqui Criminal
11 Code and Rules of Procedure, and reviewing the court's file and records, finds that the
12 defendant's motion to dismiss should be granted, for good cause shown. To provide guidance
13 as to future cases, the defendant's counsel has asked the court for an opinion to guide the
14 parties for future disclosure requirements.

14 The Pascua Yaqui Tribal Code provides in pertinent part, under the Rules of Criminal
15 Procedure, Chapter 5, Section 5.1, entitled "Discovery", as follows:

16 Rule 5.1 Disclosure by Tribe

17 A. Matters relating to guilty,(sic) innocence or punishment. No later that ten (10) days
18 after the arraignment, the prosecutor shall make available to the defendant for
19 examination and reproduction the following materials and information within the
20 prosecutor's possession or control:

- 21 1. The names and addresses of all persons whom the prosecutor will call as
22 witnesses in the case in chief together with their relevant written or recorded
23 statements;
- 24 2. All statements of the defendant and of any person who will be tried with the
25 defendant;
- 26 3. The names and addresses of experts who have personally examined a
27 defendant or any evidence in that particular case, together with the results of
28 physical examinations and of scientific tests, experiments or comparisons,
including written reports or statements made by them in connection with eth
particular case;
4. A list of all papers, documents, photographs or tangible objects which the
prosecutor will use at trial or which were obtained from or purportedly
belong to the defendant;
5. A list of all prior convictions of the defendant which the prosecutor will use
to prove motive, intent, or knowledge or otherwise use at trial;

RECEIVED
JUL 14 2004

1 6. All materials or information which tends to mitigate or negate the
2 defendant's guilt as to the offense charged, or which tend to reduce his or her
3 punishment therefor, including all prior felony convictions of witnesses
whom the prosecutor expects to call. PYTC, Title 10, Ch. 5, Sec. 5.1.

4 The intent of the disclosure law is clear, that the prosecutor has the affirmative duty to provide
5 the defendant all information within the possession or control of the prosecutor to reasonably
6 apprise the defendant of the charges filed against him or her, so the defendant may interview
7 witnesses, confront them, cross examine them, and inspect evidence which may be used against
8 a defendant at trial. Although the U.S. Constitution does not apply to tribes, see *Talton v. Mays*,
9 163 U.S. 376 (1896), federal laws dictate that Tribal courts and Tribes in criminal matters must
10 provide constitutional-like protections to defendants accused of crimes in Indian country. The
11 Pascua Yaqui Code follows the constitutional-like standards of the Indian Civil Rights Act, 25
12 U.S. § 1302, et seq., which are federally imposed standards to ensure the rights of defendants to
13 due process guarantees are afforded them in Tribal courts. One of the fundamental rights of
14 due process is the defendant's right to disclosure of all material evidence that may be used
15 against him or her and to disclose all witnesses who may testify against him or her in a criminal
prosecution by the Tribe.

16 The U.S Supreme Court in a landmark decision of *Brady v. Maryland.*, 373 U.S. 83
17 (1963), provided guidance for all U.S. courts that exculpatory information, material to a
18 defendant's guilt or punishment, which the government knew about but failed to disclose to the
19 defendant in time for trial constitutes a denial of a defendant's fundamental right to due process
20 if the government has been found to suppress such evidence. Due Process rights must be
21 afforded defendants so that they may adequately defend their rights. The rules of disclosure and
22 discovery are designed to prevent trials by ambush, because courts in their decisions affecting
23 persons' liberties in criminal cases should be able to decide cases based on what facts are
revealed rather than on what facts are concealed.

24 "The standard practice of the Pascua Yaqui Tribal Court has been to allow the
25 prosecution and defense counsel to meet, confer, and produce all information to each other so
26 that all parties have a clear understanding of what evidence and which witnesses are anticipated
27 for trial." PYTC, Title 10, Ch. 5, Sec. 5.1 mandates that the prosecutor provide such
28 information. When the prosecutor discloses information to the defendant, the practice of the

1 court has been for the parties to file their written responses to the disclosure request. If, for
2 instance, the prosecution may feel the requested information by defendant is privileged, or
3 otherwise not subject to disclosure, the prosecutor should provide a written objection or
4 explanation as to why the prosecutor cannot or should not produce such privileged information
5 to determine whether a court hearing is necessary. In such cases, where opinions of parties
6 differ, the judge may set the matter for discovery hearing and be the arbiter to determine
7 whether a protective order or other means of protecting such privileged information should be
8 issued and whether the information requested should or should not be disclosed. The court
9 practice is to assure that the attorneys and parties follow the rules of procedure and disclosure
10 without close supervision or court intervention, unless a legitimate dispute arises in requests for
11 discovery of evidence which one side believes is not subject to such disclosure. By submitting
12 such a written response to the defendant's request for disclosure, where disclosure is challenged
13 by the prosecutor's office, the prosecutor's office would show its good faith efforts to comply
14 with Pascua Yaqui Chapter 5 rules of discovery and provide written proof that it has made all
15 due diligence in its compliance to produce all information under its possession or control. The
16 prosecutor in this case failed to file such a response or objection, and he did nothing to respond
17 to the request for disclosure.

18 In the absence of any written response to the defendant's request for disclosure and
19 based on no disclosure by the prosecutor in this case, the court finds the prosecutor violated the
20 defendant's rights under tribal law.

21 PYTC section 5.5 provides in pertinent part:

22 Sanctions

23 If at any time during the course of the proceeding, it is brought to the attention
24 of the court that a party has failed to comply with the provisions of these discovery rules
25 or any order issued pursuant thereto, the court may impose any sanction which it finds
26 just under the circumstances, **including but not limited to:** (emphasis added)

- 27 1. Ordering disclosure of the information not previously disclosed;
- 28 2. Granting a continuance;
3. Holding a witness, party, or counsel in contempt of court;
4. Precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; and,
5. Declaring a mistrial when necessary to prevent a miscarriage of justice.

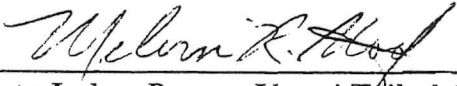
PYTC, Title 10, Ch.5, Sec. 5.1.

1 The list of sanctions above is not exclusive, but rather, the rule allows the court some discretion
2 in what other sanctions not specifically enumerated in the five types of sanctions above it may
3 impose on a party who violates the rule. The court, in exercising its contempt authority, should
4 provide monetary sanctions in cases where a party's actions have adversely affected the
5 administration of justice, and such contempt authority should be exercised judiciously.
6 However, in this matter, the purpose and intent of the court in issuing a monetary sanction
7 against the prosecutor for discovery and disclosure abuses, by his failure to disclose, is meant as
8 an incentive for obedience in the future with the laws or with the rules and regulations of the
9 Pascua Yaqui Rules of Criminal Procedure, and such a sanction is necessary to secure
10 enforcement by imposing a penalty for violation of the disclosure rules, as supported by rule
11 5.5. of the code allowing the court to do so.

12 Based on the discovery abuses in this case, by the omission of the prosecutor to
13 disclose, the court should grant the defendant's request for dismissal based on discovery abuses
14 and impose the additional sanction of a \$50.00 fine against the prosecutor, G. Allen Osburn, for
15 his omission to act in this criminal prosecution.

16 **IT IS ORDERED THAT** this case is dismissed, based on the prosecution's failure to
17 follow the disclosure rules established by the Pascua Yaqui Tribal Code Rules of Criminal
18 Procedure Chapter 5.1 ("Disclosure by Tribe"), and the prosecutor is sanctioned for contempt
19 of court in the amount of \$50.00 to be paid within one week to the court clerk, pursuant to Rule
20 5.5. ("Sanctions").

21 SO ORDERED THIS 13th DAY OF JULY, 2004.

22 
23 _____
Associate Judge, Pascua Yaqui Tribal Court

24 Date 7.1
25 cc: Tribe Defendant Counsel Other
26 K. A. / o
Clerk

EXHIBIT M

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that was never raised for the prosecution any issues with regard to disclosure. And your honor, quite frankly all the disclosure defense needs they have. They received in the police report that's all that were going to be using. We have no experts, we have no finger prints, we have not evidence of physical nature uh...we have Officer An...uh...Andres Gastelum and Bernadette Hernandez and uh...these are uh...that is in essence of what our case is uh...it's a very simple case there is nothing to it and there were many opportunities ah...throughout the uh...period of negotiations and also uh...at the pre-trial hearing for defense to raise this issue...uh this morning uh...after final discussion about the plea and final information that no there isn't going to be one that certainly hit...know well...here comes the uh...uh...well your know you haven't provided proper disclosure. Well my response...well I think I need to know about that ahead of time, if there's a problem there's an obligation to let the ...the tribe know there's a problem so that we can take rem...remedial action. We did uh...later on I filed a...earlier today uh... the uh...the tribe's response to disclosure and in essence, there is nothing new, what I have filed they have everything that we have. We have a police report, they have the police report, they've had it from the beginning uh...this document that I filed, the tribes response to disclosure and notices of witnesses, supplemental disclosure there is nothing new there. Your honor, we have provided all the disclosure that is required and it's certainly has been made available. Your honor the uh...requirement is that disclosure be made available and it's certainly has been available uh...the uh... I have been available, my phone has been open to uh...defense counsel and uh...the fact that uh...defense counsel now at the very last minute, the very eve of trial, comes up with this well...I have a complaint now because it hasn't been properly disclosed. That's what pre-trial uh...conferences are about. That's what all the discussions in the...all the issues raised during the discussions about the plea negotiations, that's what that time is about. There is no good faith disclosure if there's a problem with disclosure in fact there isn't a problem with disclosure. They have from the very beginning, the police report, the officers name is there, Bernadette Hernandez's name is there uh...that is uh...been provided to them from the beginning your honor.

COUNSEL:

First of all your honor, I think uh...any, any discussion about plea negotiations totally irrelevant to this issue before the court. Court's don't need to (inaudible) plea negotiations from the parties. So I think that postulate any of that has nothing to do...what I'm for is guidance from the Court in terms of what the prosecutors office has to do in terms of disclosure. As I read the

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rules of Criminal Procedure in the Code the affirmative duty of the prosecution to disclose these materials in the rule no later than 10 days after the arraignment. The rule doesn't say if the defense asks, if the judge orders. It's a mandatory duty to make disclosure. Whether or not disclosing a police report complies with that rule, I don't know, there is no case law in our jurisdiction, we don't have any guidance in that. It seems to me the rules are pretty clear in...in...ah...most parts. If they are saying disclosure you know, shall disclose the police report and that's it, end of story. I don't have to file disclosure motions. The other thing is that the tribe can't say they were in the dark that this is some big sneak attack. The defense filed their motion for disclosure in March. That was way in advance of today. It's not my job once I file that to be knocking on their door every day saying "please do your job." That is not the defendant's responsibility. They have a...it's my position that they have an affirmative obligation under the Rules to make that disclosure that is specified in the Rule. That they also have an obligation to respond to written requests for disclosure. They did not do that. I also believe they have the due process obligation under United States vs. Brady, even though the provisions in United States Constitution do not necessarily control a sovereign nation such as the tribe. But I think it's instructive in terms of what due process means. My reading of the Rules of Disclosure, the way it is written here is to avoid trial by surprise. That each side has an opportunity to test the others side's evidence to look at it, to examine it, to interview witnesses before trial. And that the tools they have put in place is a list of items that are contained in the disclosure rules. And you know basically it seems to me that the tribe assumes that if you get a police report that's enough. Uh...I'm just asking the court to give some guidance because I don't believe that 's enough. I know it wasn't enough in City Court when I practiced there. It wasn't enough in Pima County Superior Court when I practice there. In Federal Court, which does not have very liberal disclosure rules such as refined as the tribe's code and in the Rules of Procedure even in Federal Court there is an affirmative obligation on the Prosecutors under Brady to disclose.

PROSECUTOR:

Your honor, may I...just focus for a moment on the rule and the rule says no later than 10 days (inaudible) the prosecutor shall make available to the defendant for examination. We are available your honor. Our office is open, my phone line is open, I always uh...return his calls, we have a communication that is free and flowing. And to say that I have been unavailable and not made anything available to him is...is...uh...your honor it's not accurate. We have been making our material available, I am

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available to the defense and that is in essence what the code requires and that is what we succeeded in ...in doing. Your honor may I note that on the pre-trial...he mentioned filing his motion in March, we had a pre-trial hearing...that was in May 18th, I am looking at the courts here. The Court finds that the parties have no motions to present, legal counsel moves the court to set this matter for trial hearing. Your honor that was the time to raise these issues if there was a problem, if uh...they wanted to do it formally before the court, informally they could raise it at any time. In fact he did raise it to me today. And later on today I provided him with...I told him on the phone immediately well you already have everything. All I have is an officer, Officer Gastelum and uh...Bernadette Hernandez that's all I've got. You've already got that information in the police report. I have nothing further, no experts, no fingerprints, nothing else, you got everything. So to say that we are not available and that's what the code required has not been accurate. We have been available.

JUDGE:

The real issue in this case has the defendant's due process been violated in any way, and understand the U.S. Constitution does not apply to tribes under Talton vs. Mayes in 1896 case. None the less the Indian Civil Rights Act provides constitutional right protection and I think that the Brady case cited by uh...defense counsel is very instructive to the court and providing a guideline as to what sort of protections are afforded to defendant but the first and foremost is the discovery rules under Chapter 5 of the code, and they are very clear; Disclosure by the tribe Rule 5.1 matters relating to guilty, innocence or punishment.

No later than ten (10) days after the arraignment, the prosecutor shall make available to the defendant for examination and reproduction the following material and information within the prosecutor's possession or control. And they have six (6) very explicit statements including name and address of persons whom the prosecutor will call as witnesses with recorded statements. Statements of the defendant and of any person who will be tried with the defendant, the names and address of experts who have personally examined a defendant in that particular case, together with physical exams, scientific tests, experiments or comparisons, all written reports or statements made by them in connection with the particular case.

A list of all papers, documents, photographs or tangible objects which the prosecutor will use at trial or which obtained from or purportedly belong to the defendant;

A list of all prior convictions of the defendant, which the prosecutor will use to prove motive, intent or knowledge or otherwise use at trial;

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All material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce his or her punishment therefore, including any and all prior felony convictions of witnesses whom the prosecutor expects to call.

This puts an affirmative duty on the prosecutor to provide all information including exculpatory information and I think the Brady versus U.S., which is 373 U.S. 83 it's a 1963 U.S. Supreme Court case is very clear that exculpatory information is material to a defendant guilt or punishment, and if the government knows about and fails to disclose the information in time for trial, well then the defendant is denied due process and if the government suppresses evidence there is no opportunity for the defense to raise it's...it's defense and do so in a professional manner. In this court I'm not going to permit trials by ambush; and I think there needs to be a reasonable disclosure, which is mandated by the code, but more importantly due process dictates it. The whole purpose of disclosure to ensure these cases tried based on what facts are revealed rather than what truth is going to be concealed by suppression of evidence and it makes it very clear by 5.5 of the code sanction;

If at any time during the course of the proceeding, it is brought to the attention of the court that a party has failed to comply with any provisions of these discovery rules or any order issued pursuant thereto, the court may impose any sanction which it finds just under the circumstances, including, but not limited to: Granting a continuance; Holding a witness, party, or counsel in contempt of court; Precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; Declaring a mistrial when necessary to prevent a miscarriage of justice.

The whole purpose of a sanction is to provide an incentive for obedience with the law or with rules and regulations. Sanctions are sometimes necessary for the court to serve enforcement of it's laws by imposing a penalty for violation of disclosure laws, and Rule 5.5 of the code allows this court clear authority to do so. So I am going to go and hold the prosecution in contempt of court and fine \$50.00 and I'm not going to permit you to call witnesses which, who are not disclosed, submit any evidence not disclosed, or call anyone to testify on behalf of the prosecution. And I am hoping this will provide the motivating force, the impetus for future reference and provide guidance for defense counsel as well, that there is an expectation of this court that full disclosure will be allowed, and what I mean by that, it is an affirmative duty of the prosecution to produce these, whether or not it's requested. Now disclosure by court by order reads as follows;

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Section E. Upon motion of the defendant showing substantial need in the preparation of his or her case for additional material of information not otherwise covered by 5.1, and that defendant is unable without undue hardship to obtain the substantial equivalent by other means, the Court in its discretion may order any person to make it available to him. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

The issue you raised is whether it should have been raised at pre-trial or that was an opportunity for Mr. Fontana to raise these. I don't think he has that obligation, I think the obligation lies with the prosecution to disclose that information and only if you have an objection to that or you have some sort of privilege your asserting, would it then be the burden shifting to the defense counsel to make a motion to try to obtain that information, that's not being disclosed. So based on the information presented, I think a \$50.00 fine is a light fine ah...but again I think this will provide for future reference that the court is not going to have trial by ambush, and I do expect each party to disclose to meet, confer, to have an exchange of information, to make all available and just to assure that adequate notice is being provided. I think the practice here is...has been for the prosecutors office to submit a written response to disclosure. That way everyone has a clear understanding of what's being produced, what will be provided to the court, including statements by defendant, address of experts, papers, documents, exhibits, tangible objects that are going to be presented to the court. I think in that way everyone is assured by the court record and anyone can come in to the court record and see the request for disclosure by defense and the response provided by the prosecutor. Additionally the prosecutor would have to ask for any defenses that are required from defendant under the rule. And that conversely the prosecutor shall disclose the names and addresses of the persons whom the prosecutor will call as rebuttal witnesses together with their relevant records or recorded statements so that's an affirmative duty to disclose more information after the defense counsel has provided the response to prosecutors request for disclosure. The expectation here is a duty to ah...disclose and I think you mentioned the criminal rules of procedure. Rule 37 of the Federal Rules, I think instructed there is an informative duty of the prosecutor to disclose the information; the burden is not on the defense counsel. Because the burden of beyond a reasonable doubt lies with prosecution and they have the affirmative duty and there are a lot of case law of federal cases and sanctions would be available if there is any failure to disclose to defense an opportunity to have exculpatory information which are material to defendants guilt or punishment or to his own defense.

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So I am going to go ahead and grant the dismissal because I think that's inherent authority of this court to do so, not with standing 5.5 indicating I'm going to preclude him from calling witnesses not disclosed, not submit any evidence and the other section is to raise a defense not disclosed. I'm going to go ahead and go with that and also hold the counsel for prosecution in contempt with a \$50.00 fine to be paid within one week. That I think inherently based on all the sanction power of this court its inherent authority of the court is to go ahead and grant dismissal of this court, where I think that the due process right was violated and in that both the tribal code as well as the Indian Civil Rights Code. The federal law is very clear 1302 provides that a tribal court sitting here has to assure that due process rights of the defendant are assured, by failing to disclose any information in writing, the court has no record that this was actually complied with and as a result I am going to go ahead and grant the request for dismissal of these charges based on sanctions imposed as well as failure to provide adequate due process by the prosecution to the defense. So the case is going to be dismissed. Request is granted, court is adjourned, let's go off the record.

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

**PASCUA YAQUI TRIBE
VS.
MOLINA, CELESTINE**

**JUDGE:
DEFENDANT:
PROSECUTOR:
LEGAL COUNSEL:**

**MELVIN STOOF
CELESTINE MOLINA
ALLEN OSBURN
NICHOLAS FONTANA**

CR-04-110 / CA-04-004

TRIAL DATE: JULY 20, 2004

JUDGE: CR-04-110, Pascua Yaqui Tribe versus Celestine Molina.
Are we ready to proceed with the trial in this case?

PROSECUTOR: Yes your honor; Allen Osburn for the Tribe.

JUDGE: Any preliminary motions?

COUNSEL: On behalf of Celestine Molina who is present, who is out of
custody. There is a motion to dismiss that was filed shortly before
lunch time, I don't know if the Court received a copy of that?

JUDGE: Got a copy of it, go ahead and proceed on the motion Mr. Fontana.

COUNSEL: I'll rest on what I have on my written motion your honor. I realize
the Tribe has not had any time to respond to that. So I'll just rest
on that, what I've written there.

JUDGE: Any response Mr. Osburn?

PROSECUTOR: Yes your honor. The uh...defense...uh has received...I
have...uh...I have a March 25, 2004 at 3:00 p.m. a...uh...they
received disclosure. At that point they received the police report
uh...later on there was another ah...ah...another form here signed
by the defendant, March 26, 2004 3:25 p.m. again received
disclosure note here, criminal complaint and affidavit, your honor.
The uh...the next uh...we have disclosure of an A.P.P. plea
authorization for release uh...signed by defense counsel, and in the
(inaudible) is a modification of the A.P.P. plea that was uh...April
6, 2004 at 10:30, all through the time your honor there was a...a
shift of focus to the A.P.P. negotiations and they were certainly
made in good faith. We were under the impression that was how
this case was going to be resolved. But in any event your honor,
we uh...we also have uh...a pre-trial and at that pre-trial hearing

that was never raised for the prosecution any issues with regard to disclosure. And your honor, quite frankly all the disclosure defense needs they have. They received in the police report that's all that were going to be using. We have no experts, we have no finger prints, we have not evidence of physical nature uh...we have Officer An...uh...Andres Gastelum and Bernadette Hernandez and uh...these are uh...that is in essence of what our case is uh...it's a very simple case there is nothing to it and there were many opportunities ah...throughout the uh...period of negotiations and also uh...at the pre-trial hearing for defense to raise this issue...uh this morning uh...after final discussion about the plea and final information that no there isn't going to be one that certainly hit...know well...here comes the uh...uh...well your know you haven't provided proper disclosure. Well my response...well I think I need to know about that ahead of time, if there's a problem there's an obligation to let the ...the tribe know there's a problem so that we can take rem...remedial action. We did uh...later on I filed a...earlier today uh... the uh...the tribe's response to disclosure and in essence, there is nothing new, what I have filed they have everything that we have. We have a police report, they have the police report, they've had it from the beginning uh...this document that I filed, the tribes response to disclosure and notices of witnesses, supplemental disclosure there is nothing new there. Your honor, we have provided all the disclosure that is required and it's certainly has been made available. Your honor the uh...requirement is that disclosure be made available and it's certainly has been available uh...the uh... I have been available, my phone has been open to uh...defense counsel and uh...the fact that uh...defense counsel now at the very last minute, the very eve of trial, comes up with this well...I have a complaint now because it hasn't been properly disclosed. That's what pre-trial uh...conferences are about. That's what all the discussions in the...all the issues raised during the discussions about the plea negotiations, that's what that time is about. There is no good faith disclosure if there's a problem with disclosure in fact there isn't a problem with disclosure. They have from the very beginning, the police report, the officers name is there, Bernadette Hernandez's name is there uh...that is uh...been provided to them from the beginning your honor.

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rules of Criminal Procedure in the Code the affirmative duty of the prosecution to disclose these materials in the rule no later than 10 days after the arraignment. The rule doesn't say if the defense asks, if the judge orders. It's a mandatory duty to make disclosure. Whether or not disclosing a police report complies with that rule, I don't know, there is no case law in our jurisdiction, we don't have any guidance in that. It seems to me the rules are pretty clear in...in...ah...most parts. If they are saying disclosure you know, shall disclose the police report and that's it, end of story. I don't have to file disclosure motions. The other thing is that the tribe can't say they were in the dark that this is some big sneak attack. The defense filed their motion for disclosure in March. That was way in advance of today. It's not my job once I file that to be knocking on their door every day saying "please do your job." That is not the defendant's responsibility. They have a...it's my position that they have an affirmative obligation under the Rules to make that disclosure that is specified in the Rule. That they also have an obligation to respond to written requests for disclosure. They did not do that. I also believe they have the due process obligation under United States vs. Brady, even though the provisions in United States Constitution do not necessarily control a sovereign nation such as the tribe. But I think it's instructive in terms of what due process means. My reading of the Rules of Disclosure, the way it is written here is to avoid trial by surprise. That each side has an opportunity to test the others side's evidence to look at it, to examine it, to interview witnesses before trial. And that the tools they have put in place is a list of items that are contained in the disclosure rules. And you know basically it seems to me that the tribe assumes that if you get a police report that's enough. Uh...I'm just asking the court to give some guidance because I don't believe that 's enough. I know it wasn't enough in City Court when I practiced there. It wasn't enough in Pima County Superior Court when I practice there. In Federal Court, which does not have very liberal disclosure rules such as refined as the tribe's code and in the Rules of Procedure even in Federal Court there is an affirmative obligation on the Prosecutors under Brady to disclose.

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available to the defense and that is in essence what the code requires and that is what we succeeded in ...in doing. Your honor may I note that on the pre-trial...he mentioned filing his motion in March, we had a pre-trial hearing...that was in May 18th, I am looking at the courts here. The Court finds that the parties have no motions to present, legal counsel moves the court to set this matter for trial hearing. Your honor that was the time to raise these issues if there was a problem, if uh...they wanted to do it formally before the court, informally they could raise it at any time. In fact he did raise it to me today. And later on today I provided him with...I told him on the phone immediately well you already have everything. All I have is an officer, Officer Gastelum and uh...Bernadette Hernandez that's all I've got. You've already got that information in the police report. I have nothing further, no experts, no fingerprints, nothing else, you got everything. So to say that we are not available and that's what the code required has not been accurate. We have been available.

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The real issue in this case has the defendant's due process been violated in any way, and understand the U.S. Constitution does not apply to tribes under Talton vs. Mayes in 1896 case. None the less the Indian Civil Rights Act provides constitutional right protection and I think that the Brady case cited by uh...defense counsel is very instructive to the court and providing a guideline as to what sort of protections are afforded to defendant but the first and foremost is the discovery rules under Chapter 5 of the code, and they are very clear; Disclosure by the tribe Rule 5.1 matters relating to guilty, innocence or punishment.

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A list of all papers, documents, photographs or tangible objects which the prosecutor will use at trial or which obtained from or purportedly belong to the defendant;

A list of all prior convictions of the defendant, which the prosecutor will use to prove motive, intent or knowledge or otherwise use at trial;

All material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce his or her punishment therefore, including any and all prior felony convictions of witnesses whom the prosecutor expects to call.

This puts an affirmative duty on the prosecutor to provide all information including exculpatory information and I think the Brady versus U.S., which is 373 U.S. 83 it's a 1963 U.S. Supreme Court case is very clear that exculpatory information is material to a defendant guilt or punishment, and if the government knows about and fails to disclose the information in time for trial, well then the defendant is denied due process and if the government suppresses evidence there is no opportunity for the defense to raise it's...it's defense and do so in a professional manner. In this court I'm not going to permit trials by ambush; and I think there needs to be a reasonable disclosure, which is mandated by the code, but more importantly due process dictates it. The whole purpose of disclosure to ensure these cases tried based on what facts are revealed rather than what truth is going to be concealed by suppression of evidence and it makes it very clear by 5.5 of the code sanction;

If at any time during the course of the proceeding, it is brought to the attention of the court that a party has failed to comply with any provisions of these discovery rules or any order issued pursuant thereto, the court may impose any sanction which it finds just under the circumstances, including, but not limited to: Granting a continuance; Holding a witness, party, or counsel in contempt of court; Precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; Declaring a mistrial when necessary to prevent a miscarriage of justice.

The whole purpose of a sanction is to provide an incentive for obedience with the law or with rules and regulations. Sanctions are sometimes necessary for the court to serve enforcement of it's laws by imposing a penalty for violation of disclosure laws, and Rule 5.5 of the code allows this court clear authority to do so. So I am going to go and hold the prosecution in contempt of court and fine \$50.00 and I'm not going to permit you to call witnesses which, who are not disclosed, submit any evidence not disclosed, or call anyone to testify on behalf of the prosecution. And I am hoping this will provide the motivating force, the impetus for future reference and provide guidance for defense counsel as well, that there is an expectation of this court that full disclosure will be allowed, and what I mean by that, it is an affirmative duty of the prosecution to produce these, whether or not it's requested. Now disclosure by court by order reads as follows;

Section E. Upon motion of the defendant showing substantial need in the preparation of his or her case for additional material of information not otherwise covered by 5.1, and that defendant is unable without undue hardship to obtain the substantial equivalent by other means, the Court in its discretion may order any person to make it available to him. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

The issue you raised is whether it should have been raised at pre-trial or that was an opportunity for Mr. Fontana to raise these. I don't think he has that obligation, I think the obligation lies with the prosecution to disclose that information and only if you have an objection to that or you have some sort of privilege your asserting, would it then be the burden shifting to the defense counsel to make a motion to try to obtain that information, that's not being disclosed. So based on the information presented, I think a \$50.00 fine is a light fine ah...but again I think this will provide for future reference that the court is not going to have trial by ambush, and I do expect each party to disclose to meet, confer, to have an exchange of information, to make all available and just to assure that adequate notice is being provided. I think the practice here is...has been for the prosecutors office to submit a written response to disclosure. That way everyone has a clear understanding of what's being produced, what will be provided to the court, including statements by defendant, address of experts, papers, documents, exhibits, tangible objects that are going to be presented to the court. I think in that way everyone is assured by the court record and anyone can come in to the court record and see the request for disclosure by defense and the response provided by the prosecutor. Additionally the prosecutor would have to ask for any defenses that are required from defendant under the rule. And that conversely the prosecutor shall disclose the names and addresses of the persons whom the prosecutor will call as rebuttal witnesses together with their relevant records or recorded statements so that's an affirmative duty to disclose more information after the defense counsel has provided the response to prosecutors request for disclosure. The expectation here is a duty to ah...disclose and I think you mentioned the criminal rules of procedure. Rule 37 of the Federal Rules, I think instructed there is an informative duty of the prosecutor to disclose the information; the burden is not on the defense counsel. Because the burden of beyond a reasonable doubt lies with prosecution and they have the affirmative duty and there are a lot of case law of federal cases and sanctions would be available if there is any failure to disclose to defense an opportunity to have exculpatory information which are material to defendants guilt or punishment or to his own defense.

So I am going to go ahead and grant the dismissal because I think that's inherent authority of this court to do so, not with standing 5.5 indicating I'm going to preclude him from calling witnesses not disclosed, not submit any evidence and the other section is to raise a defense not disclosed. I'm going to go ahead and go with that and also hold the counsel for prosecution in contempt with a \$50.00 fine to be paid within one week. That I think inherently based on all the sanction power of this court its inherent authority of the court is to go ahead and grant dismissal of this court, where I think that the due process right was violated and in that both the tribal code as well as the Indian Civil Rights Code. The federal law is very clear 1302 provides that a tribal court sitting here has to assure that due process rights of the defendant are assured, by failing to disclose any information in writing, the court has no record that this was actually complied with and as a result I am going to go ahead and grant the request for dismissal of these charges based on sanctions imposed as well as failure to provide adequate due process by the prosecution to the defense. So the case is going to be dismissed. Request is granted, court is adjourned, let's go off the record.

1 PASCUA YAQUI TRIBE
2 OFFICE OF THE PROSECUTOR
3 7474 S. Camino de Oeste
4 Tucson, Arizona 85746
5 (520) 879-5780

2004 JUL 21 PM 1:10

CA-04-002
BY

6 T. Michael Andrews Chief Prosecutor
7 G. Allen Osburn, Deputy Prosecutor

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

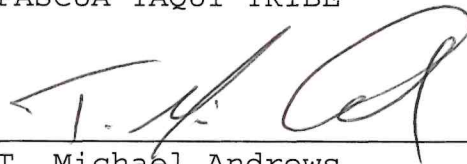
9 **IN AND FOR THE PASCUA YAQUI RESERVATION, ARIZONA**

10 PASCUA YAQUI TRIBE,)
11 Appellant,) NO. CA-04-002
12 Vs.) (Tribal Court No. CR-04-110)
13 Celestine Molina) Motion to Stay Execution of Fine
14)
15 Appellee.)

16 COMES NOW The Pascua Yaqui Tribe, by and through counsel
17 undersigned, and hereby requests the Pascua Yaqui Court of
18 Appeals to issue a stay of execution pursuant to the Pascua Yaqui
19 Court of Appeals Procedures Act of 2000 section 1.21 for G. Allen
20 Osburn, Deputy Prosecutor for the Pascua Yaqui Office of the
21 Prosecutor to pay fifty dollars (\$50.00) for an alleged contempt
22 fine to the Pascua Yaqui Tribal Courts. This motion will protect
23 the interest of the parties for a just resolution of the case.

24 **Respectfully submitted this 20th day of July, 2004.**

25 OFFICE OF THE PROSECUTOR
26 PASCUA YAQUI TRIBE



27 T. Michael Andrews
28 Chief Prosecutor

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

Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

Copy delivered/mailed to:

Nick Fontanna
Public Defender
7474 S. Camino de Oeste
Tucson, Arizona 85746
Attorney for Parent

Tribal Courts
Pascua Yaqui Tribal Court
Tucson, Arizona 84746

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

By:



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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) 879-5780

6 T. Michael Andrews Chief Prosecutor
7 G. Allen Osburn, Deputy Prosecutor

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.
12 Vs.) (Tribal Court No. CR-04-110)
13 Celestine Molina)
14 Appellee.) **NOTICE OF APPEAL TO THE**
15 **PASCUA YAQUI COURT OF APPEALS**

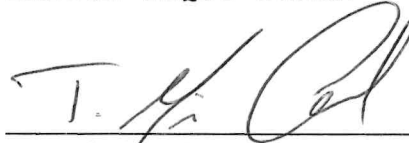
16 COMES NOW The Pascua Yaqui Tribe, by and through counsel
17 undersigned, and hereby timely files its Notice of Appeal
18 pursuant to Pascua Yaqui Court of Appeals Procedure Act of 2000
19 section 1.16, asking appellate review of a Tribal Court Order of
20 the 13 day of July 2004 dismissing prosecution in CR-04-110 for
21 alleged disclosure violations and holding Deputy Prosecutor G.
22 Allen Osburn in contempt for allegedly failing to provide
23 disclosure to said defendant in violation of Pascua Yaqui Tribal
24 Rules of Criminal Procedure 5.1. Appellant contends that the
25 Court abused its discretion on three occasions. First, the Tribal
26 Court abused its discretion when it failed to find any prejudice
27 to the defendant for the alleged disclosure violations. Second,
28 by failing to find that the Tribe did provide Rule 5.1 disclosure
to the defendant on March 25, 2004. Finally, Appellant contends
that the Court abused its discretion when it found Deputy
Prosecutor G. Allen Osburn in contempt and fined him \$50.00

without due process.

The Tribe is requesting a three-Justice appellate proceeding and oral arguments pursuant to Pascua Yaqui Court of Appeals Procedure Act 2000 section 1.16 and section 1.23 respectfully.

Respectfully submitted this 20th day of July, 2004.

OFFICE OF THE PROSECUTOR
PASCUA YAQUI TRIBE



T. Michael Andrews
Chief Prosecutor

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

Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

Copy delivered/mailed to:

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By: 