

Nos. CA-06-002; CA-06-012; CA-06-016;
CA-06-017; CA-06-018

Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribe, Plaintiff/Appellant,

v.

Juvenile F.E.,
Juvenile R.A.,
Juvenile L.S.,
Juvenile J.M.
Defendants/Appellees.

ORDER

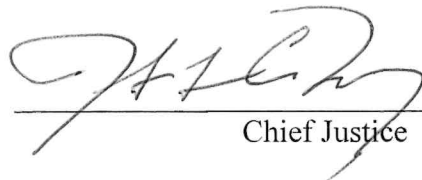
Appeal from decisions of the Pascua Yaqui Tribal Court in trial court docket Nos. JD-06-006; JD-06-066; JD-06-069; JD-06-071; and JD-06-087.

Yancy A. Jencsok, Esq., Office of the Prosecutor, Pascua Yaqui Tribe, Tucson, Arizona, for the Plaintiff/Appellant.

The Chief Justice reviewed the Appellant's motion for consolidation of the above named and numbered cases and finds that all the cases concern the same basic facts and issues which would justify consolidation in the interests of judicial economy. The motion calls for a procedural order which the Chief Justice can act on pursuant to PYTRAP 6(C) (2005).

It is therefore ORDERED that the motion to consolidate is granted.

Filed this 26 day of April, 2007.



Chief Justice

Pascua Yaqui Tribe
Office of the Prosecutor
7474 S. Camino de Oeste
Tucson, AZ 85757
(520) 879-6251

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME

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DOCKET NO. CA-06-002

CLERK WK

Yancy A. Jencsok
Juvenile Presenting Officer

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,
Plaintiff/Appellant,

Juvenile F.E.,) CA-06-002, JD-06-006
Juvenile R.A.,) CA-06-012, JD-06-066
Juvenile E.O.,) CA-06-016, JD-06-069
Juvenile L.S.,) CA-06-017, JD-06-071
Juvenile J.M.,) CA-06-018, JD-06-087
Defendants/Appellees.)

**MOTION TO CONSOLIDATE AND FOR
DECISION ON THE RECORD**

Appellant moved the court to consolidate the above referenced cases and to make a decision based on the record. This motion is supported by the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 23rd day of February, 2007.

MICAH SCHMIT
CHIEF PROSECUTOR



YANCY A. JENCOSK
Deputy Prosecutor
Counsel for Appellant

STATEMENT OF FACTS

Each of these cases involves the same basic set of facts. A minor allegedly commits a “juvenile offense” as defined in the Pascua Yaqui Juvenile Code. The minor is cited for the offense, but is not taken into custody or arrested. A juvenile offender petition is filed. The trial court dismisses the petition with prejudice. The reason given for the dismissal is that the petition was filed within ten days from the offense, citing to the Pascua Yaqui Tribe Juvenile Code, 2 PYTC §3.9(B)(4) [now 5 PYTC § 7-110(4)]. In each case, a Notice of Appeal was timely filed.

ARGUMENT

A. The cases involve identical sets of facts and an identical issue of law and should be consolidated to promote judicial economy.

The Pascua Yaqui Tribe Rules of Appellate Procedure do not address the consolidation of appeals. However, it is a common practice in the tribal trial court to consolidate cases involving the same parties. Also, many jurisdictions allow the consolidation of appeals when there are common sets of fact or legal issues.¹

As described above, each of the cases listed involves an identical fact pattern. In addition, each case has a single dispositive issue of law and can be decided by the application of a single appellate court decision.²

The issue of law central to each case is the correct interpretation of 2 PYTC §3.9(B)(4). The trial court interpreted that section to mean that when a minor has committed a “juvenile offense”³, a juvenile offender petition must be filed within 10 days, irrespective of whether the minor has been in custody. However, the Pascua Yaqui Court of Appeals recently interpreted §3.9(B)(4) to mean that the ten day deadline applies only when a minor has been taken in to custody and subsequently released. *Pascua Yaqui Tribe vs. A Juvenile*, CA-05-005 (August 25, 2006). That decision goes on to state that in order for a child to be considered “taken into custody,” the juvenile must have been arrested and placed into a detention facility. In all of these

¹ For example, the Arizona Rules of Criminal Procedure provide that “[a]ppeals which raise a common question of law or fact may be consolidated at any time.” Rule 31.4(b)(1).

² Juvenile J.M. contains the additional issue of whether, when the tenth day falls on a weekend, the deadline should be the next business day, pursuant to 9 PYTC §102(A) [now 3 PYT R.Crim.P. Rule 3(A)]. However, this issue is made moot by the court’s decision in *Pascua Yaqui Tribe vs. A Juvenile*, CA-05-005 (August 25, 2006).

³ A “juvenile offense” is “[a]n act which if committed by an adult is designated a crime.” Pascua Yaqui Juvenile Code Definitions, 5 PYTC § 7-20(X).

cases, the minor was never taken into custody. Therefore, the ten day deadline of §3.9(B)(4) does not apply and the Tribe should have had a full year from the date of the offense to file the petition.⁴

To promote judicial economy, the cases listed should be consolidated.

B. The cases should be disposed of by a decision on the record.

PYTRAP Rule 16(D) gives the appellate court the discretion to decide an appeal on the record. These cases are amenable to being decided on the record. The fact pattern for each is simple. Each trial court decision appealed from is based on a single issue. The orders appealed from, and attached to the Notice of Appeal for each case, contain an adequate summary of the facts and description of the reason for the decision. It is not necessary for an involved, drawn out process in order to reach a just decision.

CONCLUSION

The cases should be consolidated as they have a similar set of facts and an identical legal issue in common. The cases should be decided on the record as the facts and legal issue are simple and do not require briefing and legal argument.

RESPECTFULLY SUBMITTED this 23rd day of February, 2007.

MICAH SCHMIT
CHIEF PROSECUTOR



YANCY A. JENCOSK
Deputy Prosecutor
Counsel for Appellant

⁴ 1 PYTC §1.28 [now 4 PYTC § 1-40].

Original and 5 copies delivered to:

Clerk, Pascua Yaqui Tribe Court of Appeals

Copies mailed to:

Guillermo Saldivar
Advocate for Juvenile F.E.

Parent of Juvenile R.A.

Parent of Juvenile E.O.

Parent of Juvenile L.S.

Parent of Juvenile J.M.

On February 23, 2007 by:

A handwritten signature in black ink, appearing to be 'G. Saldivar', is written over a horizontal line.

PASCUA YAQUI TRIBAL COURT
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1 PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR
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Tucson, Arizona 85757
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4 Micah Schmit, SB# 014887
Chief Prosecutor

6 **IN THE PASCUA YAQUI TRIBE COURT OF APPEALS**
7 **IN AND FOR THE PASCUA YAQUI RESERVATION, ARIZONA**

8 PASCUA YAQUI TRIBE,)
Appellant,) NO. CA-06-002
9 Vs.) (Juvenile Court No. JD-06-006)
10)
11 Fabian E.) **Appellant's Opening Brief**
Appellee.)
_____)

13 COMES NOW The Pascua Yaqui Tribe, by and through counsel
14 undersigned, and hereby files its Opening Brief within the
15 time limits specified and the manner prescribed by the Pascua
16 Yaqui Rules of Appellate Procedure Ordinance of 2005
17 (hereinafter, PYTRAP).

18 **JURISDICTIONAL STATEMENT**

19 On November 17th, 2005, the Juvenile Tribal Court
20 dismissed with prejudice the above-captioned criminal case,
21 then existing under cause number JD-06-006, a copy of which is
22 attached as **Exhibit A**. The Tribe filed its Notice of Appeal,
23 November, 25th, 2005, **Exhibit B**, within the 30 days required by
24 Rule 8, PYTRAP. Appellant's Opening Brief is due within 30
25 days after the Appellate Court clerk mails notice to the
26 parties that the lower court's record on appeal has been

1 filed. *Id.* Rule 12.¹

2 **FACTUAL/PROCEDURAL BACKGROUND**

3 The Tribal Juvenile Court has consistently asserted
4 that presenting a minor with a long-form citation after a
5 detention-and-release, or even after merely speaking to a
6 minor-suspect or his parent (i.e., no placement in
7 detention), is the equivalent of an actual "detention" and
8 therefore serves to trigger the 10-day charging clock of
9 JCODE §3.9.²

10
11 In this case, the incidences of sexual abuse occurred
12 at the end of May, 2005. The victim, like so many children
13 in this situation, did not disclose immediately. This
14 resulted in her forensic interview not taking place until a
15 month later, on June 22, 2005. Thereafter, sixteen year old
16 Defendant Fabian E. was scheduled for an interview and that
17 took place, consensually and without detention, with his
18

19 1 Note: To date, the Tribe has not received the requisite notice
20 from the Clerk of the Appellate Court regarding receipt of the lower
21 court record. This is important only in that it later sets the time for
22 when appellant's opening brief is due. The Tribe was advised by a member
of the lower court that the certified record was in fact sent up to the
Court of Appeals in late December, 2005. This would then make the
Tribe's Opening Brief due as early as late January, 2006. The Tribe
simply files its Opening Brief as if such notice had been sent.

23 2 The seminal reasoning and dismissal occurred *In the Matter of*
24 *Eduardo Espinoza*, JD-05-065, by Order dated June 17, 2005, and
25 culminated in the Juvenile Court's most recent dismissal *In the Matter*
26 *of Arturo Flores*, JD-05-113, currently on appeal. These are both being
27 **attached as Exhibits C and D** for the sole purpose of illustrating the
lower court's evolving reasoning on this issue and to further
demonstrate the merits of the Tribe's request for motion and declaration
of "appellate priority" on this issue. See also **Exhibit E**, pg 2, lines
14-22, the most recent (2006) sua sponte dismissal by the lower court,
based on this same issue.

1 | parents, on July 8, 2005.

2 | In keeping with investigative custom here and in other
3 | jurisdictions, transcripts were then ordered of both of
4 | these interviews. Once completed, the case and transcripts
5 | were presented to the Chief Prosecutor for evaluation. That
6 | took place in late July, 2005 (approximately 3 weeks after
7 | the last interview).

8 | Based upon these statements, a decision was made to
9 | charge Defendant/Appellee. A police affidavit (to support
10 | the charging petition) was requested and submitted to the
11 | Tribe on October 3rd, 2005 by Detective Alfred Woods.³ And a
12 | formal Juvenile Offender Petition was promptly filed,
13 | October 7th, 2005, via long-form affidavit, in Tribal
14 | Juvenile Court. The juvenile Defendant/Appellee was served
15 | to appear for his Initial Hearing, which took place on
16 | November 3rd, 2005, a date of the trial court's choosing.

17 | At the Initial Hearing (IH), the Tribe verbally
18 | articulated its concerns regarding the lower court's past
19 | practice of dismissing similarly situated cases and
20 | suggested the court should review the case at hand for
21 | similar issues before too much was invested by the victim
22 | and the Tribe. But getting no subsequent action from the
23 |
24 |

25 | ³ The reason for the charging delay is that, unbeknownst to either the
26 | defendant/Appellee or the lower court, the Tribal Prosecutor was
27 | patiently awaiting a decision from the US Attorneys office regarding
28 | whether or not they wished to exercise jurisdiction over the case.
After waiting several months, it was decided that the case should be
charged locally, notwithstanding any interest, or lack thereof, by the

1 court, the Tribe filed a written notice with the Juvenile
2 Court, **Exhibit F**, advising that this case fell within the
3 lower court's previous interpretations of §3.9 which it
4 found to be fatal to charging.

5 The pre-charging time-frames for this case can be
6 summarized as follows. The Juvenile Offender Petition was
7 filed a little over four months after the alleged crime had
8 been committed by Appellee and three months after he was
9 first interviewed by detectives. The incident was disclosed
10 almost one month after it had occurred.

11 In its dismissal order, the lower court specifically
12 found that the 10-day charging deadline began to count down
13 from the moment of Defendant/Appellee's *interview* with
14 detectives (even though he wasn't in-custody or under arrest
15 for that voluntary interview). See **Exhibit A**, lines 12-13.
16 Troublingly, this is a different point of "counting-down"
17 then was articulated in the Arturo Flores order (**Exhibit D**,
18 page 2, lines 10-13; 19-22) which repeatedly emphasizes the
19 "offense date" as the critical moment of calculation. See
20 also the January, 12th, 2006 dismissal order from *In the*
21 *Matter of Sivouneh A.*, **Exhibit E**, which appears to revert
22 back to the "time of the offense" as the measuring point.
23
24

25 The Tribe, however, respectfully disagrees with all of
26 the aforementioned Juvenile Court applications of §3.9.

1 Instead the Tribe submits that §3.9 has a more obvious
2 construction, namely, permitting the filing of a juvenile
3 prosecution at any time, within the 12 month statute of
4 limitations from the incidence's occurrence, provided no
5 "detention" of the juvenile has occurred. The accuracy of
6 such interpretation will be clear after the following
7 argument.

8
9 **INTRODUCTION TO ARGUMENT**

10 The Tribe herein argues that the PYT Juvenile Code
11 (JCODE) is clear regarding when the 10-day Petition-filing
12 deadline is applicable, namely only when a juvenile delinquent
13 is actually "detained in a facility." As this Court will see,
14 nowhere in the Tribal criminal codes may merely the offense
15 date, or talking-to-the-parent, or talking-to-the-juvenile-
16 defendant, substitute for the actual "detention" requirement
17 for triggering the 10-day petition filing deadline. Indeed,
18 when such a formal detention has *not* occurred, then the
19 alternative long-form or summons process applies, as described
20 in the PYT criminal Law and Order Code (CODE). Accordingly,
21 the Tribe will ask this Court to reverse the lower court's
22 dismissal with prejudice and order a reinstatement of the
23 pretrial hearing in this case.

24 **A. INITIATION OF CRIMINAL CASES, BY COMPLAINT OR**
25 **PETITION**

26 All cases, whether adult or juvenile, may be initiated
27 via a Complaint or Petition, filed in either Tribal or

1 Juvenile court, respectively. The principle time-constraint
2 is the 12-month statute of limitations, contained in §1.28,
3 Title 1, of the CODE. This provision states that for any
4 criminal prosecution, the action "shall have been commenced
5 within one (1) year after the commission of the offense."⁴

6 Also, §1.29, of the CODE defines a Complaint as follows:

7 Sec. 1.29 COMPLAINTS

8 A complaint is a written charge by any person
9 presented to the Pascua Yaqui Court having
10 jurisdiction, that **a person** has committed a
11 specified offense with an offer to prove the fact
12 to the end that prosecution may be instituted.

13 *Id. Emphasis added.*

14 Noteworthy, this provision describes the charging process for
15 any *person* that has committed a crime (not just as to
16 "adults"). A Petition operates the same way as a Complaint,
17 save for the fact that a Petition is the document by which a
18 Juvenile is charged in Juvenile Court. The same layout and
19 requisite accompanying police affidavit are identical.

20 **B. ARRESTS vs. LONG-FORM PETITIONS**

21 Charged offenders may be generally divided in to two
22 groups. Those who are physically "arrested"⁵ and those who

23 4 There is no distinction made between serious or petty offenses,
24 nor is there any distinction drawn between adult or juvenile offenses.
All tribal crimes, from dog nuisances to murder, carry a one-year
statute of limitations - and a one year maximum prison sentence as well.

25 5 An "arrest" may simply be a cite/release in the field (typical of
26 disorderly conduct for e.g.) or it may actually be a booking in to jail
27 via (1) the execution of an arrest warrant (whereabouts were unknown so
an arrest warrant was drafted); or (2) due to the seriousness of the
immediate incident (robbery, agg aslt); or (3) the officer may book the
suspect for safety/flight issues (out of town residence, victim in

1 are paper-summoned via a long-form complaint/petition. This
2 bifurcation is universal throughout the land. In the instant
3 case, the process for summoning or long-forming
4 Defendant/Appellee was the procedure that was employed.

5
6 **1. Summoned Or "Long-Formed" Offenders**

7 If a suspect is summoned in to criminal court, this
8 charging-process is often referred to as a long-form
9 petition.⁶ In contrast to a field-citation or arrest, long-
10 forms often reflect a lengthier investigation, usually of
11 necessity, that then turns in to a presentment to the
12 prosecutor's office for evaluation and charging. The long-
13 form or summons process can be reserved for the less risky
14 offenders and/or it may be done out of consideration for the
15 age of the offender and/or the very limited and costly
16 detention space facing municipalities.⁷ Regardless, the
17 prosecutor's office then reviews these affidavits for probable
18 cause and, if merited, drafts a Complaint or Juvenile
19 Petition. The Complaint/Petition is filed in the trial court
20 and the defendant is then served with a summons to appear in
21

22 danger of retaliation, etc.).

23 6 The term "long-form" is contained in the boiler-plate language of
24 Tribal Affidavits and refers to charging via non-arrest. This termin-
25 ology is universal, and is used identically, both around the State of
26 Arizona, as well as around the country.

27 7 PYT has no juvenile detention facility. Via contracts there are
28 approximately a ½-dozen-plus juvenile detention beds available in other
jurisdictions (Tucson, Globe). All too often, however, these spaces are
occupied, leaving the Tribe and the Court with no custodial alternatives
so a juvenile triage sometimes has to be contemplated.

1 court by staff belonging to the court.⁸

2 In this case, the Petition was filed on October 7th, 2005
3 (**Exhibit F**). The lower court issued its summons to the
4 parent/guardian on October 10th, 2005 (**Exhibit G**) and Appellee
5 was served shortly after that. Critically, by this point,
6 events are entirely out of the Tribe's hands until the suspect
7 is located, served with the charging document, and advised to
8 appear in court for his Initial Hearing (on a date also
9 determined exclusively by the Tribal court).⁹

10 As further proof that the Code draws an intentionally
11 clear distinction between arrests and long-forms one may
12 examine the definition of "summons." The main CODE provision
13 dealing with this long-form process clearly emphasizes this
14 distinction:

15 Sec. 1.33 Summons

16 A summons may be issued *if a defendant is **not***
17 ***in custody..***

18 *Id. Emphasis Added.*

19 Again, there are no controlling deadlines, in the JCODE or
20 otherwise, except the one-year statute of limitations. And
21 clearly, there is no exclusion of juvenile offenders to this

22
23 8 This commonly applies to any case that involves difficult-to-
24 obtain evidence, such as: fraud or theft (hidden crimes), sexual abuse
25 (delayed disclosure crimes), ballistics, DNA, or fingerprint (lab or ID-
26 dependent crimes), etc. Were the PYT Codes to be read as Appellee
suggests, few if any of these kinds of cases could ever be charged, as
their offense-dates or their "contact-with-parent" dates would have far
preceded the 10-day window for bringing charges. This is completely
inconsistent with The Code, generally, but also flies in the face of
ordinary community protection and victim rights provisions.

27 9 Per the CODE, the IH on a summons shall be at least 14 days after
28 being served. In this case, it was set for November 3rd, 2005.

1 process either, as a generic term ("defendant") is used once
2 again in defining the applicability of the summons process.

3 Moreover, supporting the overall control of the Law &
4 Order Code, §1.33, is the fact that, per the JCODE's own
5 terms, the JCODE is not a stand-alone provision. This intent
6 is explicitly mandated by §1.2, entitled **Juvenile Court**
7 **Procedure**, and in pertinent part reads:

8 **C.** The procedures of the Juvenile Court
9 **shall be governed by the rules of procedure of the**
10 **Tribal Court** which are not in conflict with this
Code.

11 Id. *Emphasis Added.*

12 Quite simply, all of the rules applicable to the Tribal Court
13 (the CODE) control in Juvenile Court, *unless* they are in
14 conflict with the comparatively small handful of exceptions
15 articulated in the JCODE. This is crucial.

16 If the JCODE were designed to stand alone, juveniles (and
17 criminal proceedings generally) would be stymied for
18 incompleteness because the JCODE actually makes no allowance
19 for *most* of the fundamental requisites that are otherwise
20 covered by the main CODE. Provisions defining everything from
21 geographical or personal jurisdiction, to extradition, to
22 search warrants, to rights of the accused (and rights of the
23 victim), to discovery and motions procedures, to contempts of
24 court, are but a few of the important examples of rules,
25 rights and procedures that are absent or "silent" from the
26 JCODE. Yet these rules are all observed in Juvenile Court
27 every day *because* they are provided for in The CODE and remain

1 in control - per JCODE §1.2(C). Were one to embrace the lower
2 court's view, if the JCODE is fatally silent as to long-forms
3 then it must be equally and intentionally "silent" as to all
4 of these other fundamental provisions as well. Such reasoning
5 not only contradicts the intent of the codes, but is legally
6 illogical. It would result in no guidelines for all of the
7 above-mentioned safe-guards, even including the statute of
8 limitations, as that too is "silent" in the JCODE.

9 Clearly then, such an interpretation is entirely
10 incongruous with the aim of the JCODE, particularly when the
11 language of §1.2(C) is reviewed. One can see the specific
12 intent of that section *is* to harmonize certain heightened
13 exceptions of the JCODE with all the rest of the Law and Order
14 Code.¹⁰ It follows then that the Juvenile Code could not have
15 ever intended that it operate exclusive of the other critical
16 components of the Law and Order Code. See for e.g., State vs.
17 Fell, 203 Ariz. 186, 52 P.3d 218 (2002) for the general
18 proposition that statutes should be read complementarily when
19 construed.

20 While the JCODE is silent regarding the long-form
21 procedure, we see now that this is purposeful. The JCODE
22 actually *relies* upon all of the fundamentals already provided
23 for in the "main" CODE. Among them, the long-form and summons
24 process when a suspect has never been detained in a facility.

25 Inversely, there is absolutely no indication anywhere that

26 _____
27 ¹⁰ E.g., quicker time-frames for custodial suspects, confidentiality
28 of proceedings, a description of appropriate detention facilities and
unique adjudication options, are but a few.

1 The Codes, collectively, ever intended that Juvenile crimes
2 should *not* be afforded reasonable investigative time-frames or
3 that all juvenile crimes *have* to be charged within 10-days,
4 even where no "custody" took place.¹¹

5 Having established that the CODE controls, and the JCODE
6 merely enhances certain provisos, we can see that the summons
7 or long-form petitioning process for *initiating charges* is a
8 common method intended for both adults and juveniles, where
9 immediate detention isn't applied. This bring us to the most
10 significant split in procedures between adult and juvenile
11 proceedings, namely for (true) detainees.

12 **2. Arrested Or Detained Offenders**

13 The differences are generally outlined in the JCODE,
14 Chapter 3 (§§ 3.1 through 3.11). A quick overview of the
15 adult process, for reference sake, will follow with a
16 discussion of the juvenile in-custody process.

17 **a. Adult In-Custody Cases**

18 Once an adult offender is arrested, s/he shall be taken
19 before a tribal judge for an initial hearing within 24 hours
20 of his/her arrest, or else he shall be released. PYTRCP, Rule
21 308. Furthermore, the Complaint charging such an individual
22 shall be filed within 48 hours of his initial hearing, or the
23

24 ¹¹ One absurd possibility is that where police or victims fail to
25 immediately uncover (1)the identity or (2)the probable-cause evidence to
26 support charging a perpetrator within 10 days, but then 11 days later do
27 come to acquire this information and learn it was a juvenile, that
28 offender could *never* be charged. This is the public policy danger if
left to follow the illogical interpretation of the lower court, banning
any/all long-forms for juvenile offenders, even if they were never
placed in custody initially.

1 matter will be dismissed, *without* prejudice to the Tribe
2 filing a subsequent (i.e., long-formed) Complaint. *Id.* This
3 has been the practice for adult detainees for ages.
4

5 **b. Juvenile In-Custody Cases**

6 The Juvenile Code lays forth a stricter but equally
7 clear protocol for dealing with Juveniles that are detained.

8 As stated earlier, these are principally embodied in
9 Chapter 3 of Title 2. The linchpin to any of the Chapter 3
10 provisions applying, however, is the actual "detention" of
11 the juvenile offender.¹² From the plain reading of Chapter
12 3, a "detention" *must* occur first or none of these
13 restrictive deadlines even become relevant. Starting with
14 §3.9, it declares:

15 A. Investigation. The presenting officer shall
16 investigate within forty-eight (48) hours ***of the***
17 ***juvenile being detained..***

18 *Id.* *Emphasis Added.*

19 Everything connected to §3.9, must first fulfill the
20 inquiry: "was the juvenile detained or detained but then
21 released." The reason this is so crucial to establish is
22 that the language which the lower court bases its holding
23 upon, lies deeper *within* this very provision. Under
24 subsection 3.9(B)(4):

25 ... The *petition* shall be filed within [72] hours if
26 the child is in custody. If the child has been

27 _____
28 ¹² The entire issue at bar turns on this single elucidation.

1 previously released to his parents... **the petition**
2 **shall be filed within [10] days.**

3 Id. *Emphasis Added.*

4 Here is the magical "10-day" rule that the lower court has,
5 in the Tribe's eyes, continually misapplied. To recap
6 §3.9(B)(4), if the juvenile defendant is *detained-and-*
7 *released*, only then does the subsequent, 10-day deadline
8 apply. On the other hand, if s/he remains detained, the
9 charging-petition must be filed within just 3-days. But, if
10 s/he is never detained, then none of this section applies *at*
11 *all* and we simply turn to the summons or long-form process
12 provided for by The CODE, *supra*.

13 These serious time constraints logically mirror the
14 gravity of each custodial scenario. And, each is
15 proportional to the custodial status of the juvenile (i.e.,
16 detained, or detained but then released, or not even
17 detained in the first place).

18 Clearly then, the Due Process urgency brought on by
19 having been detained, is fundamentally absent where no
20 "detention" ever took place - as in Fabian Elenes' case
21 here. Yet the lower court has construed simply contact or
22 interviews with a juvenile, or even mere parental citation,
23 all as pseudo or constructive detentions, thereby triggering
24 the 10-day deadline for virtually every single juvenile
25 crime.
26
27

1 Probably most troubling to the lower court's super-
2 application of this perceived (universal) 10-day charging
3 deadline is the complete absence of any acknowledgment that
4 the JCODE actually defines the term "detention." Under
5 definitions of Title 2 of the JCODE it states:

6 DETENTION" - The **placement** of a juvenile in a
7 physically restrictive **facility**.

8 Id. *Emphasis Added.*

9 The JCODE therefore unambiguously expresses how the word
10 "detention" shall be applied throughout its statutes.
11 Importantly, the term does not even imply: "when an offense
12 occurs" or "when a police officer stops you" or "when a
13 parent is spoken to about a crime"¹³ or when a parent is
14 quasi-cited.¹⁴ It is a verb ("placement of") which
15 deliberately identifies a bricks-and-mortar object
16 ("physical facility") in which a juvenile must be placed,
17 before there is any detention occurring sufficient to
18 trigger the deadlines of the JCODE.

19 Without distinguishing or addressing this controlling
20 language, the lower court nonetheless holds that the Tribe's
21 Petition "should have been filed 10 days after the interview
22 with the minor [Defendant/Appellee] pursuant to.. §3.9." See

23

13 Curiously, in Exhibit D, the lower court repeatedly talked about
24 the parent being, "effectively cited" by the simple act of a police
25 officer making conversation with the parent. See Tr. pg 7, lines 5 & 19;
AND pg 2, three-lines from the bottom). In fact, there was no citation
ever given to the parent, making the constructive-citation comment
equally confusing.

26 14 Also in Exhibit D, the lower court even suggested that
27 interviewing *the parent* with the minor nowhere present, was "in effect a
28 constructive detention" of that minor. Tr. at pgs 2-3. There is no
authority for this anywhere in any law, never mind in the PYT JCODE.

1 lower court's Order, **Exhibit A**, lines 12-13). The lower
2 court goes even further, finding that the 3 months that had
3 elapsed between Defendant/Appellee's *interview* and the
4 filing of the Tribe's Petition is what made it "untimely."¹⁵

5 The risk with this kind of decision goes beyond the
6 instant case. In so holding, the lower court's reasoning
7 will dangerously preclude any potential for reasonable and
8 un-hastened investigations involving complex or hidden
9 crimes, such as those described in *footnotes 8 & 11, supra*.

10 As we saw, according to the JCODE, the trigger for this
11 fatal time-lapse requires a finding that the Juvenile was at
12 some point first in an actual detention facility. The lower
13 court, however, merely found that more than 10-days had lapsed
14 since juvenile suspect in these molest incidences had been
15 interviewed.

16 Since this ruling is at odds with clear language within
17 the JCODE requiring "detention of the juvenile to be in a
18 facility," *prerequisite* to any stringent charging protocols
19 applying, and since this ruling is furthermore at odds with
20 prior rulings from this same lower court in recent months, the
21 Tribe urges review and reversal.

24 15 The only statutory reference in the entire Order is §3.9. That is,
25 there is nothing addressing the salient effort by the Code to actually
26 limit application of the term "detention" to physically being held in a
27 facility, as intended, not "interview date" as was done here. *But See*
28 also **Exhibit E**, where the lower court inexplicably goes directly from
referencing "detention" as the statutory trigger to "offense" date,
without any logical connection to the Code or even the ruling in this
case's "interview date."

1 **CONCLUSION**

2 The Tribe respectfully asserts that the trial court
3 abused its discretion by dismissing this case, with prejudice,
4 in it's November 17th, 2005 Order.

5 The lower court views "detention" as beginning from a
6 variety of different possible measuring points, none of which
7 involves any actual detention of the juvenile suspect, as
8 required by the JCODE. In this case, the measuring point
9 happened to be the date when Appellee was interviewed
10 (voluntarily) at the invitation of a detective.

11 Since there was never a detention of the juvenile-
12 offender, the initial petition charging the juvenile needed
13 only to occur within the boundaries of the statute of
14 limitations. Accordingly, while it was three (3) months after
15 the Defendant/Appellee was interviewed, it was still 9 months
16 from the expiration of the statute of limitations.

17 For all of these reasons, The Tribe prays this Court
18 grant it relief by reversing the lower court's November 17th,
19 2005 Order which dismissed Fabian Elenes' case with prejudice.
20

21
22 ///

23
24 ///

1
2 **Respectfully submitted this 23rd day of January, 2006.**
3

4 OFFICE OF THE PROSECUTOR
5 PASCUA YAQUI TRIBE

6 

7 Micah Schmit
8 Chief Prosecutor

9
10 Original and four copies of the foregoing delivered/mailed
11 This January 23rd, 2006 to:

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

13 Copies delivered/mailed this date to:

14 Guillermo Saldivar c/o
15 PYT Public Defenders Ofc
16 Attorney for Appellee

17 PYT Attorney General's Office
18 Attn: Pilar Thomas
19 Tucson, Arizona 85757

20 Pascua Yaqui Tribal Court

21 By: 

EXHIBIT A

EXHIBIT B

05 NOV 25 PM 2:38

DOCKET NO. CA-06-002

CLERK RY

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR
7474 S. Camino de Oeste
Tucson, Arizona 85757
(520) 879-6251

Patricia Castro,
Juvenile Presenting Officer

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

PASCUA YAQUI TRIBE,
Appellant,

NO. CA-06-
(Juvenile Court No. JD-06-006)

In the matter of:
ELENES, Fabian
(DOB: 04/04/89)

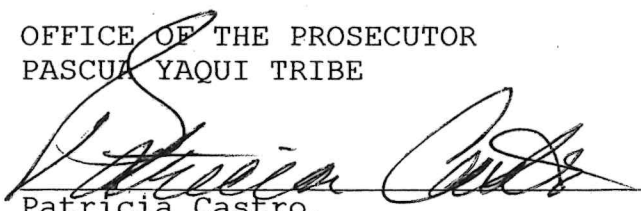
NOTICE OF APPEAL
Oral argument requested

Minor Appellee.

Notice is hereby given that the Pascua Yaqui Tribe appeals to the Appellate Court of the Pascua Yaqui Tribe from the judgment entered in this action by the Pascua Yaqui Juvenile Court on November 17, 2005. The Pascua Yaqui Tribe requests oral argument.

Respectfully submitted this 25^h day of November, 2005.

OFFICE OF THE PROSECUTOR
PASCUA YAQUI TRIBE


Patricia Castro,
Juvenile Presenting Officer

Original delivered/mailed
This date to:

Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

Copy delivered/mailed to:

Pascua Yaqui Tribal Court

By: 

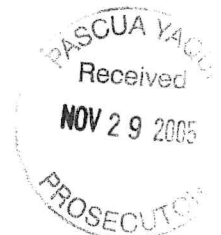


EXHIBIT C

EXHIBIT D

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IN THE PASCUA YAQUI JUVENILE COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

IN THE MATTER OF:)
)
FLORES, ARTURO,)
DOB: 09/01/87,)
A MINOR CHILD.)

CASE NO. JD-05-113

ORDER DISMISSING JUVENILE PETITION

The minor, Arturo Flores, and his mother, appeared September 1, 2005, for an initial hearing. The minor was represented by counsel, M. June Harris. Appearing for the Tribe was G. Allen Osburn.

The juvenile offender petition should be dismissed, because the Tribe failed to file its juvenile offender petition in a timely fashion, and therefore, the court lacks subject matter jurisdiction over the juvenile case.

The Pascua Yaqui Juvenile Code provides that if a child is released to the custody of his parent, the Tribe shall file its petition within ten days. 2 PYTC § 3.9(B)(4). According to the officer's probable cause affidavit, the child was "long formed" as noted in paragraph 3, on June 19, 2005, however on page two, at paragraph six of the officer's affidavit, it reads: "I request that the Court make a probable cause determination that the defendant (sic) may be continued in custody pending further proceedings." (emphasis added). The sworn and notarized affidavit also reads "the information contained herein is true and correct to the best of my knowledge and belief." The mother of the child testified that officers came by her house twice on June 19, 2005, and informed her that they were looking for her son. The officer did not request a custody warrant for the child's apprehension, but the officer's affidavit states the child was "in custody." The affidavit speaks for itself.

The file stamp on the officer's probable cause affidavit indicated the statement was made on July 24, 2005, five days after the alleged incident, and contains a police stamped showing received June 24, 2005. The affidavit attached to the juvenile offender petition and the petition itself bear a court file stamp of August 12, 2005, which is 54 days after the alleged juvenile offenses were to have occurred. The prosecutor argues that because the child was not "arrested" and "detained," it was not required to file a petition within 10 days of the June 19, 2005 incident. Yet the officer, presumably knowing he had a duty to ensure a

PASCUA YAQUI
Received
SEP 6 2005
ADMINISTRATOR

1 juvenile petition was filed within ten days, filed his affidavit in four days, which would have
2 allowed the Tribe six more days to file a petition within the ten days suggested by section
3 3.9(B)(4) of the juvenile code.

4 The Tribe argues that the code does not require the filing of a juvenile petition within
5 ten days if the child has not been detained and then released to the parent, or that if the child is
6 physically detained and in custody, the Tribe would file a petition if 48 hours and that if
7 arrested, and then released, the child's petition would be filed in ten days after the release.
8 The intent of the juvenile filing statute is to promote prompt and timely filing of the juvenile
9 offender petitions to reasonably apprise juveniles, their parents and guardians of the
10 allegations filed against them either in two days, if detained, or within ten days, if not
11 detained. The Tribe emphasizes the court should read the statute strictly by requiring only
12 after an arrest and release would the tribe be compelled to file in ten days, whereas the
13 minor's counsel argues allowing the Tribe's prosecutor to file later than 10 days after an
14 alleged juvenile offense would be a "flagrant violation of the procedures of the court" and
15 violate the minor's right to a prompt initial hearing so that the court could "provide fair
16 procedures for enforcing this code that recognize and protect the rights of the parties."

17 The presenting officer did not file the petition until August 12, 2005, or fifty four days
18 after the alleged incident, well beyond the ten days from the date of the "release," (as stated in
19 the officer's sworn affidavit the child was "in custody"), as was mandated by the Juvenile
20 Code. Due to the untimely filing of the petition, the court lacks subject matter jurisdiction
21 over the juvenile proceeding.

22 Even if the court were to assume the Tribe's assertion that the child was not actually
23 physically detained, which is does not assume, the intent of the juvenile code is to promote
24 prompt and timely investigation within 48 hours of an alleged juvenile offense, and a
25 subsequent timely filing against a juvenile. A period of 54 days after an offense is not
26 considered timely, does not fairly protect the rights of the juvenile to be cited or summoned
27 promptly. In the absence of any evidence that the minor and his parent were evading service,
28 or were secreting themselves from being served notice, the court finds there was no
wrongdoing on the part of the minor or parent to have tolled the statute or permitted a filing of
the juvenile petition 54 days after the alleged incident.

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IT IS ORDERED that based on lack of a timely filed petition, the juvenile offender petition is dismissed with prejudice to re-filing.

SO ORDERED THIS 2nd DAY OF SEPTEMBER, 2005.

Melvin R. Hoop

JUDGE, PASCUA YAQUI JUVENILE COURT

Date: 09.06.05

Juvenile Presenting Officer Minor/Parent Counsel

By: *[Signature]*
Clerk

EXHIBIT E

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IN THE PASCUA YAQUI JUVENILE COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

IN THE MATTER OF:)
ALEJANDRO, SIVOUNEH,)
DOB: 07/29/92,)
A MINOR CHILD.)

CASE NO. JD-06-027
ORDER DISMISSING JUVENILE PETITION

On January 11, 2006, the presenting officer, Patricia Castro, submitted a motion to stay proceedings in this matter, which has been set for an initial hearing on January 26, 2006. At an initial hearing, the court generally makes its determination as to whether probable cause exists. Additionally, the court must make determinations as to whether it has both personal and subject matter jurisdiction over the case.

The Pascua Yaqui Constitution provides that the Tribe "in exercising its powers of self government shall not deny to any person in a criminal proceeding the right to . . . be informed of the nature and cause of the accusation," PYT CONST. Art. I. Sec. 1(f), nor shall the Tribe "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." Id. at Sec. 1(h).

The Powers of the Pascua Yaqui Tribal Council are to develop and adopt ordinances, resolutions, rules and regulations to protect and promote the peace, health, safety and general welfare of the Pascua Yaqui people and to facilitate the conduct and operation of the tribal government. PYTC Const. Art. VI. Sec. 1(o).

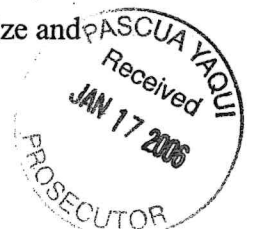
Further the Tribal Council has the power:

To enact ordinances, subject to applicable federal law and this constitution, regulating activities, including but not limited to . . . crimes. . . protection of minors. . . Id. at Sec. 1(t).

The Pascua Yaqui legislature, through its constitutional authority to do so, established the "purpose" of the juvenile code, under Juvenile Code section 1.1, which provides in pertinent part as follows:

The Juvenile Code shall be construed and interpreted to fulfill the following purposes: . . .

(D) to provide fair procedures for enforcing this Code that recognize and protect the rights of the parties.



1 The Pascua Yaqui Juvenile Code provides for two separate time frames in which
2 juvenile offender petitions shall be filed against alleged juvenile offenders. The juvenile code
3 provides firstly, that if a child is detained, the Tribe must file a petition within 72 hours of the
4 child's detention, 2 PYTC § 3.9 (B)(4), and secondly, if the child is released to the custody of
5 his parent, the Tribe shall file its petition within ten days. 2 PYTC § 3.9(B)(4). According to
6 the officer's probable cause affidavit, the child was "long formed without a warrant," as noted
7 in paragraph 3. The officer did not request a custody warrant for the child's apprehension.

8 This case file indicates that the child allegedly committed a juvenile offense on
9 December 18, 2005, and the probable cause affidavit filed by the police officer attached to
10 and made part of the juvenile offender petition bears the notation and date "Pascua Police
11 Received December 19, 2005." The file stamp on the officer's probable cause affidavit
12 indicated the statement was made on December 19, 2005, the day after the alleged incident,
13 and contains a police stamped showing received December 19, 2005. The juvenile offender
14 petition itself bear a court file stamp of January 11, 2006, which is 24 days after the alleged
15 juvenile offense was to have occurred.

16 The intent of the juvenile filing statute requiring a juvenile petition filing within 72
17 hours of a child's detention, if the child is still in detention, or a filing of a petition within 10
18 days after the incident, if a child is not detained and in custody, is to promote prompt and
19 timely filing of the juvenile offender petitions to reasonably apprise juveniles, their parents
20 and guardians of the allegations filed against them either in 72 hours, if detained, or within ten
21 days, if not detained.

22 Allowing the Tribe's prosecutor to file later than 10 days after an alleged juvenile
23 offense would be a violation of the minor's right to a prompt initial hearing so that the court
24 could "provide fair procedures for enforcing this code that recognize and protect the rights of
25 the parties." PYTC Juv. Code § 1.1(D).

26 The presenting officer did not file the petition until January 11, 2006, or twenty four
27 days after the alleged incident, well beyond the ten days from the date of the alleged incident.
28 Due to the untimely filing of the petition, the court lacks subject matter jurisdiction over the
juvenile proceeding. A period of 24 days after an offense is not considered timely, does not
fairly protect the rights of the juvenile to be cited or summoned promptly, when the Tribe has
already established a "10 day rule" as to when petitions should be filed against minors who
are not in custody or detained.

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The juvenile offender petition should be dismissed, because the Tribe failed to file its juvenile offender petition in a timely fashion, and therefore, the court lacks subject matter jurisdiction over the juvenile case.

IT IS ORDERED that based on lack of a timely filed petition, the juvenile offender petition is dismissed with prejudice to re-filing. The motion for stay is denied, based on lack of continuing jurisdiction over the case.

SO ORDERED THIS 12th DAY OF JANUARY, 2006.



JUDGE, PASCUA YAQUI JUVENILE COURT

Date: 01-13-06

Tribe Minor/Parent

By: 

Clerk

EXHIBIT F

1 **COUNT 5: MOLESTATION OF A CHILD, 1 PYTC, Sec. 4.9**

2 Not on May 28th, 2005, but between the dates of May 24th and May 29th, 2005, Defendant
3 molested 10 y.o. victim Ramona Newell by fondling or inserting his finger(s) into the
4 victim's genitals, on an occasion separate from that in Counts 3 and 4.
5 And such violations, upon conviction, are punishable under the Pascua Yaqui Tribal
6 Codes.

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

9 DATED this 7th day of October, 2005.

10
11 _____
12 Complainant/Juvenile Presenting Officer

13
14 MINOR'S ADDRESS: 7542 Kova Voo'o; Tucson, Az 85757
15 DOB: 04/04/89 SSN: 600-04-1307 ORIGIN: Pascua Yaqui No. 2694U09792
16 MINOR'S GUARDIAN: Anjelica Elenas 7542 Kova Voo'o; Tucson, Az 85757; 908-8729
17 ADDRESS: 7542 Kova Voo'o. Tucson, Az 85757 TRIBAL AFFILIATION: Pascua Yaqui

18 *Note: Accused persons, or their lawful representative, may obtain disclosure information about their*
19 *case ten days after arraignment by contacting the Prosecutor's Office at 4725 West Tetakusim Bldg C,*
20 *Tucson AZ 85746. [PYTC Title 10 Rule 5.1]*

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME

05 OCT - 6 PM 4:33

<p>PASCUA YAQUI TRIBE, Plaintiff,</p> <p>Vs.</p> <p>Fabian Elenes, Defendant</p>	<p>DOCKET NO. _____ CLERK _____</p> <p>DOCKET NO. _____ CLERK _____</p> <p style="text-align: right;">05 OCT - 7 PM 4:55</p> <p>COURT USE ONLY</p> <hr/> <p>Case Number: 050621-2404</p>
PROBABLE CAUSE AFFIDAVIT	

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME

AFFIDAVIT

1. I, Alfred Woods, 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: Fabian Elenes
 Driver's license number: N/A
 PY Enrollment number: 2694U09792
 Date of Birth: 04/04/89

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

3. The defendant was arrested cited long formed without a warrant on 07/22/05 at 0800 A.M. P.M.

4. I have probable cause to believe that the defendant committed the following offense(s) at 7542 Kova Voo'o (address) which is within the exterior boundaries of the Pascua Yaqui Indian Reservation:

PYC / ARS , Title , Chapter 4, Section 4.5, Sexual conduct with a minor

PYC / ARS , Title , Chapter 4, Section 4.6, Sexual assault



- PYC / ARS , Title 4, Chapter , Section 4.9, Molestation 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 ,

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 06/21/05 at approximately 0025 hours, Sergeant E. Esparza notified me of a possible molestation victim (Ramona Newell DOB 04/25/1995, non tribal member) that was at St. Mary's Hospital. I then responded to the hospital and made contact Ramona and her mother, Christina Wise.

Upon talking to Christina, she told me that her daughter, Ramona was molested by Fabian Elenes. She stated that Ramona told her that Fabian put his fingers in her vagina. ?

I then spoke with Ramona, she told me that her Aunt, Angie picked her up around May 24, 2005 and she stayed with her for four (4) days. She stated that her aunt lives in New Pascua in the back by the new houses, she wasn't sure of the address.

Ramona stated that Fabian came up behind her and put his fingers inside of her vagina and was moving his hand fast and hard; it felt like he was punching her. She stated that it hurt and she told him to stop but he wouldn't until he heard someone coming. She stated that they were in his bedroom. She also stated that on a separate occasion he laid behind her put his hands into her underwear and then put his fingers into her vagina. She stated that he did the same thing about three (3) more times over the four (4) days she was at the aunt's house.

Upon interviewing Anjelica Elenes, she stated that Fabian told her that he "did it, he fondled Ramona" Anjelica also stated that she picked up Ramona on 05/27/05 and she stayed throughout the holiday weekend. I Also talked to Davaid Elenes, he stated that Fabian admitted to him that he fondled Ramona.

Upon interviewing Fabian Elenes, he admitted to inserting his right index finger into the vagina of Ramona Newell on two (2) occasions and moving it around in a circular motion. Fabian stated that the only day that he molested Ramona was on Saturday 05/28/05.

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 and, if the defendant is in custody, that he be continued in custody, pending further proceedings.



 Signature of Officer

10/03/05

 Date

SUBSCRIBED AND SWORN BEFORE ME ON Oct. 3, 2005


Notary Signature

My Commission expires JUNE 2, 2008

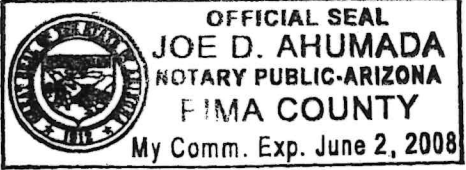


EXHIBIT G

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

IN THE MATTER OF:) CASE NO: JD-06-006
)
ELENES, FABIAN) SUMMONS
04/04/89)
A MINOR CHILD) (PARENT/GUARDIAN)

TO: ANJELICA ELENES, 7542 S. KOVA VOO'O, TUCSON AZ 85746

YOU ARE SUMMONED TO APPEAR WITH said minor on **NOVEMBER 3, 2005**
at 2:30 P.M. AT 4725 W. Calle Tetakusim for Initial Hearing.

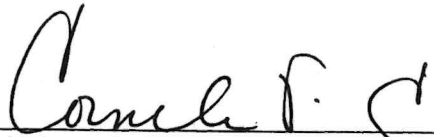
You and your child/ward have certain rights under Sec. 1.5 of the Juvenile Code.

1. The right to know the allegations against the minor.
2. The right to retain counsel for the minor at your own expense for all stage of the proceedings.
3. The right of the minor to remain silent.
4. The right to cross-examine witnesses.
5. The right to subpoena witnesses for the minor.
6. The right to know the consequences if the allegations in the petition are found to be true.
7. The right to appeal decisions of the Juvenile Court to the Court of Appeals.

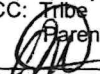
This summons shall be served upon the parties at least 14 days prior to the hearing.

Failure to appear may result in warrant for your arrest or other appropriate sanctions.

DATED THIS 10TH DAY OF OCTOBER, 2005



Judge, Pascua Yaqui Juvenile Court

Date: 10/11/05
CC: Tribe
Parent/Minor


Court Clerk

05 DEC 12 PM 4:34

DOCKET NO. CA-06-002

CLERK SBM

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR
7474 S. Camino de Oeste
Tucson, Arizona 85757
(520) 879-6251

Micah Schmit, SB# 014887
Chief Prosecutor

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

PASCUA YAQUI TRIBE,)	
Appellant,)	NO. <u>CA-06-002</u>
)	(Juvenile Court No. JD-06-006)
Vs.)	
)	Appellant's Motion Requesting
Fabian E.)	Designating Appeal a Priority.
Appellee.)	
_____)	

COMES NOW The Pascua Yaqui Tribe, by and through counsel undersigned, and hereby motions this Court to consider designating this case as one having "priority," pursuant to PYTRAP, Rules 6 & 28. Under Rule 28, the Court of Appeals may exercise its discretion and designate any other case, besides those specifically enumerated, as meriting priority on its docket.

The Tribe seeks the status of "priority" on this matter for three reasons. First, this criminal case is one of especially serious nature (sexual abuse) and the Tribal Juvenile Court dismissed such case with prejudice. Second, the basis for the dismissal turns on an interpretation of jurisdictional law involving the Juvenile Code, thereby comprising a purely legal issue but with tribal-wide impact on numerous pending juvenile arrests. Third, the

interpretation of this section of Juvenile Law will have an on-going detrimental impact on redressing future crimes committed by juveniles unless resolved.

For each of these reasons, the Tribe urges that this Court apply its discretion in declaring this matter a priority. The Court may further wish to consider the efficacy of consolidating similarly situated appeals filed, or awaiting filing, by the Tribe.

Respectfully submitted this 12th day of December, 2005.

OFFICE OF THE PROSECUTOR
PASCUA YAQUI TRIBE



Micah Schmit
Chief Prosecutor

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

Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

Copies delivered/mailed this date to:

Guillermo Saldivar c/o
PYT Public Defenders Ofc
Attorney for Appellee

PYT Attorney General's Office
Tucson, Arizona 85757

Pascua Yaqui Tribal Court

By: 

05 NOV 25 PM 2:38

DOCKET NO. CA-06-002

CLERK [Signature]

1 PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR
2 7474 S. Camino de Oeste
Tucson, Arizona 85757
3 (520) 879-6251
4 Patricia Castro,
Juvenile Presenting Officer

6 **IN THE PASCUA YAQUI TRIBE COURT OF APPEALS**
7 **IN AND FOR THE PASCUA YAQUI RESERVATION, ARIZONA**

8 PASCUA YAQUI TRIBE,
9 Appellant,
10 In the matter of:
ELENES, Fabian
11 (DOB: 04/04/89)
12 Minor Appellee.

NO.
(Juvenile Court No. JD-06-006)

NOTICE OF APPEAL
Oral argument requested

13 Notice is hereby given that the Pascua Yaqui Tribe appeals to
14 the Appellate Court of the Pascua Yaqui Tribe from the judgment
15 entered in this action by the Pascua Yaqui Juvenile Court on
16 November 17, 2005. The Pascua Yaqui Tribe requests oral argument.
17

18 **Respectfully submitted this 25^h day of November, 2005.**

19 OFFICE OF THE PROSECUTOR
20 PASCUA YAQUI TRIBE

21 [Signature]
22 Patricia Castro,
23 Juvenile Presenting Officer

24 Original delivered/mailed
This **date** to:
25 Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

26 Copy delivered/mailed to:
Pascua Yaqui Tribal Court

27 By: [Signature]

IN AND FOR THE PASCUA YAQUI JUVENILE COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

OCT -7 PM 4:45

DOCKET NO.

CLERK

[Handwritten signature]

In The Matter Of,
ELENES, Fabian,
DOB: 04/04/1989

Case No. JD-06-004
JUVENILE OFFENDER PETITION

Defendant.

The PASCUA YAQUI TRIBE, hereby complains and alleges, upon information and belief, that the above named MINOR defendant, an Indian, while within the boundaries of the Pascua Yaqui Reservation at 7542 Kova Voo'o(s), did the following "Juvenile Offenses" as defined in the Pascua Yaqui Juvenile Code, Title 2 PYTC, in particular an act which if committed by an adult would be an offense, in violation of the Pascua Yaqui Tribal Code. Specifically, the MINOR is alleged to have committed the following:

COUNT 1: MOLESTATION OF A CHILD, 1 PYTC, Sec. 4.9

at b/t the hours of
On or about May 28, 2005, Defendant molested 10 y.o. victim Ramona Newell by fondling or inserting his finger(s) into the victim's genitals.

COUNT 2: MOLESTATION OF A CHILD, 1 PYTC, Sec. 4.9

at
On or about May 28, 2005, Defendant molested 10 y.o. victim Ramona Newell by fondling or inserting his finger(s) into the victim's genitals, on an occasion separate from that in Count 1.

COUNT 3: MOLESTATION OF A CHILD, 1 PYTC, Sec. 4.9

b/t the hours of
Not on May 28th, 2005, but between the dates of May 24th and May 29th, 2005, Defendant molested 10 y.o. victim Ramona Newell by fondling or inserting his finger(s) into the victim's genitals.

COUNT 4: MOLESTATION OF A CHILD, 1 PYTC, Sec. 4.9

b/t the hours of
Not on May 28th, 2005, but between the dates of May 24th and May 29th, 2005, Defendant molested 10 y.o. victim Ramona Newell by fondling or inserting his finger(s) into the victim's genitals, on an occasion separate from that in Count 3.

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11-3-05 @ 2:30

1 **COUNT 5: MOLESTATION OF A CHILD, 1 PYTC, Sec. 4.9**

2 Not on May 28th, 2005, but between the dates of May 24th and May 29th, 2005, Defendant ^{bjt}
3 molested 10 y.o. victim Ramona Newell by fondling or inserting his finger(s) into the
4 victim's genitals, on an occasion separate from that in Counts 3 and 4.

5 And such violations, upon conviction, are punishable under the Pascua Yaqui Tribal
6 Codes.

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

9 DATED this 7th day of October, 2005.

10 
11 _____
12 Complainant/Juvenile Presenting Officer

13
14 MINOR'S ADDRESS: 7542 Kova Voo'o; Tucson, Az 85757
15 DOB: 04/04/89 SSN: 600-04-1307 ORIGIN: Pascua Yaqui No. 2694U09792
16 MINOR'S GUARDIAN: Anjelica Elenas 7542 Kova Voo'o; Tucson, Az 85757; 908-8729
17 ADDRESS: 7542 Kova Voo'o. Tucson, Az 85757 TRIBAL AFFILIATION: Pascua Yaqui

18 *Note: Accused persons, or their lawful representative, may obtain disclosure information about their*
19 *case ten days after arraignment by contacting the Prosecutor's Office at 4725 West Tetakusim Bldg C,*
20 *Tucson AZ 85746. [PYTC Title 10 Rule 5.1]*

- PYC / ARS , Title 4, Chapter , Section 4.9, Molestation 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 ,

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 06/21/05 at approximately 0025 hours, Sergeant E. Esparza notified me of a possible molestation victim (Ramona Newell DOB 04/25/1995, non tribal member) that was at St. Mary's Hospital. I then responded to the hospital and made contact Ramona and her mother, Christina Wise.

Upon talking to Christina, she told me that her daughter, Ramona was molested by Fabian Elenes. She stated that Ramona told her that Fabian put his fingers in her vagina. ?

I then spoke with Ramona, she told me that her Aunt, Angie picked her up around May 24, 2005 and she stayed with her for four (4) days. She stated that her aunt lives in New Pascua in the back by the new houses, she wasn't sure of the address.

Ramona stated that Fabian came up behind her and put his fingers inside of her vagina and was moving his hand fast and hard; it felt like he was punching her. She stated that it hurt and she told him to stop but he wouldn't until he heard someone coming. She stated that they were in his bedroom. She also stated that on a separate occasion he laid behind her put his hands into her underwear and then put his fingers into her vagina. She stated that he did the same thing about three (3) more times over the four (4) days she was at the aunt's house.

Upon interviewing Anjelica Elenes, she stated that Fabian told her that he "did it, he fondled Ramona" Anjelica also stated that she picked up Ramona on 05/27/05 and she stayed throughout the holiday weekend. I Also talked to Davaid Elenes, he stated that Fabian admitted to him that he fondled Ramona.

Upon interviewing Fabian Elenes, he admitted to inserting his right index finger into the vagina of Ramona Newell on two (2) occasions and moving it around in a circular motion. Fabian stated that the only day that he molested Ramona was on Saturday 05/28/05.

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 and, if the defendant is in custody, that he be continued in custody, pending further proceedings.



 Signature of Officer

10/03/05

 Date

SUBSCRIBED AND SWORN BEFORE ME ON Oct. 3, 2005

Joe D. Ahumada
Notary Signature

My Commission expires: *June 2, 2008*

