

No. CA-07-007  
Pascua Yaqui Tribe Court of Appeals

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Pascua Yaqui Tribe, Plaintiff/Appellant,

v.

Alex Alvarez, Defendant/Appellee.

ORDER

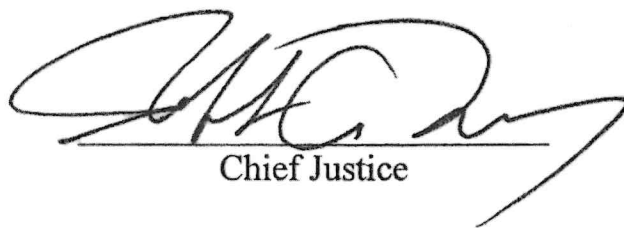
Appeal of a decision of the Pascua Yaqui Tribal Court in Case No. CR-07-46.

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

Alex Alvarez, pro se Defendant/Appellee, Tucson, Arizona.

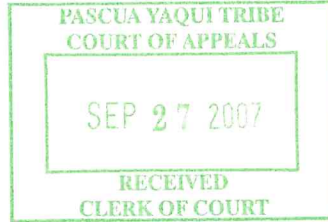
The Court dismisses the notice of appeal in this case upon motion of the Plaintiff/Appellant. The Plaintiff/Appellant shall have the right to file the case again in the Pascua Yaqui Tribal Court. A copy of this order shall be served on Alex Alvarez.

So Ordered this 8th day of October, 2006.

  
Chief Justice

Pascua Yaqui Tribe  
Office of the Prosecutor  
7474 S. Camino de Oeste  
Tucson, AZ 85746  
(520) 879-6251

Yancy A. Jencsok  
Interim Chief Prosecutor



PASCUA YAQUI TRIBAL COURT  
FILED DATE AND TIME

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DOCKET NO. CA-07-007

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**IN THE PASCUA YAQUI COURT OF APPEALS**

**IN AND FOR THE PASCUA YAQUI RESERVATION**

PASCUA YAQUI TRIBE,	)	Tribal Court Case No. CR-07-046
Plaintiff/Appellant,	)	
	)	Appellate Court Case No. CA-07-007
vs.	)	
	)	<b>APPELLANT'S MOTION TO DISMISS</b>
ALVAREZ, ALEX,	)	
Defendant/Appellee.	)	
_____	)	

The Tribe motions the court to dismiss this case without prejudice to refile in Tribal Court, pursuant to 3 PYTRAP Rule 20(B). The Tribe no longer wishes to pursue the appeal.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of September, 2007.

OFFICE OF THE PROSECUTOR  
PASCUA YAQUI TRIBE.

Yancy A. Jencsok  
Interim Chief Prosecutor

Copy delivered/mailed September 26, 2007 to:

Alex Alvarez  
c/o 7314 S. Camino Tetaviecti  
Tucson, AZ 85757

By

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

4 Micah Schmit  
Chief Prosecutor

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At \_\_\_\_\_ o'clock \_\_\_\_\_ m  
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6 IN THE PASCUA YAQUI TRIBE COURT OF APPEALS  
7 IN AND FOR THE PASCUA YAQUI RESERVATION, ARIZONA

8  
9 PASCUA YAQUI TRIBE,  
Appellant,

10 Vs. *[Redacted]*  
11 ALVAREZ, Alex V.

12 Defendant.

NO. CA-07-007  
(Tribal Court No. CR-07-046)

NOTICE OF ERRATA

13  
14 COMES NOW The Pascua Yaqui Tribe, by and through counsel  
15 undersigned, to advise the Court that the Notice of Appeal filed  
16 March 29, 2007 was mistakenly submitted without the lower court's  
17 Order. Pursuant to 3 PYTRAP Rule 3, this Court has broad  
18 authority to do justice when applying any of its rules and the  
19 Tribe respectfully requests that this Court accept the  
20 attachment.

21  
22 Respectfully submitted this 2<sup>nd</sup> day of April, 2007.

23 OFFICE OF THE PROSECUTOR  
PASCUA YAQUI TRIBE


24 *[Signature]*  
25 \_\_\_\_\_  
26 Micah Schmit  
Chief Prosecutor

1 Original delivered/mailed  
This date to:

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

3 Copy delivered/mailed to:  
Pascua Yaqui Tribal Court

4 Alex Alvarez, Defendant c/o  
7314 S. Camino Tetaviecti  
Tucson, AZ 85757

5 By:   
\_\_\_\_\_

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

4 Micah Schmit  
Chief Prosecutor

07 MAR 29 PM 4:01

CA-07-007

uk

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

8  
9 PASCUA YAQUI TRIBE,  
Appellant,

10 Vs.  
11 **ALVAREZ, Alex V.**

12 Defendant.

NO. CA-07-007  
(Tribal Court No. CR-07-046)

**NOTICE OF APPEAL**  
Oral argument requested

13  
14 Notice is hereby given that the Pascua Yaqui Tribe appeals to  
15 the Appellate Court of the Pascua Yaqui Tribe from the judgment  
16 entered in this action by Judge Stoof of the Pascua Yaqui Tribal  
17 Court on February 27, 2007. (see attached: Page 7, line 5).

18 At the hearing, a Tribal prosecutor moved the lower court to  
19 delete the adjunct Domestic Violence allegation (§3-10(F)) from the  
20 substantive Disorderly Conduct charge. However, the lower court  
21 denied the Tribe's motion on the basis that the officer's affidavit  
22 listed the crime as domestic violence/disorderly conduct and  
23 therefore the charge had to remain a domestic violence disorderly  
24 conduct charge when presented by the prosecutor.

25 The Tribe appeals Judge Stoof's decision because a government  
26 may always elect to charge any crime or crimes, provided their  
27 elements are supported by the facts set forth in an officer's


1 testimony or affidavit. A government may even choose to under-  
2 charge an incident despite a group of facts that could support  
3 multiple (or enhanced or aggravated) crimes. In other words, the  
4 prosecutor is not bound (and should never be limited by) an  
5 officer's in-the-field legal conclusions with respect to proposed  
6 charges to file, or even whether to file any charge at all. This  
7 is the ultimate province of the prosecution.

8 Since, at the time of this offense, the PYT Code momentarily  
9 lacked any "DV" enhanced crimes, the lower court went on to dismiss  
10 this case for lack of any probable cause. The Tribe hereby appeals  
11 that dismissal.

12 The Pascua Yaqui Tribe requests oral argument and a three-  
13 Justice appellate proceeding.

14  
15 **Respectfully submitted this 29<sup>th</sup> day of March, 2007.**

16  
17 OFFICE OF THE PROSECUTOR  
18 PASCUA YAQUI TRIBE

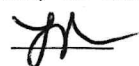
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20 \_\_\_\_\_  
21 Micah Schmit  
22 Chief Prosecutor

23 Original delivered/mailed  
24 This date to:

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

26 Copy delivered/mailed to:  
27 Pascua Yaqui Tribal Court

28 Alex Alvarez, Defendant c/o  
7314 S. Camino Tetaviecti  
Tucson, AZ 85757

By: 

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE )

Plaintiff, )

Vs. )

ALVAREZ, ALEX, )

Defendant. )

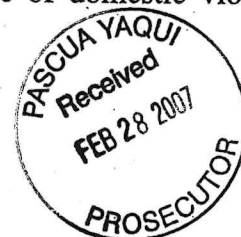
CASE NO. CR-07-046

ORDER OF DISMISSAL

On February 27, 2007, this matter came before the court on defendant's motion to dismiss based on lack of probable cause. On January 17, 2007, defendant's attorney, Nicholas Fontana, filed a motion to dismiss all Counts, because the revised criminal code does not define the alleged crime of Domestic Violence Disorderly Conduct. The Tribe, by and through G. Allen Osburn, filed its response on January 29, 2007, and the defendant filed his reply on February 2, 2007.

The defendant moved to dismiss Count One, Disorderly Conduct Domestic Violence against the defendant based on the fact that he has been charged with an offense that is not contained in the definitions of "criminal offense" under the revised Criminal Code. The Tribe argues that based on an Attorney General's letter that there was a scrivener's error in the draft of the domestic violence code, the error in the statute was corrected so that its amended definition would include the alleged conduct for which the defendant has been charged. Alternatively, the Tribe moves to amend the complaint, to delete the language "domestic violence" in Count One to strike the language "section 3-10(F)," and for the Court to find probable cause as to Count One, Disorderly Conduct. The Court notes that the Tribe filed its motion at 3:13 p.m. on Friday, February 23, 2007, and the defendant did not have an opportunity to respond to the motion to amend. The court noted that the motion practice generally followed is to permit a responding party at least 10 days to respond to any timely filed motion. The defendant objected to the Tribe's motion as untimely filed, and the court granted the defendant 10 days to respond to the Tribe's motion.

Based on the properly and timely filed motion of the defendant, the Court is asked to interpret the statutory language of the recodified domestic violence criminal statute and see whether the defendant may be charged with the offense of domestic violence disorderly conduct.



1 The Pascua Yaqui Code provides for rules of statutory construction. For example, 1  
2 PYTC § 2-40 **Conflicting Provisions**, provides in pertinent part as follows:

3 If the provision of different titles, parts, chapters, or sections of this Code conflict  
4 with or controvert each other, the provisions of the most recently enacted ordinance  
5 shall prevail if such ordinance indicates that the provisions shall prevail over  
6 previous provisions. Other wise the original ordinance shall prevail.

7 As a general rule of statutory construction, where one older statute involves the same  
8 subject matter of a later passed statute, the statute passed later in time prevails in  
9 application. 1 PYTC § 1-60 **Tribal Code Numbering**, states:

10 If there are two or more inconsistent ordinances or, if existing provisions in the  
11 current Tribal Code are in conflict, the ordinance or provision with the more recent  
12 date of amendment shall be presumed to be controlling. The tribal Code shall  
13 contain only the most recently amended version of the ordinance that comprise the  
14 Tribal Code.

15 **1 PYTC § 2-30 Rule of Construction**

16 Criminal ordinances shall be construed according to the fair import of their terms,  
17 with a view to affect their object and to promote justice.

18 Id., at sub. § (H).

19 Other special rules or canons of construction typically apply to a court's  
20 interpretation of a particular meaning of a statute. The rule of construction applied in  
21 criminal ordinances is sometimes referred to as the "rule of lenity." The "rule of lenity"  
22 requires "that before a man can be punished as a criminal. . .his case must be plainly and  
23 unmistakably within the provisions of some statute." *United States v. Gradwell*, 243 U.S.  
24 476, 485 (1917). Lenity principles "demand resolution of ambiguities in criminal statutes in  
25 favor of the defendant." *Hughey V. United States*, 495 U.S. 411, 422 (1990). See also *United*  
26 *States v. Granderson*, 511 U.S. 39, 54 (1994) ("In these circumstances – where text,  
27 structure and [legislative] history fail to establish that the Government's position is  
28 unambiguously correct – we apply the rule of lenity and resolve the ambiguity in [the  
defendant's] favor"); *Cleveland v. United States*, 531 U.S. 12, 25. (2000) (before choosing a  
"harsher alternative" interpretation of the mail fraud statute, "it is appropriate . . .to require  
that Congress should have spoken in the language that is clear and definite." The reasons for  
the rule are that "fair warning should be given to the world in a language that the common  
world will understand, of what the laws intends to do if a certain line is passed" and that  
"legislatures and not courts should define criminal activity." *Ratzlaf v. United States*, 510

1 U.S. 135, 148-149 (1994) quoting *Boyle v. United States*, 283 U.S. 25, 27 (1931) (Justice  
2 Holmes for Court). If statutory language is unambiguous, the rule of lenity is inapplicable.

3 Another well-accepted canon of statutory construction is *Expressio Unius est*  
4 *Exclusio alterius*, or express mention of one thing implies exclusion of all others. The canon  
5 is applied when the language of a statute is ambiguous. Again, because the statute in  
6 question is unambiguous, the second canon of construction example above does not apply.

7 A court must, if possible, give effect to every clause and word of a statute, *Negonsott*  
8 *v. Samuels*, 507 U.S. 99 (1993). The defendant was charged with an offense under 4 PYTC  
9 § 3-10(F), under the criminal code section made part of the criminal code recodified on  
10 August 9, 2006. The recodified code section provides in pertinent part, as follows:

11 “Domestic Violence” means any act which is a dangerous crime against children as  
12 defined in Section 10(A) or an offense defined in Sections 10(B) if the relationship  
13 between the victim and the defendant is one of marriage or former marriage or of  
14 persons of the opposite sex residing or having resided in the same household or if the  
15 victim and defendant or the defendant’s spouse are related to each other by  
16 consanguinity or affinity to the second degree.

17 The recodified section 10(A) refers to “Dangerous Crimes Against Children” and Section  
18 10(B) refers to “Child Prostitution.”

19 The Tribe in its response to the defendant’s motion to dismiss has provided as an  
20 exhibit, a copy of a letter dated November 13, 2006 from the Office of the Attorney General,  
21 Pascua Yaqui Tribe, which reads:

22 November 13, 2006

23 Judicial  
24 Law Enforcement  
25 Legal Services Department  
26 Prosecutor’s Office  
27 Public Defender’s

28 Re: Pascua Yaqui Tribal Code book

Due to a scrivener’s error Title 4, Chapter 3, Section 10(F) of the tribal code  
had an erroneous cross reference and citation.

There was no intent to alter, amend, or otherwise change the substantive law  
and the attached new page reflects the corrected citation and cross reference.

Sincerely,

/S/

Pilar Thomas, Interm Attorney General  
Office of Attorney General

1 Attached to the Attorney General's letter of November 13, 2006, is a section which differs  
2 from that cited by the defendant in his brief. The language in the attachment reads:

3 (F) "Domestic Violence" means any act which is a dangerous crime against children  
4 as defined in Section 10(A) or an offense as defined in Title 4, Chapter 1, if the  
5 relationship between the victim and the defendant is one of marriage or former  
6 marriage or of persons of the opposite sex residing or having resided in the same  
household or if the victim and defendant or the defendant's spouse are related to  
each other by consanguinity or affinity to the second degree. (emphasis added).

7 In all cases involving statutory construction, the starting point must be the language  
8 employed by Congress and Courts may assume that the legislative purpose is expressed by  
9 the ordinary meaning of the words used. *American Tobacco Co, v. Patterson*, 456 U.S. 63  
10 (1982). In the absence of a definition, courts construe a statutory term in accordance with  
11 its ordinary and natural meaning. *FDIC v. Meyer*, 510 U.S. 471 (1994). "In interpreting a  
12 statute a court should always turn to one cardinal canon before all others. . . Courts must  
13 presume that a legislature says in a statute what it means and means in a statute what it says  
there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 112 S.Ct. 1146, 1149 (1992).

14 The revised domestic violence statute says what it means and means what it says.

15 "Criminal offense" means conduct that gives a police officer or prosecutor probable  
16 cause to believe that a crime involving physical injury, a sexual offense, or a crime  
against property has occurred.

17 The new provisions of the recodified criminal code reflect a change in the domestic violence  
18 statutes:

19 **Title 4 CRIMINAL CODE CHAPTER 3 – DOMESTIC VIOLENCE**

20 **Recodified on August 9, 2006 by resolution No. C08-313-06**

21 **DISPOSITION TABLE**

22 Former Section	New Section
23 Title 1, Ch. 11, Sec. 11-1101	Section 10

24 When the Tribe recodified the criminal statutes, the attorney general provided a Disposition  
25 Table to guide users of the Code. The court should presume that the disposition is an  
26 explicit part of the code advising the Court to follow the statute as it was revised and  
27 presented in the revised statutes as of August 9, 2006. If the Court were to do so, then the  
28 first provision of the revised Section 10(F) which reads . . . "or an offense defined in

1 Sections 10(B)” must be the provision the court should follow, rather than the later provided  
2 language presented through the Attorney General’s “scrivener’s error” notice which reads:  
3 “or an offense as defined in Title 4, Chapter 1.”

4 The general rules applied when there is a conflict or error in a legislative act is that a  
5 proclamation cannot correct an error in a regulation, a regulation cannot correct a drafting  
6 error in a statutory provision, and a statute cannot amend an error in a Constitution. If it is  
7 indeed a drafting error, attempts to correct the error in drafting contained in the domestic  
8 violence criminal section 4 PYTC § 3-10(F), through means of an attorney general memo  
9 dated November 13, 2006, citing “Scrivener’s error,” is not an appropriate mechanism to  
10 correct drafting errors in a statutory provision. As to errors made in a printed statute that has  
11 already been published and distributed, whether such error is attributable to a scrivener’s,  
12 printer’s, or legislation’s error must be amended through legislation with an amendment  
13 passed with the same requisite formalities as the original statute which contains the drafting  
14 error.

15 The Pascua Yaqui legislative Council has sole authority to enact legislation. Pascua  
16 Yaqui Cons. Art. V § 1, and Art. VI § 1(t). The executive branch of the Tribe does not have  
17 the power to enact legislation, nor does the Office of the Attorney General. See Pascua  
18 Yaqui Const. Art. VII, 2 PYTC § 2-1-30. The Tribal Court must submit its own rules of  
19 procedure to the Tribal Council for ratification of proposed court rules. Pascua Yaqui  
20 Const. Art. VIII, § 3-4.

21 Where Congress finds an error or mistake in a draft of a law, it is for Congress to  
22 amend the legislative act passed in error. If Congress enacted into law something different  
23 from what it intended, then it should amend the statute to conform to its intent. The Court  
24 cannot correct a drafting error, nor can the Attorney General by way of a memorandum  
25 noting a “scrivener’s error” correct the legislative error. “It is beyond our province to rescue  
26 Congress from its drafting errors, and to provide for what we might think. . . is the preferred  
27 result.” *Fulbright v. United States Dep’t of Educ. (In re Fulbright)*, 319 B.R. 650 (Bankr.D.  
28 Mont. 2005), quoting *United States v. Granderson*, 511 U.S. 39 (1994) (Kennedy,  
Concurring). “Judges interpret laws rather than reconstruct legislators’ intentions. Where  
the language of those laws is clear, we are not free to replace it with an un-enacted  
legislative intent.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-453. For the Court to  
supply omissions to language not contained in a legislative act “transcends the judicial  
function.” *Iselin v. United States*, 270 U.S. 245, 251 (1926). The Court agrees with the

1 defendant that what the Tribe is asking for is “not for a construction of a statute, but in  
2 effect, an enlargement of it by the court, so that what was omitted, presumably by  
3 inadvertence, may be included within its scope.” 270 U.S. 245. 251 (1926). The court is  
4 unwilling to import language into statutes, and such inaction by the court is based on the  
5 court’s “deference to the supremacy of the Legislature.” *United States v. Locke*, 471 U.S. 84,  
6 95 (1985).

7 If the drafting error in the domestic violence code section is to be corrected, it is up  
8 to the Pascua Yaqui legislative body, the Tribal Council, to correct the error through the  
9 same requisite formalities it used when it passed the resolution adopting 4 PYTC § 3-10(F)  
10 as law and in its current form.

11 Based on the current wording of the domestic violence criminal law section, the  
12 Court does not find probable cause as to the allegations in Count One, Disorderly Conduct,  
13 Domestic Violence, under 4 PYTC § 3-10(F), because the defendant cannot be charged with  
14 such alleged offense that is not contained in the Tribal code.

15 Alternatively, The Tribe has requested that the court allow it to amend the criminal  
16 complaint to strike the words “domestic violence,” that the citation to Section 3-10(F) be  
17 stricken from Count 1, and that the Court determine probable cause on Count 1 as a charge  
18 of Disorderly Conduct. The court should deny the request to amend for lack of good cause  
19 shown, because the officer’s probable cause affidavit reads: . . . “it was apparent that Alex  
20 committed **Domestic Violence/Disorderly Conduct**,” for the alleged crime. (Emphasis  
21 added). The officer’s affidavit states that the defendant committed an offense which is not  
22 listed in the tribal code as a criminal offense. There is no probable cause found to Count 1,  
23 because the facts in the affidavit are in support of an alleged offense of Domestic Violence  
24 Disorderly Conduct which does not exist in the current tribal code.

25 Because there is no further necessity to maintain the cash bond, it should be  
26 exonerated and returned to the surety. The court should also grant the unopposed motion to  
27 withdraw by defendant’s counsel.

28 **IT IS ORDERED** that the Court grants the defendant’s motion to dismiss Count  
One, based on lack of probable cause, because the defendant cannot be charged with the  
offense of Disorderly Conduct Domestic Violence that is not contained in the revised  
criminal Code.

**IT IS FURTHER ORDERED** that the Attorney General’s attempt to correct an  
error in the language contained in a re-codified criminal code provision by way of a letter

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describing the error in drafting as a scrivener's error does not serve as a proper amendment or rescission of the legislation containing the error, because only the Pascua Yaqui Legislature may amend the drafting error in a legislative act by means of resolution and applying the same requisite formalities the Council followed in the first place when it adopted the legislation containing the error.

**IT IS FURTHER ORDERED** that the Tribe's request to amend Count 1 to delete "Domestic Violence," to strike "section 3-10(F)," and to find probable cause shall be denied for lack of good cause shown, because the officer's affidavit still states that the defendant purportedly committed the alleged offenses of "Domestic Violence/Disorderly Conduct. . .," and the alleged offense is not currently listed as a "criminal offense" as defined under the current criminal code.

**IT IS FURTHER ORDERED** that the appearance bond of \$150.00 posted by Felicita Alvarez on December 1, 2006, shall be exonerated and the bond monies shall be returned to the surety.

**IT IS FURTHER ORDERED** that the court grants the unopposed request of Nicholas A. Fontana to withdraw as legal counsel for defendant, for good cause shown. All future notices and motions shall be sent directly to Mr. Alex Alvarez, who may be served at his last known address, 7314 S. Camino Huivisim, Tucson, AZ 85757. Mr. Fontana no longer has any legal duty to assist Mr. Alvarez in this court case.

**IT IS FURTHER ORDERED** that the Court shall vacate the jury trial set for March 27, 2007 at 9:30 a.m., and all witnesses subpoenaed for that trial shall be excused from appearing. *WVS*

SO ORDERED THIS 27<sup>th</sup> DAY OF FEBRUARY, 2007.

*Melvin R. Hood*  
\_\_\_\_\_  
JUDGE, PASCUA YAQUI TRIBAL COURT

cc: Date 02-27-07  
 Tribe  Defendant  Counsel

*[Signature]*  
\_\_\_\_\_  
Clerk