No. CA-08-014
Pascua Yaqui Court of Appeals

Pascua Yaqui Tribe, Plaintiff/Appellee,

vs.

Arthur Baltazar, Defendant/Appellant.

ORDER

Appeal of a decision of the Pascua Yaqui Trial Court in Case No. CR-08-009, the Honorable Melvin Stoof, presiding.

Allen Osburn, Esq., Pascua Yaqui Tribe Office of Prosecutor, Tucson, AZ, for the Plaintiff/Appellee.

Arthur Baltazar, Tucson, AZ for the Defendant/Appellant.

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Appellant Arturo Baltazar filed a Notice to Appeal in this case on June 18, 2008 and filed an Opening Statement on October 30th, 2008.

Appellee has not filed its Response Brief.

Accordingly, the court will decide this case based on the record and the filings before the court, pursuant to 3 PYTC § 2-3-140 (C) (1).

Factual and Procedural History

On June 2, 2008, Appellant Arthur Baltazar, was convicted of fraud (counts 1 and 3), in violation of 4 PYTC § 1-370, and forgery (counts 2 and 4), in violation of 4 PYTC § 1-360. Appellant's former wife and cousin modified his time sheets, which benefitted Appellant by $183.53. Appellant was found guilty on all counts and sentenced on all counts as follows: pay $100 court costs, $183.53 restitution to the Tribe by money order within 30 days and perform 20 hours of community service within 60 days.

The Tribal Court's exhibits provide testimony from an auditor's expert opinion that state that Appellant knew about the variances between his reported hours and the extra hours in his paycheck. The auditor explains that there were discrepancies between the hours in Appellant's punch detail, the hours approved by his supervisor, and the hours punched in by his relatives. The auditor's report indicates that there were 6 out of 11 unauthorized entries giving Appellant more credit for hours than actually worked. The auditor found up to 15 hours per pay period that were over reported. Appellant denied knowing the changes were made by his former wife and cousin, but Appellant signed for every paycheck in agreement that that the hours paid for were correct.

Appellant seeks dismissal of the forgery and fraud charges on appeal based on double jeopardy. Appellant had a prior case, CR-07-161, in Tribal Court where he was charged with several counts of forgery and fraud. He was acquitted on all counts. After the acquittal for case CR-07-161, Appellant was charged for new and different fraud and forgery charges. The fraud and forgery charges in this appeal are based on more recent and separate transactions and dates than those in CR-07-161.

The Tribal Court denied Appellant's request for dismissal based on double jeopardy grounds, reasoning that the allegations and proof required in the instant case are different from the allegations and proof presented in the prior case in which he was acquitted.

Discussion

The issues before this Court are: (1) whether the trial court erred in denying Appellant's motion to dismiss based upon double jeopardy, and (2) whether the Tribe failed to meet the burden of proof required for Appellant's forgery and fraud convictions.

Double Jeopardy

Denial of Appellant's motion to dismiss based on double jeopardy is reviewed de novo. See United States v. James, 109 F.3d 597, 599 (9th Cir. 1997).

Discussion

Both the Pascua Yaqui Constitution and the United States Constitution provide that no person shall twice be put in jeopardy for the same offense. See Pascua Yaqui Const. art. I, Sec. 1(c); U.S. Const. amend. V. Although Appellant cites Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 18, 182, 76 L. Ed. 306, 309 (1932), Blockburger involved multiple punishments imposed in a single prosecution, providing that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." Blockburger, 284 U.S. at 304. The double jeopardy clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) against multiple punishments for the same offense. U.S. v. Brooklier, 637 F.2d 620 (9th Cir. 1980). The case at bar implicates the protection against a second prosecution for the same offenses after acquittal. However, Appellant has acknowledged that his second prosecution was for *different* offenses that were not tried during the first trial. Therefore Blockburger does not apply.

Appellant cites Green in his appellate brief, but Green is distinguishable form this case. In Green, the defendant was charged with committing arson by maliciously setting fire to a house, thereby causing the death of a woman. Green was tried by a jury. The jury instructions allowed the jury to find Green guilty of first degree murder or second degree murder. The jury found Green guilty of second degree murder but remained silent on the charge of first degree murder. Green appealed the conviction which the Court of Appeals reversed due to lack of evidence. The case was remanded for a new trial. On remand, Green was tried for first degree murder under the original indictment. He raised a double jeopardy defense but was overruled and he was found guilty of first degree murder. Eventually the Supreme Court heard the case and held that the jury's silence as to the first degree murder charge in the first trial was an "implicit acquittal" of the first degree charge. Thus, the Supreme Court concluded that the second trial for first-degree murder placed Green in jeopardy twice for the same offense in violation of the Constitution.

In this case, Appellant's second trial was not for the identical charges of which he was acquitted, which was the case in Green. Appellant was tried for separate charged that included conduct occurring during different pay periods that were not tried during his first trial.

Collateral Estoppel

Appellant also believes that prosecution is not permissible because of the doctrine of collateral estoppel. The Ninth Circuit has held that "if the Government's case depends on facts found in defendant's favor by an acquittal, collateral estoppel precludes the government from attempting to reprove those facts and, hence from retrying the defendant." See James, 109 F.3d at 600. Constitutional collateral estoppel exists where a fact necessarily determined in the defendant's favor by his earlier acquittal makes his conviction on the challenged second trial impossible unless the fact could be relitigated and be determined adversely to the defendant. Id. At 601. The three step inquiry the Ninth Circuit follows in determining whether collateral esoppel bars the bringing of a subsequent suit is as follows:

First, the issues in the two actions are identified so that the court may determine whether they are sufficiently similar and material to justify invoking the doctrine. Second, the court examines the first record to determine whether the issue was fully litigated. Finally, the court ascertains whether the issue was necessarily decided after examining the record." Id. (citing United States v. Schwartz, 785 F.Ed 673 (9th Cir.), cert. denied, 479 U.S. 890, 93 L. Ed. 2d 264, 107 S. Ct. 290 (1986)).

In Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970), the issue before the Court was whether the State violated Appellant's guarantee to be free from double jeopardy when it prosecuted the Appellant a second time for an armed robbery but involved a different victim. The Court held that since the single issue in dispute before the jury was Ashe's identity as one of the robbers, the federal rule of collateral estoppel, which is embodied in the Fifth Amendment's guaranty against double jeopardy, made the second trial impermissible.

In Ashe, six men were robbed by three or four masked men during a poker game. Four men, including Ashe, were charged with seven separate offenses—the armed

robbery of each of the six poker players and the theft of a car. The jury found Ashe not guilty based on insufficient evidence that he was one of the robbers.

Six weeks later, the defendant was brought to trial again and prosecuted for the robbery of a different participant in the poker game. The defendant filed a motion to dismiss based on the previous acquittal but the motion was overruled. The prosecution used the same evidence and witnesses; and some witnesses who had previously had trouble identifying the defendant now had stronger testimonies. The jury found the defendant guilty in the second trial.

The Supreme Court found that once the first jury had determined upon conflicting testimony that there was reasonable doubt as to whether the defendant was one of the robbers, the State could not present the same or different identification evidence in a second prosecution for the robbery of Knight, anticipating the new jury would find the evidence more convincing. Although the second trial related to another victim of the same robbery, the Court reasoned that the name of the victim, in the circumstances of this case, had no bearing on the issue of whether the defendant was one of the robbers. In addition, the U.S. Supreme Court noted that the State's brief conceded that following the defendant's acquittal, "it treated the first trial as no more than a dry run for the second prosecution." Ashe, 397 U.S. at 447. The prosecutor "redefined his presentation in light of the turn of events at the first trial." Id. The Court concluded that this is what the constitutional guarantee prohibits.

In order to have a valid collateral estoppel claim, the State would have to charge the same defendant multiple times with the same crime and use the same evidence and witnesses in all of the trials. In this case, both of Appellant's trials resulted from conduct that occurred at his place of employment and involved punch details, but the similarities end there. The Appellant was acquitted of similar charges in the first trial but according to the record, the second trial was based on wholly different charges that occurred after the charges for which he was originally acquitted. Appellant and his prior attorney acknowledged that the charges in the current prosecution derived from activities that occurred after the conduct for which he was previously charged and acquitted. Appellant was not twice put in jeopardy nor is there a valid collateral estoppel claim.

Insufficient evidence

The standard of review for the sufficiency of evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Discussion

The Pascua Yaqui Tribal Code defines fraud as, "Any Indian who shall by willful misrepresentations or deceit, or by false interpreting, or by the use of false weights and measures obtain money or other things of value shall be deemed guilty of an offense." See 4 PYTC § 370. According to the partial transcript of Appellant's trial, he testified that he had no knowledge that the time was being altered. However, insofar as the element of "willful misrepresentation" is concerned, the facts indicate Appellant knew that his punch details were being altered and should have been aware of the alterations because he received extra money in his paychecks during the October and November pay periods in question.

The criminal complaint filed against Appellant indicated that the conduct for which he was charged in the current case was between October 15, 2006 and November 11, 2006 (two pay periods). The punch details from October 15 through November 11, 2006, indicate that several punch details were altered or moved back. See Tribe's Exhibit #2. The record also contains a summary of the unauthorized charges, which was documented by the Pascua Yaqui Tribe internal audit department. The document, which includes the time periods from October 19, 2006 until November 9, 2006, specifies the number of hours that were unauthorized during that time and includes an amount totaling $183.53 from which Appellant benefitted. See Tribe's Exhibit #3.

In addition, documents requesting that each employee verify, correct and return his/her punch details were submitted for the employees' review. See Exhibits 4(a), 4(b), 4(c), 5(a), 5(b), and 5(c). The altered times were included in the documents and Appellant signed 5 of the 6 sheets containing the altered punch details. Thus, Defendant knew about the altered times.

Forgery is defined as follows: "Any Indian who shall, with intent to defraud, falsely sign, execute or alter any written instrument, shall be deemed guilty of forgery." As stated previously, the record contains several exhibits containing Appellant's punch details that had been altered and contained Appellant's signature.

The Tribe has proven beyond a reasonable doubt that Appellant committed fraud and forgery.

CONVICTION AND SENTENCE AFFIRMED.

So Ordered,

This, 15th 11-11

Chief Justice
Court of Appeals

No. CA-08-014

Pascua Yaqui Tribe Court of Appeals

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ORDER

Appeal of a decision of the Pascua Yaqui Tribal Court in Case No. CR-08-009, the Honorable Melvin Stoof presiding.

Allen Osburn, Esq., Pascua Yaqui Tribe Office of the Prosecutor, Tucson, AZ, for the Plaintiff/Appellee.

Arthur Baltazar, Tucson, Arizona, *pro se*, Defendant/Appellant.

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The Court finds that Appellant filed his opening brief in this appeal on October 30, 2008.

Appellee has neither filed a response brief nor filed a request for an extension of time in which to do so.

The court now orders that the Appellee file its response brief with the Appellate Clerk no later than 5:00 p.m. on October 23, 2009. Failure to file a brief by that date and time will result in this appeal being considered and a decision made based on the filings presently before the court.

So ORDERED this 5th day of October, 2009.

James C. Hopkins, Chief Judge

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IN THE COURT OF APPEALS

FOR THE PASCUA YAQUI NATION

Pascua Yaqui Tribe, Appellee, vs. Baltazar, Arthur, Appellant.	**Appellate Case No. CA-08-014** **Trial Court No. CR-08-009**

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

On October 15, 2007, the Tribe filed a complaint [PYT v. Balthazar, Tribal Court Record, document 52], against Arthur Balthazar, charging him with two counts of fraud [4 PYTC 1-370] and two counts of forgery [4PYTC 1-360]. Arthur Balthazar's initial appearance was set for November 21, 2007, but was subsequently continued because Arthur Balthazar had not been served with a summons and the complaint. The initial appearance was held on December 17, 2007, where he appeared without counsel. An amended complaint was filed on December 17, 2007 [document 46] by the Tribe to reflect defendant's correct address. The court held that there was sufficient probably cause to proceed, and set an arraignment hearing for December 21, 2007. Arthur Balthazar was released on a recognizance bond and ordered to appear at all hearings.

On December 21, 2007, Arthur Balthazar appeared for the arraignment. He was not represented by counsel. On his own, Arthur Balthazar entered a plea of not guilty and made a Motion to Dismiss based on double jeopardy violation ["Pascua Yaqui Constitution, article 1, sec. 1(c)]. The court ordered that the motion be filed with the court in writing no later than December 28, 2007, and that a copy be provided to the Tribe, for a response due no later than January 8, 2008.

In lieu of a written Motion to Dismiss for double jeopardy, Arthur Balthazar sent a letter to the judge, setting forth his concerns about being prosecuted for the same alleged offenses. The letter was received by the Pascua Yaqui Tribal Court on December 28, 2008 [Document 38]. A similar letter was sent by the attorney who represented Arthur

Balthazar at first trial, CR-07-157, and was received by the court on December 26, 2007 [Document 41]. A pre-trial hearing was scheduled for February 4, 2008. On February 4, 2008, Arthur Balthazar appeared without counsel and requested a continuance in order to secure representation for himself. The pre-trial hearing was continued until March 5, 2008.

At pre-trial, the tribal court examined Mr. Balthazar's Motion to Dismiss based on double jeopardy and denied it for lack of good cause shown.

The Tribe and the defendant stipulated for a bench trial since the defendant would not face any jail time in the event of a conviction. Trial was set for April 21, 2008 [Document 35]. Failing to appear on the scheduled trial date, a bench warrant was issued for the arrest of Arthur Balthazar, and for detention on a $100 cash bond. Taken into custody shortly thereafter [Document 25], Arthur Balthazar appeared in court the same day, without counsel. The Tribe recommended a $50 suspended fine for failure to appear. Defendant was released on a $100 cash bond and the case was re-set for trial on June 2, 2008 [Document 24].

At the time of trial, Arthur Balthazar appeared without counsel. After a bench trial where the Tribe presented several witnesses, Arthur Balthazar was found guilty on all four counts of the complaint. [Document 5]. Sentence was entered thereafter, where Arthur Balthazar was ordered to pay $100 in court costs, to make restitution to the Tribe in the amount of $183.53, and to perform 20 hours of community service.

Arthur Balthazar, through undersigned counsel, submitted a petition for *trial de novo* to the Court of Appeals on June 19, 2008. Said petition for trial de novo was later, at appellant's request, commuted into a notice of appeal on September 19, 2008.

STATEMENT OF FACTS

On December 17, 2007, the Tribe filed an amended complaint against Arthur Balthazar, charging him with two counts of fraud and two counts of forgery [Document 46]. Trial was held on June 2, 2008 and Arthur Balthazar was convicted on all four counts. This conviction followed a previous trial, CR-07-157, where Arthur Balthazar was charged with 12 counts of fraud and 12 counts of forgery and subsequently acquitted on all charges. The grounds for the charges in both cases, was an accusation of forgery on payroll punch details in order to obtain monetary advantages.

The Tribe never alleged that Arthur Balthazar altered any punch details himself, but rather the allegations were that he knew that someone else, inter alia his ex-wife Laura Balthazar and his cousin Adam Balthazar, had altered his punch details. This was first made clear in the prosecutors' opening statement, where he stated that Arthur Balthazar "is accused of signing payroll records that he knew had been altered, not altered by him, but altered by someone in finance and for his benefit."[Partial transcript, p.1.23]

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The Tribe then called several witnesses on its behalf. Alfred Woods, a Detective with the Police Department, was the law enforcement investigator on the case and he testified as to his part of the investigation in Mr. Balthazar. Linda Alvarez, the Interim Deputy Housing Director, testified as to the Housing Departments' procedures for keeping track of employee time as well as to Mr. Balthazar's employment with the Tribe. Mrs. Dubrow, a senior auditor with the Internal Audit Department, was the principal investigator on this case and she testified as to the details of her investigation and what she discovered. [Partial Transcript, 2.5 through 2.13]

The witnesses confirmed the Tribe's initial statement, that while Mr. Balthazar did appear to profit form the altered paycheck punch details, he did not alter them himself, had no possibility to alter them and indeed had taken no active role in the alleged fraudulent scheme. The prosecution then rested its case.

Mr. Balthazar did not have any witnesses, but decided to testify on his own behalf. He maintained that he did not alter the paycheck punch details or even knew about it and confirmed this statement, under oath, during cross-examined by the Tribe. [Partial Transcript, 4.2 through 4.11]. The Tribe attempted to establish during cross-examination and re-cross examination that Mr. Balthazar knew the records had been altered by his ex-wife and his cousin, arguing that he must have discussed it since he was in regular contact with his ex-wife. [Partial Transcript, 5.5 through 6.7]. However, the Tribe called neither the ex-wife, Laura Balthazar, nor the cousin, Adam Balthazar, as witnesses in order to

support its theory of the case.

At the conclusion of the 100 minutes trial, the court found Mr. Balthazar guilty on all four charges and sentenced him to $100 in court costs, restitution to the Tribe in the amount of $183.53, and 20 hours of community service. Arthur Balthazar complied with the sentence, paid the court costs and restitution and completed the community service.

STATEMENT OF ISSUES

1. WHETHER THE COURT ERRED IN DENYING THE APPELLANTS MOTION TO DISMISS ON GROUNDS OF DOUBLE JEOPARDY.

2. WHETHER THE COURT ERRED IN ITS APPLICATION OF THE BLOCKBURGER TEST IN DECIDING WHETHER DOUBLE JEOPARDY APPLIES.

3. WHETHER THE TRIBE FAILED TO MEET ITS BURDEN OF PROOF AS TO THE CHARGES OF FORGERY AND FRAUD.

STANDARD OF REVIEW

The Pascua Yaqui Constitution as well as the Pascua Yaqui Codes are silent regarding the standards of review to be applied by the Pascua Yaqui Court of Appeals. In other 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). However, the Court of Appeals has authority to review

findings of facts for clear error, *United States v. Robinson*, 94 F.3d 1325, 1327 (1996), and questions of law are subject to *de novo* review on appeal. *Pascua Yaqui Tribe v. Alma Soto*, CA-06-010, (2007).

ARGUMENTS

1. WHETHER THE COURT ERRED IN DENYING THE APPELLANTS MOTION TO DISMISS FOR DOUBLE JEOPARDY, IN VIOLATION OF ARTICLE 1, SEC. 1(C) OF THE PASCUA YAQUI CONSTITUTION AND THE INDIAN CIVIL RIGHTS ACT, 25 U.S.C 1.

The Pascua Yaqui Tribal Court erred in its decision when it rejected Appellant Arthur Balthazar's Motion to Dismiss for double jeopardy, and did so in violation of the Indian Civil Rights Act (ICRA), codified at 25 U.S.C. § 1302, and in violation of the Constitution of the Pascua Yaqui Tribe, art 1, sec. 1(c).

Both the Indian Civil Rights Act and the Pascua Yaqui Constitution provide defendants brought before a court with rights of due process that the Tribal Courts of the Pascua Yaqui Tribe, in exercising their duties, are bound to respect. The ICRA stipulates in Section 1302 (c) that no Indian tribe in exercising its powers of self-government shall "subject any person for the same offense to be twice put in jeopardy", and the Constitution of the Pascua Yaqui Tribe, art. 1, sec. 1(c) says that the Pascua Yaqui Tribe in exercising its powers of self-government shall not "subject any person for the same offense to be twice put in jeopardy".

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According to well-established jurisprudence, the doctrine of double jeopardy "protects a defendant form subsequent prosecution on the same charges", *Andrade v. Superior Court of the State of Arizona,* 183 Ariz. 113; 901 P.2d 461. And though the Trial Court has no obligation to follow the jurisprudence of the courts of the State of Arizona or of the United States, the Tribal Courts should respect the ICRA and the Constitution of the Pascua Yaqui Tribe, which protect defendants from repeat prosecution.

The Appellant submitted his motion to the court because he felt that the two counts of forgery and two counts of fraud that he was being charged with were duplicates of the charges brought against him in his first trial and of which he was declared not guilty by a jury.

To establish whether double jeopardy attaches to a case or not, Courts have long used a two-prong test. The Court of Appeals for the State of Arizona has held in Fitzgerald v. Superior Court, that a multiple prosecution challenge must show that "either the identical elements test or the same conduct test" has been violated, *Fitzgerald v. Superior Court*, 173 Ariz. 539, 845 P.2d 465. The identical elements test focuses on the elements of the offense and statesthat "if the second prosecution requires proof of the same conduct that constituted the offense for which the accused has already been prosecuted, double jeopardy prevents the second prosecution". *Id.* The same conduct test, or collateral estoppel, on the other hand focuses on the person of the accused and says that the state is precluded from prosecuting a person if a previous action involving the same person and the same charges with the same evidence has already been disposed off in a court of law. *Id.*

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Appellant relied upon the identical elements test when he made his motion to dismiss on grounds of double jeopardy. Appellant believed that this is what the Constitution of the Pascua Yaqui Tribe meant to prevent when it states that nobody shall be put twice in jeopardy for the same offense, but the Court disagreed with Appellant and denied his motion to dismiss.

However, even if the Court had judged that the charges in the second trial were not similar enough to qualify as double jeopardy under the identical elements test, the Court should have used its discretion and considered the same conduct test, or collateral estoppel, in its decision. A pro se defendant cannot be expected to know what kind of tests the court might apply in considering whether there is double jeopardy or not and the court should have used more discretion and taken judicial notice of the same conduct test since the Appellant only said what he knew and thought to be necessary. Had the court considered the same conduct test, it is possible that the court would have granted the Appellants motion to dismiss. There is no doubt that the same parties were involved, that the Appellant was charged with the same alleged offenses under the same circumstance, and that the same evidence was presented.

If the courts of the Pascua Yaqui Tribe do not recognize the validity of the same conduct test to establish double jeopardy, or do not apply it, these court leave the door wide open for the Tribe to hold back on some charges and prosecute an accused until they obtain a conviction, and it cannot be in the interest of the courts, nor in the interest of justice, to allow such tactics of prosecution. If the Tribe wants to prosecute an accused, they should have to charge him/her with everything they can prove, and not delay some of the charges, or else it would allow the Tribe to "make repeated attempts to convict an individual, subjecting him to embarrassment, expense and

ordeal and compelling him to live in a continuing state of anxiety and insecurity, *Green v. U.S.*, 355 U.S. 184, (also cited in *Taylor v. State of Arizona*, 169 Ariz. 335). The U.S. Supreme Court has also held that multiple prosecutions must be avoided because they offer the government an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged, and that "repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance", *Tibbs v. Florida*, 457 U.S. 31.

While this practice clearly improves the governments chances of getting convictions, is not in the interest of justice but rather is clearly prejudicial to the rights of individuals accused of criminal offenses.

2. WHETHER THE COURT ERRED IN ITS APPLICATION OF THE BLOCKBURGER TEST IN DECIDING WHETHER DOUBLE JEOPARDY APPLIES.

Appying the Blockburger test, the Court held in its order dated March 5, 2008 that the charges where different than those alleged in the earlier complaint, that the proof required and the facts were different and that therefore double jeopardy did not apply.

The Blockburger test as established by the U.S. Supreme Court in Blockburger v. U.S. establishes that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other

does not", *Blockburger v. U.S.,* 284 U.S. 299, 304 (1932).

Interpreting the test as stated in the decision, the Tribal Court may have been right in denying the Appellant's motion. However, the U.S. Supreme Court issued the Blockburger decision in 1932 and many courts have since qualified the Blockburger test, developing a modified and taking into consideration the superior strength of the government and thus increasing the burden of proof.

Thus, the Supreme Court of Arizona held in State of Arizona v. Nunez, that the prosecution "must do more than merely survive the Blockburger test. The double jeopardy clause bars any subsequent prosecution in which the government, to establish an element of an offense charged in that prosecution, will prove conduct that constitutes and offense for which the defendant has already been prosecuted". *State of Arizona v. Nunez*, 167 Ariz. 272, 806 P.2d 281.

This was clearly the case with the Appellant, were the alleged offense was exactly the same and the underlying conduct of the Appellant was exactly the same. The Court should have applied this modified Blockburger test in its consideration of the Appellant's motion to dismiss. Failing to do so subjected Appellant to increased ordeal and to be twice put in jeopardy, in violation of the Constitution of the Pascua Yaqui Tribe, the Indian Civil Rights Act and the Constitution of the United States.

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3. WHETHER THE TRIRBE FAILED TO MEET ITS BURDEN OF PROOF AS TO THE CHARGES OF FORGERY AND FRAUD.

While the Tribe presented evidence during trial and called witnesses who testified to the alleged offenses and the alleged involvement of the Appellant, no evidence or testimony proved beyond a reasonable doubt that the Appellant had either knowledge of the alleged offenses or intent to commit the alleged offenses. However, both forgery and fraud pursuant to the Pascua Yaqui Tribal Code require an element of intent or *mens rea*[1].

Forgery, [4 PYTC § 1-360], reads as follows: "Any Indian who shall, with intent to defraud, falsely sign, execute or alter any written instrument, shall be deemed guilty of forgery". Here, knowledge of the forgery and intent to defraud are required, but the Tribe failed to provide any evidentiary support for its claim that the Appellant knew of the falsified punch details or that he knew there was extra money in his paycheck. This assertion is supported by the Tribes own words, during the prosecution's opening statement, where Yancy Jencsok states that there are no allegations that the Appellant personally falsified the records [Transcript, Tribe's Opening Statement]. So if he didn't falsify the records, didn't know they had been falsified and didn't have intent to defraud the Tribe, were is the forgery?

As to fraud [4 PYTC § 1-370], the provision reads as follows: "Any Indian who shall by willful misrepresentations or deceit, or by false interpreting, or by the use of false weights and measures obtain money or other things of value shall be deemed guilty of an offense". Here to, the code is very clear and, through the use of "willful", indicates that

[1] *mens rea* is the mental component of criminal liability.

explicit knowledge and intent is required in order to meet the standard of fraud. Also, Appellant had made no willful misrepresentation in order to obtain monetary advantages.

Overall, the Tribe failed to demonstrate that the Appellant knew that punch details were being unlawfully altered and failed to prove that Appellant had any intent to defraud the Tribe. Appellant testified that he never talked about work with his ex-wife or with his cousin and that neither of them ever told him they modified his punch detail, and the Tribe failed to compel witness testimony from either the ex-wife or the cousin in order to establish knowledge and refute Appellant's version of the facts.

This Court of Appeals has authority to review findings of facts if the lower court made a clear error, *United States v. Robinson*, 94 F.3d 1325, 1327 (1996), and can therefore review whether the Tribe met its burden of proof and demonstrated beyond a reasonable doubt the Appellants involvement in the alleged offenses of forgery and fraud.

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CONCLUSION

Courts have a duty to provide for fairness and equity in court proceedings and in the administration of justice, and it cannot be the court's intent to allow the Tribe to repeatedly prosecute individuals on the same charges, taking advantage of the accused's ignorance of the law and the Tribe's superiority in the courtroom. Criminal trials should not be used to arbitrarily convict individuals that have not possibility for an adequate defense, but rather should serve to restore justice and peace, and if the Tribe does not have evidence to support its claims, then the accused should be found not guilty and set free.

This Court has should step-in and prevent the wrongful prosecution and conviction of individuals under its jurisdiction and it is also the Court of Appeals duty to correct errors and institute a rule of law that benefits the community and which is followed by the lower court.

Accordingly, Appellant Arthur Balthazar respectfully requests that this Court reverse the lower courts conviction on grounds of double jeopardy and for lack of proof as to the Appellant's guilt of the alleged offenses.

RESPECTFULLY SUBMITTED this 30th day of October, 2008.

Schneid

Tobias Schneider
Counsel for Appellant

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CERTIFICATE OF SERVICE

I, Tobias Schneider, hereby certify that a copy of the foregoing document was sent via **electronic mail**, this 30th day of October, 2008, to:

Office of the Prosecutor, Pascua Yaqui Tribe
Allen Osburn, Prosecutor
7474 S. Camino de Oeste
Tucson, AZ 85757

Court of Appeals, Pascua Yaqui Tribe
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