

No. CA-11-004, 11-005, 11-006  
Pascua Yaqui Court of Appeals

PASCUA YAQUI TRIBE  
COURT OF APPEALS

DEC 14 2011

Pascua Yaqui Tribe, Plaintiff/Appellee,

ISSUED  
CLERK OF COURT

vs.

Valenzuela, et al. Defendant/Appellant.

**ORDER**

Appeal of Trial Court Cases No. CR-11-123; CR-11-108; CR-11-143

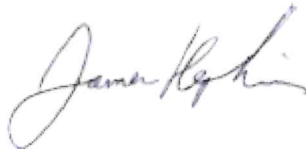
Alfred Urbina, Pascua Yaqui Tribe Office of Prosecutor, Tucson, AZ, for the Plaintiff/Appellee.

Patricia Leon-Enriquez, Pascua Yaqui Public Defender, Tucson, AZ for the Defendant/Appellant.

On June 15, 2011 the Tribal Court issued an order to stay proceedings for CR-11-123, CR-11-108, and CR-11-143 for 180 days while the cases are pending in the Court of Appeals. The cases are still pending with the appellate court.

It is ordered that the Tribal Court shall extend the stay on all further proceedings in this matter for an additional 30 days.

So **ORDERED** this 14th day of December, 2011.



James C. Hopkins, Chief Judge

1 PASCUA YAQUI PUBLIC DEFENDER  
2 7474 S. Camino de Oeste  
3 Tucson, Arizona 85757  
4 (520) 883-5013

5 Patricia Leon-Enriquez,  
6 Counsel for Appellant



PASCUA YAQUI TRIBAL COURT  
FILED DATE AND TIME

2011 OCT 21 PM 3:56

DOCKET NO. \_\_\_\_\_

CLERK \_\_\_\_\_

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

9 PASCUA YAQUI TRIBE,

10 Plaintiff/Appellee,

11 vs.

12 VALENZUELA, STELLA, et al.  
13 Defendant/Appellant.

14 APPELLATE CASE NO. CA-11-004,  
15 CA-11-005, CA-11-006

16 PASCUA YAQUI TRIBAL COURT NO.:  
17 CR-11-123, CR-11-108, CR-11-143

18 **REQUEST FOR RULING ON APPELLATE  
19 RECORD**

20 Pursuant to 3 PYTC §2-3-140 (A)(2) and 3 PYTC §2-3-140 (C)(2) of the Pascua Yaqui Tribe Rules  
21 of Appellate Procedure, counsel for Appellants Stella Valenzuela et al., respectfully requests a ruling on the  
22 appellate record because the Appellee has failed to file a timely brief. Appellants Stella Valenzuela et al., filed  
23 their Opening Brief with the Pascua Yaqui Tribe Court of Appeals on September 12, 2011. Per Clerk of the  
24 Court of Appeals Linda Imonode, a copy of that Opening Brief was served on the Appellee, the Pascua  
25 Yaqui Tribe on September 13, 2011. According to 3 PYTC §2-3-140 (A)(2), the “appellee shall file his brief  
26 and five copies within 30 days after service of the appellant’s brief.” The Appellee has clearly failed to file a  
27 timely brief, as it is now well-beyond the 30 day deadline and no such brief has been filed.

28 WHEREFORE Appellants Stella Valenzuela, et al., respectfully move this Court to rule on the  
appellate record.

DATED this 21<sup>st</sup> day of October, 2011.

PASCUA YAQUI PUBLIC DEFENDER

Patricia Leon-Enriquez  
Senior Staff Attorney  
Counsel for Defendant/Appellant

1 CERTIFICATE OF SERVICE

2 I hereby certify that the original copy of the Notice of Appeal was delivered this date to:

3 Clerk of the Court of Appeals  
4 Pascua Yaqui Court of Appeals  
5 7474 South Camino de Oeste  
6 Tucson, AZ 85757

7 and that one copy of the Notice of Appeal was delivered this date to:

8 Alfred Urbina  
9 Chief Prosecutor  
10 Office of the Prosecutor of the Pascua Yaqui Tribe  
11 4725 W. Calle Tetakusim, Bldg. C  
12 Tucson, AZ 85757

13 DATED this 21<sup>st</sup> day of October, 2011.

14 PASCUA YAQUI PUBLIC DEFENDER

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16 Patricia Leon-Enriquez  
17 Senior Staff Attorney  
18 Counsel for Defendant/Appellant  
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## **JURISDICTIONAL STATEMENT**

Pursuant to the Constitution of the Pascua Yaqui Tribe, Article VIII, §5 and the Pascua Yaqui Court of Appeals Procedures Act of 2000, §1.12, codified under Title 10 of the Pascua Yaqui Judicial Titles and Codes, this court has the power of judicial review over any Order of the Pascua Yaqui Tribal Court. Appellant Stella Valenzuela, et al., appeals an order of the Pascua Yaqui Tribal Court [June 7, 2011 Order entered in CR-11-123] in which the trial court denied Ms. Valenzuela's Motion to Dismiss for unconstitutional vagueness and lack of probable cause.

### STATEMENT OF THE CASE

On March 11, 2011, the Tribe filed a criminal complaint against Appellant Stella Valenzuela charging her with two counts of failure to send child to school. [*PYT v. Stella Valenzuela*, Pascua Yaqui Trial Court Record, document 26, hereinafter “Record at 26”]. Ms. Valenzuela’s initial appearance was held on April 5, 2011. [Record at 20]. The court determined that there was probable cause to support the charges against Ms. Valenzuela and ordered her released on a recognizance bond. [*Id.*]. Ms. Valenzuela was arraigned on the same date of April 5, 2011; she entered a plea of not guilty to both charges and a bench trial was set for June 27, 2011. [*Id.*].

On May 5, 2011, defense counsel for Ms. Valenzuela filed a Motion to Dismiss for lack of probable cause and unconstitutional vagueness. [Record at 14]. A hearing on the motion was set for June 7, 2011. [Record at 10]. Ms. Valenzuela appeared with counsel for the hearing and the matter was argued before the Trial Court. The court issued its ruling and denied the defendant’s motion to dismiss. [Record at 8 ].

On June 14, 2011, defense counsel filed a Motion to stay proceedings in Ms. Valenzuela’s case pending the filing of an interlocutory appeal. [Record at 5 ]. The Motion to Stay was granted on June 15, 2011. [Record at 3]. Ms. Valenzuela’s Notice of Appeal was filed on June 20, 2011. [Record at 1].

## STATEMENT OF FACTS

On March 11, 2011, the Tribe filed a criminal complaint against Appellant Stella Valenzuela charging her with two counts of failure to send child to school. [Record at 26]. According to the affidavit submitted in support of the complaint, Ms. Valenzuela's 17-year-old son had not attended school for the 2010-2011 school year and the officer was "unable to find any indication that he attended in 2009-2010." [Record at 27]. Additionally, Ms. Valenzuela's other minor son had missed 35 days out of 109 days of school and had been late or absent from his first-hour class 55 times since the beginning of the school year. [Id].

During the initial appearance, the Court found probable cause to believe that Ms. Valenzuela may have committed the offenses and released her on a recognizance bond. [Record at 20]. Defense counsel for Ms. Valenzuela asked the court to reconsider its finding of probable cause based on the language and the placement of the statute within the civil section of the tribal code. In denying the request to reconsider, the Court found as follows:

The Court finds that the recently enacted (Oct., 6, 2010) "Failure to Send Child to School" statute, although contained in the "civil" juvenile code, was intended as a criminal statute, based on the language stating "Any Indian"...deemed guilty of an offense." The word "guilty" implies a criminal culpability and "offense" is implied as a "criminal" offense, based on the preceding language containing the language "guilty." 5 PYTC §7-600 further provides that the ordinance is "effective upon the date of its enactment," and that if the statute conflicts with any other ordinance, "the provision of this Ordinance shall supersede and the conflicting provision shall be and hereby is repealed."

statutory interpretation  
↓  
Miranda

[Record at 20]. The court proceeded to arraignment where Ms. Valenzuela entered a plea of not guilty. A bench trial was scheduled for June 27, 2011. [Id].

On May 5, 2011, Ms. Valenzuela through legal counsel filed a Motion to Dismiss for lack of probable cause and unconstitutional vagueness. [Record at 14]. On May 6, 2011, the Trial Court ordered the Tribe to respond to Ms. Valenzuela's Motion to Dismiss. [Record at 13]. The Tribe filed its response on May 16, 2011 [Record at 12] and Ms. Valenzuela filed her reply to the Tribe's Response on May 17, 2011. [Record at 11]. The Trial Court set a hearing on the Motion for June 7, 2011. [Record at 10].

The hearing on the Motion to Dismiss was held on June 7, 2011. At the hearing, defense counsel argued that under due process, before an individual is held to answer for the violation of a criminal statute, the statute itself must do two things: give fair warning of the precise conduct deemed unlawful, and not encourage arbitrary and discriminatory enforcement. [Transcript, page 5, lines 1-10]. Defense counsel argued that under the fair warning prong, the statute must provide sufficient definitiveness that the common person is able to understand what specific conduct is prohibited. Under the Truancy provision, that understanding of definitive prohibition is not possible for two reasons.

The first reason is that when enacting the Truancy Code, the Tribal Council opted to keep the provision in the Civil Code and repealed the provisions in the Criminal Code. As a result, a person would be more likely to think that this was a civil offence rather than a criminal offence. [Transcript page 5, lines 10-25]. The second reason was that the word "offence," in and of itself, as used in the Code does not imply criminality. [Transcript, page 5, lines 25-26]. Defense counsel pointed to other sections of the Tribal Code, including the Civil Code and the Regulatory Code, which use the word "offence" without implying criminality. In those sections, when a provision

was meant to be of a civil or of a criminal nature, it was clearly referred to as either a “civil offence” or a “criminal offence.” [Transcript, page 6, lines 1-20].

Under the second prong of not encouraging arbitrary and discriminatory enforcement, defense counsel argued that the statute must provide a clear definition of the prohibited activity. This definition must be provided by the legislature not the courts. [Transcript, page 6, lines 21-26 & page 7, lines 1-2]. Two problems were pointed out by defense counsel. The first was that the Truancy provision requires the Court to go beyond the language of that provision, as evidenced by the Court itself having to look at other sections of the Code to determine the definition of the word “offence”. The second problem was that the provision allows arbitrary enforcement because it does not define the type or number of absences required for a violation. [Transcript, page 7, lines 5-15]. An example was given showing that if a child is absent one time versus a child that is absent 90 percent of the time, under the Truancy Code there is no distinction. [Transcript, page 7, lines 15-22]. Defense counsel also directed the Court to the argument made in its Motion providing that under the Doctrine of Lenity, all doubts concerning the constitutionality of an ambiguous criminal statute should be resolved in favor of the accused. [Transcript, page 7, lines 22-26].

In its response, the Tribe argued that under the issue of fair warning, the failure to send child to school is “very clear” and not vague. “It’s not vague at all, it’s very clear what this State, uh, what, uh, the Tribe has to prove in what kind of offence that has been committed, that a child has not been sent to school, and, uh, this child is under the care and custody of an adult that is responsible for that child.” [Transcript, page 11, lines 1-6].

The Tribe also argues that the word “offence” is not arbitrary because it is used throughout the criminal code generally without the actual words “criminal” in front. [Transcript, page 11, lines 6-13]. In arguing that it is fair for the word “offence” to be interpreted as criminal, the Tribe referred to a previous court ruling in CR-11-108, in which the Court held that the word “offense” meant criminal offense.<sup>1</sup> [Transcript, page 11, lines 18-26].

On the issue of whether the Court must go beyond the language of the statute to interpret the statute, the Tribe argued that the repealed provisions have no place in the argument because they were repealed. [Transcript, page 12, lines 1-15]. The Tribe argues that the only provision that matters is the one before the Court. [Transcript page 12, lines 15-16]. The Tribe continues that as applied to the facts of the case, the provision is not arbitrary and discriminatory. [Transcript, page 12, lines 17-20].

Finally, the Tribe argues that because probable cause was found initially under the affidavit alleging that one child had not been in school for two years and that the other child had missed thirty percent of the school year, the provision was not arbitrary or discriminatory as applied. [Transcript, page 12, lines 20-26]. The Tribe argued that it had sufficiently matched the facts to the elements required under statute to uphold the finding that the provision was on its face, “in the plain language and plain meaning of it...” an appropriate and not vague provision and therefore the probable cause requirements were met. [Transcript, page 13, lines 1-6].

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<sup>1</sup> Case CR-11-108 is currently on appeal with this case.

After hearing oral arguments, the Court issued its ruling denying Ms. Valenzuela's motion. [Record at 8]. In its ruling, the Court cited U.S. Supreme Court cases that defined the void for vagueness rule:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

[Record at 8, page 2, lines 5-12]

The Trial Court agreed that the vagueness doctrine has the two basic elements of "lack of notice and arbitrary enforcement." The Court gave an example of a vague law that not only failed to give notice to the defendant as to what conduct constituted a crime, but also lacked a standard for police to follow: "the scheme allowing an officer to determine what may be criminal permitted arbitrary and discriminatory enforcement of the law." [Record at 8, page 2, lines 18-26].

The Trial Court then began its analysis by looking at the language used in the statute to determine whether the legislative intent was expressed in plain language. [Record at 8, page 3, lines 21-27]. In denying the Motion to Dismiss, the Trial Court held that the statute "reasonably apprises the defendant and gives her, as a person of ordinary intelligence, notice that a certain contemplated conduct is forbidden by statute..." [Record at 8, page 4, lines 4-6]. The Court further held that the "definition of truancy in the Civil Code provides the additional notice as to what constitutes illegal

conduct related to send a child to school, and related to what constitutes a punishable offense.” [Record at 8, page 4, lines 6-8].

Additionally, the Trial Court stated that even though the Tribe had repealed two similar statutes previously contained in the Criminal Code and replaced it with the provision in question and place it in the Civil Code, it did not “affect the validity of the current statute as a criminal one, because the intent of the legislature to[sic] clear: if one is found “guilty” of failure to send a child to school, such would constitute a criminal offense.” [Record at 8, page 4, lines 9-12]. The Trial Court then referred back to its previous ruling on April 5, 2011 where it held that the use of the words “guilty” and “offense” implied that the provision was meant to be a “criminal” offense. The Court further stated that the fact that the provision was placed in the Civil Code instead of in the Criminal Code “does not in and of itself imply that prohibited conduct should be treated as “Civil” instead of “Criminal” as the Tribe has placed other criminal offenses in the Civil Code and in the Regulatory Code.” [Record at 8, page 4, lines 16-21]. Consequently, the Trial Court denied Ms. Valenzuela’s Motion to Dismiss. [Record at 8, page 5, lines 1-2].

On June 14, 2011, Ms. Valenzuela filed a Motion to stay proceedings in the lower court in order to file an interlocutory appeal with the Pascua Yaqui Court of Appeals. [Record at 5]. The Tribal Court granted Ms. Valenzuela’s motion to stay the proceedings on June 15, 2011. [Record at 3]. On June 20, 2011, Ms. Valenzuela filed a Notice of Appeal. [Record at 1].

**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

I. Whether the Court erred in finding that the Failure to Send Child to School statute was not unconstitutionally vague, thereby depriving Appellant of her due process of law guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act.

A. Whether the Court erred in finding that the definition of the Failure to Send Child to School provides notice as to the illegal conduct the statute prohibits.

B. Whether the Court erred in failing to address the arbitrary and discriminatory enforcement prong of the vagueness doctrine.

## STANDARD OF REVIEW

The Pascua Yaqui Constitution and Pascua Yaqui Judicial Titles and Codes are silent regarding the standards of review to be applied by the Pascua Yaqui Court of Appeals. In other 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); *United States v. Robinson*, 94 F.3d 1325, 1327 (9<sup>th</sup> Cir. 1996) (findings of fact reviewed for clear error). Questions of law are subject to *de novo* review on appeal. *Pascua Yaqui Tribe v. Alma Soto*, CA-06-010, at 8 (2007).

## ARGUMENT

- I. THE COURT ERRED IN FINDING THAT THE FAILURE TO SEND CHILD TO SCHOOL WAS NOT UNCONSTITUTIONALLY VAGUE THEREBY DEPRIVING APPELLANT OF HER RIGHTS OF DUE PROCESS OF LAW AS GUARANTEED BY ARTICLE 1, § 1(H) OF THE PASCUA YAQUI CONSTITUTION AND THE INDIAN CIVIL RIGHTS ACT, 25 U.S.C. § 1302(8).

Article I, §1(h) of the Pascua Yaqui Constitution provides that all Indians within the jurisdiction of the Tribal Court shall be entitled to due process of law. Likewise, the Indian Civil Rights Act (“ICRA”) provides that "No Indian tribe in exercising powers of self-government shall...deny to any person within its jurisdiction the equal protection of its law or deprive any person of liberty or property without due process of law." 25 U.S.C. §1302(8).

In Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1047 (*reversed on other grounds*) the court held that, while Fourteenth Amendment standards do not apply with full force to tribal nations, "[t]he history and decisions teach us that the Indian Bill of Rights is modeled after the Constitution of the United States and is to be interpreted in the light of constitutional law decision." The five-year legislative history of ICRA (see e.g. the discussion of ICRA legislative history, Martinez at 1042-1047), demonstrates clearly that the meaning of the language in ICRA mirrors the meaning of the language in Constitutional legal analysis. Correspondingly, United States Supreme Court decisions regarding due process rights under the Fifth Amendment of the United States Constitution, although not binding, provide some guidance as to the due process rights in Indian Country under the ICRA. Therefore, in order to determine Defendant's due process rights in the context of the Tribal law, this Court must consider and rely on the interpretations by federal courts, which have considered similar issues.

The Due Process clause of Article I-Bill of Rights, Section 1 (h) of the Constitution of the Pascua Yaqui Tribe and the Fifth Amendment of the U.S. Constitution require that before an individual is held to answer for the violation of a criminal statute, the statute itself must give fair warning of the precise conduct deemed unlawful. *See Pierce v. United States*, 314 U.S. 306, 311 (1941) (observing that the requirement that "crimes be defined with appropriate definiteness" is rooted in the common law as well). "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted). Thus, under the protective mantle of due process, "[n]o one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes... . All are entitled to be informed as to what the state forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

The Supreme Court has identified twin policy values that the prohibition on vague penal statutes serves:

First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

*Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Accord 511 Detroit Street, Inc. v. Kelley*, 807 F.2d 1293, 1295 (6th Cir. 1986).

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The question of whether a statute is unconstitutionally vague in any given case must be made on the basis of the application of that statute to the facts presented by the particular defendant. The Supreme Court has stated that "[i]t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." United States v. Mazurie, 419 U.S. 544, 550 (1975). Although there is a general presumption in favor of the validity of the statutes passed by the Legislature, this presumption is weakest in criminal cases, because of the nature of the individual interests at stake. Winters v. New York, 333 U.S. 507, 515 ("the standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanctions for enforcement."). Accordingly, criminal laws must be scrutinized "rigorously in order to protect unsuspecting citizens from being ensnared by ambiguous statutory language." United States v. Insko, 496 F.2d 204, 206 (5th Cir. 1974). Moreover, under the doctrine of lenity, all doubts concerning the constitutionality of an ambiguous criminal statute should be resolved in favor of the accused. The twin policies recognized by the Supreme Court under the doctrine are: fair warning of criminal consequences in terms that the common person would understand, and a clear definition of the prohibited activity by the legislature and not the courts. United States v. LeCoe, 936 F.2d 398, 402 (9<sup>th</sup> Cir. 1991). Additionally, the rule not only applies to interpretation of the statutes, but also to the penalties imposed. *Id.*

- A. The court erred in finding that the terms of the Failure to Send Child to School statute provide notice as to the illegal conduct the statute prohibits.

In its Motion to Dismiss and in the arguments made before the Trial Court, Defendant argued that Title 5, Chapter 7, Subchapter J: Truancy, is unconstitutionally vague and violates the due process clause of the Pascua Yaqui Constitution because it fails to provide the Defendant and other members

of the community adequate and fair notice of what conduct is criminally prohibited, and it invites arbitrary and discriminatory enforcement in this case.

The Defendant has been criminally charged under the following subsection:

5 PYT § 7-570, Failure to Send Child to School, which states:

“Any Indian who shall without good cause neglect or refuse to send his or her children or any children under his or her care to school and said children not having reached their 18<sup>th</sup> birthday shall be deemed guilty of an offense.”

Prior to the enactment of The Truancy Ordinance Amendments of 2010 (Ordinance 17-10) by the Pascua Yaqui Tribal Council, Truancy was addressed in both the Criminal Code (Title 4, Chapter 1, Subchapter B, Section 110) and the Civil Code (Title 5, Chapter 7, Subchapter J). The penalties for Truancy were also addressed in both the Criminal Code (Title 4, Chapter 1, Section 111 and Title 4, Chapter 4, Section 111) and the Civil Code (Title 5, Chapter 7, Subchapter J, Section 580). When the Truancy Ordinance Amendments of 2010 were enacted, both the offense and the penalty for truancy under the Criminal Code (Title 4, Chapter 1, Sections 110 & 111) were repealed. Additionally, Section 570 (Truancy-Truancy with a prior) of the Civil Code was changed to “Failure to Send Child to School” and Section 580 (Adult Civil Infractions for Juvenile Truancy) was repealed.

Since the “Truancy” section was purposefully repealed in the Criminal Code but remains in the Civil Code, it follows that the violation would be of a civil nature. These provisions which clearly describe a civil violation are nevertheless being used to charge the defendant with a criminal offense.

At the Initial Hearing, when the Court was asked to reconsider its finding of probable cause, it held that “the recently enacted (Oct. 6, 2010) “Failure to Send Child to School”” statute, although

contained in the “civil” juvenile code, was intended as a criminal statute, based on the language stating “Any Indian”...deemed guilty of an offense.” The word “guilty” implies a criminal culpability and “offense” is implied as a “criminal” offense, based on the preceding language containing the language “guilty.” (Record at 20, 4/5/11). Subsequently, in denying Ms. Valenzuela’s Motion to Dismiss, the Trial Court again referred to this previous ruling stating that the legislative intent was clear based on the words “guilty” and “offense.” The Trial Court also indicated that “[t]he mere fact that the offense is listed in the civil code, rather than the criminal code, does not in and of itself imply that prohibited conduct should be treated as “Civil” instead of “criminal.” The Tribe enacted criminal offenses and placed them under a “civil” code in other matters.” [Record at 8, page 16-21].

However, the fact that a statute uses the words “guilty” or “offense” does not in and of itself imply that the prohibited conduct should be treated as “criminal” instead of “civil.” The words “guilty” and “offense” are used regularly and repeatedly in the Tribal Civil Code and Regulatory Code without implying “criminal” liability. Title 5, Civil Actions, which provides the civil liability for violations of the Civil Code states, “[a]ny person who violates any provision of Section 70 of this Chapter shall be ‘guilty’ of a civil ‘offense’...” 5 PYTC § 1-80 (A). Thus, the use of the word “guilty” in this section of the civil code does not imply criminal culpability and the word “offense” does not imply “criminal offense.” Moreover, when the Tribe placed criminal offenses in other sections of the Tribal Code, the Council’s intentions were unequivocally specified in the code as noted by the following examples.

but the word civil is better it do clarity

“Any person who knowingly fails within 15 days after written notification from the Animal Control Officer to obtain registration, or counterfeits an official dog tag, or places a dog tag upon an unregistered dog is **“guilty”** of a civil **“offense.”** (8 PYTC §6-1-30 (F))

**“It shall be a criminal offense** for any owner, through either neglect or malice, to fail to provide adequate food, ... (8 PYTC §6-1-50 (E)).

“Any person who, with malicious intent, strikes, beats, maims, or treats inhumanely any animal, **shall be guilty of a criminal offense...**(8 PYTC §6-1-50 (F)).

“No person may remove or attempt to remove an animal which has been impounded or which is in the possession of the Animal Control Officer except according to this chapter. Such removal or attempt **shall constitute a civil offense.**” (8 PYTC §6-1-50 (L)).

“Any Indian person who violates any provision of this Ordinance or any rule or regulation authorized thereunder, **shall be guilty of a criminal offense...**(8 PYTC §2-1-580).

Consequently, even if effect is given to every word in the statute, the legislative intent is *not* readily expressed by the ordinary meaning of the words “guilty” and “offense” because the Tribe has used them interchangeably to imply both civil and criminal liability. Furthermore, the fact that the statute was purposely placed in the Civil Code and actively repealed from the Criminal Code indicates that the intent of the Council was to make the provision civil and not criminal.

In the end, one of the primary problems with the Truancy provision is that it requires the Court to go beyond the plain language of the statute to ascertain the statute’s meaning. The United States Supreme Court has recognized the constitutional infirmity of imposing criminal liability under such circumstances: “...The touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the conduct was criminal.” United States v. Lanier, 520 U.S. 259 (1997).

-enactment of Ordinance Amend → probably meant to be more serious → replacement of criminal, not less serious

B. The court erred in failing to address the arbitrary and discriminatory enforcement prong of the vagueness doctrine.

The second policy identified by the United States Supreme Court regarding the prohibition on vague penal statutes states that “if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Accord 511 Detroit Street, Inc. v. Kelley, 807 F.2d 1293, 1295 (6th Cir. 1986).

In its ruling on the Motion to Dismiss, the Trial Court also held that the vagueness doctrine “has two basic elements, lack of notice and arbitrary enforcement.” [Record at 8, page-2, lines 25-26]. This issue was also addressed at the hearing on the Motion to Dismiss where defense counsel argued that the statute must provide a clear definition of the prohibited activity. This definition must be provided by the legislature, not the courts. [Transcript, page 6, lines 21-26 & page 7, lines 1-2]. One of the problems pointed out by defense counsel was that the Truancy provision allows arbitrary enforcement because it does not define the type or number of absences required for a violation. [Transcript, page7, lines 5-15]. Ms. Valenzuela was charged with a criminal offense under 5 PYT §7-570, Failure to Send Child to School, which states:

Any Indian who shall without good cause neglect or refuse to send his or her children or any children under his or her care to school and said children not having reached their 18<sup>th</sup> birthday shall be deemed guilty of an offense.

The statute is unconstitutionally vague because it provides no guidance as to the number or type of absences that would constitute a violation. The statute does not provide specific standards to be followed by those intended to enforce it. Consequently, a person who does not send a child to school for one day can be considered in violation of the statute in the same manner as a person who sends a child to school only fifty percent of the time, or even fails to send a child to school at all. The law does not distinguish between such extremes and thereby leaves it up to the police, judges, and juries to make determinations. By leaving it up to the police to determine the type or frequency of absences required for a violation, the law impermissibly delegates basic policy matters and thereby invites arbitrary and discriminatory application.

Unfortunately, although the Trial Court cited cases discussing the arbitrary and discriminatory enforcement prong of the void for vagueness doctrine and stated in its ruling that it was one of two basic elements, the court only addressed the lack of notice element and ignored the second prong.

CONCLUSION

The void for vagueness doctrine is well-established and analysis under this doctrine must include evaluation under both of its prongs. In sum, the Trial Court erred in finding that the Failure to Send Child to School provides notice as to the illegal conduct the statute prohibits and in failing to address the second prong of the void for vagueness doctrine.

The Trial Court should have granted the Motion to Dismiss for unconstitutional vagueness and lack of probable cause. The Appellant asks this Court to reverse the Trial Court's ruling denying the Motion to Dismiss.

DATED this 12<sup>th</sup> day of September, 2011.

PASCUA YAQUI PUBLIC DEFENDER



\_\_\_\_\_  
Patricia Leon-Enriquez  
Assistant Public Defender  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that five (5) copies of Ms. Valenzuela's Opening Brief were delivered this date to:

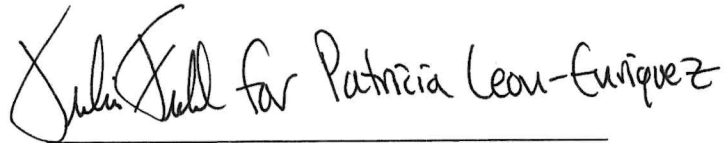
Linda Imonode  
[Linda.Imonode@pascuayaqui-nsn.gov](mailto:Linda.Imonode@pascuayaqui-nsn.gov)  
Clerk of the Court of Appeals  
Pascua Yaqui Court of Appeals  
7474 South Camino de Oeste  
Tucson, AZ 85757

and that per the instruction of the Linda Imonode, Clerk of the Court of Appeals, one (1) copy of Ms. Valenzuela's Opening Brief will be delivered on September 13, 2011 to:

Alfred Urbina  
[Alfred.Urbina@pascuayaqui-nsn.gov](mailto:Alfred.Urbina@pascuayaqui-nsn.gov)  
Chief Prosecutor  
Office of the Prosecutor of the Pascua Yaqui Tribe  
7474 South Camino de Oeste  
Tucson, AZ 85757

DATED this 12<sup>th</sup> day of September, 2011.

PASCUA YAQUI PUBLIC DEFENDER



\_\_\_\_\_  
Patricia Leon-Enriquez  
Assistant Public Defender



1 PASCUA YAQUI PUBLIC DEFENDER  
7474 S. Camino de Oeste  
2 Tucson, Arizona 85757

3 Patricia Leon-Enriquez, Esq.  
PYT Bar No. 10186  
4 Attorney for Appellant

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

8 PASCUA YAQUI TRIBE,  
9

10 Appellee,

11 vs.

12 VALENZUELA, Stella, et al,

13 Appellants.

) Case No. CA-11-004, CA-11-005, CA-11-006

) Tribal Court No. CR-11-123, CR-11-108, CR-11-143

) **MOTION FOR EXTENSION OF TIME FOR FILING TRANSCRIPT**

14  
15 Appellant Stella Valenzuela, et al, through counsel and pursuant to Section 110 (C) and Section 3  
16 PYTC §2-3-80, Pascua Yaqui Rules of Appellate Procedure, respectfully moves this to Court to enter an  
17 order extending the time for the filing of the transcript of the proceedings before the lower court.  
18 Appellant’s notice of appeal was filed on June 20, 2011. Pursuant to Section 110 (F)(5), Pascua Yaqui Rules  
19 of Appellate Procedure, no later than thirty days after the filing of the Notice of Appeal, the Appellant shall  
20 file the original transcript with the appellate court clerk and serve a copy on each party. Appellants request  
21 is made due to the following reasons:

- 22 1. Appellant first requested copies of the court record and misunderstood that a request for  
23 audio files needed to be requested separately from the request for the court record.  
Consequently, due to the misunderstanding, the request was not made until July 19,  
2011.
- 24 2. Undersigned counsel has contacted Lay Advocate Patricia Castro and Lay Advocate  
25 Rebecca Figueroa, prosecutors in the above cases, and they do not object to a request for  
extension of time to file the transcripts in the case.
- 26 3. The Chief Judge may grant a motion for a procedural order without awaiting a response  
(3 PYTC §2-3-80(c)(3))
- 27 4. Any party adversely affected by the granting of a procedural order may file a motion  
28 requesting rehearing, vacation, or modification of the order (3PYTC §2-3-80 (c)(4).

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WHEREFORE Appellants Stella Valenzuela, et al, respectfully moves this Court to enter an order extending the time for the filing of the transcripts of the lower court proceedings.

DATED this 19<sup>th</sup> day of July, 2011.

PASCUA YAQUI PUBLIC DEFENDER



Patricia Leon-Enriquez  
Assistant Public Defender

ORIGINAL e-mailed this date  
PYT Court of Appeals:

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

No. CA-11-004, 11-005, 11-006  
Pascua Yaqui Court of Appeals

---

Pascua Yaqui Tribe, Plaintiff/Appellee,

vs.

Valenzuela, et al. Defendant/Appellant.

**ORDER**

Appeal of Trial Court Cases No. CR-11-123; CR-11-108; CR-11-143

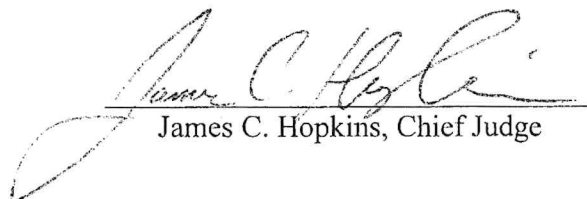
Alfred Urbina, Pascua Yaqui Tribe Office of Prosecutor, Tucson, AZ, for the Plaintiff/Appellee.

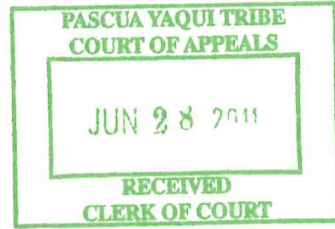
Patricia Leon-Enriquez, Tucson, AZ for the Defendant/Appellant.

On June 28, 2011 Counsel for the Defendants Valenzuela, Lujan, and Noriega submitted a Motion to Consolidate Court of Appeal cases CA-11-004, CA-11-005, CA-11-006. All three Defendants are charged with violations of the same Tribal Code Provision at issue in the Appeal and the prosecutors in the case do not object to the consolidation of these cases for purposes of this Appeal.

3 PYTC §2-3-80(c)(3) grants the Chief Judge the authority to grant motions for procedural orders without awaiting a response. Chief Justice hereby grants the Motion to Consolidate COA cases CA-11-004; CA-11-005; CA-11-006.

So **ORDERED** this day of June 30, 2011.

  
James C. Hopkins, Chief Judge



1 PASCUA YAQUI PUBLIC DEFENDER  
7474 S. Camino de Oeste  
2 Tucson, Arizona 85757  
(520) 883-5013

3 Patricia Leon-Enriquez,  
4 Counsel for Appellant

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

8 PASCUA YAQUI TRIBE,  
9 Plaintiff/Appellee,

10 vs.

11 VALENZUELA, Stella, LUJAN, Melissa,  
12 NORIEGA, Samuel;  
13 Defendants/Appellants.

) Court of Appeals Case No(s):CA-11-004; CA-11-005; CA-11-006

) Trial Court Case No(s): CR-11-123; CR-11-108; CR-11-143

**MOTION TO CONSOLIDATE**

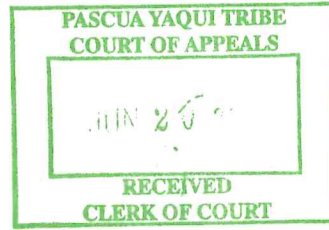
14 COME NOW the Appellants Stella Valenzuela, Melissa Lujan and Samuel Noriega, by and through  
15 their undersigned counsel, pursuant to 3 PYTC §2-3-80 (C), Pascua Yaqui Tribe Rules of Appellate  
16 Procedure, and hereby respectfully requests this Court Consolidate their cases due to the following reasons  
17 constituting good cause.

- 18 1. All three Defendants were charged with violations of the same Tribal Code Provision at  
19 issue in this Appeal.
- 20 2. A motion addressing the same issues was filed in each case and only the case of Stella  
21 Valenzuela had a formal hearing on the issues. The other cases were submitted on the  
22 Motions filed and the Honorable Judge Stoof issued similar orders in each case.
- 23 3. Undersigned Counsel has contacted Lay Advocate Patricia Castro and Lay Advocate  
24 Rebecca Figueroa, prosecutors in the above cases, and they do not object to  
25 consolidation of these cases for purposes of this Appeal.
- 26 4. The Chief Justice may grant a motion for a procedural order without awaiting a response  
27 (3 PYTC §2-3-80(c)(3).
- 28 5. Any party adversely affected by the granting of a procedural order may file a motion  
requesting rehearing, vacation, or modification of the order (3 PYTC §2-3-80(c)(4).





1 PASCUA YAQUI PUBLIC DEFENDER  
7474 S. Camino de Oeste  
2 Tucson, Arizona 85757  
3 (520) 883-5013



4 Patricia Leon-Enriquez,  
Counsel for Appellant

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

8 PASCUA YAQUI TRIBE,

9 Plaintiff/Appellee,

10 vs.

11 NORIEGA, Samuel;  
12 Defendant/Appellant.

) Court of Appeals Case No:

) Trial Court Case No.: CR-11-143

**NOTICE OF APPEAL**

13  
14 Pursuant to 3 PYTC §2-3-90, Pascua Yaqui Tribe Rules of Appellate Procedure, counsel for  
15 Appellant Samuel Noriega, respectfully files a Notice of Appeal in the Appellate Court from the Order  
16 Denying Defendant's Motion to Dismiss (Vagueness) entered in these actions by the Pascua Yaqui Tribal  
17 Court on June 15, 2011. Copy of the Court's Order is attached hereto as required by Section 90, Pascua  
18 Yaqui Rules of Appellate Procedure.

19 The Appellant further requests that this Court enter an order directing the Clerk of the Pascua Yaqui  
20 Tribal Court to prepare and submit the records within thirty (30) days.

21 DATED this 20<sup>th</sup> day of June, 2011.

22 PASCUA YAQUI PUBLIC DEFENDER

23

24 Patricia Leon-Enriquez  
25 Counsel for Defendant

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**CERTIFICATE OF SERVICE**

I hereby certify that the original copy of the Notice of Appeal was delivered this date to:

Clerk of the Court of Appeals  
Pascua Yaqui Court of Appeals  
7474 South Camino de Oeste  
Tucson, AZ 85757

and that one copy of the Notice of Appeal was delivered this date to:

Pascua Yaqui Tribal Court  
7474 South Camino de Oeste  
Tucson, AZ 85757

and that one copy of the Notice of Appeal was delivered this date to:

Alfred Urbina  
Chief Prosecutor  
Office of the Prosecutor of the Pascua Yaqui Tribe  
7474 South Camino de Oeste  
Tucson, AZ 85757

DATED this 20<sup>th</sup> day of June, 2011.

PASCUA YAQUI PUBLIC DEFENDER

  
\_\_\_\_\_  
Monique Ramsey  
Office Manager

1 IN THE PASCUA YAQUI TRIBAL COURT

2 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

3  
4 PASCUA YAQUI TRIBE, ) CASE NO. CR-11-143  
5 PLAINTIFF, ) ORDER DENYING DEFENDANT'S  
6 vs. ) MOTION TO DISMISS (VAGUENESS)  
7 NORIEGA, SAMUEL, )  
8 DEFENDANT. )  
9 \_\_\_\_\_ )

10 On June 15, 2011, the parties requested that the Court decide the defendant's motion  
11 to dismiss for lack of probable cause and for unconstitutionality of the statute because it should  
12 be void for vagueness. Appearing were the defendant and her counsel, Patricia Leon-  
13 Enriquez, and Rebecca Figueroa who appeared for the Tribe.

14 The parties waived oral arguments.

15 The defendant asserts in her brief and reply that the statute related to Failure to Send  
16 Child To School is unconstitutional and should be dismissed due to void for vagueness.

17 The Indian Civil Rights Act and the Pascua Yaqui Constitution provides that the  
18 Pascua Yaqui Tribe in exercising its powers of self government shall not deny to any person  
19 the equal protection of its laws or deprive a person of liberty without due process of law. 25  
20 U.S.C. § 1302(8), PYT Const. Art.1, § 1(h). Because the U.S. Constitution does not apply to  
21 Tribes, *Talton v. Mayes*, 163 U.S. 376 (1896), the Indian Civil Rights Act provides broad  
22 Constitutional-like rights to American Indians in tribal court proceedings. *Santa Clara*  
23 *Pueblo v. Martinez*, 436 U.S. 49 (1978).

24 The void for vagueness doctrine was developed by federal appellate courts as a rule of  
25 construction to be applied when construing the constitutionality of a particular statute. In an  
26 early case, the Supreme Court articulated the vagueness rule:

27 That the terms of a penal statute creating a new offense must be sufficiently explicit  
28 to inform those who are subject to it what conduct on their part will render them  
liable to its penalties is a well-recognized requirement, consonant alike with ordinary  
notions of fair play and settled rules of law; and a statute which either forbids or  
requires doing of an act in terms so vague that men of common intelligence must  
necessarily guess at its meaning and differ as to its application violates the first  
essential of due process of law. . . .

1 . . . [t]he crime, and the elements constituting it, must be so clearly expressed that the  
2 ordinary person can intelligently choose, in advance what course it is lawful for him to  
3 pursue.

4 *Connally v. General Const. Co.*, 269 U.S. 385, 391, and at 393 (1926).

5 Later U.S. Supreme Court cases refined the void for vagueness definition:

6 It is a basic principle of due process that an enactment is void for vagueness  
7 if its prohibitions are not clearly defined. Vague laws offend several important  
8 values. First, because we assume that man is free to steer between lawful and  
9 unlawful conduct, we insist that laws give the person of ordinary intelligence  
10 a reasonable opportunity to know what is prohibited, so that he may act  
11 accordingly. Vague laws may trap the innocent by not providing fair warning.  
12 Second, if arbitrary and discriminatory enforcement is to be prevented, laws  
13 must provide explicit standards for those who apply them. A vague law impermissibly  
14 delegates basic policy matters to policemen, judges, and juries for resolution on an  
15 ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory  
16 application.

17 *Sewell v. Georgia*, 435 U.S. 982, 986 (1978); *Grayned v. City of Rockford*, 408 U.S. 104,108  
18 (1972). See also *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Cline v. Frink*  
19 *Dairy*, 274 U.S. 445 (1927) *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

20 An ordinance is void for vagueness when it “fails to give a person of ordinary intelligence fair  
21 notice that his contemplated conduct is forbidden by statute.” *Papachristou v. City of*  
22 *Jacksonville*, 405 U.S. 156, 162 (1972). In the *Papachristou* case, the court struck down a  
23 vagrancy statute as unconstitutional because it did not define what contemplated conduct was  
24 forbidden by statute, and due to the law’s vagueness, it encouraged “arbitrary and erratic  
25 arrests and convictions.” *Id.*, at 162. Such a vaguely defined statute permitted unfettered  
26 discretion in the hands of police who could simply arrest anyone whom they believed to be  
27 “suspicious.” Thus, based on not only lack of notice to a defendant as to what conduct  
28 constituted a crime of vagrancy, but also, based on a lack of a standard as to what police  
should follow, the scheme allowing an officer to determine what may be criminal permitted  
arbitrary and discriminatory enforcement of the law. The vagueness doctrine then has two  
basic elements, lack of notice and arbitrary enforcement.

The statute challenged by the defendant as unconstitutional provides as follows:

1 Any Indian who shall without good cause neglect or refuse to send his or her children  
2 or any children under his or her care to school and said children not having reached  
3 their 18<sup>th</sup> birthday shall be deemed guilty of an offense.

4 5 PYTC § 7-570, Failure to Send Child to School.

5 The defendant argues that the statute is unconstitutional because it permits arbitrary and  
6 discriminatory enforcement and because it fails to “give fair warning of the precise conduct  
7 deemed unlawful.” Where the Supreme Court reviews the constitutionality of an act of  
8 Congress as being vague, it has to consider not only the act itself, but also, the context of the  
9 conduct to which the act is to be applied:

10 The strong presumptive validity that attaches to an Act of Congress has led this  
11 Court to hold many times that statutes are not automatically invalidated as  
12 vague simply because difficulty is found in determining whether certain  
13 marginal offenses fall within their language. [citations omitted]. Indeed, we  
14 have consistently sought an interpretation which supports the Constitutionality  
15 of legislation. [citations omitted]. **Void for vagueness simply means that  
16 criminal responsibility should not attach where one could not reasonably  
17 understand that his contemplated conduct is proscribed. In determining the  
18 sufficiency of the notice a statute must of necessity be examined in light of the  
19 conduct with which the defendant is charged.**

17 *U.S. v. National Dairy*, 372 U.S. 29, 32-33 (1963). (emphasis added).

18 The Tribe has alleged that the defendant committed a criminal offense by neglecting to send  
19 his child to school. The Tribe has also alleged that the defendant committed an offense by  
20 causing the minor to be absent from school by refusing to sent the child to school.

21 As to general canons of construction, the starting point must be the language employed  
22 by Congress and courts may assume that the legislative purpose is expressed by the ordinary  
23 meaning of the words used. *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982), In the  
24 absence of a definition, courts construe a statutory term in accordance with its ordinary or  
25 natural meaning. *FDIC v. Meyer*, 510 U.S. 471 (1994). Courts are to presume that a  
26 legislature says in a statute what it means and means in a statute what it says. *Connecticut  
27 Nat’l Bank v. Germain*, 503 U.S. 249 (1992). A court must, if possible, give effect to every  
28 clause and word of a statute. *Negonsett v. Samuels*, 507 U.S. 99 (1993).

1           The court must determine whether a person of reasonable intelligence understanding  
2 the meaning of the terms of the truancy statute and the alleged actions taken by her, if true,  
3 that she kept her child from school would be a punishable offense of a criminal offense.  
4 Because the truancy statute reasonably apprises the defendant and gives her, as a person of  
5 ordinary intelligence, notice that a certain contemplated conduct is forbidden by statute, the  
6 court should deny the defendant's motion to dismiss due to vagueness. The definition of  
7 truancy in the Civil Code provides the additional notice as to what constitutes illegal conduct  
8 related failure to send a child to school, and related to what constitutes a punishable offense.

9           The fact that the Tribe repealed two similar statutes on truancy that were contained in  
10 the criminal code and replaced those criminal provisions with the one in question and placed  
11 the statute in a civil code, does not affect the validity of the current statute as a criminal one,  
12 because the intent of the legislature to clear: if one is found "guilty" of failure to send a child  
13 to school, such would constitute a criminal offense.

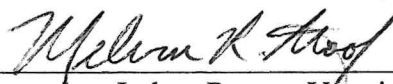
14           Notwithstanding that fact that the truancy offense is listed under a civil code, the Court  
15 has ruled in several other cases similar to this one that the word "guilty" contained in the  
16 statute implies a criminal culpability and "offense" may be implied as a "criminal" offense,  
17 based on the preceding of the statute containing the word "guilty." The mere fact that the  
18 offense is listed in a civil code, rather than contained in a criminal code, does not in and of  
19 itself imply that prohibited conduct should be treated as "Civil" instead of "criminal." The  
20 Tribe has enacted criminal offenses and placed them under a "civil" code in other matters.  
21 See, for example, regulatory code provisions for animal control contains both civil offenses, 8  
22 PYTC §6-130(F)&(L) and criminal offenses. 8 PYTC § 6-150(E)&(F).

23           Read in the light of the allegations with which she has been charged, that of allegedly  
24 refusing to send three children to school, such purported conduct may be considered as  
25 truancy, defined by the Pascua Yaqui code as "Failure to Send Child to School," and because  
26 such alleged conduct falls within a definition of what constitutes truancy under tribal law, the  
27 statute should be presumed to be constitutional and should not be stricken, because the court  
28 should favor "that interpretation of legislation which supports its constitutionality." See  
*Screws v. U.S.*, 325 U.S. 91 (1945).

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**IT IS ORDERED** that the Court denies the defendant's motion to dismiss (vagueness) for lack of good cause shown.

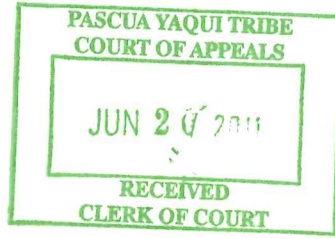
SO ORDERED THIS 15<sup>th</sup> DAY OF JUNE, 2011.

  
\_\_\_\_\_  
Associate Judge, Pascua Yaqui Tribal Court

Date 06-15-11  
cc:        Tribe        Defendant        Counsel  
        
Clerk

1 PASCUA YAQUI PUBLIC DEFENDER  
2 7474 S. Camino de Oeste  
3 Tucson, Arizona 85757  
4 (520) 883-5013

5 Patricia Leon-Enriquez,  
6 Counsel for Appellant



PASCUA YAQUI TRIBAL COURT  
FILED DATE AND TIME

2011 JUN 20 PM 4:13

DOCKET NO. \_\_\_\_\_

CLERK \_\_\_\_\_

7  
8 IN THE PASCUA YAQUI TRIBE COURT OF APPEALS  
9 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION  
10

11 PASCUA YAQUI TRIBE,

12 Plaintiff/Appellee,

13 vs.

14 VALENZUELA, STELLA;  
15 Defendant/Appellant.

) Court of Appeals Case No:

) Trial Court Case No.: CR-11-123

**NOTICE OF APPEAL**

16 Pursuant to 3 PYTC §2-3-90, Pascua Yaqui Tribe Rules of Appellate Procedure, counsel for  
17 Appellant Stella Valenzuela, respectfully files a Notice of Appeal in the Appellate Court from the Order  
18 Denying Defendant's Motion to Dismiss (Vagueness) entered in these actions by the Pascua Yaqui Tribal  
19 Court on June 7, 2011. Copy of the Court's Order is attached hereto as required by Section 90, Pascua  
20 Yaqui Rules of Appellate Procedure.

21 The Appellant further requests that this Court enter an order directing the Clerk of the Pascua Yaqui  
22 Tribal Court to prepare and submit the records within thirty (30) days.

23 DATED this 20<sup>th</sup> day of June, 2011.

24 PASCUA YAQUI PUBLIC DEFENDER

25

26 Patricia Leon-Enriquez  
27 Counsel for Defendant

28 ///  
///  
///

1  
2 **CERTIFICATE OF SERVICE**

3 I hereby certify that the original copy of the Notice of Appeal was delivered this date to:

4 Clerk of the Court of Appeals  
5 Pascua Yaqui Court of Appeals  
6 7474 South Camino de Oeste  
7 Tucson, AZ 85757

8 and that one copy of the Notice of Appeal was delivered this date to:


9 Pascua Yaqui Tribal Court  
10 7474 South Camino de Oeste  
11 Tucson, AZ 85757

12 and that one copy of the Notice of Appeal was delivered this date to:

13 Alfred Urbina  
14 Chief Prosecutor  
15 Office of the Prosecutor of the Pascua Yaqui Tribe  
16 7474 South Camino de Oeste  
17 Tucson, AZ 85757

18 DATED this 20<sup>th</sup> day of June, 2011.

19 PASCUA YAQUI PUBLIC DEFENDER

20   
21 Monique Ramsey  
22 Office Manager  
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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, ) CASE NO. CR-11-123  
PLAINTIFF, ) ORDER DENYING DEFENDANT'S  
vs. ) MOTION TO DISMISS (VAGUENESS)  
VALENZUELA, STELLA, )  
DEFENDANT. )  
\_\_\_\_\_ )

On June 7, 2011, the Court held a hearing on the defendant's motion to dismiss for lack of probable cause and for unconstitutionality of the statute because it should be void for vagueness. Appearing were the defendant and her counsel, Patricia Leon-Enriquez, and Guadalupe Gutierrez and Rebecca Figueroa appeared for the Tribe.

The defendant argues that the statute related to Failure to Send Child To School is unconstitutional and should be dismissed due to void for vagueness.

The Indian Civil Rights Act and the Pascua Yaqui Constitution provides that the Pascua Yaqui Tribe in exercising its powers of self government shall not deny to any person the equal protection of its laws or deprive a person of liberty without due process of law. 25 U.S.C. § 1302(8), PYT Const. Art.1, § 1(h). Because the U.S. Constitution does not apply to Tribes, *Talton v. Mayes*, 163 U.S. 376 (1896), the Indian Civil Rights Act provides broad Constitutional-like rights to American Indians in tribal court proceedings. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

The void for vagueness doctrine was developed by federal appellate courts as a rule of construction to be applied when construing the constitutionality of a particular statute. In an early case, the Supreme Court articulated the vagueness rule:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and settled rules of law; and a statute which either forbids or requires doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. . . .

1 . . . [t]he crime, and the elements constituting it, must be so clearly expressed that the  
2 ordinary person can intelligently choose, in advance what course it is lawful for him to  
3 pursue.

4 *Connally v. General Const. Co.*, 269 U.S. 385, 391, and at 393 (1926).

5 Later U.S. Supreme Court cases refined the void for vagueness definition:

6 It is a basic principle of due process that an enactment is void for vagueness  
7 if its prohibitions are not clearly defined. Vague laws offend several important  
8 values. First, because we assume that man is free to steer between lawful and  
9 unlawful conduct, we insist that laws give the person of ordinary intelligence  
10 a reasonable opportunity to know what is prohibited, so that he may act  
11 accordingly. Vague laws may trap the innocent by not providing fair warning.  
12 Second, if arbitrary and discriminatory enforcement is to be prevented, laws  
13 must provide explicit standards for those who apply them. A vague law impermissibly  
14 delegates basic policy matters to policemen, judges, and juries for resolution on an  
15 ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory  
16 application.

17 *Sewell v. Georgia*, 435 U.S. 982, 986 (1978); *Grayned v. City of Rockford*, 408 U.S. 104,108  
18 (1972). See also *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Cline v. Frink*  
19 *Dairy*, 274 U.S. 445 (1927) *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

20 An ordinance is void for vagueness when it “fails to give a person of ordinary intelligence fair  
21 notice that his contemplated conduct is forbidden by statute.” *Papachristou v. City of*  
22 *Jacksonville*, 405 U.S. 156, 162 (1972). In the *Papachristou* case, the court struck down a  
23 vagrancy statute as unconstitutional because it did not define what contemplated conduct was  
24 forbidden by statute, and due to the law’s vagueness, it encouraged “arbitrary and erratic  
25 arrests and convictions.” *Id.*, at 162. Such a vaguely defined statute permitted unfettered  
26 discretion in the hands of police who could simply arrest anyone whom they believed to be  
27 “suspicious.” Thus, based on not only lack of notice to a defendant as to what conduct  
28 constituted a crime of vagrancy, but also, based on a lack of a standard as to what police  
should follow, the scheme allowing an officer to determine what may be criminal permitted  
arbitrary and discriminatory enforcement of the law. The vagueness doctrine then has two  
basic elements, lack of notice and arbitrary enforcement.

The statute challenged by the defendant as unconstitutional provides as follows:

1 Any Indian who shall without good cause neglect or refuse to send his or her children  
2 or any children under his or her care to school and said children not having reached  
3 their 18<sup>th</sup> birthday shall be deemed guilty of an offense.

4 5 PYTC § 7-570, Failure to Send Child to School.

5 The defendant argues that the statute is unconstitutional because it permits arbitrary and  
6 discriminatory enforcement and because it fails to “give fair warning of the precise conduct  
7 deemed unlawful.” Where the Supreme Court reviews the constitutionality of an act of  
8 Congress as being vague, it has to consider not only the act itself, but also, the context of the  
9 conduct to which the act is to be applied:

10 The strong presumptive validity that attaches to an Act of Congress has led this  
11 Court to hold many times that statutes are not automatically invalidated as  
12 vague simply because difficulty is found in determining whether certain  
13 marginal offenses fall within their language. [citations omitted]. Indeed, we  
14 have consistently sought an interpretation which supports the Constitutionality  
15 of legislation. [citations omitted]. **Void for vagueness simply means that  
16 criminal responsibility should not attach where one could not reasonably  
17 understand that his contemplated conduct is proscribed. In determining the  
18 sufficiency of the notice a statute must of necessity be examined in light of the  
19 conduct with which the defendant is charged.**

20 *U.S. v. National Dairy*, 372 U.S. 29, 32-33 (1963). (emphasis added).

21 The Tribe has alleged that the defendant committed a criminal offense by failing to send her  
22 child to school. The Tribe has also alleged that the defendant committed an offense by causing  
23 the minor to be absent from school by not enrolling the child at school.

24 As to general canons of construction, the starting point must be the language employed  
25 by Congress and courts may assume that the legislative purpose is expressed by the ordinary  
26 meaning of the words used. *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982), In the  
27 absence of a definition, courts construe a statutory term in accordance with its ordinary or  
28 natural meaning. *FDIC v. Meyer*, 510 U.S. 471 (1994). Courts are to presume that a  
legislature says in a statute what it means and means in a statute what it says. *Connecticut  
Nat’l Bank v. Germain*, 503 U.S. 249 (1992). A court must, if possible, give effect to every  
clause and word of a statute. *Negonsett v. Samuels*, 507 U.S. 99 (1993).

1           The court must determine whether a person of reasonable intelligence understanding  
2 the meaning of the terms of the truancy statute and the alleged actions taken by her, if true,  
3 that she kept her child from school would be a punishable offense of a criminal offense.  
4 Because the truancy statute reasonably apprises the defendant and gives her, as a person of  
5 ordinary intelligence, notice that a certain contemplated conduct is forbidden by statute, the  
6 court should deny the defendant's motion to dismiss due to vagueness. The definition of  
7 truancy in the Civil Code provides the additional notice as to what constitutes illegal conduct  
8 related failure to send a child to school, and related to what constitutes a punishable offense.

9           The fact that the Tribe repealed two similar statutes on truancy that were contained in  
10 the criminal code and replaced those criminal provisions with the one in question and placed  
11 the statute in a civil code, does not affect the validity of the current statute as a criminal one,  
12 because the intent of the legislature to clear: if one is found "guilty" of failure to send a child  
13 to school, such would constitute a criminal offense.

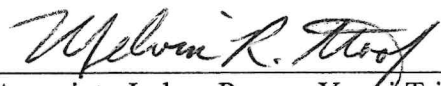
14           Notwithstanding that fact that the truancy offense is listed under a civil code, the Court  
15 noted in its April 5, 2011 ruling that the word "guilty" contained in the statute implies a  
16 criminal culpability and "offense" may be implied as a "criminal" offense, based on the  
17 preceding of the statute containing the word "guilty." The mere fact that the offense is listed  
18 in a civil code, rather than contained in a criminal code, does not in and of itself imply that  
19 prohibited conduct should be treated as "Civil" instead of "criminal." The Tribe has enacted  
20 criminal offenses and placed them under a "civil" code in other matters. See, for example,  
21 regulatory code provisions for animal control contains both civil offenses, 8 PYTC §6-  
22 130(F)&(L) and criminal offenses. 8 PYTC § 6-150(E)&(F).


23           Read in the light of the allegations with which she has been charged, that of allegedly  
24 refusing to send the child to school or to enroll the child at school, such purported conduct  
25 may be considered as truancy, defined by the Pascua Yaqui code as "Failure to Send Child to  
26 School," and because such alleged conduct falls within a definition of what constitutes truancy  
27 under tribal law, the statute should be presumed to be constitutional and should not be  
28 stricken, because the court should favor "that interpretation of legislation which supports its  
constitutionality." See *Screws v. U.S.*, 325 U.S. 91 (1945).

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**IT IS ORDERED** that the Court denies the defendant's motion to dismiss (vagueness) for lack of good cause shown.

SO ORDERED THIS 7<sup>th</sup> DAY OF JUNE, 2011.

  
\_\_\_\_\_  
Associate Judge, Pascua Yaqui Tribal Court

Date 6-7-11  
cc:  Tribe  Defendant \_\_\_ Counsel  
  
\_\_\_\_\_  
Clerk



1 PASCUA YAQUI PUBLIC DEFENDER  
7474 S. Camino de Oeste  
2 Tucson, Arizona 85757  
3 (520) 883-5013

4 Patricia Leon-Enriquez,  
Counsel for Appellant

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

8 PASCUA YAQUI TRIBE,

9 Plaintiff/Appellee,

10 vs.

11 LUJAN Melissa;  
12 Defendant/Appellant.

) Court of Appeals Case No:  
) Trial Court Case No.: CR-11-108  
) **NOTICE OF APPEAL**

13  
14 Pursuant to 3 PYTC §2-3-90, Pascua Yaqui Tribe Rules of Appellate Procedure, counsel for  
15 Appellant Melissa Lujan, respectfully files a Notice of Appeal in the Appellate Court from the Order  
16 Denying Defendant's Motion to Dismiss (Vagueness) entered in these actions by the Pascua Yaqui Tribal  
17 Court on June 8, 2011. Copy of the Court's Order is attached hereto as required by Section 90, Pascua  
18 Yaqui Rules of Appellate Procedure.

19 The Appellant further requests that this Court enter an order directing the Clerk of the Pascua Yaqui  
20 Tribal Court to prepare and submit the records within thirty (30) days.

21 DATED this 20<sup>th</sup> day of June, 2011.

22 PASCUA YAQUI PUBLIC DEFENDER

23

24 Patricia Leon-Enriquez  
25 Counsel for Defendant  
26

27 ///  
28 ///  
///

1  
2 CERTIFICATE OF SERVICE

3 I hereby certify that the original copy of the Notice of Appeal was delivered this date to:

4 Clerk of the Court of Appeals  
5 Pascua Yaqui Court of Appeals  
6 7474 South Camino de Oeste  
7 Tucson, AZ 85757

8 and that one copy of the Notice of Appeal was delivered this date to:

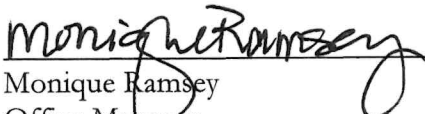
9 Pascua Yaqui Tribal Court  
10 7474 South Camino de Oeste  
11 Tucson, AZ 85757

12 and that one copy of the Notice of Appeal was delivered this date to:

13 Alfred Urbina  
14 Chief Prosecutor  
15 Office of the Prosecutor of the Pascua Yaqui Tribe  
16 7474 South Camino de Oeste  
17 Tucson, AZ 85757

18 DATED this 20<sup>th</sup> day of June, 2011.

19 PASCUA YAQUI PUBLIC DEFENDER

20   
21 Monique Ramsey  
22 Office Manager

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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,	)	CASE NO. CR-11-108
PLAINTIFF,	)	ORDER DENYING DEFENDANT’S
vs.	)	MOTION TO DISMISS (VAGUENESS)
LUJAN, MELISSA,	)	
DEFENDANT.	)	
_____	)	

On June 7, 2011, the parties requested that the Court decide the defendant’s motion to dismiss for lack of probable cause and for unconstitutionality of the statue because it should be void for vagueness. Appearing were the defendant and her counsel, Patricia Leon-Enriquez, and Rebecca Figueroa who appeared for the Tribe.

The parties waived oral arguments.

The defendant asserts in her brief and reply that the statue related to Failure to Send Child To School is unconstitutional and should be dismissed due to void for vagueness.

The Indian Civil Rights Act and the Pascua Yaqui Constitution provides that the Pascua Yaqui Tribe in exercising its powers of self government shall not deny to any person the equal protection of its laws or deprive a person of liberty without due process of law. 25 U.S.C. § 1302(8), PYT Const. Art.1, § 1(h). Because the U.S. Constitution does not apply to Tribes, *Talton v. Mayes*, 163 U.S. 376 (1896), the Indian Civil Rights Act provides broad Constitutional-like rights to American Indians in tribal court proceedings. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

The void for vagueness doctrine was developed by federal appellate courts as a rule of construction to be applied when construing the constitutionality of a particular statute. In an early case, the Supreme Court articulated the vagueness rule:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and settled rules of law; and a statute which either forbids or requires doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. . . .

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3 pursue.

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19 conduct with which the defendant is charged.**

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19 child to school. The Tribe has also alleged that the defendant committed an offense by causing  
20 the minor to be absent from school by not enrolling the child at school.

21 As to general canons of construction, the starting point must be the language employed  
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1           The court must determine whether a person of reasonable intelligence understanding  
2 the meaning of the terms of the truancy statute and the alleged actions taken by her, if true,  
3 that she kept her child from school would be a punishable offense of a criminal offense.  
4 Because the truancy statute reasonably apprises the defendant and gives her, as a person of  
5 ordinary intelligence, notice that a certain contemplated conduct is forbidden by statute, the  
6 court should deny the defendant's motion to dismiss due to vagueness. The definition of  
7 truancy in the Civil Code provides the additional notice as to what constitutes illegal conduct  
8 related failure to send a child to school, and related to what constitutes a punishable offense.

9           The fact that the Tribe repealed two similar statutes on truancy that were contained in  
10 the criminal code and replaced those criminal provisions with the one in question and placed  
11 the statute in a civil code, does not affect the validity of the current statute as a criminal one,  
12 because the intent of the legislature to clear: if one is found "guilty" of failure to send a child  
13 to school, such would constitute a criminal offense.

14           Notwithstanding that fact that the truancy offense is listed under a civil code, the Court  
15 noted in its March 15, 2011 ruling that the word "guilty" contained in the statute implies a  
16 criminal culpability and "offense" may be implied as a "criminal" offense, based on the  
17 preceding of the statute containing the word "guilty." The mere fact that the offense is listed  
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21 regulatory code provisions for animal control contains both civil offenses, 8 PYTC §6-  
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23           Read in the light of the allegations with which she has been charged, that of allegedly  
24 refusing to send three children to school, such purported conduct may be considered as  
25 truancy, defined by the Pascua Yaqui code as "Failure to Send Child to School," and because  
26 such alleged conduct falls within a definition of what constitutes truancy under tribal law, the  
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28 should favor "that interpretation of legislation which supports its constitutionality." See  
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