

No. CA-13-003

Pascua Yaqui Court of Appeals

\_\_\_\_\_  
Alvarez, Mateo, Appellant,

vs.

Pascua Yaqui Tribe, Appellee,



Appeal of a decision of the Pascua Yaqui Trial Court in Case No. CR 08-056, the Honorable Melvin Stoof presiding.

Patricia Leon-Enriquez, Office of the Public Defender for the Appellant.

G. Allen Osburn, Office of the Prosecutor for the Appellee.

**AMENDED ORDER TO TRANSPORT**

Per defense counsel's request and because the Pascua Yaqui Detention and/or Bureau of Indian Affairs is unable to transport defendant from a BIA contracted facility to the Pascua Yaqui Tribe until Saturday, April 12, 2014, this Court orders defendant's immediate release directly from his BIA contracted facility.

Dated this 8<sup>th</sup> day of April 2014.

A handwritten signature in blue ink, appearing to read "James Hopkins".

\_\_\_\_\_  
Chief Justice Hopkins, Pascua Yaqui Court of Appeals

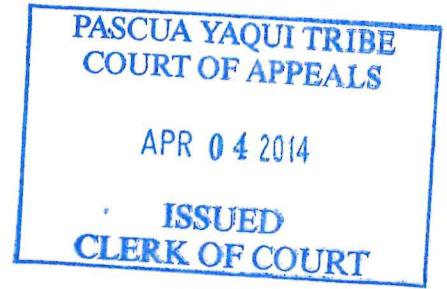
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Patricia Leon-Enriquez, Office of the Public Defender for the Appellant.

G. Allen Osburn, Office of the Prosecutor for the Appellee.

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**I. Opinion**

The issue before this Court is whether Appellant pled to two 12-month probation terms or one 24-month probation term. Pursuant the plea agreement, Appellant was sentenced to two terms of 360 days detention, sentence suspended for 12 months of supervised probation. Appellant was also sentenced to a total of 495 days in detention. The plea agreement stated that detention days were to run consecutively and that probation days were to run consecutively. Appellant was released from detention on November 12, 2010, thereby starting his probation. On December 15, 2011, one month into Appellant's second probation sentence, Appellant's probation officer filed a motion to revoke probation based on several violations. The Tribal court revoked Appellant's probation on December 12, 2012 and imposed a 24-month detention sentence. This Court finds that pursuant the plea agreement, Appellant was sentenced to two distinct consecutive 12-month terms of probation and that the motion to revoke probation was filed after Appellant's first 12-month probation term had expired. The Tribal court lacked jurisdiction to revoke probation once the term had expired. The Tribal Court did have jurisdiction over the second 12-month term, which Appellant completed on November 19, 2013. Appellant is hereby ordered released.

## II. Background

Appellant was charged by criminal complaint with count 1, assault (a violation of 4 PYTC § 1-150(A)(1)(c)), count 2, disorderly conduct (a violation of 4 PYTC § 1-305), counts 3 through 9, aggravated assault (a violation of 4 PYTC § 1-150(A)(2), and count 10, destroying evidence (a violation of 4 PYTC § 1-560). Pursuant to a plea agreement, Appellant pled guilty to Counts 2, 3, 7, 9 and 10. Counts 1, 4, 5, 6, and 8 were dismissed. Pursuant to the plea agreement, Appellant was sentenced to 360 days detention, sentence suspended for 12 months of supervised probation (Count 2), 170 days detention to be served (Counts 3 and 7), 155 days of detention to be served (Count 9), and 360 days of detention, sentence suspended for 12 months of supervised probation (Count 10). The Tribal Court's acceptance of the plea agreement provides that Appellant's sentence totaled 1215 days of detention, with credit for 115 days already served, 495 days to be served, and 720 days suspended for a total of 24 months of supervised probation. According to the plea agreement, Appellant was to be released from detention on November 12, 2010. The order accepting the plea did not specify whether the sentences would be consecutive, but the original plea agreement provided the sentence would be imposed as follows:

Defendant sentenced to 1215 total days of detention; 495 days are to be served with 720 days suspended for a total of 24 months of probation. Detention days to be consecutive; probation to be consecutive. Defendant to be credited with time served from July 5, 2009.

However, the order accepting the plea indicated the Court was adopting "all sentencing recommendations made." Appellant waived his right to appeal the judgment and sentence to the Pascua Yaqui Appellate Court. According to the probation order, probation was scheduled to begin on November 12, 2010 and terminate on November 12, 2012.

On December 15, 2011, Appellant's probation officer filed a motion to revoke probation based upon the following violations: (1) failure to report to probation officer as directed, (2) failure to participate in treatment and or counseling programs as directed, (3) failure to pay \$25 court cost or complete two hours or community service due no later than September 12, 2011, (4) failure to pay \$20 probation fees for the months of October through December 2011, and (5) failed to submit written verification of 50 completed community service hours due on September 12, 2011. On December 27, 2011, the probation officer appeared in court and was unable to

contact Appellant to process paperwork. Appellant's whereabouts were unknown; therefore, a warrant for his arrest was issued.

Appellant admitted to allegation 1, and his probation was revoked on December 12, 2012. The Court imposed the original 720 days that were previously suspended for Counts 2 and 10 and granted credit for 19 days already served for a total of 701 days.

In the Motion to Reconsider filed with the Tribal Court, Appellant asserts that the petition to revoke probation was filed a month after the probation term imposed for Count 2 had expired. He stated that the Tribal Court retained jurisdiction over the motion to revoke probation because Appellant was still on probation for Count 10. It is Appellant's belief that the probation term for Count 2 had expired, and only the 360-day term from Count 10 could be imposed.

### **III. Probation Terms**

The main issue before this Court is whether Appellant pled to two consecutive 12-month probation terms or one 24-month probation term.

In a criminal proceeding, the Court of Appeals reviews a district court's denial of a motion to reconsider for abuse of discretion. *U.S. v. Lopez-Cruz*, 730 F.3d 803, 811 (9th Cir. 2013) (citing *United States v. Tapia-Marquez*, 361 F.3d 535, 537 (9th Cir. 2004); *United States v. Hinkson*, 585 F.3d 1247, 1261–62 (9th Cir. 2009) (en banc)).

Plea agreements are analyzed under contract law principles. *See e.g., United States v. Sandoval-Lopez*, 122 F.3d 797, 800 (9th Cir. 1997). Thus, courts apply contract law standards to examine and enforce the plain language of a plea agreement and do not consider extrinsic evidence to interpret the terms of an agreement if it is clear and unambiguous on its face. *United States v. Trapp*, 257 F.3d 1053, 1056 (9th Cir. 2001); *United States v. Nunez*, 223 F.3d 956, 958 (9th Cir. 2000) (citing *Wilson Arlington Co. V. Prudential Ins. Co. Of America*, 912 F.2d 366, 370 (9th Cir. 1990)). “In construing an agreement, the court must determine what the defendant reasonably understood to be the terms of the agreement when he pleaded guilty.” *United States v. De la Fuente*, 8 F.3d 1333, 1337 (9th Cir. 1993). Additionally, any ambiguity is read against the government. *Id.* at 1338.

As stated previously, pursuant to the plea agreement, Appellant was sentenced to 360 days detention, sentence suspended for 12 months of supervised probation (Count 2), 170 days

detention to be served (Counts 3 and 7), 155 days of detention to be served (Count 9), and 360 days of detention, sentence suspended for 12 months of supervised probation (Count 10). The Tribal Court's acceptance of the plea agreement provides that Appellant's sentence totaled 1215 days of detention, with credit for 115 days already served, 495 days to be served, and 720 days suspended for a total of 24 months of supervised probation. Appellant was to be released from detention on November 12, 2010. The order accepting the plea did not specify whether the sentences would be consecutive, but the original plea agreement provided, "*Detention days to be consecutive; probation to be consecutive.* Appellant to be credited with time served from July 5, 2009." (emphasis added) The order accepting the plea indicated the Court was adopting "all sentencing recommendations made."

According to Black's Law Dictionary, consecutive is defined as "Successive; succeeding one another in regular order; to follow in uninterrupted succession." Consecutive sentences are defined as "when one sentence of confinement is to follow another in point of time, the second sentence is deemed to be consecutive. May also be applied to suspended sentences. Also called "from and after" sentences." A subsection beneath the definition for "sentence" provides:

Consecutive sentence. See Cumulative sentences, below.

Cumulative sentences: Separate sentences (each additional to the others) imposed upon a defendant who has been convicted upon an indictment containing several counts, each of such counts charging a distinct offense, or who is under conviction at the same time for several distinct offenses; one of such sentences being made to begin at the expiration of another. *Carter v. McClaughry*, 183 U.S. 365, 22 S.Ct. 181, 46 L.Ed. 236.

Black's Law Dictionary 1362 (Bryan A. Garner ed., 6th ed., West 1999).

A consecutive sentence, by definition, does not begin until the sentence to which it is consecutive has been satisfied. *Eyman v. McPherson*, 1 Ariz. App. 578, 580 (1965). Consecutive probation terms reflect a "distinct sanction for each count". *State v. Bowsher*, 225 Ariz. 586, 590, ¶ 21 (2010).

On counts 2 and 10, Appellant's sentences were suspended for each count and a 12-month probation term was imposed for each count. Each count was to be served consecutively according to the agreement.

Appellant was supposed to be released from detention on November 12, 2010, meaning the Appellant's first probation term began on that date and ended on November 8, 2011. Appellant's probation officer filed a motion to revoke probation on December 15, 2011. Therefore, the motion to revoke was filed after Appellant's first 12-month probation term had expired. The court lacks jurisdiction to revoke probation once the probation period has expired. *See Chacon*, 221 Ariz. 523, 526 (2009) (citing *State v. Johnson*, 182 Ariz. 73 (Ariz. App. 1995)). Appellant's probation on Count 2 could not be revoked because the term had expired. As a result, only the probation term for Count 10 remained and Appellant could only be revoked on Count 10.

Appellant alleges that at the time the revocation hearing was held on December 12, 2012, he had already served 19 days. The Tribal Court judge imposed a sentence of 701 days, which indicates there was credit for 19 days served, and ordered that Appellant's detention term would be completed on November 14, 2014 at 8:00 a.m.

This Court finds that Appellant could only be revoked on Count 10; therefore, his release date should have been a year earlier than the sentence imposed by the Tribal Court. Appellant's release date should have been November 19, 2013. Appellant is hereby ordered released.

#### **IV. Application of *Miranda v. Anchondo***

This Court wants to reiterate that the Tribal Court has the authority to impose one year terms of imprisonment or probation for each criminal offense. This issue has already been decided in the affirmative by *Miranda v. Anchondo*, which holds that Tribal courts may impose up to a one year sentence for each criminal violation. 684 F.3d 844 (2012). The main issue this order addresses is whether Appellant's plea agreement to serve two consecutive 12-month sentences should have been enforced as two separate sentences running consecutively or one 24-month sentence. This Court's decision does not disturb *Miranda's* reasoning regarding the court's jurisdiction to stack sentences for multi-count criminal cases.

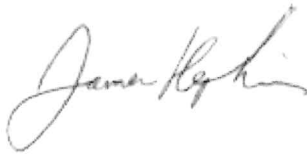
Additionally, this Court and the Tribal Court would have benefited from the crafting of a plea agreement where the terms are consistent and clear throughout the document. Also, if a defendant is in detention and the issue is one of early or modified release, then a motion or notice to expedite should be submitted to make the Court aware of defendant's position. In this

particular instance, both the Tribe and defense counsel asked for extensions for filing deadlines, thereby prolonging Appellant's time in custody.

## **V. Conclusion**

For the foregoing reasons, the Court of Appeals reverses the Tribal Court's denial of the motion to reconsider and orders Appellant released. An order of transport is attached to this final order so that Appellant can be transported back to the Pascua Yaqui Tribe and immediately released.

So ordered on this 4th day of April 2014.

A handwritten signature in cursive script, appearing to read "James Hopkins".

---

Chief Justice, James Hopkins

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

THE PASCUA YAQUI TRIBE

Appellee

v

Mateo Alvarez

Appellant

ORDER TO TRANSPORT


CASE NO. CA-13-003

TRIBAL CASE NO. 08-056

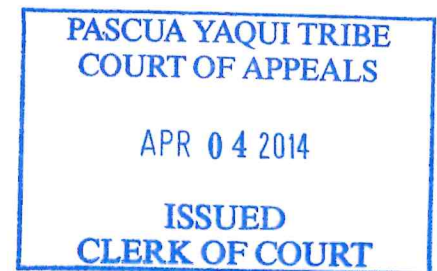
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IT IS ORDERED that the **PASCUA YAQUI DETENTION AND/OR BUREAU OF INDIAN AFFAIRS DETENTION** transport the defendant from **A BIA CONTRACTED FACILITY** to the **PASCUA YAQUI TRIBAL COURT** for **IMMEDIATE RELEASE**.

Dated this 4th Day of April, 2014.



Chief Justice Hopkins, Pascua Yaqui Court of Appeals



Cc:  
DETENTION/PROSECUTOR  
DATE: \_\_\_\_\_  
CLERK: \_\_\_\_\_

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

2 Patricia Leon-Enriquez, SBN 010186  
3 Counsel for Appellant

4  
5 IN THE PASCUA YAQUI TRIBE COURT OF APPEALS  
6 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

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8 PASCUA YAQUI TRIBE,  
9 Plaintiff/ Appellee,

10 vs.

11 ALVAREZ, MATEO,  
12 Defendant/ Appellant.

Court of Appeals Case No: CA-13-003

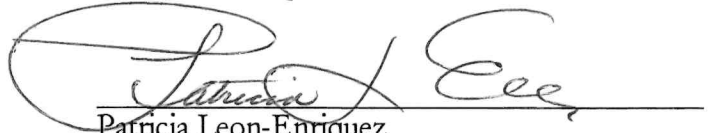
Trial Court Case No.: CR-08-056

REPLY TO TRIBE'S MOTION TO DISMISS  
/MOTION FOR RECONSIDERATION

13  
14 Pursuant to the Pascua Yaqui Rules of Appellate Procedure, 3 PYTC §2-3-130(C), the Appellant  
15 hereby files his reply to the Tribe's "Motion to Dismiss/Motion For Reconsideration" and respectfully asks  
16 that this Court deny the Appellee's Motion and grant Appellant's request for relief.

17  
18 DATED this 25<sup>th</sup> day of February, 2014.

19 PASCUA YAQUI PUBLIC DEFENDER

20   
21 Patricia Leon-Enriquez  
22 Senior Staff Attorney  
23 Counsel for Defendant/ Appellant Mateo Alvarez  
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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 Hon. Melvin Stoof  
10 Pascua Yaqui Tribal Court  
11 7474 South Camino de Oeste  
12 Tucson, AZ 85757

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

14 G. Allen Osburn  
15 Chief Prosecutor  
16 Office of the Prosecutor of the Pascua Yaqui Tribe  
17 7474 South Camino de Oeste  
18 Tucson, AZ 85757

19 DATED this 25<sup>th</sup> day of February, 2014.

20 PASCUA YAQUI PUBLIC DEFENDER

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

1 While the Appellant has previously outlined the relevant procedural history of this case in his Opening  
2 Brief, based on the nature of the Appellee's Response Brief, it appears useful to highlight some of the  
3 history here as well.

4 The trial court denied the Appellant's Motion to Modify Sentence on July 10, 2013. The Appellant then  
5 filed a Motion to Reconsider on July 19, 2013. The trial court denied the Motion to Reconsider on August  
6 12, 2013. A Notice of Appeal was filed by the Appellant on August 20, 2013. The Appellee subsequently  
7 filed a Motion to Dismiss Appeal ("Motion") on September 3, 2013 in which it surmised that the Court of  
8 Appeals lacked jurisdiction because the Appellant had not filed his Notice of Appeal timely. The Appellant  
9 was never served with Notice of the Motion filed by the Appellee and therefore did not respond to it.

10 On September 23, 2013, The Court of Appeals issued an Opinion granting Appellee's Motion to  
11 Dismiss. Appellant filed a Motion for Reconsideration pursuant to 3 PYTC §2-3-210 and the Court of  
12 Appeals, in its discretion pursuant to 3 PYTC §2-3-50, granted the Motion allowing Appellant to respond to  
13 the Appellee's Motion to Dismiss. Appellant filed his Response to the Motion to Dismiss on October 15,  
14 2013. On November 13, 2013, the Court of Appeals vacated the dismissal order and re-instated the appeal.

15 Once the appeal was reinstated, the Appellant timely filed his Opening Brief. After requesting and  
16 acquiring an extension of time, the Appellee filed what presumably should have been the Brief of the  
17 Appellee, curiously titled "Motion to Dismiss/Motion for Reconsideration," on February 18, 2014. The  
18 Appellee's February 18, 2014 filing is quite confounding. According to the Pascua Yaqui Tribal Code's  
19 Rules of Appellate Procedure, the Brief of the Appellee shall conform to the same requirements, in form, as  
20 the Brief of the Appellant except that "a statement of the case, a statement of the proceedings, a statement  
21 of the facts, or a statement of the issues need not be included unless the Appellee finds the Appellant's  
22 statements insufficient or incorrect." 3 PYTC §2-3-130(B). The Appellee's Brief fails to meet any of the  
23 requirements as set forth in 3 PYTC §2-3-130 (B).  
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1 In addition to what the Appellee's Brief fails to provide for in form, it is also completely non-  
2 responsive in terms of its substance. Rather than address the issue on appeal, the Appellee simply parrots  
3 its arguments previously made in its September 3, 2013 Motion to Dismiss. This Court's November 13,  
4 2013 Order clearly denied Appellee's Motion to Dismiss and found that the Appellant's appeal of the trial  
5 court's denial of the "Motion to Reconsider" was both appealable and timely filed. It is unclear why  
6 Appellee chose to resubmit its arguments and request that the appeal be dismissed instead of actually  
7 responding to the substantive issues raised and briefed by the Appellant. Essentially, both in form and  
8 substance, the Appellee has failed to file its Brief of Appellee pursuant to 3 PYTC §2-3-130 (B).  
9

10 If, on the other hand, Appellee's Motion is a Motion to Reconsider this Court's November 13, 2013  
11 Order denying Appellee's first Motion to Dismiss, it is untimely. Any motion for reconsideration of this  
12 Court's decision to reinstate the appeal should have been filed within 15 days after the clerk served a copy of  
13 the decision on the parties. 3 PYTC § 2-3-210.  
14

15 As a consequence, Appellee's Motion should be dismissed as untimely and the appeal should be decided  
16 on the appellate record pursuant to 3 PYTC §2-3-140(C)(2). In this case, the record includes a well-  
17 reasoned Opening Brief supported by both facts and legal argument. Because of the Appellee's decision to  
18 file another, untimely, Motion to Dismiss instead of responding to the actual issue on appeal, there are no  
19 other facts or arguments for the Court of Appeals to consider. In addition, since the Trial Court addressed  
20 the issues on the merits when it denied Mr. Alvarez' Motion to Reconsider, the Court of Appeals may  
21 consider those issues as well.  
22

23 Wherefore, the Appellant respectfully requests that the Court of Appeals grant the Appellant's request  
24 for relief and vacate the trial court's sentence and order the immediate release of Mr. Alvarez as he has  
25 already served well over the 360 days of detention that constituted the legal portion of his sentence  
26  
27  
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1 RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of February, 2014.

2 PASCUA YAQUI PUBLIC DEFENDER

3 

4 Patricia Leon-Enriquez  
5 Senior Staff Attorney  
6 Counsel for Defendant/Appellant Mateo Alvarez

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Pascua Yaqui Tribe  
Office of the Prosecutor  
7777 S Camino Huivisim, Bldg. A  
Tucson, AZ 85757

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

ALVAREZ, MATEO,	)	Case No CA-13-003
	)	
Appellant,	)	
	)	
v.	)	<b>MOTION TO DISMISS/MOTION</b>
	)	<b>FOR RECONSIDERATION</b>
PASCUA YAQUI TRIBE,	)	
	)	
Appellee.	)	
_____	)	

Comes Now the Pascua Yaqui Tribe through Deputy Prosecutor Allen Osburn and moves to dismiss this appeal for lack of jurisdiction, in the alternative the Appellee seeks reconsideration of this court's earlier ruling of November 13, 2013, this motion is supported by the attached memorandum of points and authorities.

Respectfully submitted this 14<sup>th</sup> day of February, 2014.

  
By G. Allen Osburn,  
Deputy Prosecutor

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## MEMORANDUM OF POINTS AND AUTHORITIES

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1. Background

On October 28, 2009, Defendant knowingly and intelligently entered a plea agreement. He pled guilty to five counts of a ten count criminal complaint. [ROA1 51] In exchange the Tribe recommended combined and consecutive sentences of 495 days detention for three of the counts. In addition, the Tribe recommended two consecutive sentences of 360 days detention suspended for twenty four months supervised probation. The Court accepted the recommendation and sentenced Defendant to a combined sentence of 495 days detention and an additional combined sentence of 720 days detention suspended for 24 months supervised probation. The period of probation to begin after Defendant was released from detention. The Court specified that probation was to begin on November 12, 2010. [ROA 47]

On December 15, 2011, Probation Officer, Gloria Alvarez, filed her Motion for Revocation of Probation alleging numerous violations of the probation order. [ROA 34] On December 12, 2012, the court held a hearing on the probation petition. Defendant admitted to one count of the petition. [ROA 23] The Court found the admission to be intelligent and voluntary and accepted the admission. [ROA 23] The Court revoked Defendant's probation and reinstated the combined suspended sentence of 720 days.

On April 23, 2013, Defendant filed his motion to modify his sentence. [ROA 17]. On July 10, 2013, the Court denied the motion. [ROA 08] Defendant then filed his motion to reconsider the Court's denial. [ROA 07] On August 12, 2013, the Court denied the motion to reconsider. [ROA 12] Defendant then appealed on August 20, 2013, appealing both the July 10<sup>th</sup> and August 20<sup>th</sup> orders. [ROA 01] The Appellee filed his motion to dismiss the appeal for lack

of jurisdiction. This Court dismissed the appeal as to the July 10<sup>th</sup> order, but reinstated the  
1 appeal as to the August 20<sup>th</sup> order. See Order, *Alvarez v. Pascua Yaqui Tribe*, CA-13-003  
2 (11/13/13)

3  
4 2. Discussion

5 This Court held that “the denial of the motion to reconsider was a final judgment and an  
6 appealable order.” See Order, *supra*, at 1. The Code does not define *final judgment* in a criminal  
7 matter. The Code provides that when a meaning of a word is not clear on its face or in the  
8 context of the Code, such term shall having meaning given to it by the laws of the State of  
9 Arizona...” See 1 PYTC §2-30(H). In this case, the appeal is an appeal of the trial court’s denial  
10 of a motion for reconsideration. It is well established law that an order denying a motion for  
11 reconsideration is not an appealable order. “[O]rder denying the motion to reconsider is not an  
12 appealable order.” See *State v. Limon*, 229 Ariz. 22, 23, 270 P.3d 849, 850 (Ariz.App., 2011),  
13 and *State v. Berry*, 133 Ariz. 264, 267, 650 P.2d 1246, 1249 (Ariz.App., 1982). Accordingly,  
14 the trial court’s August 20<sup>th</sup> order is not appealable.  
15

16  
17 There is good reason to enforce this rule. If a party through neglect fails to timely file  
18 their notice of appeal, a contrary rule would allow an Appellant to evade the 30 day notice  
19 requirement. See 3 PYTC §2-3-100(A). The attempt to evade the notice requirement has often  
20 been addressed as a delayed appeal. In this case, the Appellant is really seeking review of the  
21 court’s July 10<sup>th</sup> order denying his motion to modify his sentence. Appellant did not timely file  
22 his notice of appeal of that order. The motion to reconsider did not toll the time for filling his  
23 notice. So, he tried to evade the rules by appealing the order denying the motion to reconsider.  
24 Case law does not support this attempt.  
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26


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27 1 The Record on Appeal is designated throughout this motion as ROA followed by the  
28 document number as designated by the trial court’s index listing.

As this is not an appeal of a final judgment, this court should dismiss this appeal for lack

1 of jurisdiction.

2 RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of February, 2014.

3  
4   
5 By G. Allen Osburn,  
6 Deputy Prosecutor

7 A copy of the foregoing was delivered  
8 This 14 day of February, 2014, to:

9 Patricia Leon-Enriquez  
10 Office of the Public Defender  
11 Pascua Yaqui Tribe

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a. Whether the Tribal Court had jurisdiction to revoke Appellants probation after the probation term had expired on one count.....16

B. Whether the Tribal Court erred in finding that the intent of the parties to the plea was for combined suspended jail days and probationary terms based on the summary language at the end of the plea despite the specific language in the body of the plea setting forth separate and discrete sentences for each offense.....17-18

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**TABLE OF AUTHORITIES**

**Cases**

*Miranda v. Anchondo*, 684 F.3d 844 (9<sup>th</sup> Cir. 2012).....2,9,12

*United States v. Ajugwo*, 82 F.3d 925, 928 (9<sup>th</sup> Cir. 1996).....13

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*United States v. Semler*, 883 F.2d 832, 833 (9<sup>th</sup> Cir. 1989).....13

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*State v. Chacon*, 221 Ariz. 523, 526; 212 P.3d 861, 863 (2009) (*citation omitted*).....16

*United States v. Keller*, 902 F.2d 1391, 1393 (9<sup>th</sup> cir. 1990).....17

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**Tribal Authority**

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25 U.S.C.A. §1302(8).....2, 12

## **JURISDICTIONAL STATEMENT**

The jurisdiction of the Pascua Yaqui Court of Appeals extends to all appeals from final orders and judgments of the Tribal Court, in both civil and criminal matters. *See* Pascua Yaqui Const., art. 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). Appellant Mateo Alvarez appeals an order of the Pascua Yaqui Tribal Court [August 12, 2013, Order entered in CR-08-056] in which the Tribal Court responded to Appellant's argument on its merits and denied a Motion to Reconsider the Court's treatment of 2 offenses as separate and discrete for purposes of "stacking" but treated the 2 offenses as one in imposing a single sentence of 720 days jail term and a 24 months of probation.

## STATEMENT OF THE CASE

On October 28<sup>th</sup>, 2009, Appellant Mateo Alvarez entered into a plea agreement. [*PYT v. Mateo Alvarez*, Pascua Yaqui Trial Court Record, document 46, hereinafter “Record at 46”]. Pursuant to the plea agreement, Mr. Alvarez entered a plea of guilty to Counts 2,3,7,9 and 10. [Record at 51]. The Court accepted the guilty plea and adopted the sentencing recommendations outlined in the plea agreement. [Record at 46].

The plea agreement and the October 28, 2009 Order both provided that Mr. Alvarez would be sentenced to 360 days suspended for 12 months of probation for Count 2 and 360 days for 12 months of probation for Count 10. (The other Counts required detention time to be served, which was served.) The plea agreement also provided that “*Detention days and probation to be consecutive.*” [Record at 51 and 46]. Since the probation period for Count 2 and Count 10 was to be consecutive, Mr. Alvarez’ *cumulative* probation term began on November 12, 2010 and was scheduled to terminate on November 12, 2012. [Record at 47].

On December 15, 2011, Probation Officer Gloria Alvarez filed a Motion for Revocation of Probation alleging 5 violations. This motion was filed 13 months into the sentence. [Record at 34]. On November 30<sup>th</sup>, 2012, Mr. Alvarez appeared in custody for an arraignment on the motion for revocation and denials were entered. The Revocation hearing was scheduled on December 12, 2012. [Record at 27]. On December 12, 2012, Mr. Alvarez admitted to allegation 1 and his probation was revoked. At that time, the Court imposed the combined 720 days that had been previously suspended for both Count 2 (360 days) and Count 10 (360 days). [Record at 22]

On April 23, 2013, defense counsel for Mr. Alvarez filed a Motion to Modify Sentence asserting that the Court lacked jurisdiction to revoke Mr. Alvarez' probation on one of the counts because the probation period had expired. Exhibits were attached. [Record at 17]. The Tribe filed its response on May 3, 2013 [Record at 15]. Mr. Alvarez filed a reply on May 7, 2013 [Record at 14]. A hearing on the motion was set for June 5, 2013. [Record at 13]. Mr. Alvarez filed a Motion to Continue the hearing due to medical reasons on May 23, 2013. [Record at 11]. The Court re-set the hearing on July 10, 2013 [Record at 9]. Mr. Alvarez appeared with counsel for the hearing on July 10, 2013 and the matter was argued before the Tribal Court. The court issued its ruling and denied the defendant's motion to modify his sentence. [Record at 8 ].

On July 19, 2013, defense counsel filed a Motion to Reconsider because the basis for the Tribal Court's denial of Mr. Alvarez' Motion to Modify was the Court's reasoning that stacking of charges and sentences is allowed pursuant to "Beatrice Miranda v. Pascua Yaqui Tribe, however that was not the argument made by Mr. Alvarez. [Record at 7]. The Tribe filed its response on August 1, 2013 [Record at 4]. Mr. Alvarez filed his reply to the Motion to Reconsider on August 6, 2013 [Record at 5]. On August 12, 2013, the Tribal Court denied Mr. Alvarez' Motion to Reconsider [Record at 2]. Mr. Alvarez' Notice of Appeal was filed on August 20, 2013. [Record at 1].

## STATEMENT OF FACTS

Defendant Mateo Alvarez appeared in Pascua Yaqui Tribal Court on October 28<sup>th</sup>, 2009 for a change of plea hearing. [Record at 46]. The plea agreement provided that Mr. Alvarez would enter a plea of guilty to counts 2,3,7,9 and 10. Mr. Alvarez would be sentenced to 360 days suspended for 12 months of supervised probation for Count 2 *and* 360 days for 12 months of supervised probation for Count 10. (The other Counts required detention time to be served, which was served.) The plea agreement also provided that “*Detention days and probation to be consecutive.*” [ Record at 51]. The Court accepted the guilty pleas and adopted the sentencing recommendations outlined in the plea agreement on October 28, 2009. [Record at 46]. The court then issued a single Probation Order that summarized the terms of the plea by checking the box for 24 months of supervised probation, 720 days of detention suspended and probation to begin on November 12, 2010 and terminate on November 12, 2012. [Record at 47].

Thirteen months into the sentence, on December 15, 2011, Probation Officer Gloria Alvarez filed a Motion for Revocation of Probation alleging 5 violations. [Record at 34]. On November 30<sup>th</sup>, 2012, Mr. Alvarez appeared in custody for an arraignment on the motion for revocation and entered denials to all 5 allegations. The Revocation hearing was scheduled on December 12, 2012. [Record at 27]. On December 12, 2012, Mr. Alvarez admitted to allegation 1 and his probation was revoked. The Court then imposed the 720 days that had been previously suspended for both Count 2 (360 days) and Count 10 (360 days) with credit for 19 days he had already served. [Record at 23].

On April 23, 2012, Mr. Alvarez filed a Motion to Modify his sentence arguing that the Tribal Court lacked jurisdiction to impose the entire suspended sentence since the probation term

on one of the counts had already expired when the Motion to revoke his probation was filed. He argued that since he was sentenced to consecutive one year terms of probation on count 2 and count 10, the motion to revoke that was filed 13 months into the sentence only applied to one of the counts and only the 360 days from that count could be imposed upon his revocation.[Record at 17].

On May 2, 2013, the Tribe filed a response to Mr. Alvarez's motion and argued that Arizona law is not binding on the Tribal Court and that the sentencing structure in tribal courts is different than that of state courts. The Tribe agreed that Tribal courts are "generally restricted to a sentence of one year per offense," however that the practice has been to "stack" detention and probation terms in order to "provide for an appropriate sentence." The Tribe also argued that the summary of terms at the end of the plea and the court's sentencing order evidenced that the intent was for a 24 month probation term. [Record at 15].

On May 7, 2013, Mr. Alvarez filed a reply. In the reply he answered that the Tribal Code allows the use of State law for purposes of giving meaning to terms used in the tribal code that are not clear and that the use of the Arizona case law was for the court's reasoning and not for the factual situation. Mr. Alvarez then argued that the intent of the parties was as specifically spelled out in the terms of the plea and not what was summarized at the end of the plea. Additionally, he argued that the imposition of the 24 month probation term instead of 2 distinct consecutive 12 month probation terms, as provided in the plea, in essence amounted to concurrent 24 month probation terms. [Record at 14].

A hearing on the Motion to Modify Sentence was held on July 10, 2013. The Court issued its order denying the early release stating that it "follows the logic of the federal 9<sup>th</sup> circuit

court of appeals case, *Beatrice Miranda v. Pascua Yaqui Tribe*, which held that a tribal court may impose consecutive sentences that total more than one year arising out of the same factual basis for an offense. The Court also found the intent of the parties based on the summary of terms at the end of the plea which totaled all the terms of the plea. [Record at 8].

Mr. Alvarez then file a Motion to Reconsider, which is the basis of this appeal, and asked the Court to reconsider because it appeared the court misunderstood Mr. Alvarez' arguments. Mr. Alvarez was not arguing that the Court cannot "stack." Instead, Mr. Alvarez agreed that pursuant to *Miranda v. Anchondo*, 684 F.3d 844, 852 (9<sup>th</sup> Cir. 2012), the Tribal Court has the authority to impose up to a one-year term for each discrete criminal violation. Following the reasoning in *Miranda*, each offense could carry its own discrete penalty or sentence and these sentences could then be imposed consecutively or successive one to the other. Mr. Alvarez argued that the specific terms of his plea imposed a sentence for Count 2 of 360 days detention suspended for 12 months of probation was followed by a second sentence for Count 10 of 360 days detention suspended for a second 12 month term of probation. This argument was not contrary to *Miranda*. Since the 12 month probation term on Count 2 had expired, then the court only had jurisdiction to impose the sentence for count 10. [Record at 7].

The Tribe filed its response on August 1, 2013. The Tribe argued that the evidence showed that the parties intended to treat the probation term as a "single, unitary, 24 month period." The Tribe argued that the use of Black's Law Dictionary to define the term "consecutive" was a useful tool, but did not "hold the power to limit tribal jurisdiction, nor the ability to limit the authority of Tribal Judicial Officers to interpret and recognize Tribal Jurisdiction and longstanding practice." The Tribe argued that the *Miranda* case did not address

the issue of probation and to the extent that the separate sentence issue was addressed, it was raised and decided in a manner which affirmed Tribal sovereignty for multi-year sentences in multi-count criminal cases. The Tribe also argued that probation is a discretionary privilege and that the Court was correct to recognize its power to interpret the intent of the parties to the plea agreement. [Record at 4].

Mr. Alvarez filed his reply on August 6, 2013. Mr. Alvarez responded to the Tribe's attempt to inflame the issue by casting it as an attempt to limit tribal sovereignty and jurisdiction. Mr. Alvarez again acknowledged that the court had authority to impose up to one year term for each discrete criminal offense pursuant to Miranda. However, he questioned whether the sentence for each discrete offense became one indistinguishable sentence despite the language that the terms were "consecutive." Mr. Alvarez then cited the language in Miranda to support his position that each offense carries its own discrete and separate sentence. Mr. Alvarez also argued that the intent of the parties could not disregard the plain language in the plea calling for "consecutive" terms of probation. Mr. Alvarez argued that the Tribe's intent was inferred from the summary of the probation terms at the end of the plea, thereby disregarding the entire body of the plea which spelled out the specific terms of the plea. Mr. Alvarez argued that the rule of lenity called for finding that the parties intended consecutive sentences, and not a single unitary 24 month term. Mr. Alvarez pointed out that the 9<sup>th</sup> circuit case of Miranda also used Black's Law Dictionary to assist in defining the term "offense." He argued that it has also been longstanding practice and Arizona case law supports the court loss of jurisdiction when the probation term has expired. Although Mr. Alvarez agreed that Miranda did not specifically address the issue of probation, he argued that the reasoning used applied equally to the probation

issue at hand. The reasoning and ruling in Miranda showed that each discrete criminal offense carries its own discrete penalty or sentence. Contrary to the Tribe's argument, it does not become one amalgamate, unitary sentence. Mr. Alvarez asserted that the 9<sup>th</sup> Circuit Court of Appeals in Miranda supported his argument that the probation terms were separate sentences for each count. [Record at 5].

Without a hearing, on August 12, 2013, the Tribal Court issued an Order Denying the Motion to Reconsider. The court stated that it cited to the Miranda case for the proposition that the Tribe can enter consecutive sentences arising out of one criminal event and therefore the Court has the lesser power to stack probationary terms. The Tribal Court stated that it did **not** treat the two separate offenses as two discreet sentences and two discreet probationary terms of 12 months each, because that was not the parties' stipulation as evidenced in their plea which summarized the terms at the end of the plea agreement. [Record at 2]. Mr. Alvarez filed his Notice of Appeal on August 20, 2013. [Record at 1].

### **ISSUES PRESENTED FOR REVIEW**

1. Whether the Tribal Court erred in treating the two separate offenses as separate and discrete for purposes of “stacking” but failed to treat the sentence for each offense as discrete and separate sentences as required by *Miranda v. Anchondo*, 684 F.3d 844 (9<sup>th</sup> Cir. 2012) in violation of his due process rights (25 U.S.C.A. §1302(8)).
  - a. Whether the Tribal Court had jurisdiction to revoke Appellants probation after the probation term had expired.
2. Whether the Tribal Court erred in finding that the intent of the parties to the plea was for combined suspended jail days and probationary terms based on the summary language at the end of the plea despite the specific language in the body of the plea setting forth a separate and discrete sentence for each offense.

## 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 apply a *de novo* standard when reviewing questions of jurisdiction *United States v. Powell*, 24 F.3d 28 (9<sup>th</sup> Cir. 1994). A Court's interpretation and construction of a plea agreement is reviewed for clear error. *United States v. Ajugwo*, 82 F.3d 925, 928 (9<sup>th</sup> Cir. 1996). Questions of law are subject to *de novo* review on appeal. *Pascua Yaqui Tribe v. Alma Soto*, CA-06-010, at 8 (2007); *United States v. Semler*, 883 F.2d 832, 833 (9<sup>th</sup> Cir. 1989).

## ARGUMENT

- I. Whether the Tribal Court erred in treating the two separate offenses as separate and discrete for purposes of “stacking” but failed to treat the sentence for each offense as discrete and separate sentences as required by *Miranda v. Anchondo*, 684 F.3d 844 (9<sup>th</sup> Cir. 2012) and in violation of his due process rights. (25 U.S.C.A. §1302 (8)).
  - a. Whether the Tribal Court had jurisdiction to revoke Appellants probation after the probation term had expired.
- J. Whether the Tribal Court erred in finding that the intent of the parties to the plea was for combined suspended jail days and probationary terms based on the summary language at the end of the plea despite the specific language in the body of the plea setting forth a separate and discrete sentence for each offense.

I. THE TRIBAL COURT ERRED IN TREATING THE TWO SEPARATE OFFENSES AS SEPARATE AND DISCRETE FOR PURPOSES OF “STACKING” BUT THEN TREATED THE TWO SEPARATE OFFENSES AS ONE FOR PURPOSES OF SENTENCING IN CONTRAVENTION OF ESTABLISHED TRIBAL LAW.

Article I, § 1(g) of the Pascua Yaqui Constitution and the Indian Civil Rights Act, 25 U.S.C 1302(7) provide that the court may not impose a sentence exceeding one year’s imprisonment for conviction of any one offense. In the course of determining the meaning of “any one offense,” this court held 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.A. §1302(8). In *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1047 (1976) (*rev’d on other grounds*), the court held that, while the 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.” Accordingly, U.S. Supreme Court constitutional jurisprudence provides strong guidance as to the due process rights which should be accorded to defendants in Pascua Yaqui Tribal Court.

In the course of determining the meaning of “any one offense” this Court went through extensive reasoning and consideration of both Arizona and United States Supreme Court cases to define the meaning of this disputed term. *Pascua Yaqui Tribe v. Miranda, Beatrice*, CA-08-015 (pg. 22). After applying the law that is binding in Arizona and the United States, this Court held that “[a]s separate offenses, a defendant may be properly charged with both, convicted of both, and *sentenced separately* for both.” (*Id.*) This Court held that “[w]hile the defendant could not be sentenced to a term of more than one year for any one offense, she was not convicted of one offense, but eight, and *sentenced separately* for each.” (*Id.*) In addition, the 9<sup>th</sup> Circuit Court of Appeals upheld this ruling stating that tribal courts may “impose up to a one-year term of imprisonment *for each discrete* criminal violation.” *Miranda v. Anchondo*, 684 F.3d 844, 852 (9<sup>th</sup> Cir. 2012).

In this case the Tribe extended a plea offer to Mr. Alvarez. The sentence for each offense was specifically spelled out in the terms of the plea. Mr. Alvarez pled guilty to counts 2,3,7,9 and 10. Mr. Alvarez served 170 days detention for count 3, 170 days detention for count 7 and 155 days detention for count 9. Mr. Alvarez was also sentenced to 360 days detention, suspended for 12 months of probation in count 2 that would run consecutive to another 360 days detention for 12 months of probation. In exercising its powers to “stack” offenses as provided

for in *Miranda*, Mr. Alvarez was convicted of 5 offenses and sentenced separately for each. Notwithstanding, the Tribal Court in denying the Motion to Reconsider, held that it did “not treat the two separate offenses as two discreet sentences and two discreet probationary terms of 12 months each, because that was not the parties’ stipulation as evidenced in their plea...” [Record at 2, lines 13-15]. The Tribal Courts reasoning would, in essence, allow the parties stipulation to trump the law.

a. The Tribal Court had no jurisdiction to revoke Appellants probation after the probation term had expired

The specific terms of the plea agreement provided that Mr. Alvarez would be sentenced to 360 days detention suspended for 12 months of probation which would run consecutive to another 360 days detention for 12 months of probation. [Record at 51]. As with any other case, if the term of probation is 12 months, any motion to revoke must be filed within those 12 months or the Court is without jurisdiction to impose the sentence that was suspended. Although the Tribal Code is silent on the issue, other jurisdictions have held that a court “lacks jurisdiction to revoke probation once it has expired.” *State v. Chacon*, 221 Ariz. 523, 526; 212 P.3d 861, 863 (2009) (*citation omitted*). This Court has stated that “while decisions of the Arizona and United States Supreme Court are not controlling authority in this court, they are highly persuasive...” *Pascua Yaqui Tribe v. Miranda*, CA-08-015. Additionally, the Tribal Court has held similarly in other probation cases.

Here, the petition was filed 13 months into the sentence on December 15, 2011. [Record at 34]. Since the probation terms were to run consecutive to one another, the first 12 month probation term was to run from November 12, 2010 to November 11, 2011. This term would

then be followed by a second 12 months of probation that would run from November 12, 2011 to November 12, 2012. [Record at 51 and 47]. The Court's treatment of the terms as a combined 24 month probation term would render the specific terms in the plea as superfluous.

II. THE TRIBAL COURT ERRED IN FINDING THAT THE INTENT OF THE PARTIES TO THE PLEA WAS FOR COMBINED SUSPENDED JAIL DAYS AND PROBATIONARY TERMS BASED ON THE SUMMARY LANGUAGE AT THE END OF THE PLEA DESPITE THE SPECIFIC LANGUAGE IN THE BODY OF THE PLEA SETTING FORTH A SEPARATE AND DISCRETE SENTENCE FOR EACH OFFENSE.

In its Order denying Mr. Alvarez' Motion to Reconsider, the Tribal Court stated that it "[did] not treat the two separate offenses as two discreet sentences and two discreet probationary terms of 12 months each, because that was not the parties' stipulation as evidenced in their plea." [Record at 2]. Notwithstanding, the plea agreement specifically set out each offense and its corresponding sentence separately in the first 2 pages of the plea agreement. The terms were then all summed up in the first 3 lines of page 3 of the plea. It was this summary of terms that the Court focused on to determine the intent of the parties, thereby rendering the first 2 pages unessential.

"Plea agreements are contractual in nature and are measured by contract law standards." *United States v. Keller*, 902 F.2d 1391, 1393 (9<sup>th</sup> cir. 1990). In the plea at hand, there are specific provisions setting forth the terms of the plea. At the end of the plea there is a summary of the terms of the plea. The Tribe argues that the 3 sentence summary at the end of the plea is evidence of the parties' intent. Mr. Alvarez argues that the specific provisions in the 2 pages forming the body of the plea evidence the intent of the parties. The 9<sup>th</sup> Circuit

Court of Appeals held that specific provisions in a contract express the intent of the parties better than general provisions. *Central Housing Inv. Corp. v. Federal Nat. Mortg. Assn.*, 74 Ariz. 308,311; 248 P.2d 866,867. “It is a well recognized rule of law, that where there is an inconsistency in a contract, the specific provisions qualify the meaning of the general provisions.” *Tyson v. Tyson*, 61 Ariz. 329, 149 P.2d 674. Since the specific provisions in the plea set forth separate and discrete sentences for each offense, it follows that the intent of the parties was for each sentence to be separate. Moreover, in terms of plea agreements, it is the government that “ordinarily must bear responsibility for any lack of clarity. *United States v. Anderson*, 970 F.2d 602, 607 (1992) *amended*, 990 F.2d 1163 (9<sup>th</sup> Cir. 1993); *United States v. Packwood*, 848 F.2d 1009, 1011 (9<sup>th</sup> cir. 1988).

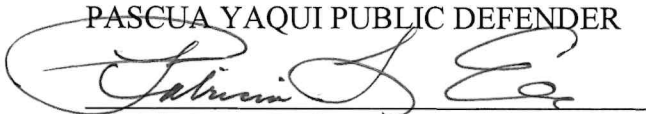
### CONCLUSION

The Tribal Court committed clear error when it held that the intent of the parties to the plea agreement was evidenced from the summary of the terms at the end of the plea and completely ignoring the specific terms in the body of the plea. Even if the reading of the plea can reasonably be read both ways, as argued by the Tribe or as argued by Mr. Alvarez, the rule of law requires that Tribe (government) bear the responsibility for lack of clarity.

Clearly, the court lacked jurisdiction to impose a suspended sentence on a probation term that had expired when the Tribe (Probation) filed the Motion to Revoke a month after the term of probation on Count 2 had expired. The Motion to Revoke could then only apply to the suspended term that was still active. Accordingly, Mr. Alvarez asks this Court to reverse the

trial court's sentence and that Mr. Alvarez be appropriately sentenced to the 360 days that were suspended in Count 10.

DATED this 30<sup>th</sup> day of December, 2013.

PASCUA YAQUI PUBLIC DEFENDER  
  
Patricia Leon-Enriquez  
Senior Staff Attorney  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that Mr. Alvarez's Opening Brief was 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 one (1) copy of Mr. Alvarez's Opening Brief was delivered this date 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 30<sup>th</sup> day of December, 2013.

PASCUA YAQUI PUBLIC DEFENDER

A handwritten signature in black ink, appearing to read 'Patricia Leon-Enriquez', written over a horizontal line.

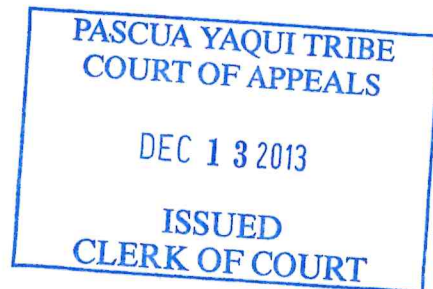
Patricia Leon-Enriquez  
Deputy Public Defender

No. CA-13-003  
Pascua Yaqui Court of Appeals

\_\_\_\_\_  
Pascua Yaqui Tribe, Appellee,

vs.

Alvarez, Mateo, Appellant.



**ORDER**

Appeal of Trial Court Cases No. CR-08-056.

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

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

On December 13, 2013 Counsel for Appellant Alvarez submitted a Motion for Extension of Time for Filing Opening Brief, opposing counsel was contacted and does not object to a request for extension of time.

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 Hopkins hereby grants the Motion for Extension of Time and gives Appellant an additional fifteen (15) days from today to file an Opening Brief, making the new due date December 30, 2013.

So **ORDERED** this 13th day of December 2013.

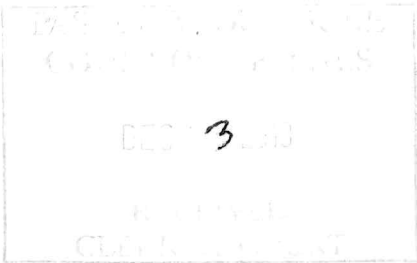
A handwritten signature in cursive script, appearing to read "James C. Hopkins".

\_\_\_\_\_  
James C. Hopkins, Chief Judge

Sent via electronic mail this 13th day of December, 2013 to:

Allen Osburn  
Allen.Osburn@pascuayaqui-nsn.gov

Patricia Leon-Enriquez  
Patricia.Leon-Enriquez@pascuayaqui-nsn.gov



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

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

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

8  
9 PASCUA YAQUI TRIBE,

10 Appellee,

11 vs.

12 ALVAREZ, MATEO,

13 Appellants.

Case No. CA-13-003  
Tribal Court No. CR-08-056

**MOTION FOR EXTENSION OF TIME FOR  
FILING OPENING BRIEF**

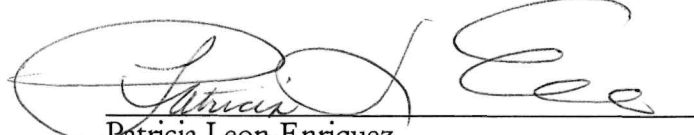
14  
15 Appellant Mateo Alvarez, through counsel and pursuant to Section 3 PYTC §2-3-70(B), Pascua  
16 Yaqui Rules of Appellate Procedure, respectfully moves this to Court to enter an order extending the time  
17 for the filing of the Appellant's Opening Brief. Appellant's notice of appeal was filed on August 20, 2013.  
18 However, the appeal was dismissed on September 23, 2013 and reinstated on November 13, 2013. The  
19 Opening Brief is due December 13, 2013. Undersigned counsel has contacted Deputy Prosecutor Allen  
20 Osburn, prosecutor in the above case, and he does not object to the request for extension of time to file the  
21 Opening Brief in this matter. 3 PYTC §2-3-80(c)(3) provides that the Chief Judge may grant a motion for a  
22 procedural order without awaiting a response.

23 WHEREFORE Appellant Mateo Alvarez, respectfully moves this Court to enter an order extending  
24 the time for the filing of the Opening Brief.

25 /  
26 /  
27 /  
28 /

1 DATED this 13<sup>th</sup> day of December, 2013.

2 PASCUA YAQUI PUBLIC DEFENDER

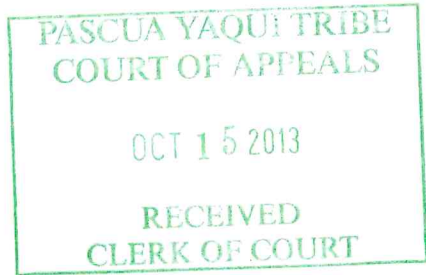
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4 Patricia Leon-Enriquez  
5 Assistant Public Defender

6  
7 ORIGINAL e-mailed this date  
8 PYT Court of Appeals:

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

2 Patricia Leon-Enriquez, SBN 010186  
3 Counsel for Appellant

4  
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 ALVAREZ, MATEO,  
12 Defendant/Appellant.

) Court of Appeals Case No: CA-13-003

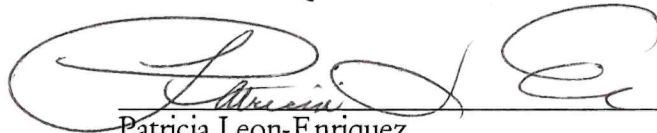
) Trial Court Case No.: CR-08-056

) **RESPONSE TO TRIBE'S MOTION TO  
DISMISS APPEAL**

13  
14 Pursuant to the Pascua Yaqui Court of Appeals Order dated October 3, 2013, the Appellant hereby  
15 files his response to the Tribe's Motion to Dismiss Appeal and respectfully asks that the Court deny the  
16 Tribe's Motion.

17  
18 DATED this 15<sup>th</sup> day of October, 2013.

19 PASCUA YAQUI PUBLIC DEFENDER

20   
21 Patricia Leon-Enriquez  
22 Senior Staff Attorney  
23 Counsel for Defendant/ Appellant Mateo Alvarez

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 Hon. Melvin Stoof  
10 Pascua Yaqui Tribal Court  
11 7474 South Camino de Oeste  
12 Tucson, AZ 85757

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

14 G. Allen Osburn  
15 Chief Prosecutor  
16 Office of the Prosecutor of the Pascua Yaqui Tribe  
17 7474 South Camino de Oeste  
18 Tucson, AZ 85757

19 DATED this 15<sup>th</sup> day of October, 2013.

20 PASCUA YAQUI PUBLIC DEFENDER

21 \_\_\_\_\_  
22 Monique Ramsey  
23 Office Manager  
24  
25  
26  
27  
28

1           **I. Facts and Procedural History**

2           The trial court denied the Appellant’s Motion to Modify Sentence on July 10, 2013. The Appellant then  
3 filed a Motion to Reconsider on July 19, 2013. The trial court denied the Motion to Reconsider on August  
4 12, 2013. A Notice of Appeal was filed by the Appellant on August 20, 2013<sup>1</sup>. The Appellee subsequently  
5 filed a Motion to Dismiss Appeal (“Motion”) in which it surmised that the Court of Appeals lacked  
6 jurisdiction because the Appellant had not filed his Notice of Appeal timely.  
7

8           **II. Law and Application**

9           There is no dispute that 3 PYTC § 2-3-100(A) mandates that a notice of appeal be “filed no later than 30  
10 days from the date the trial judge has signed the decision from which the appeal is taken.” The issue before  
11 the Court of Appeals is whether the 30 days in this case begins running from the July 10, 2013 Order  
12 denying the Appellant’s Motion to Modify Sentence or the August 12, 2013 Order denying the Appellant’s  
13 Motion to Reconsider.  
14

15           The Tribe’s Motion to Dismiss posits that the 30 days should run from the July 10, 2013 Order because,  
16 according to Arizona law, “a motion to reconsider does not toll the time for the filing of a notice.” Motion,  
17 p. 1, fn. 1 (citing *State v Limon*, 229 Ariz. 22, 23, 279 P.3d. [849], 850 (Ariz. App., 2011)). The Tribe’s  
18 argument is flawed for several reasons. First, *Limon* doesn’t even concern tolling. In *Limon*, the Court of  
19 Appeals of Arizona was tasked with determining whether or not an order denying the state’s motion to  
20 reconsider was an appealable order. *Limon*, 229 Ariz. at 23. Because “the right to appeal is strictly  
21 statutory,” *Id.* the Court looked directly to the statute governing appeals in the state in Arizona, A.R.S. § 13-  
22 4032. Citing § 13-4032, the Court found that the state was permitted to appeal from seven enumerated  
23 rulings or orders, and that a ruling on a motion to reconsider was not among them<sup>2</sup>. *Limon*, 220 Ariz. at 23.  
24  
25  
26

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27 <sup>1</sup> The issue on appeal is whether the trial court retains jurisdiction to violate a probation term that has arguably already  
28 expired, and not whether the court can “stack” probation terms.

<sup>2</sup> Incidentally, while A.R.S. § 13-4032 concerns appeals taken by the state, if Arizona law actually applied to this case, then  
the Tribe should have cited A.R.S. § 13-4033 which covers those appeals taken by defendants.

1 Thus, the real inquiry in this case is whether the Pascua Yaqui Tribe's Rules of Appellate Procedure permit a  
2 defendant to appeal an order denying a motion to reconsider.

3 While the Arizona statutory scheme governing appeals provides a narrow model where only those types  
4 of orders enumerated by statute may be appealed, the Pascua Yaqui Tribe's statute is quite different. Rather  
5 than list those orders which may be appealed, 3 PYTC § 2-3-90 lists two orders from which appeals may not  
6 be taken: (1) interlocutory appeals in civil cases, 3 PYTC § 2-3-90(F) and (2) an appeal by the Tribe of a  
7 judgment acquitting a defendant in a criminal case, 3 PYTC § 2-3-90(G). Because the Rules of Appellate  
8 Procedure overtly list the kinds of appeals which are not permitted, it implicitly permits appeals of other  
9 "judgments[s], order[s], or decision[s]" 3 PYTC 2-3-90(A)(1) not specifically prohibited. Any other  
10 interpretation would run afoul of 1 PYTC § 2-30(B)'s instruction that "[t]his Code shall be construed as a  
11 whole to give effect to all its parts in a logical, consistent manner."  
12

13  
14 The Tribe's reliance on Arizona law is misplaced. There is no need to turn to Arizona law when there is  
15 a Pascua Yaqui Tribal statute on point. While Arizona appears to have intended to construct a narrow  
16 jurisdiction for its Court of Appeals, the Pascua Yaqui Tribal Council's intent appears to have been to create  
17 broad jurisdiction for its Court of Appeals. The Tribe should not be permitted to simply turn to Arizona  
18 law because it does not agree with the outcome under Pascua Yaqui Tribal law.

19  
20 The Court of Appeals has jurisdiction over this case because the Appellant filed his Notice of Appeal  
21 within 30 days of the trial court's Order denying his Motion for Reconsideration<sup>3</sup>. The Order denying the  
22 Motion to Reconsider is an appealable order and, as a result, the Notice of Appeal was timely. While  
23 Arizona may have barred such an appeal, the Pascua Yaqui Tribal Code clearly permits it.

24 Wherefore, the Appellant respectfully requests that the Court of Appeals deny the Tribe's Motion to  
25 Dismiss Appeal and permit the appeal to proceed on its merits.  
26  
27

28  

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<sup>3</sup> Because it was timely filed, 3 PYTC § 2-3-100(B) is not applicable as there was no need for an extension of time.

1  
2 RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of October, 2013.

3 PASCUA YAQUI PUBLIC DEFENDER

4  
5 

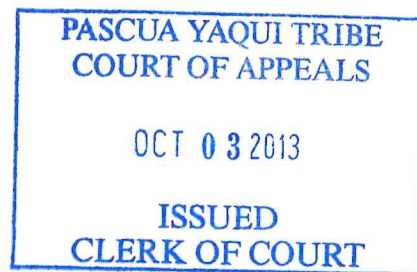
6 Patricia Leon-Enriquez  
7 Senior Staff Attorney  
8 Counsel for Defendant/Appellant Mateo Alvarez  
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No. CA-13-003  
Pascua Yaqui Court of Appeals

\_\_\_\_\_  
Pascua Yaqui Tribe, Appellee,

vs.

Mateo Alvarez, Appellant.



**ORDER**

Appeal of Trial Court Case No. CR-08-056.

Patricia Leon-Enriquez, Office of the Public Defender, Pascua Yaqui Tribe, Tucson AZ for Appellant.

G. Allen Osburn, Office of the Prosecutor, Pascua Yaqui Tribe, Tucson AZ for Appellee.

Judge Stoof issued a final order on Tribal Court case CR-08-056 on July 10, 2013. Appellant filed a Notice of Appeal based on CR-08-056 on August 20, 2013. Appellee filed a Motion to Dismiss on September 3, 2013 based on Appellant's untimely filing of the appeal. Appellee failed to comply with 3 PYTC § 2-3-60 and never served Appellant with a copy of the Motion to Dismiss. This Court issued a final opinion dismissing the appeal on September 23, 2013.

Pursuant 3 PYTC § 2-3-210, Appellee filed a Petition for Reconsideration and Request for Leave to Respond to Tribe's Motion to Dismiss Appeal on September 30, 2013.

3 PYTC § 2-3-60 clearly states the requirements for filing and serving any papers in appellate court. It is clear to this Court that Appellee failed in his responsibility to properly serve Appellant. Although the Court holds no obligation to serve papers filed by the parties or to correct Appellee's mistake, the Court recognizes that the adversarial process was not allowed to fully run its course.

3 PYTC §2-3-50 allows the appellate court to "suspend requirements or provision of any of the rules in a particular case...and order proceedings in accordance with its discretion". Chief Justice Hopkins hereby grants Appellant leave to respond to Appellee's Motion to Dismiss. This Court is not reconsidering its opinion with this order, only allowing Appellant an opportunity to respond to the Motion to Dismiss it was never served with. This order in no way disturbs, changes, or alters the Court's final opinion in this case.

Appellant has fifteen (15) days to file a Response to the Motion to Dismiss.

So **ORDERED** this 3rd day of October 2013.

A handwritten signature in cursive script, appearing to read "James C. Hopkins".

---

James C. Hopkins, Chief Judge

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

2 Patricia Leon-Enriquez, SBN 010186  
3 Counsel for Appellant

4  
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 ALVAREZ, MATEO,  
12 Defendant/Appellant.

) Court of Appeals Case No: CA-13-003

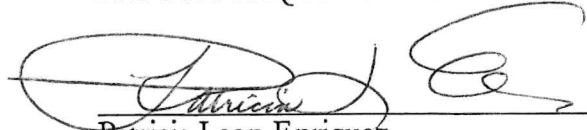
) Trial Court Case No.: CR-08-056

) PETITION FOR RE CONSIDERATION  
) AND REQUEST FOR LEAVE TO  
) RESPOND TO TRIBE'S MOTION TO  
) DISMISS APPEAL

13  
14 Pursuant to 3 PYTC § 2-3-210, counsel for Appellant Mateo Alvarez respectfully files a Petition for  
15 Reconsideration of the Court's September 23, 2013 Opinion dismissing the appeal. The grounds for this  
16 motion are set forth in the accompanying Memorandum. The Appellant requests that this Court reconsider  
17 its Opinion after granting the Appellant leave to respond to the Appellee's Motion to Dismiss Appeal.

18  
19 DATED this 30<sup>th</sup> day of September, 2013.

20 PASCUA YAQUI PUBLIC DEFENDER

21   
22 \_\_\_\_\_  
23 Patricia Leon-Enriquez  
24 Senior Staff Attorney  
25 Counsel for Defendant/Appellant Mateo Alvarez  
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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:

Hon. Melvin Stoof  
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:

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

DATED this 30<sup>th</sup> day of September, 2013.

PASCUA YAQUI PUBLIC DEFENDER

---

Monique Ramsey  
Office Manager

1  
2 Memorandum

3 I. Facts and Procedural History

4 The trial court denied the Appellant's Motion to Modify Sentence on July 10, 2013. The Appellant then  
5 filed a Motion to Reconsider on July 19, 2013. After allowing the Tribe an opportunity to respond, the trial  
6 court denied the Motion to Reconsider on August 12, 2013. A Notice of Appeal was filed by the Appellant  
7 on August 20, 2013. The Appellant eventually learned that the Appellee filed a Motion to Dismiss Appeal  
8 ("Motion") on September 3, 2013. The Motion was never served on the Appellant who had no knowledge  
9 that it had been filed, and subsequently, no opportunity to respond. The Appellant only became aware that  
10 the Motion was filed when the Court of Appeals served its September 23, 2013 Opinion dismissing the  
11 appeal.  
12

13  
14 II. Law and Application

15 The Rules of Appellate Procedure very clearly spell out the requirements of filing and serving all papers  
16 in the appellate court. 3 PTYC § 2-3-60. More specifically, the law requires:

17 (B) Service of all Papers required; Notice by the Court; Manner of Service. Copies of all papers filed by  
18 any party *shall be served by the party, or person acting for him, on all parties to the appeal no  
later than the date they are filed.*

- 19 (1) This rule shall not apply to the transcript filed pursuant to Section 90.  
20 (2) Service may be personal or by mail.  
21 (3) Personal service includes delivery of the copy to counsel or a responsible person at the office  
of counsel.  
22 (4) Service by mail is complete on mailing.  
(5) The appellate court clerk shall serve papers on parties in accordance with the foregoing.

23 (C) Proof of Service. Papers presented for filing shall contain an acknowledgement of service by the  
24 person served, or proof of service shall be shown by a statement of the date and manner of service and  
the name of the person served and signed by the person who made service.

25 3 PYTC §§ 2-3-60(B) and (C). (emphasis added).  
26

27 While the Appellee appears to have filed a Motion to Dismiss Appeal on September 3, 2013, the  
28 Appellee did not comply with requirements of 3 PYTC § 2-3-60(B) when it failed to serve opposing party a

1 copy of the Motion. Not only did the Appellee fail to serve Appellant the same day it filed the Motion with  
2 the Court; it failed to ever serve Appellant. While undersigned counsel avows that she never received a copy  
3 of the Motion to Dismiss Appeal, the Appellee's failure to serve Appellant is also readily apparent on page  
4 2, lines 19-22 of the Appellee's Motion. The "proof of service" section of the Appellee's Motion, is  
5 glaringly incomplete. Where the date of service should be listed, there is a blank line. There is no date of  
6 service or any indication as to who made service as required by 3 PYTC § 2-3-60(C).

7  
8 The Appellee's failure to serve the Appellant a copy of the Motion to Dismiss is not a simple  
9 technical misstep. Rather, the failure to properly serve the Appellant, whether intentional or not, completely  
10 undermined the fairness of the adversarial process. The Appellant was deprived an opportunity to respond  
11 and the Court of Appeals dismissed the appeal without ever considering the Appellant's presentation of the  
12 facts and law. For all the Court of Appeals knew, the Appellant's failure to respond was a willful one. As  
13 should be clear here, however, the Appellant did not make a decision not to file a response to the Motion.  
14 Rather, the Appellee's failure to properly serve a copy of the Motion on the Appellant deprived the  
15 Appellant of any notice that the Motion had been filed and an opportunity to respond.

16  
17 Because the Appellee's failure to comport with the requirements of 3 PYTC §§ 2-3-60(B) and (C) so  
18 clearly undermined the fairness of the proceedings, the Appellant requests that the Court of Appeals  
19 provide a just remedy by reconsidering its Opinion to dismiss the appeal after it gives the Appellant an  
20 opportunity to meaningfully respond to the Motion. Typically, 3 PYTC § 2-3-80(A)(2) gives a party "15  
21 days after service of the motion" to respond. In this case, however, where the Appellant did not receive  
22 actual notice of the Appellee's Motion until the Court of Appeals served Appellant with an Opinion  
23 dismissing the appeal, the Appellant requests that the Court of Appeals allow the Appellant a period of time  
24 it determines is fair to properly respond to the Motion before reconsidering its Opinion.

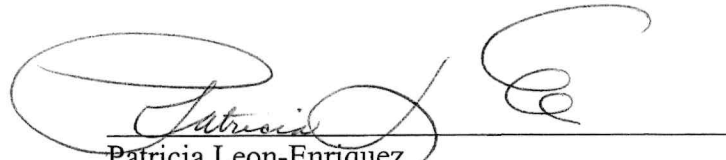
25  
26 According to 3 PYTC § 2-3-50, the Court of Appeals has discretion to fashion a remedy such as the  
27 one proposed when it finds good cause to "suspend the requirements or provisions of any of these rules."  
28

1 Overall, the Rules of Appellate Procedure are constructed “to do justice.” *Id.* There is simply no justice  
2 where a party can present a one-sided Motion to Dismiss Appeal to the Court of Appeals by failing to serve  
3 a copy on opposing party as required by the rules and the most fundamental notions of due process.

4 Wherefore, the Appellant respectfully requests that the Court of Appeals give the Appellant a period  
5 of time it deems reasonable to respond to the Motion to Dismiss Appeal and, after reviewing the response,  
6 reconsider its Opinion dismissing the appeal.  
7

8  
9 RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of September, 2013.

10 PASCUA YAQUI PUBLIC DEFENDER

11  
12 

13 Patricia Leon-Enriquez  
14 Senior Staff Attorney  
15 Counsel for Defendant/Appellant Mateo Alvarez  
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No. CA-13-003

Pascua Yaqui Court of Appeals

\_\_\_\_\_  
Mateo Alvarez, Appellant,

vs.

Pascua Yaqui Tribe, Appellee,

PASCUA YAQUI TRIBE  
COURT OF APPEALS

SEP 23 2013

ISSUED  
CLERK OF COURT

Appeal of a decision of the Pascua Yaqui Trial Court in Case No. CR-08-056, the Honorable Melvin Stoof presiding.

Patricia Leon-Enriquez, Pascua Yaqui Public Defender, 7474 S. Camino de Oeste, Tucson AZ 85757 for the Appellant.

G. Allen Osburn, Office of the Prosecutor of the Pascua Yaqui Tribe, 7777 Camino Huivisim, Tucson, AZ for the Appellee.

\*\*\*\*\*

## **I. Opinion**

1 The issue before this Court is whether a motion for reconsideration suspends the time for filing an appeal. This Court holds that it does not and affirms the Tribe's motion to dismiss the appeal due to Appellant's untimely filing.

## **II. Background**

2 Appellant appealed CR-08-056 on August 20, 2013 to determine whether the court can "stack" probation terms. The appeal is based on a final order dated July 10, 2013. Appellant filed a motion for reconsideration on July 19, 2013, which was denied by the Tribal Court judge on August 12, 2013. The Tribe filed a motion to dismiss because Appellant filed the appeal over thirty days after the final order in violation of 3 PYTC §2-3-100(A).

### III. Untimely Filing

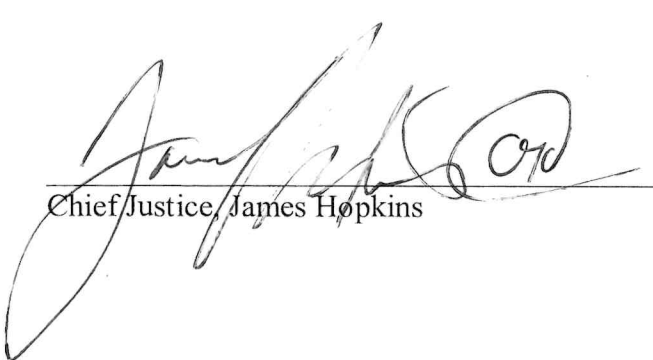
3       “The right to appeal is strictly statutory.” *See State v. Berry*, 133 Ariz. 264, 267, 650 P.2d 1246, 1249 (App.1982). The Pascua Yaqui Tribal Code states that “notice of appeal shall be filed no later than thirty days from date the trial judge has signed the decision from which the appeal is taken, unless a different time is provided by law.” See 3 PYTC §2-3-100(A). The time for filing a motion to appeal may be extended if the following motions are timely filed: a motion for judgment notwithstanding the verdict, a motion to amend or make additional findings of fact whether or not granting the motion would alter the judgment, a motion to alter or amend the judgment, or a motion for new trial. See 3 PYTC §2-3-100(B).

4       In the instant case, Appellant filed a motion to reconsider, which is not on the list of motions that would allow an extension of time to file an appeal. The Tribal Court’s final order is dated July 10, 2013 and Appellant had thirty days from the 10<sup>th</sup> of July to file an appeal. Since the notice of appeal was untimely, this Court lacks the jurisdiction and the appeal is dismissed.

### IV. Conclusion

5       Appeal dismissed.

So ordered on this 23rd day of September 2013.

  
Chief Justice James Hopkins

1 **Pascua Yaqui Tribe**  
2 *Office of the Prosecutor*  
3 7474 S Camino de Oeste  
4 Tucson, AZ 85757  
(520) 879-6251 Telephone  
(520) 879-6260 Facsimile

PASCUA YAQUI TRIBE  
COURT OF APPEALS  
  
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PASCUA YAQUI TRIBAL COURT  
TELEPHONE: (520) 879-6251  
2013 SEP -3 PM 4:36  
DOCKET NO. \_\_\_\_\_  
CITY \_\_\_\_\_

5 By Allen Osburn,  
6 Deputy Prosecutor

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

9 PASCUA YAQUI TRIBE, ) Appellate Ct. No. \_\_\_\_\_  
10 )  
11 Plaintiff/Appellee, ) Trial Ct. Case No. CR-08-056  
12 )  
13 v. )  
14 ) **MOTION TO DISMISS**  
15 ALVAREZ, Mateo, ) **APPEAL**  
16 )  
17 )  
18 )  
19 )  
20 )  
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23 )  
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25 )  
26 )  
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28 )  
Defendant/Appellant.

COMES NOW the Appellee, Pascua Yaqui Tribe through its attorney, the undersigned and moves to dismiss the above caption and numbered appeal for lack of jurisdiction. The Appellant appeals the final order of the trial court, date and filed July 10, 2013. The Appellant filed his notice of appeal on August 20, 2013. The difference between the two dates is 41 days. The Pascua Yaqui Tribal Code states: “[t]he notice of appeal shall be filed no later than 30 days from the date the trial judge has signed the decision from which the appeal is taken, unless a different time is provided by law.” See 3 PYTC § 2-3-100 (A). The Appellant did not file any of the specified motions identified in subsection (B) that would toll the time for the filing of notice.<sup>1</sup> Thus, the Appellant’s filed notice is untimely.

<sup>1</sup> The Appellant filed a motion for reconsideration. However, a motion to reconsider does not toll the time to file a notice of appeal. See State v. Limon, 229 Ariz. 22, 23, 279 P.3d 574, 850 (Ariz. App., 2011)


1 The Appellant did not cite law or facts that provided a legal basis for extended the time to file  
2 his notice of appeal. This Court cannot grant a motion to extend the time for appeal outside the  
3 narrow confines of subsection 3 PYTC § 2-3-100 (B). The Code specifically forbids the extending  
4 the time for the filing the notice.

5  
6 Shortening or Extension of Time. The time for doing any act provided for in these  
7 rules, or by order of the appellate court, or by any applicable law, may be shortened or  
8 extended upon stipulation of the parties and filed with the appellate court, or upon  
9 written motion for good cause shown, **but the appellate court may not shorten or  
10 extend the time for the filing of a notice of appeal.**

11 [emphasis mine] See 3 PYTC § 2-3-70 (B). In short, the Appellant has no basis to extend the filing  
12 deadline.

13 In conclusion, the Appellant's notice of appeal is file untimely. This is jurisdictional.  
14 Further, Appellant cited no lawful basis to extend or toll the time for the notice requirement.  
15 Therefore, Appellee moves to dismiss the above appeal for lack of jurisdiction.

16 RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of September, 2013.

17  
18   
19 By G. Allen Osburn  
20 Deputy Prosecutor

21 A copy of the foregoing was delivered this  
22 \_\_\_\_\_ date to:

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28  
Public Defender

PASCUA YAQUI TRIBE  
COURT OF APPEALS  
AUG 20 2013  
RECEIVED  
CLERK OF COURT

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

3 Patricia Leon-Enriquez, SBN 010186  
4 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 ALVAREZ, MATEO,  
12 Defendant/ Appellant.

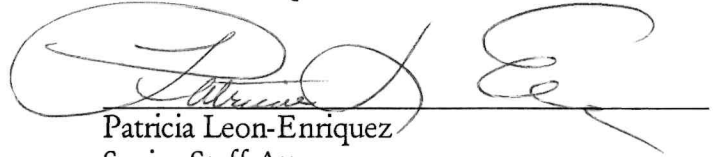
) Court of Appeals Case No:  
) Trial Court Case No.: CR-08-056  
) NOTICE OF APPEAL

13  
14 Pursuant to 3 PYTC Part II, Chapter 2-3, Section 90, Pascua Yaqui Tribe Rules of Appellate  
15 Procedure, counsel for Appellant Mateo Alvarez respectfully files a Notice of Appeal in the Appellate Court  
16 from the Order denying Defendant's request for early release entered in this action by the Pascua Yaqui  
17 Tribal Court on July 10, 2013 and the Order denying Defendant's Motion to Reconsider entered on August  
18 12, 2013. Copies of the Court's Orders are attached hereto as required by Section 90, Pascua Yaqui Rules of  
19 Appellate Procedure.

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

22 DATED this 20<sup>th</sup> day of August, 2013.

23 PASCUA YAQUI PUBLIC DEFENDER

24   
25 Patricia Leon-Enriquez  
26 Senior Staff Attorney  
27  
28

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:

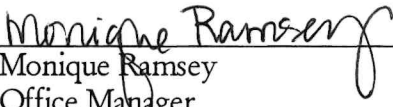
8 Hon. Melvin Stoof  
9 Pascua Yaqui Tribal Court  
7474 South Camino de Oeste  
Tucson, AZ 85757

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

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

15 DATED this 20<sup>th</sup> day of August, 2013.

16 PASCUA YAQUI PUBLIC DEFENDER

17  
18   
19 Monique Ramsey  
20 Office Manager  
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1 IN THE PASCUA YAQUI TRIBAL COURT

2 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

3  
4 PASCUA YAQUI TRIBE, ) CASE NO. CR-08-056  
5 PLAINTIFF, )  
6 vs. ) ORDER DENYING REQUEST FOR  
7 ALVAREZ, MATEO, ) EARLY DETENTION RELEASE  
8 DEFENDANT. )  
9 \_\_\_\_\_ )

10 On July 10, 2013, the defendant, in custody, appeared with his counsel, Patricia Leon-  
11 Enriquez, who requested that the Court grant a request that he be released early from detention  
12 that had been agreed to through a plea agreement. The Tribe's G. Allen Osburn objected to the  
13 request, and probation's Yvette Alvarez objected to the request, because the Tribe and  
14 probation have "stacked" probationary terms just as the court has allowed for consecutive  
15 sentencing on separate counts beyond a one year period.

16 Defendant argues that because the motion to revoke probation was filed 13 months  
17 after the original order, that the court lost jurisdiction over the motion to revoke because the  
18 time of filing was past the "one year per offense" dictated by the criminal statutes. However,  
19 the court disagrees, and the Court follows the logic of the federal 9<sup>th</sup> circuit court of appeals  
20 case, *Beatrice Miranda v. Pascua Yaqui Tribe*, which held that a tribal court may impose  
21 consecutive sentences that total more than one year arising out of the same factual basis for an  
22 offense, so long as each distinct offense contains elements that the other crimes proven. Such  
23 "stacking" of sentences did not violate the defendant's civil or constitutional rights and were  
24 valid judgments under tribal and federal law, the Indian Civil Rights Act. If the tribal court  
25 may impose consecutive sentences for separate crimes, then it also has the concomitant or  
26 lesser power to "stack" probationary periods. In this case, the defendant and his counsel,  
27 Rachel Rico, negotiated the plea agreement and agreed that 720 days detention would be  
28 suspended for 24 months of probation, based on two consecutive sentences of 360 day  
detention suspended for one year probation. The October 20, 2009 plea agreement makes  
clear the parties' intent:

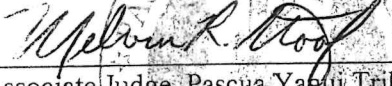
Defendant sentenced to 1215 total days of detention; 495 days are to be served with  
720 days suspended for a total of 24 months of probation. Detention days to be  
consecutive; probation to be consecutive. Defendant to be credited with time served  
from July 5, 2009.

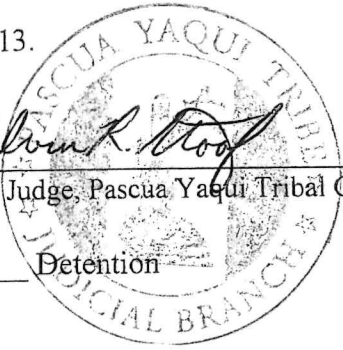
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The Court adopted the parties' agreement and made the agreement it part of the final order. The fact that the probation officer filed for revocation of probation one month after 12 months had passed, or 13 months after the agreement was entered, does not divest the court of its jurisdiction to rule on the motion to revoke, because the parties' intent was that probation last 24 months, and the motion to revoke was filed well within that time frame. Because the defendant signed the agreement, and his counsel also advised him prior to entry of the plea agreement, he was aware that the terms of probation were for 24 months, and for lack of good cause shown, the court should deny the request for an early release from detention.


**IT IS ORDERED** that the Court denies the request for an early release from detention, for lack of good cause shown.

SO ORDERED THIS 10<sup>th</sup> DAY OF JULY, 2013.

  
Associate Judge, Pascua Yaqui Tribal Court



cc: Date 07.10.13  
 Tribe  Defendant/Counsel  Probation  Detention

  
Clerk

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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

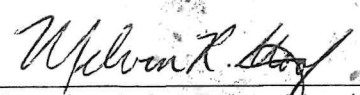
PASCUA YAQUI TRIBE,	)	CASE NO. CR-08-056
PLAINTIFF,	)	
vs.	)	ORDER DENYING MOTION TO
ALVAREZ, MATEO,	)	RECONSIDER
DEFENDANT.	)	
_____	)	

On July 10, 2013, the Court denied the motion for early release, and on July 19, 2013, defendant's counsel, Patricia Leon-Enriquez, asked the court to reconsider its ruling, the Tribe filed its objection on August 1, 2013, and defendant filed a reply on August 6, 2013.

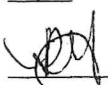
The defendant's motion to reconsider should be denied, because the court cited to the *Miranda* case for the proposition the a Tribe could enter consecutive sentences arising out of one criminal event, and from that premise drew the inference that the Court has the concomitant or lesser power to stack probationary periods. The Court does not treat the two separate offenses as two discreet sentences and two discreet probationary terms of 12 months each, because that was not the parties' stipulation as evidenced in their plea, which stated that "**720 days suspended for a total of 24 months of probation,**" and the agreement does not read that each offense was a "discreet" probationary period or that the defendant was sentenced separately for each, but rather, the 720 suspended days were combined and the probationary periods were 24 months, combined, for the plea. (emphasis added). For lack of good cause shown, the Court denies the motion to reconsider its previous denial of the defendant's motion for early release.

**IT IS ORDERED** that the Court denies the request for an early release from detention, for lack of good cause shown.

SO ORDERED THIS 12<sup>th</sup> DAY OF AUGUST, 2013.

  
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 Associate Judge, Pascua Yaqui Tribal Court

cc: Date 08 12 13  
 Tribe  Defendant/Counsel  Probation  Detention

  
 \_\_\_\_\_  
 Clerk