

PASCUA YAQUI TRIBE
COURT OF APPEALS
JAN 28 2014
ISSUED
CLERK OF COURT

No. CA-13-005
Pascua Yaqui Court of Appeals

In Re Pascua Yaqui Tribe, Petitioner

Writ of Mandamus regarding Pascua Yaqui Trial Court in Case No. CR-14-080 and CR-14-081, the Honorable Melvin Stoof presiding.

Fredrick Lomayesva, Office of the Prosecutor, 7777 S. Camino Huivisim, Bld.A, Tucson AZ 85757.

Opinion

I. Jurisdiction

1. This Court has jurisdiction to hear a writ of mandamus pursuant to PYT Constitution Article VIII, §2 and 3 PYTC §2-3-260.

II. Summary

2. The petition before this Court is unusual in that Petitioner Tribe filed an extraordinary writ of mandamus seeking an order to direct the Respondent, the Honorable Judge Stoof, to receive the Defendant's waiver of counsel on the record. "The remedy of mandamus is a drastic one, to be involved only in extraordinary situations." *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654 (9th Cir. 1977) (citing *Will v. United States*, 389 U.S. 90, 95 (1967)). Therefore, "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Id.* "To warrant the court in issuing the writ it must appear that the petitioner has a clear legal right to the performance of the particular duties sought to be enforced and that it has no other plain, adequate and complete method of redressing the wrong or obtaining the relief to which it is entitled so that without the issuance of the writ there would be a failure of justice." *See Kay Ferer Inc., v. Hulen*, 160 F.2d 146, 149 (1947). Even if the Government has no right to appeal, the writ of mandamus should not be used as a substitute for an interlocutory appeal. *See Will v. United States*, 389 U.S. 90, 97 (citing *DiBella v. United States*, 369 U.S. 121, 130 (1962)). In this case, the Tribe could have sought to have the Tribal Court reconsider the request by way of motion, or alternatively the Tribe could have sought to have this Court rule on the matter by way of an interlocutory appeal. Instead, the Tribe is

seeking judicial review, and while the foregoing options present a more suitable way to request a remedy, judicial efficacy requires consideration of the time to re-file under a more appropriate Code section and committing further judicial resources than have already been spent in this matter. This Court is not proceeding on the basis of mandamus; the writ of mandamus is denied. However, we will proceed on the basis of judicial efficacy and will address the issue of waiver of counsel as an interlocutory appeal. The Court of Appeals may suspend any Rules of Appellate Procedure and order proceedings in accordance with its discretion. 3 PYTC §2-3-50.

3. This case revolves around the issue of whether Ms. Molina is lay counsel, which by all accounts she is. In the instant case, the guiding provision this Court focused on, 3 PYTC § 1-4-50, provides that “Lay counsel shall be permitted to practice before the Pascua Yaqui Courts in criminal matters, only when the defendant has waived his right to counsel. Lay counsel shall be certified as provided in Section 20.” Since Ms. Molina is lay counsel, and in light of the unique facts underlying this case, this Court is of the opinion that the learned Judge Stoof is required by the Pascua Yaqui Code to obtain the Defendant’s waiver of counsel. As a procedural safeguard then, the waiver should be explicit and on the record. This case is remanded to the Tribal Court for compliance with this order.

III. Background

4. On November 18, 2013, Defendant was involved in an altercation with the victim, Ignacio Valenzuela. Defendant knocked the victim onto the ground and kicked him in the head and face. Another individual, Daniel Ramirez, began kicking the victim. The victim was unconscious, but Defendant and Ramirez continued kicking the victim. Defendant and Ramirez escaped in a green vehicle, which was later found with Defendant and Ramirez still inside. Blood was still on their shoes and pants. Defendant was searched and a plastic bag containing 6 small packaged plastic bags containing a white powdery substance, which tested positive for cocaine, were found. Defendant was charged by criminal complaint CR-14-080 with Count 1, assault, a violation of 4 PYTC § 1-130(A)(1); Count 2, aggravated assault, a violation of 4 PYTC § 1-130(B)(4); Count 3, battery, a violation of 4 PYTC § 1-150(A); Count 4, rout, a violation of 4 PYTC § 1-740; and Count 5, disorderly conduct, a violation of 4 PYTC § 1-580(A)(1). He was also charged by criminal complaint CR-14-081 with Counts 1 and 2, narcotics and dangerous drugs, a violation of 4 PYTC § 1-780(C), and Count 3, possession of drug paraphernalia, a violation of 4 PYTC § 1-790(A).

5. On November 18, 2013, Defendant appeared in custody for an initial hearing with his counsel Melissa Acosta, who requested that she be allowed to withdraw representation because of a direct conflict. The court granted Ms. Acosta's request and an arraignment was scheduled for November 27, 2013. On November 26, 2013, Lourdes Salomon Molina entered a Notice of Appearance as Defendant's lay advocate. At the November 27th hearing, the Defendant's decision to retain Ms. Molina was a significant factor that informed the interplay between the Tribe's duty to provide counsel pursuant to the Code on the one hand and the Tribal Law and Order Act (TLOA) on the other.

6. During the Arraignment hearing, the Tribe informed the court that it would seek a sentence in excess of one year under the TLOA. The applicable provisions require that an indigent defendant be provided, at the Tribe's expense, a defense attorney licensed to practice by any jurisdiction in the United States. The Tribe stated that pursuant to TLOA, the Defendant was entitled to a state bar licensed attorney and that a waiver on the record or in writing was necessary in order for Ms. Molina to continue as his counsel. Judge Stoof ordered a five-minute break to allow Ms. Molina to explain the situation with her client with respect to the Tribe's position on sentencing, the TLOA provisions, and the Defendant's entitlement to a state licensed attorney.

7. Once the proceedings came back on the record, the learned Tribal Judge pointed out that 25.U.S.C. § 1302(c) of the TLOA provides the following:

(c) RIGHTS OF DEFENDANTS. In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

- (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
- (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

Judge Stoof reasoned that according to the provisions of the TLOA, Ms. Molina is qualified to represent a defendant facing over a year in prison because she has been licensed by the Pascua Yaqui Court, which is in a Tribal jurisdiction, has a bar exam and appropriate licensing standards that effectively ensure the competent and effective responsibility of its licensed attorneys. Following the adjournment, neither the Tribe, nor Ms. Molina appear to have raised the issue of

the Defendant's explicit waiver on the record with respect to the requirements prescribed by 3 PYTC § 1-4-50. Moreover, the transcript suggests that because the Defendant retained Ms. Molina on a non-indigent basis there was ambiguity insofar as the Defendant was required to submit a waiver in writing, or on the record, and it appears to have been addressed during the five minute adjournment as per Ms. Molina's undertaking. After the adjournment the issue with respect to waiver of counsel, however, appears to have been subsumed with the TLOA and its application to the Pascua Yaqui Tribal courts.

8. On December 30, 2013, the Tribe filed a Writ of Mandamus claiming that the Tribal Court judge violated his duty by failing to obtain an express waiver of counsel on the record. Respondent Judge Stoof filed a Response on January 3, 2014 claiming that there was no duty, statutory or otherwise, that the court failed to follow the federal statute or tribal statutes to appoint a licensed attorney. Petitioner Tribe filed a Reply Brief on January 14, 2014.

IV. Lay Advocate and Attorney

9. The first issue before us is whether Ms. Molina is a lay advocate. Several Tribal Courts have defined a lay advocate as a person who is "a non-lawyer and who has been qualified by the Court to serve as an Advocate on behalf of a party. See Sault Ste. Marie Tribe of Chippewa Indians Admissions to Practice, Rule 87.102 (4), and Bay Mills Tribal Code, Rule 105.2, Code of Ethical Conduct. Our own Pascua Yaqui Code goes further to distinguish between those who have a state license and those who do not have a state license but are certified by the Tribal Court with 3 PYTC §1-4-10, which states, "Officers of the Tribal Court include state licensed attorneys and lay counselors who are certified by the Tribal Court." Ms. Molina is not licensed by the State of Arizona. She has been disbarred. Therefore, she is not considered a lawyer within the State. She has complied, however, with the Pascua Yaqui requirements to become a lay advocate. A certified attorney would be one who is licensed with a state and becomes licensed with the Pascua Yaqui Tribe, while a lay advocate will be one who is not licensed with a state, yet he/she completes the requirements to represent individuals in Tribal Courts.

10. The TLOA merely provides that the attorney *appointed* at the court's expense must be a defense attorney licensed to practice law by any jurisdiction in the United States. Ms. Molina has been retained and is not appointed. This, however, does not change the Pascua Yaqui Tribal Code's definition of whether she is lay counsel or an attorney. The Pascua Yaqui Tribal Code includes certified attorneys and lay counsel as those permitted to practice in the Pascua Yaqui

courts. The Tribal Code goes a step further and requires that there be a valid waiver of counsel before a defendant is allowed to proceed with a lay advocate. Although the waiver of counsel is usually in the context of appointed counsel (and not retained lay counsel), the Pascua Yaqui Code does not differentiate between retained and appointed counsel. For further commentary on the issue, see Fortin, Seth, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. Rev. Disc. 88 (2013); Patton, David, *Tribal Law and Order Act of 2010: Breathing Life Into the Miner's Canary*, Gonzaga L. Rev. Vol. 47:3 (2012). The Code merely states that if a defendant proceeds in a criminal matter with lay counsel, he has to waive his right to counsel.

11. This situation is peculiar in that Ms. Molina was licensed by the State of Arizona at one point, and although no longer licensed by the State, she has been licensed by the Tribe, has experience in the legal field, and would understand the law more effectively than the average lay counsel. The Tribe's desire to protect a defendant is well-founded, especially considering the punishment Defendant is facing. Ms. Molina is likely to be more than able to assist Defendant during trial with the same zeal and knowledge as a licensed state attorney, but the Code appears to confine her within the definition of lay counsel, which requires a waiver from Defendant before she is allowed to proceed as his counsel.

V. Waiver

12. Next we consider what constitutes a sufficient waiver. A waiver of defendant's right to counsel must be "knowingly and intelligently" made. *Faretta v. California*, 422 U.S. 806, 835 (1975). A waiver may be implied through a defendant's actions or conduct. *See State v. Hampton*, 92 P.3d 871, 874 (Ariz. 2004) (citing *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995)). Consistent "disruptive or dilatory conduct by a defendant will support a determination that the defendant 'waived' his right to counsel." *Hampton*, 92 P.3d at 874. A waiver by conduct may occur only after a court warns the defendant that further disruptive conduct may result in the loss of the right to counsel and explains the consequences of such a waiver. *Id.*

13. In *Hampton*, the defendant's waiver was implied from his numerous death threats against each attorney appointed to represent him. Nonetheless, the court was required to inform the defendant of the consequences of waiving his right to counsel. "When lower courts are confronted with misconduct directed toward counsel, they should apprise the defendant, on the record, of the risks and consequences of waiving the right to counsel." *Hampton*, 92 P.3d at

874, fn. 3. The superior court was instructed to warn the defendant of the consequences of his misconduct and that any further misconduct could be considered a waiver of his right to counsel. The Court was also instructed to warn the defendant that representing himself in a capital case without counsel would be difficult and that this could be his final opportunity to challenge his conviction and death sentence. *Hampton*, 92 P.3d at 875.

14. In the instant case, there is no egregious conduct such as death threats against counsel. The learned Tribal judge's comment concerning "conduct" referred to Defendant's conduct in choosing Ms. Molina as counsel. The judge stated that Defendant's conduct in choosing Ms. Molina was an implicit waiver of counsel. However, the waiver of counsel should be on the record. *Hampton* provides that even when a defendant's "conduct" is of a serious nature to constitute a waiver of counsel, he must still be informed of the consequences of proceeding without counsel. There is no indication this was done in the case at bar and in particular after the adjournment.

15. "While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). The record must show that the defendant waived his right to representation. *U.S. v. Wadsworth*, 830 F.2d 1500, 1504 (9th Cir. 1987). *See also Carnley v. Cochran*, 369 U.S. 506, 516 (1962) ("[p]resuming waiver from a silent record is impermissible"); *United States v. Kennard*, 799 F.2d 556, 557 (9th Cir. 1986) (per curiam) (explicit waiver required for a second trial although defendant waived his right to counsel at his first trial). In *U.S. v. Balough*, the Ninth Circuit stated that "a district court should not grant a defendant's request to waive representation of counsel and serve as his own counsel, without discussing with the defendant, in open court, whether the waiver was knowingly and intelligently made, with an understanding of the charges, the possible penalties, and the dangers of self-representation. This is clearly the preferable procedure and should be followed by district courts in every case." 820 F.2d 1485, 1488 (9th Cir. 1987).

16. Although the cases involving a waiver involve a defendant proceeding pro se, the Pascua Yaqui Code requires a waiver of the right to counsel when a defendant proceeds with lay counsel in criminal matters. One can only assume that this waiver is for a defendant who has been appointed lay counsel, but the Code concerning the waiver does not differentiate between lay

counsel who has been appointed or lay counsel who has been retained. Respondent argues that because Defendant retained Ms. Molina, Defendant implicitly waived his right to counsel. Case law appears uniform on waivers implied through the defendant's conduct. Even when a defendant repeatedly threatens counsel's life, the Court must still inform the defendant of consequences of waiving counsel.

17. In this case, Defendant does choose Ms. Molina as counsel even though she is a lay advocate. However, the record shows that Ms. Molina asks for a recess to explain to Defendant the consequences of choosing lay counsel over a state licensed attorney. A short recess was taken where Ms. Molina presumably explained the fact that she is not a state licensed attorney, but since it was off the record, it is unclear whether Defendant truly understood the fact that he was waiving his right to a state licensed attorney.

18. This case is of such a magnitude that Defendant will be facing over a year in prison for a violent crime. He will be utilizing lay counsel; therefore, a waiver should be on the record in this instance. Even in situations where a defendant threatens his attorney and clearly displays (by his conduct) that he does not want counsel, jurisprudence has held that the court is required to warn Defendant of the consequences of proceeding without counsel. Defendant's conduct was merely in choosing Molina as his counsel. Therefore, a valid waiver and informing Defendant of the nature of the charges, the possible penalties, and the consequences of proceeding to trial with lay counsel should be obtained on the record.

VI. Sanctions

19. Although Petitioner Tribe requested relief through the most extraordinary method instead of a more direct and less resource consuming motion to reconsider or interlocutory appeal, this Court does not find that these particular set of facts merit sanctions on Petitioner Tribe.

VII. Conclusion

20. For the foregoing reasons, this Court holds that Defendant should waive his right to counsel on the record if he is to continue being represented by lay counsel. The case is remanded to Tribal Court for compliance with this order.

So ordered on this ^{20th} day of January 2014.



Chief Justice, James Hopkins

IN THE PASCUA YAQUI COURT OF APPEALS
PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,)
)
 Petitioner,)
)
 v.)
)
 THE HON. MELVIN STOOF,)
 Pascua Yaqui Tribal Court,)
)
 Respondent.)
 _____)

Appellate Case No. CA-13-005

R E P L Y

PASCUA YAQUI TRIBE
Office of the Tribal Prosecutor
7777 S. Camino Huivisim, Bldg. A
Tucson, AZ 85757

By Frederick Lomayesva,
Deputy Prosecutor

1. Respondent Wrongly Asserts Petitioner Moved to Disqualify Opposing Advocate.

The Respondent asserts that Petitioner moved to disqualify Ms. Molina. “THE COURT, IN FACT, MADE A RULING ON THE TRIBE’S MOTION TO PREVENT DEFENDANT’S LAY COUNSEL, MS. MOLINA, FROM REPRESENTING HIM;...” See Respondent’s Answer, page 1. The tribe’s motion is as follows:

MR. LOMAYESVA: Your Honor, it is likely that the tribe is going to seek punishment cumulatively more than one year. Under the provisions of the *Tribal Law and Order Act*, the Defendant is entitled to State Bar [...] representation. If he is willing to waive that he should probably do so on the record or in writing. We ask that the court proceed with an inquiry that he waive the requirement so he can proceed with counsel of his choice.

See Attachment A. The Petitioner advised the Respondent of its intent to seek a sentence greater than one year. The Petitioner advised the Respondent of the application of the *Tribal Law and Order Act*.¹ The Petitioner moved the Court to obtain a waiver *on the record* that Defendant waived his right to court appointed *licensed defense attorney*, so he could “proceed with [lay] counsel of his choice.”

The Petitioner did not move to disqualify the defendant’s advocate. The Tribe did not the move the court to appoint Ms. Molina as substitute counsel or

¹ The *Tribal Law and Order Act* amended the *Indian Civil Rights Act* in 2010. In this brief, the Petitioner uses the two interchangeably as the provisions at issue were added by the *Tribal Law and Order* to the *Indian Civil Rights Act*.

move to “prevent the court from appointing Ms. Molina ‘as court appointed counsel’ to represent the defendant. Nor, did the Tribe move the court “to find that she, as a lay counsel, was not legally qualified to represent the defendant.” See Respondent’s Answer, page 6. The Petitioner has never argued that Ms. Molina is unqualified or unable to represent the Defendant as a *lay counselor*. The Respondent’s “interpretation” of Petitioner’s Motion is not supported by a review of the record.

2. The Court erroneously equates the terms *lay counsel* and *state licensed attorney*.

The Respondent erroneously equates the terms *lay counselor* (lay advocate) and *attorney* as a matter of law.² The Respondent states: “THE COURT CORRECTLY FOUND THAT UNDER THE TRIBAL LAW AND ORDER ACT, AS A LICENSED LAY COUNSELOR, UNDER PASCUA YAQUI COURT RULES MS. MOLINA IS ‘BAR CERTIFIED’ AS PROVIDED IN SECTION 20’ OF 3 PYTC §1-4-20”. See Respondent’s Answer, page 5. A trial court’s interpretation of statutes is a matter of law. This Court reviews issues of law *de*

² Ms. Lourdes Molina, formerly Lourdes Lopez, was licensed by the State Bar of Arizona to practice law in Arizona. She was disbarred by court order. See Supreme Court Order No. SB-07-0139-D (11/29/07). She is no longer licensed in the State of Arizona. She is licensed by the Pascua Yaqui Court as a lay counselor (lay advocate).

novo. “[W]e are not bound by our trial courts’ interpretation of Pascua Yaqui statutes and court rules. We review questions of law using the *de novo* standard of review, which makes this Court the final arbiter on interpreting our statutes and rules. See Tribe v. Alma Soto, CA-06-010, Opinion, page 8 (PY App. Ct., 2007). Whether the trial court correctly interpreted federal and tribal statutes to find that Ms. Molina, as a *lay counselor*, is an *attorney* under tribal or federal law is a matter of law for this Court to decide.

Although Respondent correctly points out that the tribal court can license both *state licensed attorneys* and *lay counselors*,³ he did not provide legal authority that they mean the same thing. The Code provides that Officers of the Court include both *state licensed attorneys and lay counselors* who are certified by the Pascua Yaqui Tribe. See 3 PYTC §1-4-10(B). The Code identifies and distinguishes between the two classes of legal practitioners.

A *lay counselor* is not a *state licensed attorney* because *state licensed* means licensed by the State of Arizona. The Pascua Yaqui Code provides for uniform definitions of certain terms used within the Code.

The Pascua Yaqui Tribal Council finds it in the best interest of the Tribe to have a uniform set of definitions and rules of construction that shall apply throughout the Tribal Code so as to assist Tribal Members, Tribal Court, and others in interpreting the Tribal Code.

³ The term *lay counselor* is often also referred to as a *lay advocate*.

See 1 PYTC §2-10(B). The Pascua Yaqui Code specifically defines the term *state*. “The following definitions shall be applied when construing the provisions of this Code... (P) “State” means the State of Arizona, unless otherwise expressed, and its political subdivisions.” See 1 PYTC § 2-20(P). The Code provisions dealing with the licensing of attorneys does not otherwise define the term *state*. So, *state licensed attorneys* must be read *Arizona licensed attorneys*. In contrast, a *lay counselor* is not licensed by the State of Arizona. The distinction between the two classes of tribal law practitioners is whether they are licensed to practice law in the State of Arizona.

This is consistent with other provisions of the Code. For example, in 3 PYTC §1-4-30(A), the Code requires that the “Chief Prosecutor shall be a state licensed attorney.” Under the Respondent’s interpretation, the Chief Prosecutor could be a *lay counselor*. It is clear that the Code intends that the terms *state licensed attorneys* and *lay counselors* have a meaningful distinction.

The Respondent’s interpretation would render the words *state licensed* without meaning and superfluous. “Any interpretation which renders statutory language superfluous is highly disfavored and to be avoided whenever possible. *United States v. Novak*, 476 F.3d 1041, 1048 (9th Cir.2007).” See *Valenzuela v. Giumarra Vineyards Corp.*, 614 F. Supp. 2d 1089, 1100 (E.D. Cal. 2009). The

Respondent's reading of the tribal statutes violates this basic tenant of statutory interpretation.

Respondent's argument asks this Court to ignore the Code's distinction by ignoring the term *state licensed*.

In construing statutes we "give full effect to the intent of the lawmaker, and each word, phrase, clause and sentence must be given meaning so that no part will be void, inert, redundant or trivial." *Adams v. Bolin*, 74 Ariz. 269, 276, 247 P.2d 617, 621 (1952) (citing *City of Phoenix v. Yates*, 69 Ariz. 68, 72, 208 P.2d 1147, 1149 (1949)).

Lincoln v. Holt, 215 Ariz. 21, 24, 156 P.3d 438, 441 (Ct. App. 2007). This is consistent with Code's rules of statutory interpretation. "This Code shall be construed as a whole to give effect to all its parts in a logical, consistent manner." See 1 PYTC § 2-30(B). The Respondent equates the terms *lay counselor* and *state licensed attorney*. This interpretation of the Code fails to give effect to the term *state licensed*. The failure to give full meaning to the words "*state licensed*" violates these basic rules of statutory construction.

As the terms *state licensed attorney* and *lay counselor* have different meanings within the Code, they are not the same. A *lay counselor* is not a *state licensed attorney*. The *Indian Civil Rights Act*, provides for tribal appointment of a defense attorney licensed to practice law by any jurisdiction in the United States. See 25 U.S.C. §1302(c)(2). As Ms. Molina is licensed by the tribe as a *lay counselor*, and not as a *state licensed attorney*, she cannot be an *attorney licensed*

by any jurisdiction. The fact Ms. Molina is “bar certified” by the Pascua Yaqui Tribal Court does not change her status to attorney under tribal or federal law. The Respondent’s argument is without merit.

3. Right to Defense Attorney

The Respondent inconsistently argues that the defendant had no right to a defense attorney (therefore no waiver was necessary), and he had a right but waived that right. We will address each argument in turn.

a. Right to Waive Court Appointed Defense Attorney

The *Indian Civil Rights Act* mandates that an Indian Tribe provide an indigent defendant court appointed defense attorney where the Tribe seeks a sentence greater than one year. 25 U.S.C. §1302(c)(2). As Mr. Acuna is an American Indian facing criminal charges in a tribal court that could result in a term of imprisonment greater than one year, the *Indian Civil Rights Act* applies.⁴ This is not a disputed statement of law.

⁴ The tribe recently amended its code provision to make the application of TLOA a matter of tribal law as well as a federal law requirement. “If the charges facing the indigent defendant could result in loss of liberty for over one-year, or a fine of greater than \$5,000.00 the defendant shall have the right to an attorney licensed to practice law in any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.” See 3 PYTC §2-2-310(D). The provision expressly states the term *attorney* in subsection (D) as distinguished by the term *tribal*

The Petitioner did not raise or argue that Defendant could not waive that right. In that sense, both parties agree that a defendant can waive his right to a court appointed defense attorney. However, if a defendant chooses to waive his 6th Amendment right to counsel, then it must be a knowing and intelligent waiver of a known right.

When an accused manages his own defense, he relinquishes, as a purely factual matter many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must ‘knowingly and intelligently forego those relinquished benefits.’”

Faretta v. California, 422 U.S. 806, 834, 95 S.Ct 2525, 2541, 45 L.Ed.2d 562 (1975), also State v. McLemore, 230 Ariz. 571, 576, 288 P.3rd 775, 780 (Ariz. App., 2012), and Carnley v. Cochran, 369 U.S. 506, 512, 82 S.Ct. 884, 888, 8 L.Ed2d 70 (1962) (a knowing and intelligent waiver of a right to counsel applies to states through the due process clause of the 14th Amendment)

Congress,⁵ in exchange for expanding the sentencing jurisdiction of tribes, applied the right to counsel to tribal criminal proceedings where the tribe seeks to impose terms of imprisonment greater than one year. See the *Tribal Law and Order Act of 2010* codified at 25 U.S.C. §1302(b). Congress clearly intended to

court advocate used in subsection (C). The tribal council clearly intended that the right to defense attorney meant a right to an attorney and not to a tribal court advocate where the term of imprisonment could be more than one year.

⁵ Congress has plenary power authority to regulate in the area of Indian affairs and has regulated the area of tribal sentencing authority through the Indian Civil Rights Act. See *United States v. Kagama*, 118 U.S. 375 (1886).

mirror the federal 6th amendment requirements in the *Tribal Law and Order Act* as expressed in 25 U.S.C. §1302(c).⁶ So, a waiver of a defendant's right to a defense attorney in tribal court (as articulated in the *Tribal Law and Order Act*) must be a knowing and intelligent waiver as a matter of *federal law*.

It is equally clear that the Pascua Yaqui Tribe requires the Court to make a finding of a knowing and intelligent waiver of counsel.

A defendant may waive his or her rights to counsel under (A) and (B), in writing, after the court has determined that he or she knowingly, intelligently and voluntarily desires to forego them.

See 3 PYTC § 2-2-310(D). Where federal law provides an indigent defendant a right to a defense attorney, federal and tribal laws provide that the defendant may waive that right if the waiver is a knowing, intelligent and voluntary relinquishment.

⁶ The 6th Amendment provides: "In all criminal proceedings, the accused shall enjoy the right ... to have the assistance of counsel for his defense." The *Indian Civil Rights Act* provides: "In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall- (1) provide to the defendant the right to effective assistance of counsel **at least equal to that guaranteed by the United States Constitution**; and (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensure the competence and professional responsibility of its licensed attorneys; ..." [emphasis mine] 25 U.S.C. §1302(c).

b. Respondent erroneously argues that a waiver of counsel is only required when a defendant wants to proceed *pro se*.

Respondent asserts that a waiver⁷ of the defendant's right to a defense attorney is only required where the defendant wants to proceed *pro se*.⁸ In other words, if the defendant wants to proceed with a lay advocate, then no waiver of defense attorney is necessary. This argument is contrary to federal and tribal laws.

Once the right to a defense attorney attaches, it continues until waived. The *Indian Civil Rights Act* mandates the appointment of a defense attorney where the sentence sought will exceed one year. See 25 U.S.C. §1302(c). The right to counsel attaches whether the defendant requests counsel or does not. See Carnley v. Cochran, supra at 513, 82 S.Ct. 884, 889 and State v. McLemore, 230 Ariz. at 576, 288 P.3rd 780 (The right to counsel attaches automatically, is self-executing, and persists until affirmatively waived.) Defendant's *Indian Civil Rights Act* right to a court appointed defense counsel attached when the Court was advised that the Tribe was seeking a sentence greater than one year. It continues to exist until the defendant waives that right.

⁷ In this case, there was no expressed written or oral waiver of counsel by the defendant. As such, the Respondent seems to apply his legal proposition to mean all waivers whether written or oral

⁸ "THE NECESSITY FOR THE COURT TO HAVE A WRITTEN, VOLUNTARY, WAIVER OF COUNSEL IN OPEN COURT *ONLY APPLIES* WHEN THE COURT HAS ADVISED THE DEFENDANT OF HIS RIGHT TO AN APPOINTED ATTORNEY OR LAY COUNSEL, AND THE DEFENDANT THEN REJECTS HIS RIGHT TO BOTH A COURT APPOINTED ATTORNEY OR LAY ADVOCATE." See Respondent's Answer, page 7.

Respondent argues that where the defendant wants representation by *lay counsel*, no waiver of defense attorney is required. Respondent does not cite any tribal or federal case law in support of his legal assertion. In contrast, where the federal right (pursuant to the *Indian Civil Rights Act*) to a defense attorney attaches, it continues until waived. As *lay counsel* is not an attorney, a request for representation by a non-attorney is similar to a request to represent one's self because in both cases one gives up their right to representation by an attorney.

When an accused manages his own defense, he relinquishes, as a purely factual matter many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently forego those relinquished benefits.'

Faretta v. California, 422 U.S. 806, 834, 95 S.Ct 2525, 2541, 45 L.Ed.2d 562

(1975). Thus, a waiver of the right to a defense attorney is necessary where the defendant wants to proceed *pro se* or where the defendant wants to proceed by *lay counsel*.

Federal courts, in reviewing a defendant's right to counsel, and waiver of that right have consistently held that the court should on the record make findings that the waiver is voluntary and a knowing and intelligent relinquishment of a known right. See Johnson v. Zebrest, supra at 465 (it would be fitting and appropriate for that determination to appear upon the record.), Carnley v. Cochran, supra at 515., Faretta v. California, supra at 835., United States v. Goldberg, 67

F.3d 1092, 1099 (3rd Cir., 1995) and Arizona v. McLemore, supra at 578. Federal law is clear, a waiver of the right to counsel must be on the record.

The Code makes this an explicit tribal requirement. “Lay counsel shall be permitted to practice before the Pascua Yaqui Courts in criminal matters, **only when the defendant has waived his right to counsel.**” [emphasis added] See 3 PYTC §1-4-50. The Code clearly intends to set conditions when *lay counsel* can represent criminal defendants. Lay counsel can represent a criminal defendant only after a defendant has waived his right to an attorney.

It is evident that a court determination must include an inquiry by the court of the defendant to ensure that the waiver is knowingly, intelligently and voluntarily made. A silent record would make it impossible for a reviewing court to ensure that the findings were made.

Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver.

See Carnley v. Cochran, supra at 516. Similarly, anything less than an on the record determination of a defendant’s right to an attorney in tribal court is not an waiver of defendant’s rights as guaranteed by the *Indian Civil Rights Act* and the

Tribal Code. It makes little sense to require a writing of the waiver⁹, but not to include it in the record. Nor does it make sense that the Court should make findings of a knowing, intelligent, and voluntary waiver, but not to include those findings on the record. Respondent's argument is without merit.

c. Respondent erroneously argues that one can impliedly waive the right to a defense attorney.

The Respondent asserts no express waiver is necessary as it can be implicitly found by the defendant's conduct. The Respondent cites three cases; United States v. Coles, United States v. Goldberg, and Arizona v. Hampton. Those cases do not support the Respondent's position.

United States v. Goldberg drew a distinction among: waiver, forfeiture, and waiver by conduct. Waiver is an intentional and voluntary relinquishment of a known right. See United States v. Goldberg, supra at 1099. Forfeiture, in contrast,

Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of a defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right.

id. A defendant may forfeit his right to counsel where he was abusive towards his attorney. Waiver by conduct is described as a hybrid between waiver and

⁹ A defendant may waive his or her rights to counsel under (A) and (B), **in writing**, after the court has determined that he or she knowingly, intelligently and voluntarily desires to forego them. [emphasis added] See 3 PYTC §2-2-311(D).

forfeiture. “Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel. See *id.* The court has described *waiver by conduct* as not a true waiver. It is not a true waiver because the defendant wants an attorney, but has engaged in dilatory conduct. For example, the defendant has the resources to hire an attorney, but does not do so. This case is not a waiver by conduct situation. The issue before this court was whether the defendant was waiving his right to a court appointed defense attorney.

In United States v. Coles, the defendant was appointed four attorneys. Coles had requested withdraw of the fourth appointed attorney and the appointment of a fifth attorney. The lower court found that this was a request to proceed *pro se*. The Sixth Circuit court of Appeals found that the defendant’s conduct constituted a waiver of his right to counsel. It found that this was not a request for self representation, because that would require an on the record determination of a knowing, intelligent, and voluntary relinquishment. Instead, the defendant’s dilatory conduct was the basis of the waiver.

In Arizona v. Hampton, the defendant made death threats against his appointed counsels. The Arizona court discussed the issues of waiver by conduct and forfeiture. In a waiver by conduct, the defendant must be warned by the court that disruptive conduct may result in the loss of the right to counsel. It found that

the defendant's conduct was so egregious that he had forfeited his right to court appointed counsel. See Arizona v. Hampton at 875. Similarly, in United States v. Goldberg, the defendant threatened his court appointed counsel's life. The court found that he had by his threats forfeited his right to court appointed counsel.

This case does not involve the dilatory or disruptive conduct of the defendant. As such, there were no warning by the court that further disruptive conduct could lead to the loss of the defendant's right to court appointed counsel. The cases cited by Respondent do not support his contention that a waiver of counsel may be implied.

d. Sanction

The Respondent has moved for sanctions against the Office of the Prosecutor acting in their official government capacity.¹⁰ The Respondent asserts, in essence, that his interpretation of law was correct, therefore the Petition was frivolous and subject to sanction pursuant to 3 PYTC § 2-2-330. Our Appellate Rule is taken from the Arizona Rules of Appellate Procedure, Rule 25. They are identical in text. In *Arizona Tax Research Association v. Arizona Department of*

¹⁰ The Office of the Prosecutor filed their Petition for a Writ of Mandamus in their official capacity as a tribal government official expressing the tribe's interest in the case. A tribal official performing their duty pursuant to their tribal office is generally protected by the doctrine of *sovereign immunity*. The Respondent has not offered a waiver (by tribal resolution or statute) of the immunity. Normally, absent a waiver, the tribe is protected by the immunity.

Revenue, 163 Ariz. 255, 258, 787 P.2d 1051, 1054 (Ariz., 1989), the court in analyzing Rule 25 stated:

Appellate courts traditionally use their authority to impose sanctions under rule 25 with "great reservation." *See, e.g., Molever v. Roush*, 152 Ariz. 367, 375, 732 P.2d 1105, 1113 (App.1986); *Price v. Price*, 134 Ariz. 112, 114, 654 P.2d 46, 48 (App.1982). The policy behind using caution in finding an appeal **frivolous** is that we do not want to deter the filing of appeals in unique or novel cases out of fear of reprisal; the countervailing policy for imposing sanctions is to discourage an unwarranted burden on the parties and on the courts' resources by the filing of meritless appeals.

The rule identifies the countervailing value that party should be able to file an appeal without a fear of reprisal by the court in novel or unique cases. In this case, the issue who is an attorney for the purposes of the *Tribal Law and Order Act* has not been determined in tribal or federal court. It is important issue of law, and its resolution has ramifications on tribal court practice. Thus, it is an important and novel issue of law requiring resolution by this Court.

It is well settled law that "if an appeal presents a legal question about which reasonable persons could differ, it is not frivolous." *See City of Phoenix v. Bellamy*, 153 Ariz. 363, 367, 736 P.2d 1175, 1179 (Ariz. App., 1987), cited in *Arizona Tax Research Association v. Arizona Department of Revenue.*, *supra.*, (Absent an allegation of improper motive, the conclusion that an appeal is **frivolous** can be upheld only on the basis that the issues raised were not

supported by any reasonable legal theory.), and Johnson v. Brimlow, 164 Ariz. 218. 164 Ariz. 218 (Ariz. App., 1990). In this matter, the Petitioner has produced abundant statutory and case law demonstrating the Respondent's failure to obtain an express waiver of the defendant's right to an attorney is a violation of the *Indian Civil Rights Act*. At the least, the Petition has raised novel issues of law supported by a reasonable legal theory. It is understandable that the Trial Court does not like to be questioned, but a challenge to the Court's interpretation of the law is not frivolous, otherwise errors of law would evade review. According to establish case law, this Petition cannot be classified as frivolous.

The Respondent then asserts without evidence or citation to the record that the Petition "was taken solely for the purpose of delay..." See Respondent's Answer, page 9. Absent support within the record to support this allegation, it is a conclusory statement unsupported by the facts of the case. The Arizona Court of Appeals has held: "sanctions appropriate where counsel's arguments are conclusory statements unsupported by facts of the case. Voight v On, 86 Ariz 128, 133, 341 P.2d 923, 936 (1959)." Johnson v. Brimlow, 164 Ariz. at 221, 791 P.2d at 1104. Respondent's argument that the Petition was filed solely for delay is unsupported by the facts of the case and subject to sanction.

4. Conclusion


This is an important case to the Tribe. The passage of the *Tribal Law and Order Act* amending the *Indian Civil Rights Act* imposes new rights and obligations upon tribes. It provides indigent criminal defendants a right to a defense attorney. It also provides that a defendant can challenge the failure of the tribal courts to comply with the federal law in federal district court through a petition for writ of habeas corpus. 25 U.S.C. §1303.

The Tribe has a substantial interest in ensuring that a potential conviction stand in light of a federal challenge. It is far too easy to imagine a defendant's federal court challenge to a tribal court conviction based upon the court's violation of his right to a defense attorney where the court did not appointed defense attorney or obtained a waiver of Defendant's right to one. An on the record waiver of defendant's right to defense attorney is the law, and is not a burdensome task for the trial court. Respondent has failed to present persuasive authority in opposition to this Petition.

Wherefore, the Petitioner requests that this Court exercise it discretion and grant the relief requested which is to remand this case to the trial court and order the court to obtain an on the record waiver of defendant's right to appointment of defense attorney so he can proceed with lay counsel of his choice.

RESPECTFULLY SUBMITTED this 14 day of January, 2014.

PASCUA YAQUI TRIBE
Office of the Tribal Prosecutor
7777 S. Camino Huivisim, Bldg. A
Tucson, AZ 85757


By Frederick Lomayesva,
Deputy Prosecutor

CERTIFICATE OF SERVICE

An original and 4 copies of this reply brief were filed this 14th day of January 2014, in the Pascua Yaqui Court of Appeals.

A copy of the brief was delivered to Respondent Melvin Stoof this 14th day of January 2014.

A copy of the brief was mailed to Defense Lay Counsel Lourdes Molina this 14th day of January 2014.

ATTACHMENT A

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

PASCUA YAQUI TRIBE,)
Plaintiff,)
v.)
PETER ACUNA,)
Defendant.)

Case No.

Tucson, Arizona
November 27, 2013

Partial Transcript

BEFORE: The Honorable Melvin Stoof,
Judge Of The Pascua Yaqui Tribe

APPEARANCES:

THE TRIBE:
Mr. Fred Urbina, Chief Prosecutor
Mr. Frederick Lomayesva, Deputy Prosecutor

DEFENSE ADVOCATE:
Lourdes Molina

ARRAIGNMENT

1
2 THE COURT: I believe Ms Molina is representing Mr. Acuna.

3 THE CLERK: [in audible]

4
5 THE COURT: Is there a reason why the prosecutor is sitting at a different table?

6 MR. LOMAYESVA: My understanding is that from the Bailiffs [it is] for safety reasons.

7 BAILIFFS: Judge ... [in audible]

8 THE COURT: O.K. We're on the record. This is CR-14-080, CR-14-081, Pascua Yaqui
9 Tribe verses Peter Acuna. First on the docket I got is CR-14-080 Motion for substitution of counsel
10 to permit Melissa Acosta to withdraw as attorney of record and Lourdes Salomon Molina to be
11 appointed as advocate in both cases.

12
13 MR, LOMAYESVA: Your honor, [in audible] related to this motion. Your honor, it is
14 likely that the tribe is going to seek punishment cumulatively more than one year. Under the
15 provisions of the Tribal Law and Order Act, the Defendant is entitled to State Bar [...] representation.
16 [...] If he is willing to waive that he should probably do so on the record or in writing. We ask that
17 the court proceed with an inquiry that he waive that requirement so he can proceed with counsel of
18 his choice.

19
20 THE COURT: Any response to the motion?

21 MS. MOLINA: You know, I would agree Judge that if the tribe is now for the first time
22 indicated that it is asking or going to be asking the court to impose a sentence beyond a year I agree
23 that under the provisions he is entitled to an attorney that is licensed by the state of Arizona. I have
24 explained to Mr. Acuna that I am not a state licensed attorney. I am however, an advocate, he's not
25 been informed of that information. I can certainly talk to him and explain to him what that means if
26 you want to take a brief five minute recess.
27
28

1 THE COURT: I would rather proceed.

2 MS. MOLINA: O.K.

3 THE COURT: Let me ask [...] the question, has the Tribe Law And Order Act [been]
4 mandated at this time effective as of today's date, November 27, that those are mandated? Because
5 [it is] my understanding that there is a year's period from the date in which Congress enacted it that it
6 would actually be effective and applicable to tribes. That the tribe actually has a year transition
7 period in which to provide for that. So, am I mandated as a matter of federal law to require that there
8 be a licensed attorney if a penalty is sought over one year.
9

10 Additionally, my other question is has the tribe amended its constitution at this point per
11 count of the one year or are you talking about asking the Court to possibly have staking of sentences
12 beyond more than one year which is different. It is a different issue because the federal law says that
13 if it is one year for one count they are required and mandated to have an attorney who licensed by the
14 state or licensed by the state.
15

16 MR. LOMAYESVA: We are asking to stack various counts.
17

18 THE COURT: O.K. Now the question is does that Act then say in effect say that if its one
19 year per count that that affects the mandatory court appointed state licensed attorney?

20 MR. URBINA: Your honor there is no mandate per se, there's a requirement, and certainly
21 [...] he has a right to a bar certified attorney in a case in which there will be more than one year
22 possibly imposed. So, for four counts there is a possibility for four years to be imposed. So, he
23 certainly does has a right under the Tribal Law and Order Act. The Tribal Law and Order Act was
24 passed in 2010 and its in full effect essentially and tribe's are capped at nine years, but the courts and
25 congress have basically ruled that consecutive sentencing is allowed. However, if a person faces over
26 one year then they have a right to bar certified counsel.
27
28

1 THE COURT: Let's take about a five minute break, so that we can have Ms. Molina discuss
2 the matter with her client and we will make a determination also whether he might be waiving the
3 necessity of having a licensed attorney to assist him. So, we'll go ahead and take about a five minute
4 break.

5 MS. MOLINA: And if I can inquire judge should he want to have a state licensed attorney
6 who would that be? Because, I'm sure he's going to ask me who will it be?
7

8 THE COURT: I don't know. We got a conflict, because we got conflict counsel. We got
9 several people on for conflict counsel. But, I would not know that ...

10 MS. MOLINA: OK.

11 THE COURT: I gotta talk with Mr. Casey who has a whole list of ...
12

13 MS. MOLINA: I know who they are, but I'm saying you are saying you don't know exactly
14 who would be the next person on the list.

15 THE COURT: No, I do not.

16 MS. MOLINA: O.K..
17

18 THE COURT: Allright.

19 MR. URBINA: Certainly, you Honor, if he qualifies.

20 THE COURT: We will take a brief recess.

21 BAILIFF: All rise.
22

23 **R E C E S S**
24

25 THE COURT: All right, we're back on the record. CR-14-080 and 081, Pascua Yaqui Tribe
26 versus Peter Acuna. After a brief recess, all of ours are present and counsel. Before
27
28

ATTACHMENT B

PASCUA YAQUI TRIBAL COURTS

REQUEST FOR COURT APPOINTED COUNSEL AND ORDER

Pascua Yaqui Tribe Plaintiff	V.	Defendant Name, Address and Telephone # ACUNA, RON PETER 7518 S. CAMINO BENEM TUCSON, AZ 85757
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REQUEST

The defendant requests a court-appointed legal counsel and submits the following information.

RESIDENCE: <input checked="" type="checkbox"/> Live with family <input type="checkbox"/> Rent <input type="checkbox"/> Own <input type="checkbox"/> Room/Board	MARITAL STATUS: <input checked="" type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Divorced <input type="checkbox"/> Separated	
DEPENDENTS (Number): 1		
INCOME: (Employer name, city): Average take home pay: \$ <u>0</u> <input type="checkbox"/> Weekly <input type="checkbox"/> Monthly <input type="checkbox"/> Every two weeks		
OTHER INCOME: (State monthly amount and source) (DSS, VA, rent, pensions, spouse income, unemployment) \$ <u>0</u>		
ASSETS: (State value of car, home, bank deposits, inmate accounts, bonds, stocks, etc.) \$ <u>0</u>		
OBLIGATIONS: (Itemize monthly rent, installment payments, mortgage payments, child support, etc) \$ <u>0</u>		
PUBLIC ASSISTANCE: Please indicate which benefits you currently receive: <input type="checkbox"/> General Assistance <input checked="" type="checkbox"/> Food Stamps <input type="checkbox"/> Food Stamps benefits transferred electronically <input type="checkbox"/> Poverty related veteran's benefits <input type="checkbox"/> Temporary assistance for needy families (TANF) <input type="checkbox"/> Medicaid Supplemental security income <input type="checkbox"/> Other (describe) \$ 360		
AUTHORIZATION FOR RELEASE OF INFORMATION: I give permission to the court to contact anyone or any agency with regard to any investigation of verifying the financial information I have or will provide to the Court in support of my application. UNDER PENALTIES OF PERJURY , I declare that I have examined the above statements made by me and to the best of my knowledge and belief each and all are true and correct.		
<u>X Peter Acuna Jr</u> Print Name	<u>X [Signature]</u> Signature	<u>11-18-2013</u> Date

ORDER

Pascua Yaqui Public Defenders Office / Attorney _____ is appointed to represent the defendant.

The Petition is denied because: _____

Date: 11/18/13

Judge: Cornelius [Signature]

Defendant In-Custody

Next Court Date/Time: 11/18/13 at 4pm

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

PASCUA YAQUI TRIBE
Petitioner,
VS.

THE HONORABLE MELVIN STOOF,
PASCUA YAQUI TRIBAL COURT,
Respondent.

) TRIAL COURT CASE NOS. CR-14-080, 81
) APPELLATE CASE NO. ~~14~~-13-005

) RESPONDENT'S ANSWER TO TRIBE'S
) PETITION FOR WRIT OF MANDAMUS
) AND REQUEST FOR SANCTIONS
) DUE TO FRIVOLOUS FILING

The respondent, Melvin R. Stoof, files his response to the Tribe's Petition for Writ of Mandamus, because the court does not have a Solicitor of the Court with authority to do so, and who may file or argue before the Appellate court on behalf of the trial court. Because the Tribe's petition is for the extraordinary writ of mandamus, based on the court's alleged failure to perform a purely ministerial duty imposed by law, and because the Tribe has asked for an expedited hearing, the Court must respond to the prosecutor's petition. The Court's Administrative Attorney, Mr. Casey, who is on vacation, and who advised all court related departments and attorneys of his personal time off prior to December 27, 2013, and who will not be returning from his leave until January 6, 2014, shall file a separate response, if the Court of Appeals finds that he may do so, in support of the Court's position. Pursuant to 3 PYTC § 3-2-260, the Court files its response to the Tribe's Petition for Writ of Mandamus.

THE TRIBE HAS FAILED TO PROVIDE A PRIMA FACIE SHOWING THAT THE JUDGE HAS FAILED TO TAKE A PURELY MINISTERIAL ACTION THAT HE WAS LEGALLY REQUIRED TO DO, BECAUSE THE COURT, HAS, IN FACT, MADE A RULING ON THE TRIBE'S MOTION TO PREVENT DEFENDANT'S LAY COUNSEL, MS. MOLINA, FROM REPRESENTING HIM; THE COURT RULED THAT MS. MOLINA COULD DO SO.

As to the court's general authority to require its ministerial officers to carry out their duties, the Pascua Yaqui Constitution Art. VIII provides that "the Judicial powers of the Pascua Yaqui Tribe shall be vested in such tribal courts as the tribal council may establish but shall include a trial and appellate court." P Y Const. Art. VIII, Sec. 1.

The duties and procedures of the tribal courts shall be established by ordinance of the tribal council. Id. At Sec. 3. The court has the authority to provide for the orderly conduct of

proceedings before it or its officers, 3 PYTC § 1-2-50(C), the court must compel the obedience to its judgments, order, and process, 3 PYTC § 1-2-50(D), and it must control in furtherance of its ministerial officers and all other persons in any matter connected with a judicial proceeding before it in every matter pertaining thereto. Id. At (E). The court has the power to compel the attendance of persons to testify in any action or proceeding pending therein, in the cases and manner provided by law. Id. At (F). The court has the power to amend and control its processes and orders so as to make them conformable to law and justice, Id. At (H), and it has the power to devise and make new process and form of proceedings consistent with the law, necessary to carry out the effect of the powers and jurisdiction possessed by it. Id. At (I). The last provision allows the court to adopt procedures for which there is no specific statutory provision. It allows the court discretion to tailor remedies to address issues of what court procedures should be followed. Although listed under the Pascua Yaqui Civil Code, the code provides that where there is no specific tribal code provision, that the court may adopt state and federal law, and that the court has the exclusive jurisdiction to construe the meaning of Tribal laws and to determine the legality under the Constitution and laws of the Pascua Yaqui Tribe and the Indian Civil Rights Act.

The purpose and construction section of the rules of criminal procedure provides in pertinent part, as follows:

These rules are intended to provide for the just, speedy determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual while preserving the public welfare.

3 PYTC § 2-2-20.

In carrying out the overarching criminal procedure principles to promote speedy trials, avoid unnecessary delays, and protect individual rights, the court must rely on the Federal Indian Civil Rights Act, the Pascua Yaqui Constitution, and the Criminal Court Rules of Procedure.

THE COURT'S RULING THAT THE DEFENDANT HAD IMPLICITLY WAIVED HIS RIGHT TO COUNSEL IS SUPPORTED BY THE DEFENDANT'S ACTIONS THAT HE ALLOWED MS. MOLINA, A LICENSED LAY COUNSEL, TO ENTER HER WRITTEN NOTICE OF APPEARANCE AND TO REPRESENT HIM IN THESE CRIMINAL CASES.

The statute related to lay counsel provides, in its entirety, as follows:

Lay counsel shall be permitted to practice before the Pascua Yaqui Courts in criminal matters, only when the defendant has waived his right to counsel. Lay counsel shall be certified as provided in section 20.

3 PYTC § 1-4-50, **Lay Counsel.**

The Rules of Court statute allows a defendant to be represented by lay counsel in criminal matters “only when the defendant has waived his right to counsel” to assist in his defense. 3 PYTC § 1-4-50. In this case, Ms. Molina entered her notice of appearance on November 26, 2013, See Pet. Attachment E. Prior to that date, on November 18, 2013, the Court had allowed the withdrawal of Melissa Acosta of the public defender’s office, and the court was in the process of appointing a substitute counsel, See Pet. Attachment D. At the time Ms. Molina had entered her appearance, the court had already granted Ms. Acosta’s motion to withdraw, due to conflicts. But, the Court had not yet issued a formal order for the appointment of a substitute “conflict” counsel, pursuant to 3 PYTC § 2-2-312(C), **Manner of Appointment.** The defendant decided to hire Ms. Molina, at his own expense, prior to the court appointing substitute counsel for Ms. Acosta. *Ms. Molina’s appearance made the court action to appoint substitute “conflict” counsel unnecessary because it was a moot issue.*

THE COURT DID NOT APPOINT MS. MOLINA, BUT RATHER, MS. MOLINA WAS HIRED BY THE DEFENDANT TO REPRESENT HIS INTERESTS, PURSUANT TO HIS RIGHT TO DO SO, UNDER 3 PYTC § 1-4-50. THE COURT CANNOT VIOLATE THE DEFENDANT’S RIGHTS TO CHOOSE A LAY COUNSEL, WHERE THE CODE DOES NOT REQUIRE THAT IT APPOINT HIM AN ATTORNEY WHEN HE HAS CHOSEN HIS OWN COUNSEL, AT NO EXPENSE TO THE TRIBE.

In these two cases, there was no substitute court appointment of any legal counsel, licensed attorney, lay advocate, lay counsel, or any other type of legal representative, after Ms. Acosta withdrew. 3 PYTC § 2-2-312(C). There was no duty, statutory or otherwise, that the court failed to follow the federal statute or tribal statutes to appoint a licensed attorney. There was no misinterpretation of the statute, because the court’s actions did not involve its making a decision on who should be appointed as a substitute counsel. To act otherwise, and to prohibit

Ms. Molina from representing the defendant would violate the defendant's right to her representing him, under the Federal Indian Civil Rights Act, 25 U.S.C. § 1302(6), tribal constitution law, Pascua Yaqui Constitution, Art. 1, Sec. 1(f), and statutory provisions, 3 PYTC § 2-2-260 (B)(3)(b), including hiring a lay counsel. 3 PYTC § 1-4-50.

Contrary to the Tribe's position, there is nothing in the plain language of the Pascua Yaqui statute above cited related to "lay counsel" that requires that the court ensure a defendant's knowing and intelligent waiver "must be on the record or in writing" as alleged by the Tribe. Even in the absence of an express waiver, a defendant can implicitly waive his right to counsel through his conduct. *U.S. v. Coles*, ___ F.3d ___ (6th Cir. 2012), *U.S. V. Goldberg*, 67 F.3d 1092, 1100, (3d. Cir. 1995), *State of Arizona v. Hampton*, ___ Ariz. ___, (2003). The defendant allowed Ms. Molina to enter her written appearance on his behalf, he did not object to the court's order to allow Ms. Acosta to withdraw, he did not seek a court order to appoint a substitute attorney or advocate in Mr. Acosta's place, the defendant did not ask that Ms. Molina *not* represent him, he allowed her to argue motions to the court, and by his own actions, the defendant has implicitly waived his right to a licensed attorney. He has voluntarily and knowingly chosen to allow Ms. Molina, a lay counsel, to represent him.

THE COURT MAY NOT FORCE A DEFENDANT TO ACCEPT A COURT APPOINTED CONFLICT COUNSEL WHERE THE DEFENDANT HAS OPTED TO HAVE AN ADVOCATE REPRESENT HIM, INSTEAD OF COURT APPOINTED COUNSEL.

The gist of the Tribe's motion on November 27, 2013, was twofold, first, that the court rule Ms. Molina should *not* be allowed to represent the defendant in the two criminal cases, for which she had been retained to do so, by the defendant, *at his own expense*, because she was not a competent counsel under federal law, because she was not "licensed by the state," and second, that the defendant be ordered to waive his right to counsel on the record, before the court allow Ms. Molina to represent him. Deputy prosecutor Lomayesva stated to the court that if the defendant were willing to waive his right to counsel, he needed to do so on the record or in writing, "so he can get his counsel of choice." Mr. Lomayesva conceded that the defendant was entitled to get "counsel of his choice," but he still believed that Ms. Molina was not qualified because she was not a licensed attorney, or "state bar representative." Ms. Molina asked for

recess to discuss the defendant's options, because she was not a licensed attorney, but rather, she was a licensed lay counsel. The court ordered a recess, so that Ms. Molina could discuss the matter with her client. See **Respondent Attachment Two, Court Audio recording of November 27, 2013 hearings.**

Immediately prior to the brief court recess, the Court asked Deputy Prosecutor Mr. Lomayesva and Mr. Urbina, Chief Prosecutor, whether the federal Tribal Law and Order Act "mandates," as of November 27, 2013, that the court appoint a "*state* licensed attorney," for the defendant, (emphasis added), and **Mr. Urbina responded, "[t]here is no mandate, per se, but there is a requirements and he certainly has a right to a "bar certified attorney," where he may face a penalty over one year possibly imposed. . . he has a right . . . "to 'bar certified counsel'."** The Tribal Law and Order Act provides that the tribal court in cases where a prison term may exceed one year, the Court shall provide a defendant to a "right to effective assistance of counsel," and that "at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney *licensed to practice by any jurisdiction* in the United States. . ." (citation omitted, emphasis added)

THE COURT CORRECTLY FOUND THAT UNDER THE TRIBAL LAW AND ORDER ACT, AS A LICENSED LAY COUNSEL, UNDER THE PASCUA YAQUI COURT RULES, MS. MOLINA IS "BAR CERTIFIED" AS PROVIDED IN SECTION 20" OF 3 PYTC § 1-4-20.

"Officers of the Court" include "(C) State licensed attorneys and lay counselors who are certified by the Pascua Yaqui Tribe." 3 PYTC § 1-110(C), **Officers of the Court.** The Pascua rules for certification of Attorneys and Lay Counselors is that their licensure is identical. 3 PYTC § 1-4-20, **Certification of Attorneys and Lay Counselors.** The court correctly ruled on November 27, 2013, that Ms. Molina, as a licensed practitioner, in a jurisdiction that has appropriate standards of professional responsibility and requires a bar exam as a condition of admission, may represent the defendant. Even under the appointment of counsel statute, the Tribe treats attorneys and advocates the same. 3 PYTC § 2-2-312(C), **Manner of Appointment.**

Under the Pascua criminal code, in effect as of November 27, 2013, the date of the court's ruling, (The Tribe has amended several criminal statutes related to court appointed

counsel since that time), the Code established the manner of appointment of a public defender or conflict counsel, the law provided:

if a public defender is not appointed, an attorney *or advocate under contract* with the Tribe to provide conflict criminal defense services shall be appointed to the case.

3 PYTC § 2-2-312(C), **Manner of Appointment.** (emphasis added).

Because the Court was not asked by the defendant to “appoint” a substitute attorney or lay advocate to represent the defendant in this case, and he had not asked the court to appoint a substitute court counsel, the defendant did not fill out any request for the court to appoint him substitute counsel, based on any alleged indigency, the federal statute, the Tribal Law and Order Code and Pascua Yaqui Statutes regarding the court’s duty to *appoint* qualified counsel, do not even apply to the court’s ruling or any requests made to the Court for a ruling by the Tribe as to whether Ms. Molina could appear. *Id.* The court did not breach any legal duty by not appointing substitute counsel for the defendant, as requested by the Tribe, because the *defendant never asked the court to do so.* The Tribe has no standing to ask that the court appoint a “bar certified” attorney for the defendant, because that right rests solely with the defendant. Additionally, Ms. Molina is not an “advocate under contract” with the Tribe to provide conflict criminal defense services.” 3 PYTC § 2-2-312(C), **Manner of Appointment.** The court was not asked to appoint Ms. Molina under § 2-2-310 or required to appoint her as a “conflict” advocate, under § 2-2-312. The general legal axiom is that relief not requested shall not be granted. That axiom applies to this matter.

The Court interpreted the Tribe’s motion, not as a motion to prevent the appointment of a court appointed substitute counsel, but rather, as a motion either to prevent the court from appointing Ms. Molina “as a court appointed counsel” to represent the defendant, or alternatively, for the Court to find that she, as a lay counsel, was not legally qualified to represent the defendant. More specifically, the Tribe was seeking a ruling to disqualify Ms. Molina from representing the defendant, because she was somehow not qualified to do so under both the federal Tribal Law and Order Act and Pascua Yaqui tribal law. The Tribe does not have the right to require the court to disqualify Ms. Molina and to appoint a licensed attorney in her place, because the defendant allowed Ms. Molina to represent him “voluntarily” and “at his own

expense.” He has a right to seek counsel “at his own expense” under federal law, the Federal Indian Civil Rights Act, 25 U.S.C. § 1302(6), tribal constitution law, Pascua Yaqui Constitution, Art. 1, Sec. 1(f), and statutory provisions, 3 PYTC § 2-2-260(B)(3)(b), including hiring a lay counsel. 3 PYTC § 1-4-50. The Court cannot force a defendant to accept a court appointed counsel. However, that is the basic logic of the Tribe’s argument, that the court somehow has a legal duty to appoint a licensed substitute attorney, whether the defendant wishes the court to do so, or not.

THE NECESSITY FOR THE COURT TO HAVE A WRITTEN, VOLUNTARY, WAIVER OF COUNSEL IN OPEN COURT *ONLY APPLIES* WHEN THE COURT HAS ADVISED THE DEFENDANT OF HIS RIGHT TO AN APPOINTED ATTORNEY OR LAY COUNSEL, AND THE DEFENDANT THEN REJECTS HIS RIGHT TO BOTH A COURT APPOINTED ATTORNEY OR LAY COUNSEL, PURSUANT TO 3 PYTC § 2-2-310(A)(B)& (D).

The Tribe’s position is that a waiver of counsel must “be on the record.” The court prefaced its ruling as to the Tribe’s request for a waiver of counsel and that the court appoint conflict counsel to the defendant by stating:

Before the court asks about any potential waivers, in response to the Tribe’s motion that the Court appoint conflict counsel, the court is looking at the Tribal Law and Order Act, and I don’t feel that motion will be granted.

The appellate court should not grant the Tribe’s writ of mandamus, because there is no statutory duty or a necessity for the trial Court “to make an inquiry on the record” of whether the defendant is knowing and intelligently waiving his right to counsel, when he had chosen to hire a lay advocate, Ms. Molina. (There is no such similar language as to requirement of a defendant’s written waiver, contained in 3 PYTC § 1-4-50, Lay Counsel).

Such an inquiry “on the record” would only be necessary where the court is advising the defendant that he may have court appointed counsel or a lay advocate for the defendant, and he has knowingly waived the right to either. 3 PYTC § 2-2-310(A)(B)& (D). (as effective November 27, 2013, date of the court’s ruling). For example, in cases where the defendant does not want court appointed counsel or an advocate, and he wants to represent his own interests, the court must insure his waiver is in writing on a two page “Waiver of Counsel” form provided by

the Court's clerk and bailiff at the beginning of each and every hearing. Testimony is taken under oath. See Respondent's Attachment One, **Waiver of Counsel Form**.

The Court's waiver of counsel form clearly instructs a defendant about the form and his decision to represent himself:

You have told the judge that you do not want an attorney or lay advocate. . . .

The form further reads:

I am asking the court to allow me to represent myself and give up my constitutional right to have an attorney or lay advocate represent me.

The form's signature section clearly states that it shall be signed when a defendant waives *both* his right to a court appointed attorney *and* his right to a court appointed advocate. *Id.* at p. 2.

The Pascua Yaqui criminal procedure statute provides that the court shall *appoint* an attorney for the defendant where he or she may be imprisoned for one day or more, where the defendant has made a written application for such court appointed counsel, and after the court determines the defendant's indigency, but if the defendant chooses not to accept court appointed counsel or a court appointed advocate, then the court must, in open court, find that the waiver of the court appointed counsel and court appointed advocate, by the defendant, for whatever reason, is done "knowingly, intelligently and voluntarily desires to forego them," and that it be "in writing." 3 PYTC § 2-2-310(A)(B)& (D). The defendant did not need to knowingly and voluntarily waive his right to court appointed counsel in these two cases on the record or in writing for that matter, under 3 PYTC § 2-2-310(A)(B)(and (D), because at the time of the Tribe's November 27, 2013 motion, the defendant had no licensed legal counsel appointed, due to the court allowing Ms. Acosta to withdraw on November 18, 2013, due to conflicts. As noted above, the defendant implicitly waived his right to counsel by allowing Ms. Molina to represent him. 3 PYTC § 1-4-50, Lay Counsel. There was no necessity for a written waiver of counsel in these two cases, because such waiver of counsel forms are only used when the defendant represents himself and does not want *either* a court appointed attorney *or* a lay advocate appointed. 3 PYTC § 2-2-310(D).

THE APPELLATE COURT SHOULD SANCTION THE PROSECUTOR FOR FILING A FRIVOLOUS APPEAL AND FOR ITS FRUITLESS, TIME CONSUMING LITIGATION

THAT CONSUMED SEVERAL HOURS OF COURT TIME TO RESPOND TO THE PROSECUTOR'S CHALLENGE TO THE COURT'S EXPLICIT RULING WHERE THE JUDGE HAS CARRIED OUT HIS LEGAL DUTY TO RULE ON THE TRIBE'S MERITLESS MOTIONS.

3 PYTC § 2-3-330 provides:

Where the appeal is frivolous or taken solely for the purpose of delay, or where a motion is frivolous or filed solely for the purpose of delay, or where the party has been guilty of an unreasonable infraction of these rules, the appellate court may impose upon the offending attorney or party or both, such penalties or damages, (including contempt, withholding or imposing costs, or imposing attorney's fees) as the circumstance of the case and the discouragement of like conduct in the future may require. . . .

The prosecutor's appeal in this case has been a waste of precious resources of the Tribal court, and of the Pascua Yaqui Court of Appeals, and the appellant should be sanctioned because it should be aware that there is no showing that the trial judge breached a legal duty to carry out a purely ministerial act, a prerequisite for a mandamus.

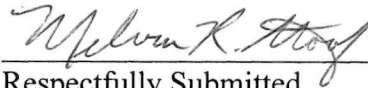
The Court ruled that the defendant *implicitly* waived his right to counsel, when he hired Ms. Molina, and it found she was a competent licensed practitioner. It also found there was no need to ask for an express waiver of counsel. See both November 27, 2013 orders. The Tribe could have asked for a motion to reconsider its ruling, it could have asked for a motion to clarify, it could have filed an interlocutory appeal, but instead, the Tribe chose the route of an extraordinary writ, that of mandamus. The Court believes that the motion is frivolous and taken solely for the purpose of delay, because the Court met its duty in making its ruling on allowing a lay counsel to appear and that the defendant waived his right to counsel by hiring her. Nothing more should be ordered or mandated by the Court of Appeals to the Trial Judge, who has appropriately ruled on the Tribe's motions.

The Court requests that it sanction the appellant for his unsupported petition for mandamus, and that this Court of Appeals order the prosecutor's office to compensate the Court for the nine hours time at the salaried rate of the associate judge of \$44.03 per hour, for a total of \$396.27 fees to be paid into Court's salaries budget, and the Appellee also respectfully requests that this court order that the appellant pay costs of \$0.10 per page for photocopying of the Respondent's Answer with this Court, and for copies sent to interest parties, for total costs of

\$41.40, to be paid into the Court's operating budget, pursuant to 3 PYTC § 2-3-330. Such an award to the Appellee of costs and attorney fees would discourage future like conduct of filing frivolous appeals and extraordinary writs by the Appellant.

Based on the foregoing authorities, the respondent respectfully requests that the Court of Appeals dismiss the Tribe's petition for mandamus, as one without merit, and it take no further action, other than imposing a monetary sanction to prevent future frivolous filings. Alternatively, in the event the Appellate court treats the Tribe's motion as an interlocutory appeal, then it should affirm the trial court's order and uphold the ruling to allow Ms. Molina to represent the defendant in these matters and that the defendant implicitly waived his right to counsel when he hired Ms. Molina as an advocate at his own expense.

SUBMITTED THIS 2nd DAY OF JANUARY, 2014.



Respectfully Submitted
Associate Judge, Pascua Yaqui Tribal Court
7777 Camino Huivism, Bldg B.
Tucson, AZ. 85757
(520) 879-6276
Fax: (520) 879-6277

I certify that a true and correct copy of the foregoing was sent by
Hand delivery and certified mail, return receipt requested
To the Appellant, Pascua Yaqui Prosecutor's office.

Melvin R. Stoof, Respondent
Date _____

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

PASCUA YAQUI TRIBE)	TRIAL COURT CASE NOS. CR-14-080, 81
Petitioner,)	APPELLATE CASE NO. 14-__
VS.)	
)	
THE HONORABLE MELVIN STOOF,)	
PASCUA YAQUI TRIBAL COURT,)	
Respondent.)	

**AFFIDAVIT IN SUPPORT OF SANCTIONS FOR FRIVOLOUS FILING AND FOR
COSTS AND IN SUPPORT OF REASONABLE ATTORNEY FEES**

STATE OF ARIZONA

COUNTY OF PIMA

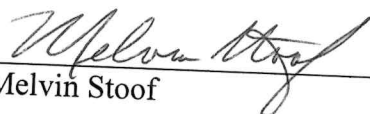
Before me the undersigned authority, personally appeared, the respondent, Melvin R. Stoof, who being duly sworn, does depose and state the following.

1. I am an attorney licensed to practice in the States of Texas and New Mexico for the past 28 years. I am familiar with the fees that are customarily charged by attorneys and know the reasonable value of such legal work.
2. I charged a customary fees for legal services in the State of Texas as an attorney in Houston, at a rate of \$275.00 per hour from June 1986 through January 1994, and I charged \$225.00 per hour in the State of New Mexico as an attorney in Albuquerque, from January 1994 through January 1, 1997, when I had practiced as a partner.
3. Based on the amount of work performed in this matter, to respond to the petitioner's writ of mandamus, the respondent performed the following: review pleadings, legal research as to writ of mandamus, research related to implied waiver's of counsel, review of tribal codes and court forms, retrieval of court audio tape and waiver of counsel form, drafting of answer and response to petitioner's pleading.
4. Although the respondent may ask for attorney fees, the respondent requests that the prosecutor's office compensate the Court for the nine hours time at the salaried rate of the associate judge for the Pascua Yaqui Court of \$44.03 per hour, for a total of \$396.27 fees to be paid into Court's salaries budget, and the Respondent also respectfully requests that this court order that the appellant pay costs of \$0.10 per

page for photocopying of the Respondent's Answer with this Court, and for copies sent to interest parties, for total costs as supported by the attached costs affidavit, to be paid into the Court's operating budget, pursuant to 3 PYTC § 2-3-330. Such an award to the Appellee of costs and attorney fees would discourage future like conduct of filing frivolous appeals and extraordinary writs by the Appellant.

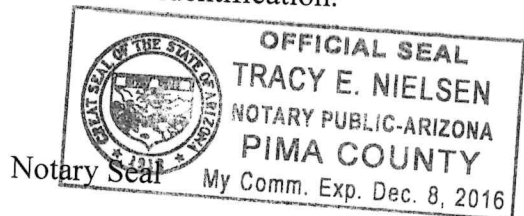
5. In my opinion, the sums listed above are reasonable in this case and the hourly rate of \$44.03 per hours is reasonable based on the experience and expertise of the respondent.

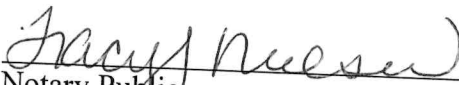
FURTHER AFFAINT SAYETH NAUGHT.


Melvin Stoof

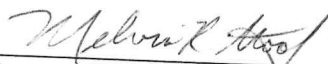
STATE OF ARIZONA
COUNTY OF PIMA

SWORN TO AND SUSCRIBED before me, this 3rd day of January, 2014, by affiant, Melvin R. Stoof, who is personally known to me or who has produced an Arizona Driver's License as identification.




Notary Public *expiration 12-8-16*

I certify that a true and correct copy of the foregoing was sent by Hand delivery and certified mail, return receipt requested To the Appellant, Pascua Yaqui Prosecutor's office.


Melvin R. Stoof, Respondent
Date 1/3/14

I certify that a true and correct copy of the foregoing was sent by
Hand delivery and certified mail, return receipt requested
To the Appellant, Pascua Yaqui Prosecutor's office.



Melvin R. Stoof, Respondent

Date 1/3/14

PASCUA YAQUI TRIBAL COURT

Pascua Yaqui Tribe,

Plaintiff

Vs.

CASE NO: _____

_____,
Defendant

WAIVER OF COUNSEL

Instructions: You have told the judge that you do not want an attorney or lay advocate. The purpose of this form is to notify you of your right to an attorney or lay advocate and of the ways in which an attorney or lay advocate can be important to you in this case, and also to allow you to give up your rights if you choose. **READ THE ENTIRE FORM CAREFULLY BEFORE SIGNING.**

I am asking the court to allow me to represent myself and give up my constitutional and statutory right to have an attorney or lay advocate represent me. I understand that if I choose to represent myself today, I may change my mind at any time during this case and may be given an opportunity to have an attorney or lay advocate represent me.

I am _____ years old.

I am am not presently employed. *If employed, state your place of employment and occupation:*

I do do not read, write, and/or understand the English language.

I am am not currently receiving treatment for mental or emotional problems.

I have have not had any alcohol, medications (prescribed or not), or drugs within the last 24 hours.

I have have not received treatment in the past for mental or emotional problems.

I do do not have physical or psychological disabilities that may affect my ability to understand what is happening in court or communicate my position or views on this case to the court.

I have have not had an attorney or lay advocate represent me in the past.

I understand a petition has been filed stating that I committed the following offense(s): _____

I understand I have the right to:

- Have an attorney or lay advocate represent me at all stages of this proceeding.
- Have an attorney or lay advocate appointed for me if I am eligible.
- Hire my own attorney or lay advocate at my own expense
- Represent myself and act as my own attorney.

Check this box if you have read and understood the above.

I understand an attorney/lay advocate would:

- Represent and speak on my behalf in court.
- Advise me about my legal rights and options.
- Explain and assist me with legal and court procedures.
- Help me negotiate a settlement of my case with the tribal prosecutor.
- Investigate and explore possible defenses to the charges against me that may or may not be readily apparent to me.
- Prepare and conduct my defense at any motion hearing or trial.
- File motions on issues of evidence, testimony, and procedures of the police.
- Assist me at trial.
- File an appeal, if requested.

Check this box if you have read and understood the above.

I understand that if I represent myself:

- The judge cannot be my attorney and cannot give me any legal advice.
- The tribal prosecutor cannot be my attorney and cannot give me legal advice.
- The judge, tribal prosecutor, and court personnel are not required to explain court procedures or the law.
- The judge cannot treat me differently because I do not have an attorney or lay advocate.
- I will be required to follow all legal rules and procedures that an attorney/lay advocate would have to follow in court.
- It may be difficult for me to present evidence and challenge evidence that is presented by the tribal prosecutor.
- If I want to testify I must be sworn as a witness and answer questions from the tribal prosecutor.
- It may be difficult for me to do a good job as my own attorney or lay advocate.

Check this box if you have read and understood the above.

DO NOT SIGN THIS FORM UNLESS YOU HAVE READ IT COMPLETELY OR HAD IT READ TO YOU. DO NOT SIGN THIS FORM IF YOU WANT AN ATTORNEY OR LAY ADVOCATE.

I am making this decision to represent myself knowingly and voluntarily. No one has made any promises or threats to me, and no one has used any influence, pressure, or force of any kind to get me to not ask for an attorney or advocate. No one has told me I should not ask for an attorney or lay advocate to represent me.

I have read, or have had read to me, this entire document. I have truthfully answered and understood all portions of this document. I understand the court process involved in my case so that I can adequately represent myself. I want to give up my right to an attorney or lay advocate. I want to represent myself.

_____	_____	_____	_____
Date	Defendant	Date	Parent/Guardian (if defendant is a minor)
_____	_____		
Date	Judge		

DEC 20 2013
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IN THE PASCUA YAQUI COURT OF APPEALS

PASCUA YAQUI INDIAN RESERVATION

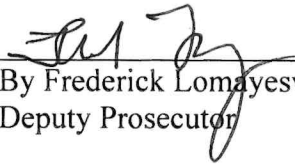
PASCUA YAQUI TRIBE,)
)
 Petitioner,)
)
 v.)
)
 THE HON. MELVIN STOOF,)
 PASCUA YAQUI TRIBAL COURT,)
)
 Respondent .)
 _____)

APPELLATE CASE NO. CA-13-005 .

**MOTION TO FILE APPENDIX
IN LIEU OF THE RECORD &
TRANSCRIPTS**

COMES NOW the Pascua Yaqui Tribe, and moves to file an appendix in lieu of filing the record and transcripts pursuant to Pascua Yaqui Tribe v. Soto, CA-06-010. This motion is supported by the attached memorandum of points and authorities which by this reference is incorporated herein and made a part hereof.

RESPECTFULLY SUBMITTED this 30 day of December, 2013.


By Frederick Lomayesva,
Deputy Prosecutor

Pascua Yaqui Tribe
Office of the Tribal Prosecutor
7777 S. Camino Huivisim
Tucson, AZ 85757
(520) 879-6251

MEMORANDUM OF POINTS AND AUTHORITIES

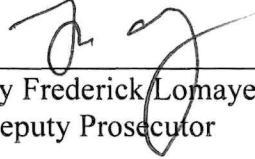
The Petitioner, the Pascua Yaqui Tribe, has filed a Petition for Writ of Mandamus. There are no facts in controversy and the matters presented are issues of law. In Pascua Yaqui Tribe v. Soto, CA-06-010, this Court held “A transcript may not be necessary in an appeal that presents a pure question of law.” In this case, the issues raised are pure issues of law governing the duty of the trial court and the court’s failure to comply with his duty. A transcript is not necessary to decide pure issues of law. Wherefore, the tribe requests that the Court allow the tribe to proceed without transcripts.

In the Soto case, the Court of Appeals held that it was the duty of the Tribe to prepare the record in an appeal. Rule 3 PYTC §2-3-120(A) governs the preparation of the record on appeal. However, the present action is not an appeal but a petition for an *extraordinary writ* (a writ of mandamus). There is no express rule making 3 PYTC §2-3-120(A) applicable to petitions for extraordinary writs. Given the expedited nature of extraordinary writs, it is not clear that 3 PYTC §2-3-120(A) was intended to govern the procedures of extraordinary writs. In Soto, this Court opined that pursuant to Rule PYTCAP Rule 10(B) (now 3 PYTC §2-3-50), that the Court may suspend strict application of the rules in regards to the filing of the record for good cause shown. The appendix filed with the court contains all the essential pleading necessary for a determination of this petition. In addition, the gather of the record would present undue delay in its preparation in light of the fast approaching trial date. Wherefore, if this court finds that 3 PYTC §2-3-120(A) applies, the Tribe asks this Court to find good cause and accept the Tribe’s Appendix in lieu of the record.

///

///

RESECTFULLY SUBMIITED 30 day of December, 2013.



By Frederick Lomayesva,
Deputy Prosecutor

Pascua Yaqui Tribe
Office of the Prosecutor
7777 S Camino Huivisim, Bldg. A
Tucson, AZ 85757
(520) 879-6251

A copy of the foregoing motion was served
This 30 day of December, 2013, by delivery
upon

The Honorable Melvin Stoof

A copy of the foregoing motion was served
This _____ day of December, 2013, by mail
upon

Lourdes Molina

IN THE PASCUA YAQUI COURT OF APPEALS

PASCUA YAQUI INDIAN RESERVATION

FILED

CLERK

PASCUA YAQUI TRIBE,)
)
 Petitioner,)
)
 v.)
)
 THE HON. MELVIN STOOF,)
 PASCUA YAQUI TRIBAL COURT,)
)
 Respondent .)
 _____)

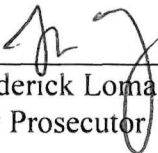
APPELLATE CASE NO. CA-13-005.

PETITIONER'S APPENDIX

- A. Complaint and Statement of Probable Cause (CR-14-081)
- B. Complaint and Statement of Probable Cause (CR-14-080)
- C. Initial Hearing Order (CR-14-080)
- D. Initial Hearing Order (CR-14-081)
- E. Defendant's Notice of Appearance (CR-14-081)
- F. Defendant's Motion for Substitution of Counsel & Order (CR-14-080)
- G. Defendant's Motion to Modify Release Conditions (CR-14-080 & CR-14-081)
- H. Tribe's Response (CR-14-080 & CR-14-081)
- I. Arraignment Order (CR-14-080)
- J. Arraignment Order (CR-14-081)

A Copy of the above Appendix was filed this 30 day of December, 2013.

Pascua Yaqui Tribe
Office of the Prosecutor
7777 S Camino Huivisim, Bldg. A
Tucson, AZ 85757
(520) 879-6251



By Frederick Lomayesva,
Deputy Prosecutor

CERTIFICATE OF SERVICE

A copy of the Appendix was served by delivery this 30 day of December, 2013, upon

The Honorable Melvin Stoof
Judge of the Pascua Yaqui Tribal Court

A copy of the Appendix was served by mail this _____ day of December, 2013, upon

Lourdes Molina
P.O. Box 24133
Tucson, AZ 85734

ATTACHMENT A

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

NOV 18 PM 3
CR214
PSE

Pascua Yaqui Tribe,
Plaintiff,

vs.

ACUNA, PETER R.
Defendant.

Case No.

CRIMINAL COMPLAINT

The PASCUA YAQUI TRIBE, hereby complains and alleges, upon information and belief, that the above named defendant, an Indian, while on the Pascua Yaqui Reservation, did commit the following offense(s):

COUNT 1: 4 PYTC § 1-130(A)(1) ~ Assault

On or about November 18, 2013 at approximately 4:53 a.m., at or near 7580 S. Yoem Bo-Oh, Tucson, AZ, Defendant committed assault by intentionally, knowingly or recklessly causing any physical injury to another person, to wit: *caused injury to Ignacio Valenzuela.*

COUNT 2: 4 PYTC § 1-130(B)(4) ~ Aggravated Assault

On or about November 18, 2013 at approximately 4:53 a.m., at or near 7580 S. Yoem Bo-Oh, Tucson, AZ, Defendant committed aggravated assault by committing assault and the Defendant committed the assault while the victim was bound or otherwise physically restrained or while the victim's capacity to resist was substantially impaired, to wit: *assaulted Ignacio Valenzuela while he was unconscious.*

COUNT 3: 4 PYTC § 1-150(A) ~ Battery

On or about November 18, 2013 at approximately 4:53 a.m., at or near 7580 S. Yoem Bo-Oh, Tucson, AZ, Defendant did willfully strike another person or otherwise inflict bodily injury, or who, by offering violence, caused another to harm him, to wit: *kicked Ignacio Valenzuela.*

COUNT 4: 4 PYTC § 1-740 ~ Rout


On or about November 18, 2013 at approximately 4:53 a.m., at or near 7580 S. Yoem Bo-Oh, Tucson, AZ, Defendant did meet with one or more persons to do an unlawful act upon common cause of quarrel, and make advances towards it, to wit: *met with Daniel Ramirez to assault Ignacio Valenzuela.*

COUNT 5: 4 PYTC § 1-580(A)(1) ~ Disorderly Conduct

On or about November 18, 2013 at approximately 4:53 a.m., at or near 7580 S. Yoem Bo-Oh, Tucson, AZ, Defendant engaged in fighting or provoking a fight in a public place, to wit: *fought with Ignacio Valenzuela.*

1 And such violations, upon conviction, are punishable under the Pascua Yaqui Tribal
2 Codes. The undersigned hereby swears or affirms that this complaint is based upon
3 information and belief, and the attached Affidavit and Verification, or signed statement.

4 **DATED this 18th day of November, 2013.**

5 
6
7 Complainant/Attorney

8 Pursuant to Article I, § 1(g) of the Pascua Yaqui Constitution, 4 PYTC § 4-20, and 25 U.S.C. §
9 1302(a)(b), If found guilty at sentencing or plea agreement, the Pascua Yaqui Tribe will seek
punishment that may include imprisonment.

10 DEFENDANT: Peter R. Acuna
11 ADDRESS: 7518 S. Camino Benem, Tucson, AZ 85757
12 DOB: 05/27/1988 ORIGIN: Pascua Yaqui Tribe #
SEX: Male HT: 6'00" WT: 155 EYES: Brown HAIR: Brown

13 Note: Accused persons may obtain disclosure information about their case ten days after arraignment by contacting
14 the Prosecutor's Office at 7777 S. Camino Huivisim, Tucson AZ 85757. [3]PYT R.Crim.P. Rule 38]

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

PASCUA YAQUI TRIBAL COURT
 FULL COURT ROOM
 2013 NOV 18 PM 3:03

<p>PASCUA YAQUI TRIBE, Plaintiff</p> <p>Vs.</p> <p>Peter Acuna, Defendant</p>	<p>DOCKET # CR-14-08</p> <p>FILED BY tas</p>
	<p align="center">COURT USE ONLY</p> <p align="center">Case Number P13111802</p>
<p align="center">PROBABLE CAUSE STATEMENT</p>	

AFFIRMATION

1. *J. Pallanes 3654*
 I being a duly authorized law enforcement officer of the Pascua Yaqui Indian Tribe and for the Pascua Yaqui Indian Reservation, declare under penalty of perjury, the following is true and correct:

- A. I am the arresting officer in this case; OR
 I am a law enforcement officer and make this statement on information and belief derived from Officer .

2. SUSPECTED PARTY (Defendant)

Name: **Peter Acuna**
 Driver's license number: **D05845811**
 Tribal enrollment number: **2694U07404**
 Date of birth: **05/27/1988**

Peter Acuna is an enrolled member of the **Pascua Yaqui** Tribe.
 is an Indian subject to the jurisdiction of the Pascua Yaqui Tribe.

3. The defendant was **Arrested** on **11/18/2013** at **4:53:00 AM**

4. I have probable cause to believe that the defendant committed the following offense(s) at or near **7580 S Yoem Bo-Oh** which is within the exterior boundaries of the Pascua Yaqui Indian Reservation.

PYTC 4-1-130 B Aggravated assault

PYTC 4-1-740 route

PYTC 4-1-130 assault

PYTC 4-1-150 battery

5. Statement of Probable Cause:

On November 18, 2013 at 04:53 I responded to 7580 S Yoem Bo-Oh (within the external boundaries of the Pascua Yaqui Reservation), in reference to an injured subject, later identified as Ignacio Valenzuela (07/17/1991, an enrolled member of the Pascua Yaqui Tribe).

When I arrived Mr. Valenzuela was unconscious and had a large amount of blood on his face. He was breathing but could not answer any questions or make any sounds. Several subjects on scene were point out a green car that had left the area as officers arrived on scene. Sgt. Gastelum made contact with the vehicle.

I then spoke with a witness Margaret Romero (07/12/1985). She stated that she had witnessed an altercation between the victim and Peter Acuna (05/27/1988, an enrolled member of the Pascua Yaqui tribe), who she had positively identified. She stated that at one point Ignacio was knocked to the ground and Peter began to kick him in the head and face. At this time she identified a second suspects as Daniel Ramirez (01/03/1995), wearing a white shirt, tan pants, and a ball cap. Daniel also began kicking Ignacio in the head and face. She stated that it was quickly obvious that Ignacio was unconscious and she yelled this to the suspects, however the suspects continued to kick and step on Ignacio. She stated that eventually the suspects got into a green car and left the area. She then showed me a text on her phone where she had recorded the vehicles license plate.

I then relayed Ms. Romero's information to Sgt. Gatelum who was with the vehicle that had left the scene. I confirmed the license plate number given by Ms. Romero and matched it to that vehicle. In addition, Sgt. Gastelum confirmed that Peter Acuna and Daniel Ramirez, wearing the clothing described, were in the vehicle. Sgt. Gastelum also informed me that blood had been found on the suspects shoes and pants.

I then spoke with a second witness Malinda Romero (01/08/1990). She supported Margaret's account of the events. She two identified both Peter Acuna and Daniel Ramirez by name. She also stated that she had even tried to physically stop the altercation, but was quickly over powered.

PROBABLE CAUSE STATEMENT

Peter Acuna

Incident# P13111802

Page 2 of 4

nearby vehicle to continue kicking him and stepping on his face. She also remembered clearly telling Peter and Daniel to stop because Ignacio was unconscious and could not fight back.

Based on his actions, witness statements, and physical evidence on his person, I believe there is cause to charge Peter Acuna with an offense

The information contained herein is true and accurate to the best of my knowledge and belief.

6. I request that the Court make a probable cause determination and, if the defendant is in custody, that he be continued in custody, pending further proceedings.

 Peter Acuna 3654
Signature of Officer

EXECUTED ON:

 11/18/13

Date

ATTACHMENT B

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

NOV 18 PM 3:00
CR-14
Paf

Pascua Yaqui Tribe,
Plaintiff,
vs.
ACUNA, PETER R.
Defendant.

Case No.

CRIMINAL COMPLAINT

The PASCUA YAQUI TRIBE, hereby complains and alleges, upon information and belief, that the above named defendant, an Indian, while on the Pascua Yaqui Reservation, did commit the following offense(s):

COUNT 1: 4 PYTC § 1-780(C) ~ Narcotics and Dangerous Drugs

On or about November 18, 2013 at approximately 5:14 a.m., at or near 5047 Mureo, Tucson, AZ, Defendant did possess or have under his control, any narcotic, hallucinatory or other dangerous drug, to wit: *cocaine*.

COUNT 2: 4 PYTC § 1-780(C) ~ Narcotics and Dangerous Drugs


On or about November 18, 2013 at approximately 5:14 a.m., at or near 5047 Mureo, Tucson, AZ, Defendant did plant, cultivate, possess, have under his control, dispense, use, transport, carry, sell, give away, prepare for sale, furnish, administer, or offer to sell, furnish, administer or give away any narcotic, hallucinatory or other dangerous drug, to wit: *possessed cocaine packaged for sale*.

COUNT 3: 4 PYTC § 1-790(A) ~ Possession of Drug Paraphernalia

On or about November 18, 2013 at approximately 5:14 a.m., at or near 5047 Mureo, Tucson, AZ, Defendant did use, or possess with intent to use, drug paraphernalia to pack, repack, store, contain, or conceal, a drug, to wit: *one or more baggies*.

And such violations, upon conviction, are punishable under the Pascua Yaqui Tribal Codes. The undersigned hereby swears or affirms that this complaint is based upon information and belief, and the attached Affidavit and Verification, or signed statement.

DATED this 18th day of November, 2013.


Complainant/Attorney

Pursuant to Article I, § 1(g) of the Pascua Yaqui Constitution, 4 PYTC § 4-20, and 25 U.S.C. § 1302(a)(b), If found guilty at sentencing or plea agreement, the Pascua Yaqui Tribe will seek punishment that may include imprisonment.

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DEFENDANT: Peter R. Acuna
ADDRESS: 7518 S. Camino Benem, Tucson, AZ 85757
DOB: 05/27/1988 ORIGIN: Pascua Yaqui Tribe #2694U07404
SEX: Male HT: 6'00" WT: 155 EYES: Brown HAIR: Brown

Note: Accused persons may obtain disclosure information about their case ten days after arraignment by contacting the Prosecutor's Office at 7777 S. Camino Huivisim, Tucson AZ 85757. [3 PYT R.Crim.P. Rule 38]

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

NOV 18 PM 3:03

<p>PASCUA YAQUI TRIBE, Plaintiff</p> <p>Vs.</p> <p>Peter Acuna Jr. , Defendant</p>	<p style="text-align: right;">CR-14-081 P48</p> <p style="text-align: center;">COURT USE ONLY</p> <p style="text-align: center;">Case Number P13111803</p>
PROBABLE CAUSE STATEMENT	

AFFIRMATION

1. I **3L49-Clinton Baker** being a duly authorized law enforcement officer of the Pascua Yaqui Indian Tribe and for the Pascua Yaqui Indian Reservation, declare under penalty of perjury, the following is true and correct:
 - A. I am the arresting officer in this case; OR
 - I am a law enforcement officer and make this statement on information and belief derived from Officer .

2. SUSPECTED PARTY (Defendant)
 - Name: **Peter Acuna Jr.**
 - Driver's license number: **SSN: 600729418**
 - Tribal enrollment number: **2694U07404**
 - Date of birth: **05/27/1988**

Peter Acuna Jr. is an enrolled member of the **Pascua Yaqui** Tribe.
 is an Indian subject to the jurisdiction of the Pascua Yaqui Tribe.

3. The defendant was Arrested on 11/18/2013 at 5:14:00 AM

NOV 18 2013 PM 12:31

4. I have probable cause to believe that the defendant committed the following offense(s) at or near **5047 Mureo** which is within the exterior boundaries of the Pascua Yaqui Indian Reservation.

<u>PYTC</u>	4-1-780	Possession of Dangerous Drug or Narcotic
<u>PYTC</u>	4-1-780	Possession of Dangerous Drug or Narcotic
<u>PYTC</u>	4-1-780	Possession of Dangerous Drug or Narcotic
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<u>PYTC</u>	4-1-790	Possession of Drug Paraphernalia
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<u>PYTC</u>	4-1-790	Possession of Drug Paraphernalia
<u>PYTC</u>	4-1-790	Possession of Drug Paraphernalia
<u>PYTC</u>	4-1-790	Possession of Drug Paraphernalia

5. Statement of Probable Cause:

On 11/18/2013 at 0514 hours I, Officer Baker, made contact with Peter Acuna Jr (DOB 05/27/1988) at 5047 Mureo (within reservation boundaries) in reference to case P13111802. Peter was the suspect in that case and I called the arrest time on Peter Acuna Jr for Officer Pallanes at 0514 hours.

I conducted a search incident to arrest on Peter Acuna Jr at 5047 Mureo. I located a plastic bag in his front left pocket. Inside the plastic bag contained 6 small individually packaged plastic bags containing a white powder substance. The 6 individual bags together weighed a total of 3 grams in it's packaging. I also located his wallet, phone, and cash throughout several different pockets. The cash totaled \$365.00 dollars. I field tested the white powder substance using the 904 Reagent Cocaine

Salts pouch. The white powder tested positive as cocaine. The white powder was sent to AZ DPS for examination.

Since I located the narcotics on the search incident to arrest I charged Peter Acuna Jr with six counts of PYTC 4-1-780 Possession of a Dangerous Drug and six counts of PYTC 4-1-790 Possession of Drug Paraphernalia.

While entering Peter's property into evidence I observed Peter had been released by the Arizona Dept of Corrections in July of 2013. Peter openly stated that he had just been released from prison.

The information contained herein is true and accurate to the best of my knowledge and belief.

6. I request that the Court make a probable cause determination and, if the defendant is custody, that he be continued in custody, pending further proceedings.

CB 3249
Signature of Officer

EXECUTED ON: 11-18-13
Date

ATTACHMENT C

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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

<p>PASCUA YAQUI TRIBE, Plaintiff,</p> <p>Vs.</p> <p>ACUNA, PETER R. , Defendant.</p>	<p>COURT USE ONLY</p>
	<p>Case Number: CR-14-080</p>
<p>INITIAL HEARING ORDER</p>	

The defendant appeared in custody with his counsel, Melissa Acosta, on November 18, 2013 for an Initial hearing. Present for the Tribe was Frederick Lomayesva. Tracy Nielsen appeared for pre-trial services.

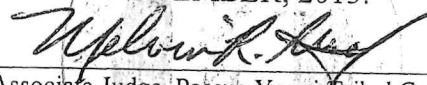
The court finds that probable cause exists to believe defendant may have committed the offense of Count One, Narcotics and Dangerous Drugs, Count Two, Narcotics and Dangerous Drugs, and Count Three, Possession of Drug Paraphernalia. The Tribe recommends that the defendant be released on a \$500.00 cash bond, based on three prior failures to appear, that the defendant should be ordered to appear at all future hearings, obey all laws, not consume narcotics or dangerous drugs, be subject to random urine testing by the police department and pre-trial, and be subject to pre-trial release, not possess any drug paraphernalia, the pre-trial services officer agrees, asks for a no contact order with Ignacio Valenzuela and the address of 7580 Yoem Bo-oh, and the defendant did not object. The Court should set an arraignment.

IT IS ORDERED that the defendant, Peter R. Acuna, shall be released on a \$500.00 cash bond, he must appear at all future scheduled hearings, and obey all laws, pending the arraignment date. Mr. Acuna shall have no narcotics or dangerous drugs, and he shall be subject to random urinalysis testing by the police department. He shall not possess drug paraphernalia. The defendant shall report to pre-trial immediately after he is released. He shall have no contact with Ignacio Valenzuela and the address of 7580 Yoem Bo-oh, In the event he cannot post his cash bond, then the court shall issue a transport order.

AN ARRAIGNMENT shall be scheduled for November 27, 2013, at 9:00 a.m.


THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

SO ORDERED THIS 18th DAY OF NOVEMBER, 2013.


Associate Judge, Pascua Yaqui Tribal Court

Date: 11.18.13

Tribe Defendant/Counsel Pre-trial

Clerk: 

NOV 19 2013 AM 8:42

ATTACHMENT D

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

PASCUA YAQUI TRIBE, Plaintiff, Vs. ACUNA, PETER R. , Defendant.	COURT USE ONLY
	Case Number: CR-14-081
INITIAL HEARING ORDER	

On November 18, 2013, the defendant appeared in custody for an initial hearing, with his counsel, Melissa Acosta, who announced that she has a direct conflict, because she had already spoken to Daniel Ramirez, an alleged co-defendant, and the Court should grant her request that she be allowed to withdraw from representing the defendant, and that the court appoint conflict counsel for the defendant. Present for the Tribe was Frederick Lomayesva. Tracy Nielsen appeared for pre-trial services.

The court finds that probable cause exists to believe defendant may have committed the offense of Count One, Assault, Count Two, Aggravated Assault, Count Three, Battery, Count Four, Rout, Count Five, Disorderly Conduct. The Tribe recommends that the defendant be released on a \$5,000.00 cash bond, based on 3 prior failures to appear and the seriousness of the allegations, that the defendant should be ordered to appear at all future hearings, obey all laws, not consume narcotics or dangerous drugs, be subject to random urine testing by the police department and pre-trial, and be subject to pre-trial release, not possess any drug paraphernalia, not contact the alleged victim, Ignacio Valenzuela and the address of 7580 S. Yoem Bo-oh, and not associate with Daniel Ramirez, and he did not object. The defendant waived reading of the complaint and entered a not guilty plea. The Court should set an arraignment.

IT IS ORDERED that the defendant, Peter R. Acuna, shall be released on a \$5,000.00 cash bond, he must appear at all future scheduled hearings, and obey all laws, pending the arraignment date. Mr. Acuna shall have no narcotics or dangerous drugs, and he shall be subject to random urinalysis testing by the police department. He shall not possess drug paraphernalia. not contact the alleged victim, Ignacio Valenzuela, or the address of 7580 S. Yoem Bo-oh, and not associate with Daniel Ramirez. The defendant shall report to pre-trial immediately after he is released. In the event he cannot post his cash bond, then the court shall issue a transport order.

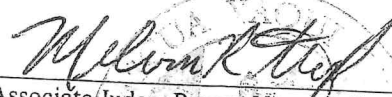
An ARRAIGNMENT shall be scheduled for November 27, 2013 at 9:00 a.m..

THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

IT IS FURTHER ORDERED that the Court grants the request by Ms. Acosta to withdraw, due to direct conflicts, and the Court shall appoint a conflict counsel to assist the defendant prior to his next scheduled hearing.


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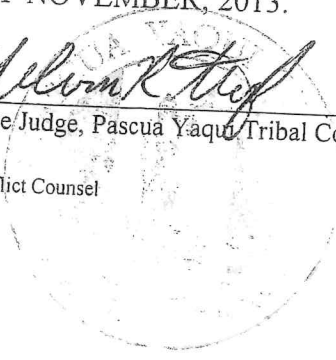
SO ORDERED THIS 18th DAY OF NOVEMBER, 2013.


Associate Judge, Pascua Yaqui Tribal Court

Date: 11.18.13

Tribe Defendant/Counsel Pre-trial Conflict Counsel

Clerk: 



ATTACHMENT E

1 Lourdes Salomón Molina, J.D.
2 P.O. Box 24133
3 Tucson, Arizona 85734
4 Tel: (520) 247-1329
5 lourdessalomonmolina@gmail.com
6 Lay Advocate for Defendant

2013 NOV 27 AM 8:44
CKET NO. CR-14-081

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

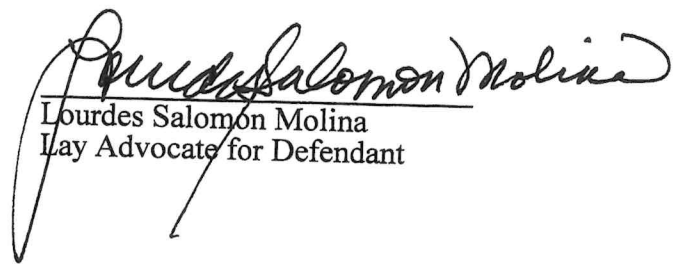
9 PASCUA YAQUI TRIBE,
10
11 Vs. Plaintiff,
12
13 ACUÑA, PETER
14
15 Defendant.

No. CR 14-081
NOTICE OF APPEARANCE

16 **COMES NOW** Lourdes Salomón Molina, Lay Advocate, of Lourdes Salomón Molina, J.D.,
17 P.O. Box 24133, Tucson, Arizona 85734, (520) 247-1329, lourdessalomonmolina@gmail.com and
18 hereby enters a notice of appearance on behalf of **PETER ACUÑA**, Defendant, in the above-
19 captioned matters.

20 **RESPECTFULLY SUBMITTED** this 26th day of November, 2013.

21 **Lourdes Salomón Molina, J.D.**

22 
23 Lourdes Salomón Molina
24 Lay Advocate for Defendant

25 Copies this day to:
26 Pascua Yaqui Prosecutor's Office
27 7474 S. Camino de Oeste
28 Tucson, Arizona 85757

ATTACHMENT F

1 Lourdes Salomón Molina, J.D.
2 P.O. Box 24133
3 Tucson, Arizona 85734
4 Tel: (520) 247-1329
5 lourdessalomonmolina@gmail.com
6 Lay Advocate for Defendant

2013 NOV 27 PM 8:44

DOCKET NO. CR-14-02

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

9 PASCUA YAQUI TRIBE,

No. CR 14-080

Plaintiff,

Vs.

SUBSTITUTION OF REPRESENTATION

10 ACUÑA, PETER

11 Defendant.


12 The Defendant, **PETER ACUÑA**, by and through undersigned lay advocate, hereby moves
13 for the withdrawal and substitution of counsel for Defendant, in the above-captioned matter.

- 14 1. Melissa Acosta was previously appointed to represent the Defendant.
- 15 2. Defendant has retained Lourdes Salomón Molina to represent him.
- 16 3. Lourdes Salomón Molina has been informed of all dates of hearings and other court
17 proceedings and will be prepared for same.

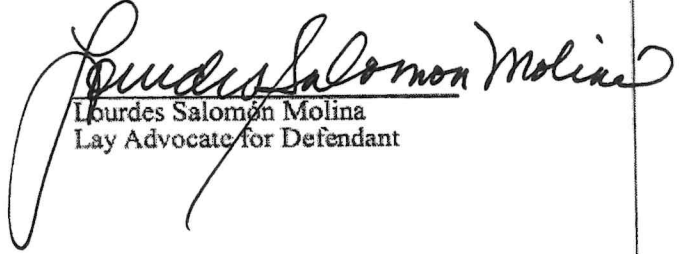
18 **RESPECTFULLY SUBMITTED** this 26th day of November, 2013.

19 Pascua Yaqui Public Defender's

Lourdes Salomón Molina, J.D.

20 

21
22 Melissa Acosta, Esq.

23 
24 Lourdes Salomón Molina
25 Lay Advocate for Defendant

26 Copies this day to:
27 Pascua Yaqui Prosecutor's Office
28 7474 S. Camino de Oeste
Tucson, Arizona 85757

Melissa Acosta
Pascua Yaqui Public Defender's Office
Melissa.Acosta@pascuayaqui-nsn.gov

1 Lourdes Salomón Molina, J.D.
P.O. Box 24133
2 Tucson, Arizona 85734
Tel: (520) 247-1329
3 lourdessalomonmolina@gmail.com
Lay Advocate for Defendant

4
5 **IN THE PASCUA YAQUI TRIBAL COURT**
6 **IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION**

7 PASCUA YAQUI TRIBE,
8
9 Plaintiff,
10 Vs.
11 ACUÑA, PETER
12 Defendant.

No. CR 14-080

**ORDER RE: SUBSTITUTION OF
REPRESENTATION**

13 Upon reading the foregoing, Substitution of Representation, and good cause appearing therefore,
14 IT IS HEREBY ORDERED that Melissa Acosta is withdrawn as attorney of record and
15 Lourdes Salomón Molina is hereby noted as advocate of record.

16
17 SO ORDERED this 26th day of NOVEMBER, 2013 ^{med}

18
19 
20 JUDGE OF THE PASCUA YAQUI TRIBAL COURT

21 Copies this day to:
Pascua Yaqui Prosecutor's Office
7474 S. Camino de Oeste
22 Tucson, Arizona 85757

23 Melissa Acosta
Pascua Yaqui Public Defender's Office
24 Melissa.Acosta@pascuayaqui-nsn.gov

25 Lourdes Salomón Molina
P.O. Box 24133
26 Tucson, Arizona 85734

27
28

ATTACHMENT G

1 Lourdes Salomón Molina, J.D.
2 P.O. Box 24133
3 Tucson, Arizona 85734
4 Tel: (520) 247-1329
5 lourdessalomonmolina@gmail.com
6 Lay Advocate for Defendant

2013 NOV 27 AM 8:45
CKET # CR-14-081/A
[Signature]

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

9 PASCUA YAQUI TRIBE,
10 Plaintiff,
11 Vs.
12 ACUÑA, PETER
13 Defendant.

No. CR 14-081 / CR 14-080
**MOTION TO MODIFY CONDITIONS OF
RELEASE**

14 **COMES NOW, PETER ACUÑA**, Defendant, by and through lay advocate undersigned, and
15 hereby moves this court to modify the conditions of release in the above-captioned matter. The motion
16 is supported by the attached Memorandum of Points and Authorities which is incorporated by
17 reference herein.

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **LAW AND ARGUMENT:**

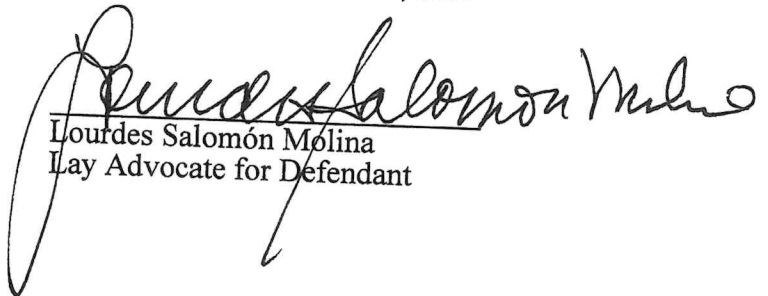
20 It is well settled that bail is set for those incarcerated for the sole purpose of securing their
21 attendance in court when required. Under no circumstances should bail be an instrument of
22 oppression. State vs. Norcross, 26 Ariz. App. 115, 117, 546 P.2d 840 (Ariz. App. 1976). Excessive
23 bail is not to be required for the purpose of preventing the prisoner from securing pretrial release;
24 reasonable bail should not be denied for the purpose of punishing a person charged with a crime.
25 Gusick vs. Boies, 233 P.2d 446, 62 Ariz. 233 (1951).

26 In the case at bar, and in support of Defendant request, he asks this court to set a lower bond.
27 This jurisdiction traditionally rarely imposes bonds for those individuals charged with criminal
28 offense. In this case, Defendant has been charged with Possession of Dangerous Drug or Narcotic (6
counts), Possession of Drug Paraphernalia (6 counts), Aggravated Assault, Assault, Battery and Rout.

1 all stemming from one incident. The court imposed a bond in the amount of \$5,500.00, which in thi
2 jurisdiction is excessive. Defendant respectfully requests that the bond be lowered to an amoun
3 commensurate with the offense, flight risk and danger to the community.
4

5 **RESPECTFULLY SUBMITTED** this 26th day of November, 2013.

6 **Lourdes Salomón Molina, J.D.**

7
8 
9 Lourdes Salomón Molina
Lay Advocate for Defendant

10 Copies this day to:

11 Pascua Yaqui Prosecutor's Office
12 7474 S. Camino de Oeste
13 Tucson, Arizona 85757
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ATTACHMENT H

1 **PASCUA YAQUI TRIBE**
2 7474 S. CAMINO DE OESTE
3 TUCSON, ARIZONA 85746
4 (520) 879-6251
5 (520) 879-6260

6 Frederick Lomayesva,
7 DEPUTY PROSECUTOR

PASCUA YAQUI TRIBAL COURT
2013 NOV 27 AM 9:23
DOCKET NO. **CR-14081**
PAF

8 **IN THE PASCUA YAQUI TRIBAL COURT**
9 **IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION**

10 **PASCUA YAQUI TRIBE**

11 Plaintiff,

12 vs.

13 **ACUNA, PETER**

14 Defendant


Case No.: CR-14-081

**TRIBE'S RESPONSE TO
DEFENDANT'S
MOTION TO MODIFY CONDITIONS
OF RELEASE**

15 Comes now the Pascua Yaqui Tribe by and through counsel undersigned, and hereby objects to
16 the Court granting Defendant's Motion in the above captioned matter, for the reasons set forth in
17 the following Memorandum of Points and Authorities.

18 **RESPECTFULLY submitted this 27th day of November, 2013.**

19
20
21 **PASQUA YAQUI OFFICE OF THE PROSECUTOR**

22
23 
24 **FREDERICK LOMAYESVA**
25 **DEPUTY PROSECUTOR**

26 *G. Allen Osburn for F.L.*

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On November 18, 2013, at approximately 4:53 a.m., at or near 7580 S. Yoem Bo-Oh, Defendant, PETER ACUNA, an adult male Indian, along with Co-Defendant, Daniel Ramirez, engaged in several violent criminal acts that seriously injured victim, Ignacio Valenzuela, to include: 1 Count of Aggravated Assault, 1 Count of Disorderly Conduct, 1 Count of Rout, 1 Count of Assault, and 1 Count of Battery. The criminal acts arise from an incident witnessed by several community members, in which Defendant assaulted the victim on the Reservation, by brutally beating and kicking him, to include assaulting the victim while he was unconscious and where he did not have the capacity to resist. After physically assaulting the victim, Defendant fled from the scene in a green car.

A witness at the scene recorded the car's license plate number and gave the number to Officer Juan Pallanes, of the Pascua Yaqui Police Department, who had responded to the scene. The witness also identified Defendant as one of the suspects. While fleeing the scene, the car that Defendant was in was stopped by Sgt. Andres Gastelum of the Pascua Yaqui Police Department. Sgt. Gastelum verified the license number that was relayed to him by Officer Pallanes. Sgt. Gastelum then found Defendant in the vehicle and found blood on his shoes and pants. After the police investigation, Defendant was arrested. While being searched incident to his arrest by Officer Clint Baker, the Defendant was found in possession of six (6) individually wrapped plastic bags of a white powdery substance, weighing a total of three (3) grams. The powdery substance field tested positive as cocaine. (See CR-14-080, where the Court found probable cause for three criminal counts involving possession of **Narcotics and Dangerous**

1 **Drugs Cocaine, and Possession of Drug Paraphernalia).** Defendant was booked into the
2 Pascua Yaqui Detention facility.
3

4 The Pascua Yaqui Fire Department responded to the scene and transported the
5 unconscious victim to the University Medical Center Hospital emergency room. The victim
6 suffered serious facial trauma and head injuries.

7 On November 18, 2013, Defendant appeared for his Initial Hearing. The Court found
8 that probable cause existed to believe that the Defendant may have committed all criminal counts
9 listed on the Tribe's complaint. The Court ordered that Defendant be released upon posting a
10 \$5,000 cash bond, obey all laws, and appear at all future hearings, shall have no narcotics or
11 dangerous drugs, not possess drug paraphernalia, not contact the victim, in addition to other
12 collateral release requirements.
13

14 The tribe related that Defendant was a danger to the community and his violent acts
15 indicate that the defendant poses a substantial danger to the community and a risk to commit
16 future similar crimes. The nature of the allegations described in the Tribe's affidavit clearly
17 demonstrates the potential continual danger to the community presented by Defendant. Officer
18 Pallanes' affidavit provided sufficient reliable information to believe that the Defendant
19 committed the violent acts alleged in the Tribe's complaint and, therefore, more than justified the
20 issuance of the appearance bond.
21
22

23 **Additional Relevant Facts:**

- 24 1. Defendant is a felon who has recently been released from the Arizona Department of
25 Corrections on **July 24, 2013**. Defendant was released after serving 5 years in prison. He was
26 incarcerated and served time for a 2007, Pima County, 2nd Degree Burglary (a class three
27 Felony) and Theft case (class four Felony)(case # 10-20070924). While he was on Probation
28

1 for the 2007 Burglary, Defendant committed a second case of Burglary in the 2nd Degree
2 (case # 10-20084076) and an **Arizona state warrant** was issued for his arrest (case #
3 CR08816310). Defendant was subsequently arrested, his **Probation was revoked**, and he
4 was sentenced to prison.
5

6 2. On February 15, 2011, while in State prison, Defendant committed and was found guilty of
7 Aggravated Assault. (*see attached*)

8 3. On August 21, 2012, while serving a sentence in the Arizona Department of Corrections,
9 Defendant committed, an Assault on Staff and was found guilty. (*see attached*)
10

11 4. In Pascua Yaqui Tribal Court case CR-09-193, a case where Defendant pled guilty to two
12 counts of possession of Narcotics and Dangerous Drugs, (cocaine), Defendant disobeyed the
13 Court's order and failed to appear for court hearings on 3 separate occasions. The case
14 involved the illegal sale of crack and cocaine from **7518 S. Camino Benem**. **Three Bench**
15 **Warrants** were issued by the Honorable Judge Melvin Stoof in the case because Defendant
16 failed to appear.
17

18 5. In this matter, on November 18, 2013, the Department of Pre-Trial Services conducted a Pre-
19 Trial assessment of Defendant while he was in custody. Defendant indicated that he
20 currently resides at **7518 S. Camino Benem**, that he is unemployed, and that he is a recently
21 released felon. The assessment of community safety by the Pre-Trial Services Department is
22 that Defendant is violent, presents a danger to the community if released and they
23 recommended a bond be imposed by the court.
24

25 **LAW:**

26 Defendant, through his advocate, claims that his bond is unreasonable and the sole
27 purpose of bond is to secure an appearance. Defendant is incorrect, however, and his argument
28

1 is without merit. Even if the Court finds Defendant's claims should be considered, which the
2 Tribe does not concede, given the factual circumstances, the nature of the offenses, and the
3 Defendant's criminal history, his bond was reasonable. Therefore, Defendant's Motion should
4 be denied.
5

6 The PYT Constitution and Code addresses criteria to be considered with regard to bail
7 and appearance bond issues. The Pascua Yaqui Constitution forbids the requirement that
8 Defendant's post *excessive* bail. Pascua Yaqui Tribe Constitution, Article I, § 1(g). Rule 190 of
9 the Pascua Yaqui Rules of Criminal Procedure govern bail and factors to be considered when the
10 court sets bail. 3 PYT R.Crim.P. Rule 190. The Rule states in pertinent part:
11

12 Every defendant shall be released pending and during trial on his or her own
13 recognizance, **unless the court determines, based upon findings of fact made**
14 **at the initial appearance, or a later hearing to modify the conditions of**
15 **release, that such release will not reasonably assure his or her appearance for all**
16 **future hearings.** No defendant shall be held without bail **unless the court**
17 **determines, based upon findings of fact made at the initial appearance, or a**
18 **later hearing to modify the conditions of release, that there is a grave risk**
19 **that the defendant, while released, will commit a crime.** Every person entitled
20 to release under the terms of this section shall be entitled to release from custody
21 pending and during trial under whichever one or more of the following conditions
22 is deemed by the judge to be the least restrictive alternative which will reasonably
23 assure the appearance of the person at any lawfully required hearing:
24 (4) Release after deposit by the accused or a bondsman of bond in either cash or
25 other sufficient collateral in an amount specified by the judge. The judge, in his or
26 her discretion, may require that the accused post only a portion of the total bond,
27 the full sum to become due if the accused fails to appear as ordered
28

3 PYTC § 2-2-190 (A)(B)(C)(4). (*emphasis added*).

29 The Tribal Court has also historically relied on traditional factors when considering the
30 requirement of an appearance bond or setting conditions of pre-trial release. The court generally
31 has considered a number of issues in determining a pretrial appearance bond and conditions of
32 release: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence
33 against the person; (3) the history and characteristics of the person, including the person's

1 character, physical and mental condition, family and community ties, employment, financial
2 resources, and past criminal conduct; past failures to appear, and history relating to drug,
3 violence, or alcohol abuse; and (4) the nature and seriousness of the danger to any person or the
4 community that would be posed by the defendant's release.
5

6 The above mentioned method of determination and analysis is consistent with 9th Circuit
7 case law and the federal Bail Reform Act. See *United States v. Winsor*, 785 F.2d 755, 757 (9th
8 Cir.1986); *United States v. Motamedi*, 767 F.2d 1403, 1407 (9th Cir.1985).
9

10 **ANALYSIS:**

11 In this case, a \$5,000.00 appearance bond is not only reasonable, but rather low, and
12 serves the legitimate governmental purpose of ensuring the protection and safety of the victim
13 and the tribal community and will help to guarantee that Defendant appears for future court
14 appearances. The Court's order following Defendant's Initial Appearance grants his conditional
15 release pending Defendant fulfilling the condition of posting a low bond.
16

17 On August 26th, 2013, Defendant, through his advocate, filed a request for a reduction of
18 the court ordered bond. It is important to start with the fact that defendant has never indicated
19 that he could not afford to post bond. There is no reason to believe at this point that Defendant,
20 or a surety acting on his behalf, could not fulfill the condition requested by the Court. To the
21 contrary, Court documents indicate that Defendant has hired and retained a private
22 attorney/advocate to represent him as opposed to a court-appointed attorney, generally reserved
23 for the indigent.
24

25 Defendant incorrectly relies on *State v. Norcross*, 26 Ariz. App. 115, 546 P.2d 840
26 (1976), where the defendant in that matter escaped after committing an armed robbery to support
27 his claim that Bail in this matter is excessive. In fact, the court in *Norcross* actually stands for the
28

1 opposite proposition and supports the reasonable bond in this matter. The facts in Defendant's
2 case are clearly distinguishable from the facts and the outcome in *Norcross*.
3

4 In the instant case, we do not believe that the bail was excessive or a denial of due
5 process, in fact it was set rather low when we now consider all of the relevant factors. The
6 defendant in *Norcross* was arrested for what amounted to escape and armed robbery in 1976.
7 His Bond was set at \$5,500.00. In the present case, Defendant participated in a brutal aggravated
8 assault on a quiet neighborhood street where the victim was beaten unconscious and transported
9 to a Level 1 Trauma Center. Moreover, in *Norcross*, the Arizona Court of Appeals remarked,
10 "Considering the gravity of the offense charged, coupled with the fact that the trial court was
11 able to review defendant's record and the circumstances of the case before setting bond, we feel
12 there was no abuse of discretion in setting the bond at \$5500." Therefore, *Norcross* is not
13 applicable and actually supports the bond amount imposed. In *Gusick v. Boies*, 72 Ariz. 233,
14 237, 233 P.2d 446, 448 (1951), the court held that \$150,000.00 bond for one count of Sodomy
15 and a count of Fellatio was excessive. The court reduced the bond to \$60,000.00. However, in
16 *Gusick*, the Defendant did not have any criminal history to speak of.
17

18
19 More importantly, our Court's factual findings, the seriousness of the offense and the
20 danger that Defendant poses to the community required the exercise of sound judgment and the
21 application of legal principles established by our Constitution and Code. The Court was correct
22 in setting a bond for this defendant given the serious allegation, supported by probable cause, the
23 brutal beating to the point of unconsciousness of the victim. Defendant's community ties are not
24 enough to militate against the nature of the offense or the potential danger to other Yaqui
25 community members. Defendant was recently released from prison, he has a strong propensity
26 and character for violence, he was arrested and possessed narcotics and dangerous drugs, he has
27
28

1 a history in this court and the Arizona Courts of failures to appear and warrants for his arrest, he
2 has a history of felonious and criminal conduct, he poses a flight risk, he resides at the address
3 where he was previously arrested for Narcotics violations, but more importantly, Defendant
4 poses a grave risk to commit another crime while released. The risk and circumstances the Tribe
5 seeks to guard against are normally beyond a surety's control. Finally, Defendant, through his
6 advocate incorrectly states that the bond amount, "in this jurisdiction," is excessive. However,
7 the advocate for Defendant knows that this is not accurate because she appeared in a case, (CR-
8 10-273, Tribe v. Salazar), in which the bond was set at \$10,000.00, for a shooting case with no
9 injuries.

12 **CONCLUSION:**

13 Wherefore, the Court has ample evidence to support a renewed decision and was correct
14 in setting a bond at the time of the Initial Hearing. Defendant requested that the bond be
15 "commensurate with the offense, flight risk, and danger to the community," the Tribe agrees.
16 The Tribe respectfully requests that the bond not be reduced and be increased to \$10,000 to
17 ensure the safety of the community and the future appearance of the Defendant. As such, the
18 Defendant's motion should be denied.

21 Dated this 27th day of November, 2013.

23 

24 Frederick Lomayesva
DEPUTY PROSECUTOR

25 G. Allen Osborn for F.L.

26 **ORIGINAL** delivered and filed this:
date to:

27 Clerk of the Court

A copy delivered/faxed to:

28 Lourdes Salomon Lopez, J.D. (Advocate for Defendant)

P.O. Box 24133

Tucson, AZ 85734

IISO100 REQUESTOR:

INMATE RECORD

TIME 16:02

ADC NO: 240244 NAME: ACUNA, PETER R. JR. ("B") STAT: I INACTIVE

BIRTH : 05/27/88

SEX: M AGE: 25

PED : NOT APPL.

RACE : NA INDIAN

NAMES : ACUNA, PETER R. JR. ("A")

CSBD: 07/24/2013

CSED: 03/25/2014

ACUNA, PETER R. JR. ("B")

CUS :

CRD : 10/23/2013

ZIP : 85757

BALTAZAR, PETER (AKA)

BALTAZAR, DANIEL (AKA)

CHUCKY, (AKA)

03/25/2009 LOC:

COM COUNTY	SENT BEGIN	COMM SUPER	SENT IMP	CC CS	REL DATE	STATUS
A PIMA	10/06/2008	0Y 6M 0D	3Y 5M30D		04/04/2012	IMPOSED
CNT CO/CAUSE	OFFENSE DESC		FELONY		SENT IMP CC CS	VERIFY
01R 10-20070924	BURGLARY 2ND DEGRE		CL3 ND/NR	3Y 6M 0D		EXPIRED Y
02 10-20070924	THEFT		CL4 ND/NR	2Y 6M 0D	01	EXPIRED Y

COM COUNTY	SENT BEGIN	COMM SUPER	SENT IMP	CC CS	REL DATE	STATUS
B PIMA	10/13/2008	0Y 8M 0D	5Y 0M 0D	A	07/24/2013	IMPOSED
CNT CO/CAUSE	OFFENSE DESC		FELONY		SENT IMP CC CS	VERIFY
01R 10-20084076	BURGLARY 2ND DEGRE		CL3 ND/NR	5Y 0M 0D		ACTIVE Y

MOVEMENT	DATE & TYPE	DESTINATION	REASON FOR	ORIGIN
03/17/09	NEW COMMITMENT	ASPC-PX ALHAMBRA		PIMA
03/24/09	TRANSFERRED TO	ASPC YUMA CHEYE		ASPC-PX ALHAMBRA
03/24/09	RECEIVED AT	ASPC YUMA CHEYE		ASPC-PX ALHAMBRA
04/13/10	TRANSFERRED TO	L3 GREAT PLAINS		ASPC YUMA CHEYENNE
04/14/10	RECEIVED AT	L3 GREAT PLAINS		ASPC YUMA CHEYENNE
09/20/10	TRANSFERRED TO	ASPC-F EAST UNI		L3 GREAT PLAINS
09/20/10	RECEIVED AT	ASPC-F EAST UNI		L3 GREAT PLAINS
01/05/11	TRANSFERRED TO	ASPC-E MEADOWS		ASPC-F EAST UNIT
01/05/11	RECEIVED AT	ASPC-E MEADOWS		ASPC-F EAST UNIT
01/06/11	TRANSFERRED TO	ASPC-E MEADOWS		ASPC-E MEADOWS
01/06/11	RECEIVED AT	ASPC-E MEADOWS		ASPC-E MEADOWS
05/05/11	TRANSFERRED TO	ASPC-F CENTRAL		ASPC-E MEADOWS CDU
05/05/11	RECEIVED AT	ASPC-F CENTRAL		ASPC-E MEADOWS CDU
05/02/12	TRANSFERRED TO	ASPC-E SMU I		ASPC-F CENTRAL UNI
05/02/12	RECEIVED AT	ASPC-E SMU I		ASPC-F CENTRAL UNI
07/24/13	COM SUPERV RLSE	ASPC-E SMU I		PIMA

ICSS	TY	PUBLIC RISK SCORE	INSTITUTIONAL RISK SCORE	DATE	APVD
		1 2 3 4 5 6 7 8	1 2 3 4 5 6 7 8		

03/23/09 11 P:3 I:3 M: MH: E:3 V:3 W: A/D:3 S: R:0 OVERRIDE:0 03/23/09 JAR5

RCSS	TY	P	I	M	MH	E	V	W	AD	S	R	ADMN	LOC	APVD
03/16/11	07	5	5			4	2	2	0		0		A01	BZT1
09/20/11	91	5	5			4	2	2	0		0		A01	BSE6
10/23/12	91	5	5			4	0	1	0		0		A08	BJA5

IISO100 REQUESTOR:

INMATE RECORD

TIME 16:02

ADC NO: 240244 NAME: ACUNA, PETER R. JR. ("B") STAT: I INACTIVE

RCSS TY P I M MH E V W AD S R ADMN LOC APVD

CUSTODY CLASS DATE & TYPE APPROVED NEXT REV PAROLE CLASS LOCATION
10/13/08 ADMISSION N 2 ASPC YUMA CHEYE
10/13/08 PAR.CL.CHG. * 1 161 DAYS ASPC YUMA CHEYE
03/23/09 INITIAL CL. 3/3 03/23/09 03/23/10 1 694 DAYS ASPC-PX ALHAMBR
02/15/11 DISP. ACTION 02/18/11 05/16/11 3 90 DA/CS ASPC-E MEADOWS
03/16/11 RE-CLASS/ADM 5/5 04/08/11 03/15/12 ASPC-E MEADOWS
09/20/11 NO MOVEMENT 5/5 09/20/11 09/19/12 ASPC-F CENTRAL
08/21/12 DISP. ACTION 08/21/12 11/19/12 3 90 DA/CS ASPC-E SMU I
10/23/12 NO MOVEMENT 5/5 10/23/12 10/23/13 ASPC-E SMU I
04/17/13 TR INELIGIBL ASPC-E SMU I
07/24/13 TRUTH-IN-SEN R ASPC-E SMU I
END PC TIME 11/19/12

WORK/PGM EVAL DATE&ASSIGN TYPE *RATING* HRS RATE DI SP LOCATION
06/16/09 UNASSIGNED 0 0 0 0.0 0.00 EXIT/XXC ASPC YUMA
01/31/10 FUNCTIONAL LITERAC 5 0.0 0.00 ASPC YUMA
02/28/10 FUNCTIONAL LITERAC 1 0.0 0.00 ASPC YUMA
10/06/10 I/M BARBER/BEAUTIC 5 60.0 0.35 ASPC-F EA
10/19/10 I/M BARBER/BEAUTIC 5 60.0 0.30 ASPC-F EA
11/02/10 I/M BARBER/BEAUTIC 5 60.0 0.30 ASPC-F EA
11/15/10 I/M BARBER/BEAUTIC 5 60.0 0.30 ASPC-F EA
11/29/10 I/M BARBER/BEAUTIC 5 60.0 0.30 ASPC-F EA
12/13/10 I/M BARBER/BEAUTIC 5 60.0 0.30 ASPC-F EA
12/27/10 I/M BARBER/BEAUTIC 5 60.0 0.30 ASPC-F EA
01/11/11 I/M BARBER/BEAUTIC 5 42.0 0.30 ASPC-E ME

DISCIPLINE VIOLATION DATE CASE TYPE VERDICT DISPOSITION STATUS
05/15/09 09-Y02-0754 DISOBEY VERBAL/ GUILTY-MIN. VERBAL REPRMND FINALIZED
WRITEN REPRMND
03/16/10 10-Y02-0274 DISOBEY VERBAL/ GUILTY-MIN. VERBAL REPRMND FINALIZED
WRITEN REPRMND
PRIV LOSS DAYS
EXTRA DUTY HRS
02/15/11 11-A16-0040 AGGRAVATED ASSA GUILTY-MAJ. VERBAL REPRMND FINALIZED
PRIV LOSS DAYS
TIME FORFT DAY
08/21/12 12-A08-1052 ASSAULT ON STAF GUILTY-MAJ. PRIV LOSS DAYS FINALIZED
TIME FORFT DAY

HOUSING DATE LOCATION & TYPE COUNSELOR WK/PGM ASGN
03/17/09 B06-WD-D163G MAXIMUM CU
03/18/09 B06-WD-E206A MAXIMUM CU
03/18/09 B06-WD-E206A MAXIMUM CU NCH1
03/24/09 Y02-209C 11U MEDIUM CUS DJB6
03/25/09 Y02-209C 11U MEDIUM CUS AAS0
03/30/09 Y02-206C 10U MEDIUM CUS CJ23 UNPAID LABOR POOL #

IISO100 REQUESTOR:

INMATE RECORD

TIME 16:02

ADC NO: 240244 NAME: ACUNA, PETER R. JR. ("B")

STAT: I INACTIVE

HOUSING DATE	LOCATION	& TYPE	COUNSELOR	WK/PGM ASGN
04/09/09	Y02-204C 10U	MEDIUM CUS	USX1	UNPAID LABOR POOL #
04/21/09	Y02-204C 10L	MEDIUM CUS	USX1	UNPAID LABOR POOL #
06/03/09	Y02-204C4C22	MEDIUM CUS	USX1	UNPAID LABOR POOL #
06/16/09	Y02-204C4C22	MEDIUM CUS	USX1	
04/14/10	K04-HUPEH03H	MEDIUM CUS	WTR6	
04/20/10	K04-HUPEH03E	MEDIUM CUS	WTR6	
04/20/10	K04-HUPCA34U	MEDIUM CUS	FMG0	
09/15/10	K04-HUPEB04H	MEDIUM CUS	EAR0	
09/20/10	A03-CL-D0207	MEDIUM CUS	NDS2	
09/22/10	A03-CL-D0207	MEDIUM CUS	NDS2	I/M BARBER/BEAUTICN
12/22/10	A03-CL-D0207	MEDIUM CUS	NDS2	I/M BARBER/BEAUTICN
01/05/11	A16-05ABWB28	MEDIUM CUS	MRM2	I/M BARBER/BEAUTICN
01/06/11	A16-05ABWB28	MEDIUM CUS	MRM2	
01/06/11	A19-DUAB119U	ADMINIS. D	ELJ8	
01/11/11	A19-DUAB109U	ADMINIS. D	ELJ8	
05/05/11	A01-CB-7F014	MAXIMUM CU	PDA1	
05/05/11	A01-CB-7F014	MAXIMUM CU	PDA1	
07/29/11	A01-CB-1A005	MAXIMUM CU	BSE6	
07/29/11	A01-CB-1A005	MAXIMUM CU	BSE6	
11/22/11	A01-CB-1A005	MAXIMUM CU	DRJA	
05/02/12	A08-WG3D212B	MAXIMUM CU	SGJ4	
05/10/12	A08-WG4D101B	MAXIMUM CU	GPW1	
03/13/13	A08-WG4D101B	MAXIMUM CU	GPW1	
06/05/13	A08-WG4D101B	MAXIMUM CU	MRW3	

IISUI012 NO WARRANTS OR DETAINERS FOUND

IISUI005 NO OUT TIME FOUND

IISUI009 NO PAROLE BOARD INFO FOUND

ATTACHMENT I

1 IN THE PASCUA YAQUI TRIBAL COURT

2 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

3 PASCUA YAQUI TRIBE

Plaintiff,

4 VS.

5 ACUNA, PETER R.,

6 Defendant.

CASE NO. CR-14-080

ORDER SETTING TRIAL

7 On November 27, 2013, the defendant, Peter R. Acuna, appeared with his advocate,
8 Lourdes Salomon Molina, who substituted for Melissa Acosta, who was allowed to withdraw
9 as counsel, for an arraignment, and Frederick Lomayesva appeared for the Tribe.

10 The defendant waived reading of his rights, waived reading of the criminal complaint,
11 and he entered a not guilty plea to Count One, Narcotics and Dangerous Drugs, Count Two,
12 Narcotics and Dangerous Drugs, Count Three, Possession of Drug Paraphernalia.

13 The Tribe had requested that the court grant its motion to disqualify the advocate from
14 representing the defendant, because the Tribe may be seeking a penalty of more than one year
15 imprisonment, and that the recently enacted federal Tribal Law and Order Act requires that a
16 defendant has the right to a licensed attorney, and that the defendant's advocate is not a
17 licensed attorney. The Tribal Law and Order Act provides in pertinent part:

18 (c) RIGHTS OF DEFENDANTS. In a criminal proceeding in which an Indian Tribe,
19 in exercising powers of self-government, imposes a total term of imprisonment of
20 more than 1 year in a defendant, the Indian Tribe shall –

21 (1) provide to the defendant the right to effective assistance of counsel at least
22 equal to that guaranteed by the United States Constitution; and,

23 (2) At the expense of the tribal government, provide an indigent defendant *the*
24 *assistance of a defense attorney licensed to practice by any jurisdiction in the*
25 *United States* that applies appropriate professional standards and effectively
26 ensures the competence and professional responsibility of its licensed
27 attorneys. (emphasis added)

28 The court finds that Ms. Molina is certified to practice in this jurisdiction. The Rules of Court
provides that the court certifies attorneys and lay counselors to practice after attending a four
hour class, passing a tribal bar exam, and such advocates and attorneys are subject to The
American Bar Association standards of conduct. 3 PYTC § 1-4-20, **Certification of**
Attorneys and Lay Counselors, 3 PYTC § 1-4-40(C), **Appearance of Attorneys**. Ms.
Molina is qualified to represent the defendant because she is licensed in this jurisdiction, and
the jurisdiction is one that has appropriate standards of professional responsibility and

1 requires a bar exam as a condition of admission. The Court denies the Tribe's motion to
2 disqualify Ms. Molina, for lack of good cause shown. By allowing Ms. Molina to represent
3 him, the defendant has waived his right to counsel, implicitly, and he has the benefit of lay
4 counsel who is certified by the Pascua Yaqui Tribal Court. 3 PYTC § 1-4-50 **Lay Counsel**.

5 The defendant's advocate had requested a modification of release conditions and bond
6 that was set at \$5,000.00. The criminal procedure code provides:

7 (A) Any person remaining in custody may move for reexamination of the
8 conditions of release based upon the existence of material facts not previously
9 presented in court.

10 (B)

11 **3 PYTC § 2-2-210(A). Modification and Revocation of Release**

12 The statute allows a defendant to move to re-examine, and defendant's counsel did so by
13 filing a motion to modify conditions of release. The Tribe filed its response to the motion,
14 objected to it, and asked for an increase to \$10,000.00 cash bond. The defendant's advocate
15 brought forward new information that was not brought up at the initial hearing, due to Ms.
16 Acosta of the public defender's office inability to advise the defendant, and added information
17 about the defendant's significant connections to the community as a basis to grant a lowered
18 bond. The Court denies the defendant's request to lower the bond, for lack of good cause
19 shown,

20 The statute allows the Tribe to file its own motion to modify when there has been a
21 breach of release conditions:

22 (C) Prosecutor's motion:

23 (1) Upon verified petition by the prosecutor stating facts or circumstances
24 constituting a breach of conditions of release, the court may issue a warrant or
25 summons to secure the defendant's presence in court. A copy of the petition
26 shall be served with the warrant or summons.

27 (2) Hearing. After a hearing on the matters set forth in the petition, the
28 court finds that the person released has not complied with the conditions of
release, the court may modify the conditions or revoke release.

Id. at (C)(1)&(2).

29 The Tribe did not file a "verified petition" to modify to meet the technical requirements of the
30 statute, nor has there been an allegation that the defendant has "breached a condition of
31 release", because the defendant has been in custody pending posting of a bond, and therefore
32 could not have violated a "condition of release." The Court denies the Tribe's motion to
33 increase the bond to a \$10,000.00 cash bond, because the court agrees with the defendant's
34 counsel that the information provided by the Tribe is not "new evidence," but rather was
35 information that was available to the Tribe at the time of the initial hearing, the Tribe could

1 have reasonably accessed through its NCIC data base, and by its access to the Pascua Yaqui
2 police department's access to state detention and police records, in addition to its own records
3 related to the defendant. Also, the court agrees with the defendant's advocate that the
4 information attached to the Tribe's response that purports to be state records were not certified
5 as a state official record. The Pascua Yaqui Evidence code allows the court to admit into
6 evidence public documents including those of state records. The Court finds that the attached
7 three pages to the Tribe's response to defendant's motion to modify do not meet such
8 admissibility requirements, because although they may be public records, they were not
9 certified records, certified by an official of the state, by any custodian of records of the state,
10 and therefore the Tribe's attached papers lack trustworthiness as to their admissibility. 3 PYT
11 R. Evid. Rule 39(f), **Hearsay Exceptions: Availability of Declarant Immaterial**, Public
12 Records and Reports, 3 PYT R. Evid 48(D) **Certified Copies of Public Records**. The Court
13 will not allow a second bite of the apple by the Tribe when it could have introduced
14 information about the defendant at the time of his initial appearance.

15 The Court denies the Tribe's motion to increase the bond, because it did not file a
16 verified petition, because it has not provided new evidence that was not readily available at
17 the time of the initial hearing, and because the purported "state records" are not admissible
18 because they were not certified as official public records. See and compare Civil Procedure
19 Rules 3 PYTC § 2-1-130(E) (the court will not allow introduction of "new" previously
20 undisclosed evidence to be admitted, unless the party trying to introduce the new evidence
21 proves it was unaware of its existence and the new evidence could not have, without
22 reasonable effort, been discovered in time to disclose), 3 PYTC 2-1-140(D) **Motions** (The
23 judge may deny a motion which could and should have been made earlier in the case if it
24 appears that the moving party knew or should have known earlier about the basis for the
25 motion and has raised it late because of negligence or an intent to harass the other party).

26 The Tribe's previous recommendations that the defendant be released on a \$5,000.00
27 shall be maintained, and the Court should adopt all other prior release conditions, pending his
28 trial.

29 The Tribe asked that the court order the defendant not to contact any witnesses.
30 Defendant's counsel objected and indicated that she could not interview the witnesses if the
31 Court granted the motion to restrict access to the witnesses. The Court asked the Tribe to
32 clarify its position, because if the court were to grant the Tribe's motion, the defendant and his
33 counsel would be restricted in their ability to adequately prepare their defense in violation of
34 his right under the Pascua Yaqui Constitution, the Pascua Yaqui Criminal Code, and the
35 Indian Civil Rights Act. The Court found that the defendant should be ordered to not contact
36 the alleged victim, because the victim's right statute mandates such protections, and that
37 specific request by the Tribe to order the defendant not to contact an alleged victim should be
38 granted. Additionally, the Tribe had not filed for any protective order for the court to grant

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such a request. 3 PYTC § 2-2-400(A)(B)(C), **Excision and Protective Orders**. The Tribe then withdrew its motion.

IT IS IT IS ORDERED that the defendant, Peter R. Acuna, shall be released on a \$500.00 cash bond, to be posted, he shall appear at all future hearings, obey all laws, and the defendant shall not contact the alleged victim, Ignacio Valenzuela or the address of 7580 S. Yoem Bo-oh. He shall not consume narcotics and dangerous drugs or drug paraphernalia and he shall be subject to random urinalysis testing by pre-trial services and law enforcement. He shall continue to follow all pre-trial conditions of release.

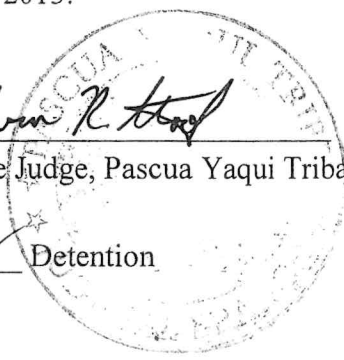
A BENCH TRIAL shall be scheduled for February 12, 2014 at 9:00 a.m.. *gjd*

THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

SO ORDERED THIS 27th DAY OF NOVEMBER, 2013.

Melvin R. Hood

Associate Judge, Pascua Yaqui Tribal Court



Date: 11-27-13
 Tribe Defendant/Counsel _____ Pre-trial Detention
Clerk: *[Signature]* _____

ATTACHMENT J

1 IN THE PASCUA YAQUI TRIBAL COURT

2 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

3 PASCUA YAQUI TRIBE
4 Plaintiff,

VS.

5 ACUNA, PETER R.,
6 Defendant.

CASE NO. CR-14-081

ORDER SETTING TRIAL

7
8 On November 27, 2013, the defendant, Peter R. Acuna, appeared with his advocate,
9 Lourdes Salomon Molina, who substituted for Melissa Acosta, who was allowed to withdraw
10 as counsel, for an arraignment, and Frederick Lomayesva appeared for the Tribe.

11 The defendant waived reading of his rights, waived reading of the criminal complaint,
12 and he entered a not guilty plea to Count One, Assault, Count Two, Aggravated Assault,
13 Count Three, Battery, Count Four, Rout, and Count Five, Disorderly Conduct.

14 The Tribe had requested that the court grant its motion to disqualify the advocate from
15 representing the defendant, because the Tribe may be seeking a penalty of more than one year
16 imprisonment, and that the recently enacted federal Tribal Law and Order Act requires that a
17 defendant has the right to a licensed attorney, and that the defendant's advocate is not a
18 licensed attorney. The Tribal Law and Order Act provides in pertinent part:

19 (c) RIGHTS OF DEFENDANTS. In a criminal proceeding in which an Indian Tribe,
20 in exercising powers of self-government, imposes a total term of imprisonment of
21 more than 1 year in a defendant, the Indian Tribe shall –

22 (1) provide to the defendant the right to effective assistance of counsel at least
23 equal to that guaranteed by the United States Constitution; and,

24 (2) At the expense of the tribal government, provide an indigent defendant *the*
25 *assistance of a defense attorney licensed to practice by any jurisdiction in the*
26 *United States* that applies appropriate professional standards and effectively
27 ensures the competence and professional responsibility of its licensed
28 attorneys. (emphasis added)

29 The court finds that Ms. Molina is certified to practice in this jurisdiction. The Rules of Court
30 provides that the court certifies attorneys and lay counselors to practice after attending a four
31 hour class, passing a tribal bar exam, and such advocates and attorneys are subject to The
32 American Bar Association standards of conduct. 3 PYTC § 1-4-20, **Certification of**
33 **Attorneys and Lay Counselors**, 3 PYTC § 1-4-40(C), **Appearance of Attorneys**. Ms.
34 Molina is qualified to represent the defendant because she is licensed in this jurisdiction, and
35 the jurisdiction is one that has appropriate standards of professional responsibility and

1 requires a bar exam as a condition of admission. The Court denies the Tribe's motion to
2 disqualify Ms. Molina, for lack of good cause shown. By allowing Ms. Molina to represent
3 him, the defendant has waived his right to counsel, implicitly, and he has the benefit of lay
4 counsel who is certified by the Pascua Yaqui Tribal Court. 3 PYTC § 1-4-50 **Lay Counsel**.

5 The defendant's advocate had requested a modification of release conditions and bond
6 that was set at \$5,000.00. The criminal procedure code provides:

7 (A) Any person remaining in custody may move for reexamination of the
8 conditions of release based upon the existence of material facts not previously
9 presented in court.

(B)

10 **3 PYTC § 2-2-210(A). Modification and Revocation of Release**

11 The statute allows a defendant to move to re-examine, and defendant's counsel did so by
12 filing a motion to modify conditions of release. The Tribe filed its response to the motion,
13 objected to it, and asked for an increase to \$10,000.00 cash bond. The defendant's advocate
14 brought forward new information that was not brought up at the initial hearing, due to Ms.
15 Acosta of the public defender's office inability to advise the defendant, and added information
16 about the defendant's significant connections to the community as a basis to grant a lowered
17 bond. The Court denies the defendant's request to lower the bond, for lack of good cause
18 shown,

19 The statute allows the Tribe to file its own motion to modify when there has been a
20 breach of release conditions:

(C) Prosecutor's motion:

21 (1) Upon verified petition by the prosecutor stating facts or circumstances
22 constituting a breach of conditions of release, the court may issue a warrant or
23 summons to secure the defendant's presence in court. A copy of the petition
24 shall be served with the warrant or summons.

25 (2) Hearing. After a hearing on the matters set forth in the petition, the
26 court finds that the person released has not complied with the conditions of
27 release, the court may modify the conditions or revoke release.

28 Id. at (C)(1)&(2).

The Tribe did not file a "verified petition" to modify to meet the technical requirements of the
statute, nor has there been an allegation that the defendant has "breached a condition of
release", because the defendant has been in custody pending posting of a bond, and therefore
could not have violated a "condition of release." The Court denies the Tribe's motion to
increase the bond to a \$10,000.00 cash bond, because the court agrees with the defendant's
counsel that the information provided by the Tribe is not "new evidence," but rather was
information that was available to the Tribe at the time of the initial hearing, the Tribe could

1 have reasonably accessed through its NCIC data base, and by its access to the Pascua Yaqui
2 police department's access to state detention and police records, in addition to its own records
3 related to the defendant. Also, the court agrees with the defendant's advocate that the
4 information attached to the Tribe's response that purports to be state records were not certified
5 as a state official record. The Pascua Yaqui Evidence code allows the court to admit into
6 evidence public documents including those of state records. The Court finds that the attached
7 three pages to the Tribe's response to defendant's motion to modify do not meet such
8 admissibility requirements, because although they may be public records, they were not
9 certified records, certified by an official of the state, by any custodian of records of the state,
10 and therefore the Tribe's attached papers lack trustworthiness as to their admissibility. 3 PYT
11 R. Evid. Rule 39(f), **Hearsay Exceptions: Availability of Declarant Immaterial**, Public
12 Records and Reports, 3 PYT R. Evid 48(D) **Certified Copies of Public Records**. The Court
13 will not allow a second bite of the apple by the Tribe when it could have introduced
14 information about the defendant at the time of his initial appearance.

15 The Court denies the Tribe's motion to increase the bond, because it did not file a
16 verified petition, because it has not provided new evidence that was not readily available at
17 the time of the initial hearing, and because the purported "state records" are not admissible
18 because they were not certified as official public records. See and compare Civil Procedure
19 Rules 3 PYTC § 2-1-130(E) (the court will not allow introduction of "new" previously
20 undisclosed evidence to be admitted, unless the party trying to introduce the new evidence
21 proves it was unaware of its existence and the new evidence could not have, without
22 reasonable effort, been discovered in time to disclose), 3 PYTC 2-1-140(D) **Motions** (The
23 judge may deny a motion which could and should have been made earlier in the case if it
24 appears that the moving party knew or should have known earlier about the basis for the
25 motion and has raised it late because of negligence or an intent to harass the other party).

26 The Tribe's previous recommendations that the defendant be released on a \$5,000.00
27 shall be maintained, and the Court should adopt all other prior release conditions, pending his
28 trial.

29 The Tribe asked that the court order the defendant not to contact any witnesses.
30 Defendant's counsel objected and indicated that she could not interview the witnesses if the
31 Court granted the motion to restrict access to the witnesses. The Court asked the Tribe to
32 clarify its position, because if the court were to grant the Tribe's motion, the defendant and his
33 counsel would be restricted in their ability to adequately prepare their defense in violation of
34 his right under the Pascua Yaqui Constitution, the Pascua Yaqui Criminal Code, and the
35 Indian Civil Rights Act. The Court found that the defendant should be ordered to not contact
36 the alleged victim, because the victim's right statute mandates such protections, and that
37 specific request by the Tribe to order the defendant not to contact an alleged victim should be
38 granted. Additionally, the Tribe had not filed for any protective order for the court to grant

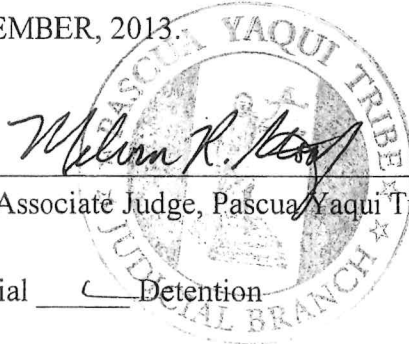
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such a request. 3 PYTC § 2-2-400(A)(B)(C), **Excision and Protective Orders**. The Tribe then withdrew its motion.

IT IS IT IS ORDERED that the defendant, Peter R. Acuna, shall be released on a \$5,000.00 cash bond, to be posted, he shall appear at all future hearings, obey all laws, and the defendant shall not contact the alleged victim, Ignacio Valenzuela or the address of 7580 S. Yoem Bo-oh, and not associate with Daniel Ramirez. He shall not consume narcotics and dangerous drugs or drug paraphernalia and he shall be subject to random urinalysis testing by pre-trial services and law enforcement. He shall continue to follow all pre-trial conditions of release.

A BENCH TRIAL shall be scheduled for February 19, 2014 at 9:00 a.m.. *lyj*

THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.
SO ORDERED THIS 27th DAY OF NOVEMBER, 2013.



Associate Judge, Pascua Yaqui Tribal Court

Date: 11-27-13

Tribe Defendant/Counsel _____ Pre-trial Detention

Clerk: *lyj*



IN THE PASCUA YAQUI COURT OF APPEALS

PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,)
)
 Petitioner,)
)
 v.)
)
 THE HON. MELVIN STOOF,)
 PASCUA YAQUI TRIBAL COURT,)
)
 Respondent .)
 _____)

APPELLATE CASE NO. CA-13-005

PETITION FOR WRIT OF MANDAMUS

(Request for Expedited Hearing)

JURISDICTION

This Court has jurisdiction to hear a *writ of mandamus* pursuant to pursuant to PYT CONST. Art VIII, §2, and 3 PYTC §2-3-260.

STATEMENT OF FACTS

1. On November 18, 2013, while attending a party, the defendant allegedly confronted Ignacio Valenzuela. He knocked him down and began to kick him until he was unconscious. He, along with a co-defendant, Daniel Ramirez, continued to kick him after he was rendered unconscious. Defendant was arrested and detained on November 18, 2013. A five count criminal complaint was filed the same date. (CR-14-081) See Attachment A.
2. In a search incident to his arrest, cocaine was discovered in his clothing. He was separately charged with additional drug related charges. (CR-14-080) See Attachment B. The court appointed Melissa Acosta, Office of the Public Defender to represent defendant in that matter. See Attachment C.

3. At the initial hearing held on November 18, 2013, the Court found probable cause and set a \$5000 bond in CR-14-081. See Attachment D. The court set a \$500 bond in CR-14-080. See Attachment C. The court deferred appointment of conflict attorney in CR-14-081 until the arraignment. The arraignment was set in both cases for November 27, 2013.

4. On November 27, 2013, Lourdes Molina filed her notice of appearance in CR-14-081. See Attachment E. In CR-14-080, Ms. Molina filed a motion for substitution of counsel. See Attachment F.

5. In both cases, the Defendant filed on November 27, 2013, a motion to modify release conditions. See Attachment G. The tribe responded on the same date and moved to increase the bond to \$10,000. See Attachment H.

6. At the arraignment, the Tribe notified the Court that the Tribe will seek a total sentence that would exceed one year in length. The Tribe advised the Court that as it was asking for a sentence in excess of one year, the *Tribal Law and Order Act (TLOA)* would apply. The Tribe further advised the Court that TLOA requires that the tribe provide defendant a “defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.” See Attachment I and J.

5. Since Lourdes Molina is a lay counselor, the Tribe requested Defendant waive his right to a defense attorney pursuant to federal and tribal law.

6. The Trial Court, on its own, restated the motion as a motion to disqualify counsel. The court then denied its own motion. The court reasoned that Lourdes Molina was licensed by the Pascua Yaqui Court to practice law before its courts and the Pascua Yaqui Courts was “any jurisdiction in the United States,” therefore she met the standard articulated in the TLOA. The

court further found that the Respondent (Defendant) had **implicitly** waived his right to counsel.

See Attachment I and J.

11. The court set a bench trial for February 12, 2013, at 9:00 a.m. for both cases. See

Attachment I and J.

12. The Honorable Melvin Stoof is an appointed Judge of the Pascua Yaqui Tribal Court.

A STATEMENT OF ISSUES PRESENTED

1. Did the court violate its duty by failing to obtain an express waiver of counsel on the record pursuant to federal and tribal laws?

2. Did the court violate its duty by failing to conduct an inquiry of the defendant on the record whether the waiver was a knowing and intelligent relinquishment of a known right.

ARGUMENT

A. Writ of Mandamus

A writ of mandamus lies where a government official, like a lower court, fails to exercise his discretion which he has a duty to exercise or to perform a duty required by law as to which he has no discretion. See Ariz. Rules of Appellate Procedure, Rule 3(a). In this case, the lower court has failed to obtain an express waiver of defense attorney from the defendant. The tribe has no other means of an alternative speedy or adequate remedy.

We apply a five-factor test to determine whether mandamus relief is warranted: (1) whether the petitioner has no other adequate means to attain the *1122 relief he or she desires; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems, or issues of law of first impression. *United States v. Amlani*, 169 F.3d 1189, 1193–94 (9th Cir.1999) (citing *Bauman*, 557 F.2d at 654–55).

See United States v. Fei Ye, 436 F.3d 1117, 1121-22 (9th Cir. 2006). This court has jurisdiction to hear this matter as the court below had a duty to obtain an express waiver of counsel, and make an inquiry as to whether the waiver was a knowing and intelligent relinquishment of a known right. See discussion below. The court's failure to obtain an express waiver and to make the inquiry threatens the Tribe's right to have a secure conviction. This is not a correctable issue on appeal as the tribe has no authority to appeal an acquittal in a criminal matter, and the error is likely to be raised in a federal habeas pursuant to the *Indian Civil Rights Act* if there is a conviction. As the issue of the trial court's duty to perform an *on the record inquiry* of defendant's waiver of his right to defense attorney pursuant to federal and tribal law, it raises new and important issues of law of first impression in this jurisdiction. In United States v. Le, the 9th Cir. found it had jurisdiction to accept the prosecutor's petition for a writ of mandamus.

B. Motion to Waive Counsel.

The Tribe moved to the Court to obtain from Defendant a waiver of his right to "defense attorney pursuant to the *Indian Civil Rights Act*, and 3 PYTC § 1-4-50. The court on its own restated the motion as a motion to disqualify counsel. The court then denied its restated motion. The court held that "Ms. Molina is qualified to represent the defendant because she is licensed in this jurisdiction..." The Judge did not make an inquiry *on the record* of the defendant whether he waived his right to defense attorney nor whether such waiver was a knowing and intelligent waiver of a known right.

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1. Defendant's Right to Defense Attorney Pursuant to Tribal Law.

The Pascua Yaqui Tribal Constitution provides for a right to defense counsel at their own expense. See PYT CONST. Art 1, §1(f). The Pascua Yaqui Code also articulates a right to defense counsel. See 3 PYTC § 1-4-50. A criminal defendant has right to representation by defense counsel to assist in their defense.

The Pascua Yaqui Code permits a defendant the right to waive that right. A defendant may choose representation in a criminal matter by a *lay counselor*, but only after there has been a waiver of defense attorney. “Lay counsel shall be permitted to practice before the Pascua Yaqui Courts in criminal matters, only when the defendant has waived his right to counsel.” See 3 PYTC § 1-4-50. In this case, Ms. Molina is a lay counselor.¹ Although the Code uses the term *counselor*, it is clear from its context that it means attorney. There are only two types of practitioners; *state licensed attorneys* and *lay counselors*. If the right to counsel must be waived, then it is clear counsel means attorney in this section. Thus, Ms. Molina, a lay counselor, may represent the defendant only after the defendant has waived his right to a state licensed attorney.

2. Defendant has a Right to A Defense Attorney Pursuant to the ICRA

The *Indian Civil Rights Act (ICRA)* was enacted in 1968. The *ICRA* limited tribal sentencing authority of an Indian tribe to not more than one year for any one offense. See 25 U.S.C. §1302(a)(7). It also provided that a defendant before a tribal court had the right “at his own expense to have assistance of counsel for his defense. See 25 U.S.C. §1302(a)(6). Thus, tribal defendants had a right to counsel, but there was no right to court appointed counsel at the tribe's expense.

¹ The Tribe requests that the Appellate Court take judicial notice of the judicial branch's website wherein Ms. Molina is listed as a lay advocate licensed in the Pascua Yaqui Jurisdiction.

The *ICRA* was subsequently amended in 2010 by the *Tribal Law and Order Act (TLOA)*. *TLOA* added enhanced sentencing provisions. It provides that if a tribe seeks to impose “a total term of imprisonment of more than one year, the Indian tribal shall:

- (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
- (2) at the expense of the tribal government, provide an indigent defendant the assistance of a **defense attorney licensed to practice law by any jurisdiction** in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

[emphasis added] See 25 U.S.C. §1302(c). This fundamentally changed a defendant’s right to counsel if the total term of imprisonment would be greater than one year. It required that an indigent defendant has a right to a court appointed attorney licensed to practice law by any jurisdiction in the United States.

3. Waiver of the Right to Defense Counsel.

The waiver of a defendant’s right to defense attorney has been examined by federal law.

Waiver of counsel must *knowing and intelligent waiver* of a known right.

When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must ‘knowingly and intelligently’ forgo those relinquished benefits. *Johnson v. Zerbst*, 304 U.S., at 464—465, 58 S.Ct., at 1023. Cf. *Von Moltke v. Gillies*, 332 U.S. 708, 723—724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (plurality opinion of Black, J.).

Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562 (1975). The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the

background, experience, and conduct of the accused. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938).

An implied waiver fails to ensure that the waiver of defense attorney was a knowing and intelligent waiver of a known right.

‘The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused-whose life or liberty is at stake-is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.’

See Carnley v. Cochran, 369 U.S. 506, 514-15, 82 S. Ct. 884, 889-90, 8 L. Ed. 2d 70 (1962). In that case, the Court admonished:

Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. [emphasis added]

Carnley v. Cochran, 369 U.S. 506, 516, 82 S. Ct. 884, 890, 8 L. Ed. 2d 70 (1962). Both Pascua Yaqui Law and federal law permit a defendant to waive their right to a defense attorney to assist in their defense. See also 3 PYTC § 1-4-50. The waiver must be a knowing and intelligent waiver. The waiver must be on the record.

5. Ms. Molina is not a defense attorney pursuant to 25 U.S.C. §1302(c).

The court found Ms. Lourdes Molina was a *defense attorney licensed to practice law by any jurisdiction in the United States* within the meaning of 25 U.S.C. §1302(c).

Ms. Molina is qualified to represent the defendant because she is licensed in this jurisdiction, and the jurisdiction is one that has appropriate standards of professional responsibility and requires a bar exam as a condition of admission.

See Attachments I and J. Although the Court correctly found that Ms. Molina is licensed to practice law before the tribal court, the Court erred in finding that she meets the standards set forth in 25 U.S.C. §1302(c).

The court erred because it held, in essence, that all tribally licensed practitioners met the requirements of 25 U.S.C. §1302(c). The court's interpretation of 25 U.S.C. §1302(c) fails to distinguish (as the code does) between *state licensed attorneys* and *lay advocates*. If Ms. Molina is not a licensed attorney under tribal law, then she cannot be a licensed attorney to practice law in any jurisdiction in the United States because she is not licensed as an attorney in the Pascua Yaqui jurisdiction. Interpretations of statutes are reviewed *de novo* on appeal. See *State v. Kearney*, 206 Ariz. 547, 549, ¶ 5, 81 P.3d 338, 340 (App.2003) and *Haag v. Steinle*, 227 Ariz. 212, 214, 255 P.3d 1016, 1018 (Ariz. Ct. App. 2011). The Court interpretation of the Pascua Yaqui Code is reviewed *de nova* before the Court of Appeals. The court erred as a matter of law that Ms. Molina met the requirements of 25 U.S.C. §1302(c).

C. Conclusion

A tribal defendant has a right to court appointed defense attorney licensed in any jurisdiction in the United States if his total sentence may exceed one year. Defendant has a right to waive that right. If the defendant chooses to waive his right to court appointed defense attorney, it must be a knowing and intelligent relinquishment of a known right. The court has a duty to obtain an express waiver of that right on the record, and must perform an inquiry to ensure that the waiver was an intelligent and knowing one. The court failed to do its duty

The court failed to do so because it ignored the tribal code's distinction between *lay counselors* and *state licensed attorneys*. The court erroneously interpreted tribal law to mean

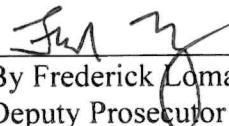
that *lay counselors* and *state licensed attorneys* are the same thing. This, in turn, led to the erroneous conclusion that a lay counselor was the equivalent of a defense attorney as defined in federal law. The failure to obtain an express waiver of defense counsel could lead to a reversal of a potentially successful tribal conviction on review in federal district court. The crimes alleged are serious. A reversal based upon a failure to follow the law would detrimentally affect the tribal community.

STATEMENT OF RELIEF REQUESTED

The tribe requests that this Court order respondent to make an inquiry on the record of the defendant's waiver of a defense attorney and whether such waiver is a knowing and intelligent waiver of a known right in CR-14-080 and CR-14-081.

RESPECTFULLY SUMMITTED this 30 day of December, 2013.

THE PASCUA YAQUI TRIBE
Office of the Tribal Prosecutor
7777 S Camino Huivisim, Bldg. A
Tucson, AZ 85757
(520) 879-6251



By Frederick Lomayesva
Deputy Prosecutor

CERTIFICATE OF SERVICE

A copy of the Petition for Writ of Mandamus was served by delivery this 30 day of
December, 2013, upon

The Honorable Melvin Stoof,
Judge of the Pascua Yaqui Tribal Court

A copy of the Petition for Writ of Mandamus was served by mail this _____ day of
December, 2013, upon

Lourdes Molina
P.O. Box 24133
Tucson, AZ 85734