PYT COA *14/06/02 PM03:36

IN THE PASCUA YAQUI APPELLATE COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff/Appellant, v. MOLINA, SALOMON F. Defendant/Appellee	Case No. CA-14-003

REPLY BRIEF

Pascua Yaqui Tribe
Office of the Tribal Prosecutor
7777 S Camino Huivisim, Bldg. A
Tucson, AZ 85757
(520) 879-6251 Telephone
(520) 879-6260

Alfred Urbina, Chief Prosecutor

By Frederick Lomayesva,
Deputy Prosecutor

A. <u>THE APPELLANT'S BRIEF WAS TIMELY FILED PER THE RULES OF APPELLATE PROCEDURE.</u>

The defendant asserts that the Appellant's Brief was untimely filed. The Code requires that the Appellant's brief be filed 10 days after service of the record has been made. "The appellant shall file his brief and five copies within 30 days after the appellate clerk mails notice required by Rule 10(A). See 3 PYT §2-3-140(A)(1). In this case, the court ordered an expedited briefing schedule shortening the period to five days. Rule 10(A), now 3 PYTC §2-3-120(A), is the notice the clerk of the court issues when the record on appeal is perfected. While the notice was filed on May 5, 2014, it was not served upon the Appellant until May 6, 2014. See **Attachment A**. Ten days after May 6, 2014, is May 16, 2014. The Opening Brief was filed on May 16, 2014. Appellant's Opening Brief was timely filed. Defendant's motion is without merit.

B. <u>PUBLIC SEXUAL INDECENCY</u>

The Tribe withdraws this issue for appeal.

C. <u>VOLUNTARY INTOXICATION</u>

The judge admitted defendant's *Jury Instruction 23* over the objection of the Tribe. The Tribe has preserved this issue for appeal by making a timely objection. The issue was of law not of fact. This court has *de novo* review and is not bound by the trial court's findings of law. As the Tribe has withdrawn its appeal of public sexual indecency, the issue is whether voluntary intoxication is a defense to aggravated assault and disorderly conduct.

It is clear that Arizona law prior to 1994 allowed a defendant to introduce evidence of voluntary intoxication to counter the mental state of *intentional.* The law did not permit voluntary intoxication as a defense to *knowing* and *reckless.* The defendant has not contested this point. The defendant used Arizona to support his jury instruction. As it was written, it did not reflect Arizona law prior to 1994, and it did not reflect Arizona law post 1994. In short, the law relied upon the defendant did not support his instruction. The defendant appears not to dispute this point.

Defendant urges that the court should ignore the change in Arizona law. He argues that the definitions of mental states contained in the Sex Crimes permit the use of intoxication as a defense to; *aggravated assault* and *disorderly conduct.* However, he does not answer how his interpretation of definitions in Title 4, Chapter 3, should apply to Title 4, Chapter 1. His assertions are contrary to the rules of statutory construction contained within the Code itself. "Definition given with a title or chapter apply only to the words or phrases used in such title or chapter unless otherwise provided. " See 1 PYTC §2-30(D). He did not provide a statutory citation to show that the drafters of the Code intended the definitions to apply to Offenses in Title, 4, Chapter 1. In short, he has provided no legal argument why this court should read Sex Crimes as allowing the use of voluntary intoxication as a defense to Offenses contained with Title 4, Chapter 1.

Title 4, Chapter 1, does not provide any express language allowing a defendant to introduce evidence of voluntary intoxication as a defense. There is nothing to suggest an implied provision allowing voluntary intoxication in Chapter 1. This is the likely reason the defendant felt compelled to support his jury instruction with Arizona law. The Code permits reference to Arizona law when the meaning of a term is not clear on its face or in the context of the Code. It

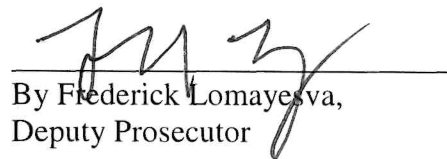
states: "such terms shall have the meaning given to it by the laws of the State of Arizona, unless such meaning would undermine the underlying principles and purposes of the Code." See 1 PYTC §2-30(H). In this case, there is no Pascua Yaqui statute expressly permitting the use of voluntary intoxication as a defense. Absent express statutory language, the defendant necessarily asks this court to make an implied finding that intoxication is a permitted defense. By defendant's own legal posture, he must concede that statutory interpretation is necessary. Statutory interpretation only occurs when the face of the Code is not clear on its face or in the Context of the Code. Under this situation, the Code requires this Court to look to Arizona law. Arizona law does not permit the use of voluntary intoxication as a defense.

CONCLUSION

The Tribe withdraws its first issue on appeal that the court improperly dismissed count 3 of the complaint, public sexual indecency. The defendant does not show any statutory authority that voluntary intoxication is a defense of an Offense in Title 3, Chapter 1. He asks this Court to look to Sex Crimes to find such defense is authorized. However, the Code states that definitions found in one chapter apply to that chapter only, "unless otherwise provided." See 1 PYTC §2-30(D). In this case, defendant has provided no statutory language to support – unless otherwise provided. Importantly, the defendant is asking that this court engage in statutory interpretation to make this connection. Statutory interpretation is engaged only when the statute is ambiguous or unclear. In this event, the Code requires the Court to look to Arizona law. See 1 PYTC 2-30(H). Arizona law does not permit the defense of voluntary intoxication. The defendant argument is without basis in law.

RESPECTFULLY SUBMITTED this 2nd day of June, 2014.

Office Of The Tribal Prosecutor



By Frederick Lomayesva,
Deputy Prosecutor

CERTIFICATE OF SERVICE

The original opening brief and five copies were delivered this 2nd day of JUne, 2014, to the Pascua Yaqui Court of Appeals.

A copy of the opening brief was served upon opposing counsel, Patricia Leon-Enriquez, this 2nd day of June, 2014.

ATTACHMENT A

Fred Lomayesva

From: Linda Imonode-Skemer
Sent: Tuesday, May 06, 2014 2:18 PM
To: Patricia Leon-Enriquez; Fred Lomayesva
Attachments: CA-14-003 Rule 120 Notice.pdf

Good afternoon,

Attached is the Rule 120 Notice.

Linda

Linda Imonode Skemer
Staff Attorney, Court of Appeals
Pascua Yaqui Tribe
7777 Camino Huivisim, Building B
Tucson, Arizona 85757
Linda.Imonode-Skemer@pascuayaqui-nsn.gov
(520)879-6292 (office)
(520)879-6277 (fax)

Confidential Information: This email and any attachments are for the sole use of the intended recipient and may contain confidential and/or legally privileged information intended only for the use of the individual(s) named above. The Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521, protects the confidentiality of this e-mail and any attachments. If you are not the intended recipient, you are hereby notified that you should not review, use, disclose, distribute, or forward this email. If you have received this email in error, please notify the sender immediately and delete/destroy any and all copies of the original message. Thank you.

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

PASCUA YAQUI TRIBE,	)	APPELLATE CASE NO. CA-14-003
	)	
Appellee,	)	PASCUA YAQUI TRIBAL COURT NO.:
	)	CR-14-196
vs.	)	
	)	
MOLINA, SALOMON F.,	)	
	)	
Appellant.	)	
	)	

PYT CCR '14/05/27 PM04:30

RESPONSE BRIEF

Patricia Leon-Enriquez
Pascua Yaqui Bar No. 10186
PASCUA YAQUI PUBLIC DEFENDER
7474 South Camino de Oeste
Tucson, AZ 85757
(520) 883-5013

Attorney for Appellant

TABLE OF CONTENTS

I. TABLE OF CONTENTS.....2

II. TABLE OF AUTHORITIES.....3

III. STATEMENT OF THE CASE.....4-6

IV. PRELIMINARY ISSUE.....7

V. STATEMENT OF FACTS.....6,7

VI. ARGUMENT.....8-17

VII. CONCLUSION.....17-18

VIII. CERTIFICATE OF SERVICE.....19

TABLE OF AUTHORITIES

Cases

State v. Flores, 160 Ariz. 235, 239, 772 P.2d 589, 593 (App. 1989)(citations omitted)....8,9,13
State v. Malott, 169 Ariz. 518, 520; 821 P.2d 179, 181 (Ariz. App. 1991)..........................9
State v. Jannamon, 169 Ariz. 435, 819 P.2d 1021 (Ariz. App. 1991)..............................10
State ex rel. Hamilton v. Superior Court, 128 Ariz. 184, 624 P.2d 862 (1981).........10,11,14,15
State v. Whitaker, 164 Ariz. 359, 793 P.2d 116 (Ariz. App. 1990)................................11
Marshall v. State of Indiana, 602 N.E.2d 144 (Ind. App. 1992)....................................11
Westbrook v. State of Texas, 624 S.W.2d 294, 295 (Tx. App. 1981)...............................12
Hines v. State of Texas, 906 S.W.2d 518, 519 (Tex. App. 1995) 12
Inglehart v. State of Texas, 47 S.W.3d 185 (Tex. App. 2001).......................................14
Arizona Board of Regents v. State of Arizona Public Safety Retirement Fund Manager Administrator, 160 Ariz. 150, 157, 771 P.2d 880, 887 (1989). 16
State v. Bravo, 131 Ariz. 168, 639 P.2d 358 (1981)..16

Tribal Authority

3 PYTC §2-3-130(A)(4)..... 6
3 PYTC §2-3-130(A)(4)(a). 6
3 PYTC §2-3-140 (C)(1)..7
1 PYTC §2-30(H)...9
4 PYTC §2-80...15-16
1 PYTC §2-30(B)...16

Arizona Authority

A.R.S §13-1403(A)(3)...14
A.R.S. §13-1401(2)...14
A.R.S. §13-503..17

Other Authority

Indiana Code §35-45-4-1(a)(4)...12
Tex.Penal Code Ann. S. 21.07..12

STATEMENT OF THE CASE

On February 16, 2014, Appellee Salomon Molina appeared in Court for an Initial Hearing on charges of Aggravated Assault and Disorderly Conduct that were filed by the Tribe on the same date. [*PYT v. Salomon Molina*, Pascua Yaqui Trial Court Record, document 65 and 67, hereinafter "Record at 65 and 67"]. At the Initial Hearing, the Court found probable cause as to the two counts contained within the complaint. After hearing from defense counsel, the Court denied the motion to reconsider as to probable cause, however stated that it would "consider a written motion if the Defendant wished to pursue his challenge to probable cause." [Record at 65]. The Tribe requested a $50,000 bond. The Court found good cause to release Mr. Molina on a $1000 *suspended* bond. [*Id.*].

Three days later, on February 19, 2014, the Tribe filed an amended complaint with the additional charge, Count 3, of Public Sexual Indecency. [Record at 62]. The Arraignment Hearing was held on February 26, 2014. [Record at 58]. The Court found probable cause as to Count 3 and Mr. Molina entered a "not guilty" plea to all three counts contained within the criminal complaint. [*Id.*]. Despite the fact that there were no new facts or circumstances present since the February 16, 2014 Initial Hearing, the Tribe requested a $1000 *cash* bond based solely on having amended the complaint to add Count 3. [*Id.*]. Over Mr. Molina's objection, the Court set a $500 cash bond [*Id.*]. Mr. Molina posted the bond on February 26, 2014, and was subsequently released. [Record at 59-60].

On March 18, 2014, Mr. Molina filed a request for a jury trial. [Record at 51]. The request for the jury trial was granted on March 19, 2014. [Record at 49]. The Court set the

pretrial conference date for April 23, 2014 and provided that the Court would not consider any pre-trial motions, proposed voir dire questions, or proposed jury instructions filed after the deadline date of April 22, 2014. [Record at 49].

On March 26, 2014, the Court held another hearing to address probable cause due to the fact that the Tribe previously filed a 2nd Amended Complaint on February 27, 2014, amending the alleged date of incident in Count 3. [Record at 55]. The Court again found probable cause as to Count 3 and reset the Pretrial Conference to an earlier time on April 23, 2013. [Record at 44]. The Court also granted the Tribe's Motion for additional trial dates. [*Id.*]

Mr. Molina filed a Motion to Dismiss for lack of probable cause as to Count 1 and Count 3 of the criminal complaint on April 10, 2014. [Record at p. 185 of Index]. The Tribe filed its Response on April 22, 2014. [Record at 36]. Mr. Molina filed his Reply on April 25, 2014. [Record at 21]. On April 22, 2014, the parties filed their respective voir dire and jury instructions. [Record at 40 & 35]. At the Pretrial Conference the following day, April 23, 2014, the Tribe objected to Mr. Molina's Jury Instruction No. 23 (Voluntary Intoxication). [Record at 22]. Rather than making a ruling, the Court took the matter under advisement and ordered the parties to brief the issue. [*Id.*]. The Court then set a second Pretrial Conference on April 28, 2014, at which time it would hear arguments on Mr. Molina's Motion to Dismiss as well as his proposed and contested Voluntary Intoxication instruction. [Record at 22 & 40 - Jury Instruction No. 23].

On April 28, 2014, rather than brief the issue, the Tribe filed a Motion to Strike Jury Instruction [Record at 19]. Mr. Molina filed a Memorandum in Support of a Voluntary Intoxication Jury Instruction. [Record at 20]. On that same date, the Court reviewed the filings

and heard oral arguments. [Record at 18]. The Court then denied Mr. Molina's request to dismiss Count 1, granted Mr. Molina's request to dismiss Count 3, and included Mr. Molina's proposed Jury Instruction No. 23. [*Id.*]. The Tribe filed an Interlocutory Appeal on May 1, 2014.

STATEMENT OF FACTS

Mr. Molina objects to Appellant's Statement of Facts as they are not properly before this Court. The Pascua Yaqui Rules of Appellate Procedure ("Appellate Rules") clearly provides that a Statement of Facts should only include "facts relevant to the issues presented for review, with appropriate references to the record." 3 PYTC §2-3-130(A)(4). Besides including alleged "facts" that are wholly irrelevant to the issues before this Court, with the exception of two sentences, the Tribe fails to cite where in the record its purported "facts" are coming from. Even more troubling is that one of those citations, "**ROA: 36, page 02**," is actually the Tribe's Response to the Defendant's Motion to Dismiss. Simply because the Tribe previously provided the trial court with its own version of events, does not suddenly make them "facts". Furthermore, the Appellate Rules prohibit the inclusion of "evidentiary matters unless material to a proper consideration of the issues presented, in which instance reference shall be made to the record or page of the transcript where such evidence appears." 3 PYTC §2-3-130(A)(4)(a).

The Appellant's Statement of Facts unquestionably fails to comport with the Rules of Appellate Procedure. The "facts" included by the Tribe are not only irrelevant, but inflammatory, and prejudicial. As to Count 3, Public Sexual Indecency, Mr. Molina's position is that even if the Tribe were able to prove the facts as they are alleged, there is no crime. Thus, the allegation contained in Count 3 of the 2nd Amended Complaint [Record at 55], and the fact that

the Tribe did not contest the trial court's finding that no one else was present aside from Mr. Molina and A. A. [Record at 18, p. 2], are the only facts relevant for purposes of this appeal. This Court does not need any particular facts aside from the allegations contained within the criminal complaint to decide whether voluntary intoxication is a permissible defense or not.

PRELIMINARY ISSUE: THE APPELANT'S UNTIMELY BRIEF

On May 2, 2014, the Appellate Court issued an Order requesting that the trial court clerk *expedite the issuance* of the Index and Transmittal and that "[a]t the ***issuance*** of the Index and Transmittal, appellant will have ten (10) days to submit an opening brief."

On May 5, 2014, the trial court clerk *issued* the Index and Transmittal by filing it with the Court of Appeals. The Index and Transmittal filing date of May 5, 2014, is clearly evidenced on the on-line Court of Appeals docket for this particular appeal. Additionally, also on May 5, 2014, the Court's Administrative Attorney, notified all the parties via electronic mail that the Index and Transmittal had been generated.

Because this Court ordered that the Appellant file his Opening Brief 10 days from the *issuance* of the Index and Transmittal, the Appellant's brief was due on May 15, 2014. Nevertheless, the Appellant's Opening Brief was filed at 2:59 p.m. on May 16, 2014. As a result, the Opening Brief is untimely and should be dismissed pursuant to 3 PYTC §2-3-140 (C)(1).[1]

---

[1] The Tribe appears to have adopted a practice of filing things after court ordered deadlines and then asking the court to extend its deadline well after it has passed. Aside from the untimely filing of its Appellate Brief, the Tribe also engaged in this practice with the trial court. On April 30, 2014, the trial court ordered the Tribe to respond to the Defendant's Motion to Dismiss by close of business on May 2, 2014 so that the Defendant would have an opportunity to file a reply

ARGUMENT

In its Opening Brief, the Tribe sets forth two issues for appellate review. The first issue presented is whether the Tribal Court erred in dismissing Count 3, Public Sexual Indecency, because there is no third party alleged to have witnessed the purported sexual contact, and the second, is whether the court abused its discretion when it admitted defendant's proposed Jury Instruction No. 23 (Voluntary Intoxication) contrary to established law. For the reasons set forth below, this Court should not disturb the trial court's orders.

I. The Tribal Court did not err when it dismissed Count 3, Public Sexual Indecency.

The trial court based its decision to dismiss Count 3, Public Sexual Indecency, on the fact that there was no one else present to witness the alleged sexual contact between Mr. Molina and A.A. [Record at 18]. In reaching its decision, the court noted that because the Pascua Yaqui and Arizona Public Sexual Indecency statutes mirrored each other, it looked to Arizona case law in order help determine the statutory intent. [*Id.*]. The trial court then cited *State v. Flores*, 160 Ariz. 235, 239, 772 P.2d 589, 593 (App. 1989) for the proposition that the crime of Public Sexual Indecency was clearly "designed to protect the ***public*** from shocking and embarrassing ***displays*** of sexual activities." (emphasis added). [*Id.*]. The trial court's legal analysis is sound and reaches the correct conclusion.

---

by 8:30 a.m. on May 5, 2014, in anticipation of a Motion Hearing set for May 5, 2014 at 9:00 a.m. [Record at 16]. Despite the Tribe's objections set forth in a Motion to Strike by the Tribe, the Court re-affirmed its briefing schedule in another Order dated May 1, 2014. [Record at 18]. The Tribe filed its Response on May 5, 2014 at 8:28 a.m. [Record at 4]. Acknowledging that it had filed its Response untimely, the Tribe made a verbal motion at the Motion Hearing on May 5, 2014, requesting that the Court grant the Tribe leave to file the Response late. [Record at 1]. Over the Defendant's objections, the Court accepted the Tribe's tardy filing. [*Id.*].

The Appellant initially argues that the Tribal Court should not have engaged in a statutory intent analysis because the plain meaning of the words are clear and unambiguous. The Tribe then provides a grammar lesson to show that the use of the words *another person* can only mean that "one or more people witness the offensive act." However, the Tribe's argument does not satisfactorily address whether the "one or more people" that witness the offensive act can be the participants or require a third party. The language of the statute is neither plain nor unambiguous as suggested by Appellant.

Since the terms are not defined within the Tribal Code and are clearly subject to more than one interpretation, it was appropriate for the Tribal Court to look to Arizona law. "Whenever the meaning of a term used in this Code is not clear on its face or in the context of the Code, such term shall have the meaning given to it by the laws of the State of Arizona, unless such meaning would undermine the underlying principles and purposes of this Code." 1 PYTC §2-30(H). Further, if the words of a code section appear plain but can lead to different or absurd meanings, the Court can engage in a statutory intent analysis. "In construing a statute, courts should give the statute a sensible construction which will accomplish legislative interest and purpose, and which will avoid absurd results...The legislative intent can be discovered by an examination of the development of a particular statute." *State v. Flores*, 160 Ariz. 235, 239, 772 P.2d 589, 593 (App. 1989)(citations omitted).

Additionally, while Appellee agrees that Arizona law analyzing the identical statute is instructive in determining the underlying principles and purposes of the Tribal Code, it is clear that the Arizona law cited by the Appellant does not support its arguments. In an attempt to show that Arizona law supports its position, Appellant cites to *State v. Malott,* 169 Ariz. 518,

821P.2d 179 (App. 1991), for the proposition that the victim of an inappropriate touch was also the only witness to that touch. However, it is apparent that Appellant misread the case and its findings.

In *Malott*, the defendant was charged with second degree burglary, attempted sexual assault, public sexual indecency, and two counts of public sexual indecency to a minor. *Id.* at 518-19. The facts suggest that the defendant broke into the victim's home where she was sleeping with her two minor children in the same room. *Id.* at 519. The victim awoke when the defendant touched her back and buttocks. *Id.* The defendant masturbated in front of the adult victim and child victims, although the children never awoke. *Id.* There is nothing in the opinion to suggest that the charge of public sexual indecency was based on the victim viewing her own buttocks being touched. *Id.* Rather, the public sexual indecency conviction appears to be based on the defendant masturbating in front of the adult victim. *Id.* Additionally, the defendant was not accused of any sexual acts with the minor children. *Id.* There is absolutely nothing about this case that supports the Appellant's argument that a participant of a sexual act can also be a victim for purposes of the public sexual indecency offense.

There are other cases in Arizona that have addressed the Public Sexual Indecency statute which have also involved individuals masturbating in the presence of others. In *State v. Jannamon*, the defendant was charged and convicted by a jury of three counts of public sexual indecency to a minor. The charges arose from the defendant masturbating in a movie theatre while three minor girls were sitting next to him. One of the charges was reversed for insufficiency of the evidence as to the age of one of the victims. *State v. Jannamon*, 169 Ariz. 435, 819 P.2d 1021 (Ariz. App. 1991). In *State ex rel Hamilton v. Superior Court*, the Defendant

was charged and convicted of exposing himself and masturbating in front of three schoolgirls. The Court in that case was determining whether the statute for Public Sexual Indecency was void for vagueness and therefore unconstitutional. *State ex rel. Hamilton v. Superior Court*, 128 Ariz. 184, 624 P.2d 862 (1981). In *State v. Whitaker*, Defendant was charged with Public Sexual Indecency for exposing himself and masturbating in front of his two minor daughters and two other females while in his bedroom, in the living room and in front of the living room window. This Court addressed the term "public" for purposes of the public sexual indecency statute. *State v. Whitaker*, 164 Ariz. 359, 793 P.2d 116 (Ariz. App. 1990).

No Arizona case supports Appellant's argument that the victim of the sexual contact can also be a witness for purposes of Public Sexual Indecency. Moreover, Appellant agrees that "[t]he typical sexual indecency case is where the defendant masturbates in front of another." [Appellant's Opening Brief, pg. 13, line 1]. Consequently, Appellant turns to the laws of other states for support. However, the cases from other states, cited by Appellant do not provide support for Appellant's argument either. On the contrary, the law supports Mr. Molina's position.

In *Marshall v. State of Indiana*, 602 N.E.2d 144 (Ind. App. 1992), a case cited by the Appellant, the Indiana Statute is quite different from the Arizona Statute and the Tribal Code. Indiana law provides, in relevant part, that:

> Public Indecency –Indecent Exposure –
> (a) A person who knowingly or intentionally, in a public place:
>> (4) Fondles the genitals of himself or another person; commits public indecency a class A misdemeanor.

■■■

Indiana Code §35-45-4-1(a)(4). It is clear from that Indiana state statute that a person can be found guilty of Public Indecency in Indiana if he fondles the genitals of another person in a public place **because the statute says so**. Thus, the *Marshall* case is of no help to the Appellant as the Public Sexual Indecency offense with which Mr. Molina is charged does not say so. The Tribe's comparing of apples to oranges should not persuade this Court. Rather, it demonstrates a manner in which the Tribal Council could have clearly made a participant of a sexual act also the witness, for purposes of a Public Sexual Indecency offense if it had so intended and desired.

Likewise, in *Westbrook v. State of Texas*, also cited by the Appellant, the defendant was charged for public lewdness under Tex.Penal Code Ann. S. 21.07. Tex.Penal Code Ann. S. 21.07 provides that:

> §21.07 **Public Lewdness**
> (a) A person commits an offense if he knowingly engages in any of the following acts in a public place or, if not in a public place, he is reckless about whether another person is present who will be offended or alarmed by his:
> (1) act of sexual intercourse;
> (2) act of deviate sexual intercourse;
> (3) act of sexual contact; or
> (4) act involving contact between the person's mouth or genitals and the anus or genitals of an animal or fowl
> (b) An offense under this section is a Class A misdemeanor.

Although the language of the Texas statute is similar to the Arizona statute and the Tribal Code, there is a distinction in terms of acts committed in a public place and those committed in a non public place. In *Westbrook*, the Texas Court of Appeals only determined whether the booth in the adult bookstore was a "public place" for purpose of conviction under the statute. *Westbrook v. State of Texas*, 624 S.W.2d 294, 295 (Tx. App. 1981).

In stark comparison, the Texas Court of Appeals in *Hines v. State of Texas*, 906 S.W.2d 518, 519. (Tx. App., 1995) (en banc), reviewed the specific language at issue in this case. In *Hines*, the defendant engaged in sexual contact with a thirteen year old. The question before the court was whether the thirteen year old complainant could also be the "other person present" who might be offended or alarmed. *Hines v. State of Texas*, 906 S.W.2d 518, 519. (Tx. App., 1995). In *Hines*, the State made the same argument put forth by Appellant in this matter, namely that the Court's interpretation is contrary to the plain meaning of the statute. The State, like Appellant, also argued that "an accused can be prosecuted if he is reckless about whether the person with whom he engages in sexual contact will be offended or alarmed by that act." *Hines* at 520.

The Court in *Hines* rejected those arguments for a few reasons. First, the Court found that it was the sensibilities of the "public" that the statute was designed to protect and while the recipient of the contact might be offended or alarmed by the contact, the act could have been charged under a different statute that did not intend to protect the sensibilities of the public. *Id.* More specifically, the Court found that because the offense involved a thirteen year old victim, the defendant could have been more appropriately charged with the local Indecency with a Child offense. *Id.* at 520-21. Second, the Court in *Hines* also held that had the legislature intended the statute to be read as proposed by the State, it would have drafted it differently so that its intent was clear. *Id.* at 521.

In *Inglehart v. State of Texas*, the Court of Appeals again rejected a similar argument as the one made by Appellant. In that case, the defendant grabbed and rubbed the breasts of the complainant while defendant was showing her a house available for rent. There were no other

persons present. The State charged defendant under Tex. Pen. Code Ann. §21.01(2) (Vernon 1994) claiming that he "knowingly engaged in sexual contact by grabbing the complainant's breast in a nonpublic place, and while being reckless about whether another person, namely the complainant, was present who was offended or alarmed by his actions." *Inglehart v. State*, 47 S.W.3d 185 186 (Tex. App. 2001). In reversing the conviction, the court held that "the other person about whose presence the actor is reckless cannot be the complainant, but must be a third person." *Id.*

Finally, Appellant argues that the Tribal Court misread *State v. Flores*, 160 Ariz. 235, 772 P.2d 589 (Ariz. App. 1989). The Appellant claims that the court in *Flores* was "asked to look to the sufficiency of the state's claim that masturbating on one's self amount to sexual intercourse pursuant to A.R.S. § 13-1403(A)(3)." [Opening Brief, pg. 14]. However, while focusing on the specific facts of the case, Appellant misses other important points made by the court. While it is true that the court addressed the issue of sexual intercourse versus sexual contact, it was the court's reading of the statute as a whole, including all subsections and legislative intent, which makes the *Flores* case appropriate for consideration of the issues at hand.

The Court in *Flores* looked to *Hamilton* v. Superior Court, 128 Ariz. 184, 624 P.2d 862 (1981), for guidance on the issue, even though the issue in *Hamilton* was the definition of "sexual contact" under A.R.S. §13-1401(2) and the constitutionality of A.R.S.§ 13-1403. The *Flores* case, following Hamilton stated that "*[w]hile A.R.S. §13-1403 is designed to protect the public from shocking and embarrassing displays of sexual activities*, masturbating oneself in the presence of another is not contemplated by subsection (A)(3)." *Id* at 239. That statement in

Flores, comports with the holdings in the other cases cited and it applies to the legislative intent of the statute as a whole. The *Flores* court further held that the statement made in *Hamilton*, was the correct statement of the law. The statement in *Hamilton* was:

> "We believe that it is clear that the statute can be violated by one person acting alone, as was the case here, with one or more people watching. The statute is not concerned with sexual intercourse, as defined in A.R.S.§13-1401(3) which would require at least two persons, *but action by one (or more) in public that may be seen or observed by others. The statute gives clear notice that if one person engages in the activities described by the statute in the presence or view of others, that person will be in violation of the statute.*"

State ex. rel. Hamilton v. Superior Court, 128 Ariz. at 186.

It is clear from the language in *Hamilton*, that the "*actions* by one or more" people that may "be seen or observed by others" contemplates that there is a critical distinction between those involved in the acts and those that are merely observing. Consequently, the trial court's application of *Flores* was not in error.

II. The Tribal Court did not err when it admitted Jury Instruction No. 23 – Voluntary Intoxication.

The second issue set forth by Appellant for appellate review is whether the court abused its discretion when it admitted defendant's proposed Jury Instruction No. 23 (Voluntary Intoxication) contrary to established law. The trial court based its decision to admit the Instruction on its finding that the Tribal Code "includes clear language when it prohibits voluntary intoxication as a defense when a culpable mental state is recklessness, [while] the [C]ode does not include language which prohibits the use of voluntary intoxication as a defense when a violation of the Code calls for an intentional or knowing state." [Record at 18].

The Appellant argues *for the first time on appeal*, that because 4 PYTC § 2-80 of the Tribal Code does not identify voluntary intoxication as a defense, then "the rule of statutory interpretation, *expressio unius est exclusio alterius* suggests that the Tribe did not intend to include voluntary intoxication as a defense." [Appellant's Opening Brief, page 16].

If, however, the code section regarding defenses is read as suggested by Appellant, that any defense not mentioned in that section is therefore not a defense, then there would be NO defenses whatsoever available to the charge of Public Sexual Indecency. *See* Title 4 PYTC§2-80 (Defenses) (listing no defenses for 4 PYTC §2-30 (Public Sexual Indecency)). Consequently, any argument regarding mental states, alibi, or mistaken identity would not be available because it was not listed. Such an interpretation would lead to ridiculous results and certainly does not interpret the Code "as a whole to give effect to all of its parts in a logical, consistent manner." 1 PYTC §2-30(B).

Additionally, the rule of statutory interpretation, *expressio unius est exclusio alterius* is a doctrine that provides that "[w]here the legislature has specifically used a term in certain places ***within a statute*** and excluded it in another place, courts will not read that term into the ***section*** from which it was excluded." *Arizona Board of Regents v. State of Arizona Public Safety Retirement Fund Manager Administrator*, 160 Ariz. 150, 157, 771 P.2d 880, 887 (1989). Here, the Appellant is asking the Court to apply the doctrine to other statutes when it is clear that the use of the terms "statute" and "section" cited above is to apply to language and sections within a given statute.

Appellant's next argument is that Appellee incorrectly relied upon *State v. Bravo*, 131 Ariz. 168, 171; 639 P.2d 358, 361 (1981) for support of its instruction. *Bravo* supports the Jury

Instruction No. 23 because prior to 1994, the State of Arizona allowed a jury to consider voluntary intoxication, assuming there was sufficient evidence of intoxication, in determining whether a defendant had the necessary culpable mental state of intentionally or knowingly committing the act. *Id.*

In January of 1994, the Arizona legislature changed Arizona law through the adoption of a statute that expressly proscribed the Trier of fact from considering voluntary intoxication in determining whether a defendant had the necessary culpable mental state. A.R.S. § 13-503. Unlike the Arizona legislature, the Pascua Yaqui Tribal Council has not changed the law regarding the admissibility of evidence concerning voluntary intoxication. If the Council wishes to bar the introduction of voluntary intoxication evidence, then it must amend the Tribal Code. While the Tribal Court understood that it had wide power, it also understood that changing the tribal law is the province of the Tribal Council. "The Court finds that this may be a matter for the Tribal Council to address in their legislative capacity." [Record at 18]. Here, Appellant is urging this Court to adopt an Arizona statute, namely A.R.S. § 13-503, which expressly prohibits voluntary intoxication as a defense or in determining whether a defendant had the necessary culpable mental state, thereby placing this Court in the position of Tribal Council.

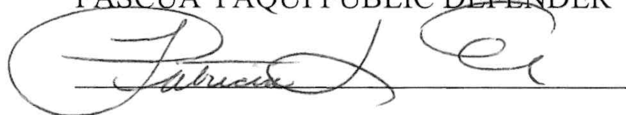
CONCLUSION

The Tribal Court did not err when it dismissed Count 3, Public Sexual Indecency. Neither a plain reading of the statute nor interpretative case law supports the Appellant's contention that a party to the alleged sexual contact can also be a witness. The trial court correctly determined that the Tribe mischarged Count 3 and, as a result, properly dismissed

Count 3. Additionally, the trial court did not abuse its discretion when it admitted Jury Instruction No. 23 (Voluntary Intoxication). It engaged in a meaningful analysis of the Tribal Code and tasked Tribal Council with changing the law regarding voluntary intoxication, just as the State of Arizona did. Appellee, Mr. Molina respectfully requests that this Court either dismiss the Appellant's appeal because it was filed untimely or deny the appeal on its merits for the reasons contained herein.

DATED this 27th day of May, 2014.

PASCUA YAQUI PUBLIC DEFENDER



Patricia Leon-Enriquez
Senior Staff Attorney
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that Mr. Molina's Response Brief was delivered this date to:

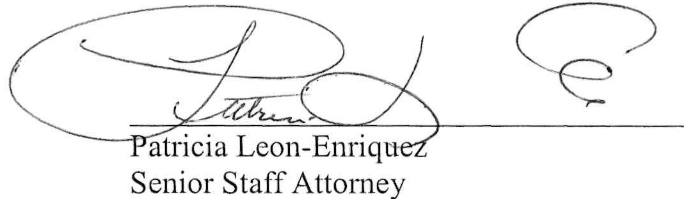
Linda Imonode
Linda.Imonode@pascuayaqui-nsn.gov
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7474 South Camino de Oeste
Tucson, AZ 85757

and that one (1) copy of Mr. Molina's Response Brief was delivered this date to:

Fred Lomayesva
Deputy Prosecutor
Office of the Prosecutor of the Pascua Yaqui Tribe
7474 South Camino de Oeste
Tucson, AZ 85757

DATED this 27th day of May, 2014.

PASCUA YAQUI PUBLIC DEFENDER



Patricia Leon-Enriquez
Senior Staff Attorney

No. CA-14-003

PASCUA YAQUI TRIBE
COURT OF APPEALS
MAY 22 2014
ISSUED
CLERK OF COURT

Pascua Yaqui Court of Appeals

Pascua Yaqui Tribe, Appellant,

vs.

Salomon Flores Molina, Appellee,

Interlocutory appeal of a Pascua Yaqui Tribal Court Order in Case No. CR-14-196, the Honorable Margaret Flores presiding.

Frederick Lomayesva, Office of the Prosecutor of the Pascua Yaqui Tribe, 7777 Camino Huivisim, Tucson, AZ for the Appellant.

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

Order Altering Briefing Schedule

Appellant will have five (5) days to submit a Reply brief to Appellee's Response instead of the ten (10) days originally given in this Court's recent Opinion. The Pascua Yaqui Code guarantees defendants a speedy trial and provides certain time limits that the Court must comply with. See 3 PYTC § 2-2-330. Additionally, the Code gives Appellant less time to file a reply. See 3 PYTC 2-3-140 (A).

In order to maintain compliance with the aforementioned Code provisions, Chief Justice Hopkins hereby grants that Appellant will be given five (5) days after service of the Appellee's Response brief to file a Reply or a notice that no Reply will be filed.

So **ORDERED** this __22nd____ day of _May_ 2014.

James C. Hopkins, Chief Judge

PYT COA '14/05/16 PM02:59

IN THE PASCUA YAQUI APPELLATE COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff/Appellant , v. MOLINA, SALOMON F. Defendant/Appellee	Case No. CA-14-003

OPENING BRIEF

Pascua Yaqui Tribe
Office of the Tribal Prosecutor
7777 S Camino Huivisim, Bldg. A
Tucson, AZ 85757
(520) 879-6251 Telephone
(520) 879-6260

Alfred Urbina, Chief Prosecutor

By Frederick Lomayesva,
Deputy Prosecutor

TABLE OF CONTENTS

1.	Table of Contents	2
2.	Table of Citations	3
3.	Statement of the Case	5
4.	Statement of Facts	7
5.	Issues Presented for Review	8
6.	Argument	9
7.	Conclusion	19
8.	Certificate of Service	20

TABLE OF CITATIONS

Pascua Yaqui Court of Appeals

In re. Pascua Yaqui Tribe , CA-13-005 (2014) 7

Pascua Yaqui Tribe v. Soto, CA-06-010 (2007) 9

State Cases

Board of Education v. Leslie, 112 Ariz. 463, 465, 543 P.2d 775, 777 (1975) 10

Cammack v. Texas, 641 S.W.2d 906 (Tx. App., 1982) 12

Marshall v. Indiana, 602 N.E.2d 144 (Ind. App., 1992) 12

Smith v. Pima County Law Enforcement Council, 113 Ariz. 154, 157, 548 P.2d 1151, 1154 (1976) 10

State v. Bouchier, 159 Ariz. 346, 347, 767 P.2d 233, 234 (Ariz. App.1989) 10

State v. Bravo, 131 Ariz. 168, 639 P.2d 358 (1981) 18

State v. Flores, 160 Ariz. 235 239, 772 P.2d 589, 593 (App. 1989) 9, 13, 14

State v. Gallego, 178 Ariz. 1, 870 P.2d 1097 (Ariz., 1994) 18

State v. Gonzales, 206 Ariz. 469, 80 P.3d 276(Ct. App. 2003) 15

State v. Marlott, 169 Ariz. 518, 821 P.2d 179 (Ariz. App., 1991) 12, 14, 15

State v. Sandoval, 175 Ariz. 343, 346, 857 P.2d 395, 398 10

Westbrook v. Texas, 624 S.W.2d 295 (Tx App., 1981) (Ariz. Ct. App. 1993) 12

Zamora v. Reinstein, 185 Ariz. 272, 275, 915 P.2d 1227, 15

1230 (1996)

Pascua Yaqui Code:

1 PYTC §2-30(A)	10
1 PYTC §2-30(B)	16
1 PYTC §2-30(D)	16
1 PYTC §2-30(H)	11, 18
3 PYTC §2-3-90	7
4 PYTC §2-10(C)	17
4 PYTC §2-10(N)	6
4 PYTC §2-30	13
1 PYTC §2-30(A)	10, 11, 14
4 PYTC §2-30(F)	10
4 PYTC §2-80	16, 17

State Statutes:

A.R.S. §13-503	19
A.R.S. §13-1403	11, 13, 14

STATEMENT OF THE CASE

This case was initiated by the Pascua Yaqui Tribe (hereinafter referred to as the "Tribe") when it filed a *Criminal Complaint* alleging aggravated assault and disorderly conduct against Salomon Molina on February 16, 2014. **ROA: 67.**[1] The Tribe (subsequent to the initial hearing) amended its complaint on February 19, and 27, 2014. **ROA: 62, 55**. The complaint was amended to add an additional charge, count three, *Public Sexual Indecency*. **ROA: 62**.

The initial hearing was held on February 16, 2014. Mr. Molina appeared in custody with his court appointed counsel. The court found probable cause as to counts one and two. The court then denied defendant's motion to reconsider the court's finding of probable cause. The Tribe recommended a $50,000 cash bond. The court denied the request. The court ordered a $1000 cash bond and, if released, he would be subject to release conditions. **ROA: 65**.

The arraignment hearing was held on February 26, 2014. The court found probable cause as to count three of first amended complaint. **ROA: 58**. Mr. Molina entered a denial to all charges. A bench trial was ordered. Despite the serious nature of the charges and over the objection of the Tribe, the court lowered

---

[1] The record on appeal is referred to as ROA. The ROA is followed by the Clerk of the Court's document number. Where the document number is not included, but the document was still include, the page number will be identified as p.

the bond to $500. Mr. Molina posted bond and was released from custody. **ROA: 61**.

On March 18, 2014, the court granted Mr. Molina's request for a jury trial. Dates for the trial were set. An additional date was set for a pretrial conference. The court ordered the parties to submit all pretrial motions, and proposed voir dire questions and jury instructions two days prior to the pretrial conference. **ROA: 49.**

On March 26, 2014, the court held a second probable cause hearing on the second amended complaint. **ROA: 50**. The court found probable cause as to count 3 as amended. **ROA: 44.** Dates for jury trial and pretrial conference were reset.

On April 10, 2014, Mr. Molina filed his Motion to *Dismiss (Probable Cause)*. **ROA: p185**. The motion sought to dismiss counts 1 (aggravated assault) and count 3 (public sexual indecency). The Tribe filed its *Response to Defendant's Motion to Dismiss* on Aril 22, 2014. The Tribe opposed the motion. **ROA: 36**. Mr. Molina filed his reply on April 25, 2014. **ROA: 21**.

Jury instructions were filed on April 22, 2014. **ROA: 40, 35**. On April 23, 2014, the court held its first pretrial conference. The Tribe objected to Mr. Molina's proposed jury instruction twenty three, *voluntary intoxication*. The court ordered the parties to brief the issue whether voluntary intoxication was a defense to crimes committed while intoxicated. **ROA: 22**. On April 28, 2014, the court

held its second pretrial conference. The court granted Mr. Molina's motion to dismiss count three and admitted his instruction twenty three over the Tribe's objection. **ROA: 16.**

This appeal followed. A notice of appeal was filed on May 1, 2014. This court has proper jurisdiction to hear this matter pursuant to 3 PYTC §2-3-90, and In re. Pascua Yaqui Tribe , CA-13-005 (2014).

STATEMENT OF FACTS

On or about February 16, 2014, Salomon Molina arrived at his cousin's home intoxicated. He planned to continue drinking with his cousin. His cousin (Celso Gastellum) and his wife (Jonie Gastellum) subsequently went to bed. They left Salomon Molina in the living room to sleep on the couch. Jonie Gastellum's daughter (hereinafter referred to as A.A.) was already asleep in a separate bedroom. **ROA: 36, page 02**. They were awakened by the scream of A.A. They immediately went to her room and saw Salomon Molina sitting next to her bed drinking beer.

A.A. said that Mr. Molina woke her because he was fondling her left breast. His hand was under her shirt, but over her bra. He stared at her and asked "what do you see in the room?" He continued to fondle her. She removed his hand, then screamed. He continued to stare at her. **ROA: 68.**

ISSUES ON APPEAL

1. Did the court err as a matter of law in dismissing count three, public sexual indecency, because the victim saw the sexual contact?

2. Did the court abuse its discretion when it admitted defendant's proposed jury instruction twenty three (Voluntary Intoxication) contrary to established law?

ARGUMENT

A. THE COURT ERRED, AS A MATTER OF LAW, WHEN IT DISMISSED COUNT 3, PUBLIC SEXUAL INDECENCY.

1. Standard of Review

Salomon Molina argued that public sexual indecency cannot be based upon a sexual contact where the victim (of the sexual contact) is also the witness. "The intended victim is NOT intended to include those who may have been a party to the sexual contact, whether willing or not." See **ROA: p.185**. The court held:

> The Court grants the Defendant's Motion to Dismiss Count 3: Public Sexual Indecency as the Court looks to Arizona law, which is mirrored by the Pascua Yaqui Code and the intent of the law. As included in the Defendant's Reply, "The statute was clearly 'designed to protect the ***public*** from shocking and embarrassing ***displays*** of sexual activities.' *State v. Flores*, 160 Ariz. 235, 239, 772 P.2d 589, 593 (App., 189) (emphasis added). According to the facts presented in the probable cause statement and the criminal complaint, only two individuals present at the time of the alleged incident were the alleged victim and the Defendant. No other person was present.

Thus, the court held as a matter of law that the witness to a sexual contact had to be a third party. Whether a victim can be a witness is a question of law. This court hears questions of law *de novo* and is not bound by the trial court's interpretation of tribal law. See Pascua Yaqui Tribe v. Soto, CA-06-010, page 8 (PY Ct. App., 3/9/07).

2. The plain words of the statute precluded the court from engaging in an analysis of statutory intent.

The court erred in engaging in a statutory analysis where the words of the statute were plain and unambiguous.

> The intent of the legislature in enacting a statute is first to be determined from statutory language. *State v. Bouchier,* 159 Ariz. 346, 347, 767 P.2d 233, 234 (App.1989). Statutory language which is clear and unambiguous generally requires no judicial construction. *Smith v. Pima County Law Enforcement Council,* 113 Ariz. 154, 157, 548 P.2d 1151, 1154 (1976). If that language is plain and unambiguous leading to only one meaning, the court will follow that meaning. *Board of Education v. Leslie,* 112 Ariz. 463, 465, 543 P.2d 775, 777 (1975).

State v. Sandoval, 175 Ariz. 343, 346, 857 P.2d 395, 398 (Ariz. Ct. App. 1993) See also 1 PYTC §2-30(A) (Words will be given their plain meaning ...) In this case, the statute states: "A person commits public sexual indecency by intentionally or knowingly engaging in any of the following acts, **if another person is present**, ..." See 4 PYTC § 2-30(A). In the Code, the term *person* refers to *a* person. This is supported by the fact that the form of the verb *is* agrees with a singular subject, *another person*, within the same clause. Thus, the "plain words" of the statute does not require that the sexual contact be witnessed by a third party.

This view of the term is mandated by the Code. "Words used in the singular include the plural and the plural includes the singular." See 4 PYTC § 2-30(F). So, even if the term, *another person*, were read in the plural, it would embrace the singular pursuant to the Code. Thus, no matter how one reads, *another person*,

either in the singular or plural form of the noun, it is only capable of one meaning - that one or more people witness the offensive act. It was error for the court to read the statute as requiring a third party to witness the act of sexual contact.

3. <u>It was error of the court to interpret the Code that a victim of sexual contact could not also be a witness.</u>

The Code's definition of *public sexual indecency* was adopted from Arizona's statute. See A.R.S. §13-1403. The Code states:

> A person commits public sexual indecency by intentionally or knowingly engaging in any of the following acts, **if another person is present**, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act: (1) An act of sexual contact. [emphasis added]

See 4 PYTC § 2-30(A). The Arizona Revised Statute states:

> A person commits public sexual indecency by intentionally or knowingly engaging in any of the following acts, **if another person is present**, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act: 1. An act of sexual contact. [emphasis added]

See A.R.S. 13-1403(A). A side by side comparison reveals that they are identical statutes. "Whenever the meaning of a term used in this Code is not clear on its face or in the context of the Code, such term shall have the meaning given to it by the laws of the State of Arizona, unless such meaning would undermine the underlying principles and purposes of this Code." See 1 PYTC § 2-30(H). There

is no Pascua Yaqui case law analyzing this provision of the Code. Arizona law analyzing the identical statute would further the underlying principles and purposes of the Code.

In State v. Malott, the court upheld a public sexual indecency conviction where the defendant woke the victim by touching his hands on her back and buttocks. The victim had been sleeping with her two daughters who did not wake up during the sexual contact. See State v. Malott, 169 Ariz. 518, 821 P.2d 179 (Ariz. App., 1991). In that case, the victim alone witnessed the sexual contact and was also involved in the sexual contact.

Arizona's position is supported by other states. A conviction for public indecency was upheld where the defendant fondled a police officer. See Marshall v. Indiana, 602 N.E.2d 144 (Ind. App., 1992). Similarly, conviction upheld for public lewdness where the defendant fondled a police officer in a booth in an adult book store where there were no other witnesses. See Westbrook v. Texas, 624 S.W.2d 295 (Tx App., 1981). The Texas statute is similar to our statute for public sexual indecency. He was charged with committing "acts of sexual contact while in a public place." *Id.* See also Cammack v. Texas, 641 S.W.2d 906 (Tx. App., 1982). In all of these cases, the victims were fondled by the defendants. The victims were the sole witnesses.

The typical sexual indecency case is where the defendant masturbates in front of another. However, Arizona and other states have concluded that one who is involuntarily fondled can testify that they witnessed the sexual contact. The victim's testimony can support a charge of public sexual indecency. The court erred as a matter of law in holding otherwise.

3. The Court misread State v. Flores.

Mr. Molina urged that State v. Flores requires a third party witness the act of sexual contact between two others. The court held, in relevant part:

> 'The statute was clearly designed to protect the public from shocking and embarrassing **displays** of sexual activities.' State v. Flores, 160 Ariz. 235 239, 772 P.2d 589, 593 (App. 189) [sic] (emphasis added) Accordining [sic] to the facts presented at the time of the alleged incident were the alleged victim and the Defendant. No other person was present.

See *Order*, CR-14-196 (4/28/14). **ROA 18, page 2**. However, in Flores, the court held that public sexual indecency based upon **sexual intercourse** had to be between two people and witnessed by a third. The court did not rule upon public sexual indecency based upon **sexual contact**.

Public sexual indecency can be based upon; 1) an act of sexual contact, or 2) an act of oral sexual contact, or 3) an act of sexual intercourse. See 4 PYTC §2-30. This is identical to Arizona's statutory scheme. See A.R.S. 13-1403. In Flores, the court was asked to look to the sufficiency of the state's claim that masturbation on

one's self amount to sexual intercourse pursuant to A.R.S. §13-1403**(A)(3).** The analogous tribal code provision is 4 PYTC §2-30**(A)(3).** The court held it did not. However, Mr. Molina was not charged with committing *sexual intercourse* in front of another in violation of 4 PYTC §2-30(A)(3). He was charged with committing a sexual contact in front of another under 4 PYTC §2-30(A)(1).

Importantly, the court in State v. Flores contrasted the two subsections; sexual contact and sexual intercourse. It found that they were distinct and where the underlying basis for public sexual indecency was *sexual intercourse* was it necessary for two participants and a witness. State v. Flores, 160 Ariz. 235, 240, 772 P.2d 589, 594 (App., 189) The court's ruling did not apply to allegations where the defendant exposes another to an act of sexual contact. It is clear, Flores is inapplicable to this case where the act alleged is an act of sexual contact. See 4 PYTC §2-30(A)(1). The court's application of Flores in this case was in error.

B. THE COURT ERRED WHEN IT ADMITTED DEFENDANT'S PROPOSED JURY INSTRUCTION TWENTY THREE CONTRARY TO LAW.

1. Standard of Review

The court admitted defendant's jury instruction number twenty three permitting Salomon Molina to introduce evidence of voluntary intoxication as a defense. **ROA 18.** Appellate review of the trial court's interpretation of statutes

and admission of jury instructions are reviewed on appeal *de novo.* "("We review de novo whether ... instructions to the jury properly state [ ] the law."); *Zamora v. Reinstein,* 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996) (explaining that issues of statutory construction are questions of law, which are reviewed de novo)." State v. Gonzales, 206 Ariz. 469, 470-71, 80 P.3d 276, 277-78 (Ct. App. 2003) The court's holding that voluntary intoxication is a defense and its admission as a jury instruction is reviewed *de novo* by before the Appellate Court.

2. The court erred as a matter of tribal law statutory interpretation.

The court found that the Code defined the mental states of *intentional, knowing*, and *reckless* in Title 4, Chapter 2 (Sex Offenses). See 4 PYTC §2-10(C). The court noted that the definition of recklessness included the following language: "A person who creates a risk but is unaware of the risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk," but the definition for intentional and knowing did not. See 4 PYTC §2-10(C). The court concluded:

> The court finds that the Pascua Yaqui Tribe includes clear language when it prohibits voluntary intoxication as a possible defense when a culpable mental state is recklessness, the code does not include language which prohibits the use of voluntary intoxication as a defense when a violation of the Code calls for an intentional or knowing mental state.

ROA 18, page 2. Therefore, the Court reasoned the tribal legislature did not intend to prohibit voluntary intoxication as a defense to the mental states of intentional and knowing. The Court's holding is contrary to the express intent of the Code.

The Code enumerates the defense applicable in sex offenses in 4 PYTC § 2-80. The Code does not identify voluntary intoxication as a defense. The rule of statutory interpretation, *expressio unius est exclusio alterius*, suggests that Tribe did not intend to include voluntary intoxication as a defense to sex offenses.[2] In this case, the Code lists available defenses. The list does not include voluntary intoxication in the list. Therefore, there was no legislative intent to include it as a defense. The Court's finding of an implied intent to permit voluntary intoxication is contrary to the intent of the Code.

The Court failed to harmonize the entire Chapter of Code at issue. "The Code shall be construed as a whole to give effect to all of its parts in a logical, consistent manner." See 1 PYTC §2-30(B). In this case, the Court failed to harmonize sections 4 PYTC § 2-10(C) (Culpable Mental States) and 4 PYTC §2-80 (Defenses). The definition of recklessly merely creates a presumption. If one is

---

[2] Without explanation, the Court made the defense available to non-sex offenses under Title 4, Chapter 1 (e.g., aggravated assault and disorderly conduct). At best, the Court's interpretation is limited to sex offenses pursuant to Title 4, Chapter 2. "Definitions given within a title or chapter only apply to words or phrases in such title or chapter unless otherwise provided." See 1 PYTC §2-30(D). In this case, there was no section within Chapter 2 to provide otherwise.

voluntarily intoxicated, then one acts recklessly in regards to the risk they create. See 4 PYTC §2-10(C). The section does not strictly permit or prohibit the introduction of evidence of voluntary intoxication. However, to read the definition as a prohibition against the introduction of evidence on voluntary intoxication is consistent with 4 PYTC §2-80 (Defenses) that the Code's intentionally did not include voluntary intoxication as a defense. Both sections are harmonized when read together to prohibit the introduction of evidence on voluntary intoxication as a defense. The court erred in its application of the tribal rules on statutory interpretation.

3. The Court erred in failing to look to Arizona law.

Mr. Molina argued that the terms *intentionally* and *knowingly* were not clear, because their definitions were not consistent with the definition of recklessly. As discussed above the court should have reached an opposite conclusion based upon the clear language of the Code. However, even if the court found the language unclear, then the court erred by not looking to the laws of Arizona. If the meaning of a term used in the Code is not clear, then the Code mandates the Court look to the laws of the State of Arizona.

> Whenever the meaning of a term used in this Code is not clear on its face or in the context of the Code, such term shall have the meaning given to it by the laws of the State of Arizona, unless such meaning would undermine the underlying principles and purposes of this Code.

See 1 PYTC §2-30(H). In this case, the laws of Arizona are clear. Voluntary intoxication is not a defense.

Mr. Molina's instruction relied upon Arizona law for support of its instruction. The instruction stated, in part, "If you determine that Mr. Molina was intoxicated at the time, you may consider whether the intoxication prevented him from acting with a particular mental state or states required to establish the offense." It cited State v. Bravo, 131 Ariz. 168, 639 P.2d 358 (1981) in support of the instruction.

The Tribe objected that Bravo was limited to the mental state of intentional. In Bravo, the court held voluntary intoxication was not a defense where the mental state was recklessly. "Where the necessary culpable mental state is recklessly, his voluntary intoxication is not to be considered by the jury, and if he recklessly commits an assault even though intoxicated he is guilty of that crime." Bravo, 131 Ariz. 171, 639 P.2d at 361. In State v. Gallego, 178 Ariz. 1, 870 P.2d 1097 (Ariz., 1994), the Arizona Supreme Court held "the law in Arizona is clear: 'the jury may not consider voluntary intoxication with respect to the defendant's culpable mental state [of knowingly.]. Gallego, 178 Ariz. at 12, 870 P.2d 1108. Thus, the applicability of Bravo was limited to the mental state *intentional.*

Importantly, in 1993, the Arizona legislature amended its statutory code. It prohibited voluntary intoxication as a defense.

> Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of alcohol, an illegal substance under chapter 34 of this title or other psychoactive substances or the abuse of prescribed medications does not constitute insanity and is not a defense for any criminal act or requisite state of mind.

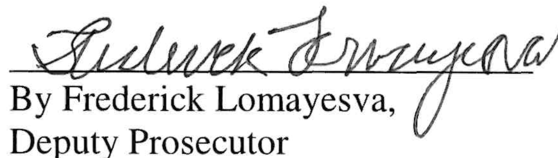
See ARS §13-503. Thus, the Arizona legislature overturned the ruling in Bravo and did not permit voluntary intoxication as a defense to any mental states including; intentional. The legal authority supporting the instruction has not been the law since 1993.

CONCLUSION

For the reasons stated above, the trial court erred as matters of law in: 1) dismissing count three, public sexual indecency, and 2) adopting Mr. Molina's jury instruction twenty three as a statement of law in this case. The Tribe requests that this Court reverse the holdings of the trial court and remand the matter for proceedings consistent with the holding of this Court.

RESPECTFULLY SUBMITTED this 16th day of May, 2014.

Office Of The Tribal Prosecutor



By Frederick Lomayesva,
Deputy Prosecutor

CERTIFICATE OF SERVICE

The original opening brief and five copies were delivered this 16th day of May, 2014, to the Pascua Yaqui Court of Appeals.

A copy of the opening brief was served upon opposing counsel, Patricia Leon-Enriquez, this 16th day of May, 2014.

PYT COA '14/05/13 PM02:44

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

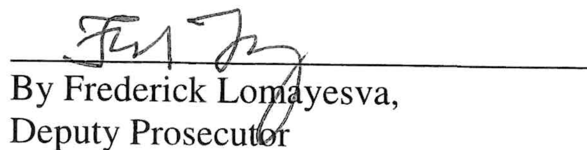
IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Appellant, v. MOLINA, SALOMON F., Appellee.	Case No. CA-14-003 **NOTICE OF FILING TRANSCRIPTS**

Comes Now the Pascua Yaqui Tribe through Deputy Prosecutor Frederick Lomayesva, and gives notice of the Appellant's filing of transcripts pursuant to 3 PYTRAP §2-3-110 (F). The original transcript and a copy of the transcript was filed this day with Clerk of the Pascua Yaqui Court of Appeals. A copy of the transcript was delivered this day to opposing counsel.

RESPECTFULLY SUBMITTED this 13 day of May, 2014.



By Frederick Lomayesva,
Deputy Prosecutor

A copy of the foregoing motion was
Delivered this 12 day of May, 2014, to:

Patricia Leon-Enriquez, Esq.
Office of the Public Defender
Attorneys for Salomon Molina

1 IN THE PASCUA YAQUI TRIBAL COURT

2 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

3

4 PASCUA YAQUI TRIBE,	)	
	)	CASE NO. CR-14-196
5 Plaintiff,	)	
	)	
6 vs.	)	
	)	
7 SALOMON MOLINA,	)	
	)	
8 Defendant.	)	
	)	
9 ______________________________	)	

10

11

12

13 HEARING ON MOTION TO DISMISS

14 APRIL 28, 2014

15

16

17 ORIGINAL

18

19 TRANSCRIBED FROM AUDIO RECORDING

20

21

22 ____

23 Kathy Fink & Associates
2819 E. 22nd Street
24 Tucson, Arizona 85713
520.624.8644

25

1 BEFORE: HON. MARGARET FLORES
2
3 APPEARANCES: FREDERICK LOMAYESVA, ESQ.
Deputy Prosecutor
4
PATRICIA LEON-ENRIQUEZ, ESQ.
5 For the Defendant
6
ALSO PRESENT: DEFENDANT SALOMON MOLINA
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 I N D E X

2

3 PAGE

4

Line	Entry	PAGE
5	Motion to have one attorney argue at a time	
	Argument	4
6	Ruling	5
7	Motion to Dismiss	
	Argument	6
8	Ruling	29
9	Motion to Amend Complaint	31
10	Deft's Jury Instruction No. 23	
	Argument	31
11	Ruling	38
12	Interview of Detective Garcia	
	Discussion	38
13	Court Order	46
14	Motion to Amend Conditions of Release	
	Ruling	49

15

16

17

18

19

20

21

22

23

24

25

1 P R O C E E D I N G S

2

3 THE COURT: Pascua Yaqui Tribe versus

4 Salomon Molina, Docket No. CR-14-196.

5 Today's date is April 28th, 2014. And this is

6 a scheduled hearing on a motion to dismiss in this

7 matter. The Court would also address another matter,

8 depending on the outcome of that motion to dismiss.

9 So at this time the Court will note that the

10 defendant is present with Court-appointed counsel,

11 Ms. Patricia Leon-Enriquez, and the tribe is present

12 represented by Mr. Frederick Lomayesva.

13 MR. LOMAYESVA: Hi, your Honor.

14 THE COURT: Hello. Are the parties ready to

15 proceed?

16 MS. LEON-ENRIQUEZ: Yes, your Honor.

17 MR. LOMAYESVA: I would ask to proceed with a

18 motion to request, and that is I ask that one attorney

19 argue one motion at a time. At the last hearing, we had

20 both Patricia and Jessica both arguing a motion at the

21 same time. And I felt that was rather confusing to the

22 procedure that was before the Court.

23 I don't think it's appropriate to do that. If

24 she wants to consult with her colleague, that's

25 appropriate, but next thing you know, if this continues,

1 I will have to potentially argue against all four of them
2 coming at me, she, Jessica, Melissa, and Sarah Dent (ph).
3 Where one stops, the other starts. I don't think that's
4 appropriate. And I'd ask that one person be permitted to
5 argue at a time.
6 MS. LEON-ENRIQUEZ: Your Honor, I'm not sure
7 what the tribe is talking about. At the last hearing, I
8 was the one that argued the motions. I did consult with
9 Jessica. She had the phone and was able to do some
10 research to help the Court. But other than that, she
11 wasn't making any arguments to the Court.
12 I believe the Court may have asked her a
13 question regarding what she was researching, but I don't
14 understand how that is saying that different attorneys
15 are arguing motions.
16 MR. LOMAYESVA: Well, your Honor, if the
17 defendant has an objection, I'd ask that you order one
18 attorney at a time to argue the motion.
19 THE COURT: Is there any objection?
20 MS. LEON-ENRIQUEZ: No objection.
21 THE COURT: At this time the Court is going to
22 grant that motion to have one attorney argue any motion
23 at one time.
24 So at this point the Court is going to proceed
25 with the hearing of the motion to dismiss and the moving

1 party will begin.

2 MS. LEON-ENRIQUEZ: Your Honor, since the

3 parties did file -- we filed the motion, the tribe did

4 file the response, and we filed a reply, I want to ask

5 the Court, did you want the parties to just go over what

6 was stated in the motion or if there is anything specific

7 that the Court --

8 THE COURT: All right. At this time, as both

9 parties have submitted their -- first the motion, the

10 response, and then the reply, the Court would like to

11 hear a brief overview of what the parties have submitted

12 in their motions, their response and the reply.

13 With regard to anything specific, I believe the

14 Court may have some questions after the Court hears from

15 the parties in their oral arguments today. So the Court

16 will hear from Ms. Leon-Enriquez first.

17 MS. LEON-ENRIQUEZ: Your Honor, the defense did

18 file a motion to dismiss for lack of probable cause as to

19 two counts, these being count 1 and count 3 of the

20 amended criminal complaint.

21 We are asking the Court to dismiss those

22 charges. The two counts, count 1 is the aggravated

23 assault. Count 3 is the public sexual indecency.

24 With regards to the aggravated assault, your

25 Honor -- may I have a moment?

1 THE COURT: Uh-huh.

2 MS. LEON-ENRIQUEZ: With regard to the

3 aggravated assault, your Honor, the required proof is

4 that in the commission of an assault, the victim was

5 bound or otherwise physically restrained or that it was

6 committed while the victim's capacity to resist was

7 substantially impaired.

8 In regards to the terms, bound or restrained, I

9 don't believe that there were any facts presented by the

10 tribe that would put this case in that category.

11 Therefore, we are assuming that the tribe -- and actually

12 the assumption also comes from the tribe's response to

13 the motion -- that they're basing their facts on the

14 third count, the capacity to resist was substantially

15 impaired.

16 Now, the tribal code does not define any of

17 those terms. However, since the statute or the code

18 section is identical to the Arizona code section of

19 aggravated assault, we believe that actually the code

20 allows for the Court to look at Arizona law that governs

21 in this matter and that's under 1 PYTC 2-30(H).

22 In the facts in this case, your Honor, there

23 has been nothing else that has been presented is the

24 allegation the victim is sleeping. So, based on that

25 also, the definition of "bound" would cover the sleeping.

1 The same thing with the restraint.

2 So, again, we are going under the assumptions

3 that the tribe has indicated that the fact that the

4 alleged victim sleeping in this case, that her capacity

5 to resist was substantially impaired.

6 However, this is not the type of substantial

7 impairment that was envisioned by the law. One of the

8 main cases that the Court has and that was mentioned in

9 the motion was the case of an appeal in Maricopa County,

10 Juvenile Action No. JV-123196.

11 This is a case out of the Court of Appeals of

12 Arizona from May 28th, 1992. In that case, because there

13 wasn't a whole lot of history, the case talked about what

14 some of the terms actually meant. The Court defined the

15 substantially impaired as considerably weakened, capacity

16 as ability to do something, and resist as refuse to

17 submit to. Ability to flee from a situation was included

18 in the incapacity.

19 In the case of the juvenile, that was a case

20 where the juvenile was riding his bike down the street

21 and the defendant came up to him on his bike and sprayed

22 some substance into his eyes. The initial spray in the

23 eyes did cause watering of the eyes and staining around

24 the eye area.

25 The victim in that case, the juvenile, was able

1 to ride off on his bike and stop further down. In that
2 case, the assailant went up to him and sprayed him in the
3 eyes again and requested that he give him the bike. At
4 that point the juvenile took off on his bike and the
5 assailant didn't go after him after that.
6 In court, the Court did state that as for the
7 first spray in the eyes -- I'll read the language on here
8 -- "The victim testified that only a bit of the spray got
9 in his eye and although it blurred his vision, he could
10 still see out of the other eye. The first spray could
11 not be said to have substantially impaired the victim."
12 So even a spray into the eye that caused
13 stinging and tearing of the eye was not considered by
14 this Court to fit in that category to constitute
15 substantial impairment.
16 The Court in that case also looked at the case
17 of State v. Barnett. However, it talked about the
18 dissenting position in that case, Judge Fernandez'
19 division in that matter. That was a case about a doctor
20 that was waiting in front of his office building and two
21 assailants came over and punched him in the face.
22 One of the assailants then got on his back. He
23 _____ first after the doctor. The second assailant then
24 got on his back and the victim started feeling a shocking
25 sensation at that point. He was still able to get away,

1 in which case, he then pushed one of the assailants off
2 and they eventually both ended up running off.
3 So the Court in the juvenile case was talking
4 about Barnett, the dissent in Barnett. In that case, the
5 dissenting judge, Judge Fernandez, stated that he
6 believed that the use of the word "or" between bound or
7 restrained or capacity to resist was substantially
8 impaired showed that the statute reflected a legislative
9 intent that the physical restraint required the rough
10 equivalent to the restraint that exists when the victim
11 was bound.
12 So, in other words, it's the same because each
13 of those were found to be--restrained or the capacity or
14 substantially impaired--were basically even, as far as
15 what was required.
16 The judge also indicated that he believed that
17 the statute requires something more substantial than the
18 momentary restraint that occurred in the cases before
19 being charged as an aggravated assault as opposed to a
20 misdemeanor. And the Court in the juvenile case was in
21 agreement with that.
22 In that case, the Barnett case, the Court had
23 heard testimony from an expert that talked about the
24 sensation that the doctor was feeling when he was being
25 Tased. The testimony that the Court heard was that the

1 Tasing had to be to certain muscles which caused the
2 person to become incapacitated for like fifteen minutes.
3 And that's what Judge Fernandez was talking
4 about when he was talking about the level of restraint or
5 substantial impairment that was required in the case,
6 which the case of the juvenile agreed with.
7 So, your Honor, the fact that the victim in
8 this case -- because there is no other information -- the
9 fact that the victim was sleeping is not the type of
10 substantial impairment that is required.
11 As seen in the juvenile case, even spraying in
12 the eyes wasn't sufficient. Even though they did find
13 him guilty of the simple assault, it was still not
14 sufficient with a single spray in the eye. The same
15 thing with the Tasing in Barnett. Even with the Tasing,
16 the doctor wasn't incapacitated because the Taser wasn't
17 used in the proper muscles in order to incapacitate him.
18 That was not enough.
19 The other thing, your Honor, is that these, the
20 cases prior to Barnett and Juvenile, dealt with other
21 issues or had other definitions for what could be
22 considered sufficient.
23 As indicated also in the juvenile case, it
24 states that: The present statute, which was repealed,
25 provided that assault is aggravated when committed by a

1 person of (reading) or strength upon one who is decrepit
2 _____ finding or restraining conditions that normally
3 exist before an assault begins.
4 To be decrepit -- in parentheses, it says "to
5 be decrepit is to be disabled" -- (reading) -- "incapable
6 or incompetent from physical or mental weakness or
7 defect."
8 That was the law prior to this. But it was
9 amended after that.
10 So for all those reasons, your Honor, we
11 believe that the facts as presented in this case and the
12 _____ sleeping do not fit within the definition of the
13 aggravated assault statute and what is required for that.
14 So we would ask for dismissal of that count, your Honor.
15 THE COURT: Is there another argument that
16 defendant had with regard to the third count?
17 MS. LEON-ENRIQUEZ: Yes, your Honor. The third
18 count was public sexual indecency. And basically, your
19 Honor, we go by the statute in that case.
20 That case, your Honor, has more to do with the
21 arguments in this case than to do with who was present
22 and the language in that charge. Basically -- if I can
23 have just a moment here, your Honor.
24 Once again, in the charge of public sexual
25 indecency, the tribal court doesn't define the terms in

1 that charge. So, using the same code section, it's
2 proper to look at Arizona law for help in defining this.
3 The plain reading states that the victim should
4 be a third party that's witnessing a separate act of
5 sexual contact and not a person that's a party to the
6 conduct, whether they want to be a party or not.
7 The public sexual indecency statute is more
8 concerned by the actions of one person or more than one
9 person in public that can be seen or observed by others.
10 Now, we understand that "public" doesn't mean
11 that it has to be out at the mall or out on the street
12 where there's people passing by. We understand that it's
13 something that can be done in the home. However, the
14 Court, in different cases that dealt with this particular
15 section, did talk about the act being separate from the
16 viewing of the act.
17 It separated the actors from those who were
18 viewing the actions. The different cases -- all the
19 cases that we found had more to do with masturbatory
20 contact where a person was masturbating and somebody else
21 was observing or a party to that, whether they wanted to
22 or not, which is the case in this matter.
23 In the Whitaker case, that one tracks the
24 language of indecent exposure. This was an Arizona case
25 which indicated that the public sexual indecency charge

1 followed the language of indecent exposure. It doesn't
2 mean that it was the same, but it did follow the same
3 principals where you have an actor and was prohibited is
4 something that can be viewed by somebody else.
5 In this case, what the tribe is trying to do is
6 trying to make the facts fit within this charge and it
7 doesn't really apply. In this case, there was two actors
8 but one of the actors was also the person that was
9 viewing, which doesn't follow what any other case law on
10 these type of charges indicates.
11 They all talk about, as I stated before, having
12 an actor and that act, whatever that may be, being
13 watched by somebody separate. As I indicated before, I
14 have found that the tribe hasn't brought forth any other
15 cases that shows any similar facts to the case as this
16 matter.
17 As I said before, all the cases that I saw were
18 where there was masturbatory conduct being observed by
19 someone who was not part of that conduct. The cases that
20 were cited in the motion were the MaLott (ph) case. That
21 one was the two adult women -- an adult woman and two
22 minor children living in a duplex, the male _____
23 entering the home and masturbating in front of the woman
24 while the children slept.
25 And he was charged with public sexual indecency

1 and also with the public sexual indecency to a minor,
2 because the children were present even though they were
3 sleeping. They have a different standard for minors in
4 those cases.
5 The Danaman (ph) case is also an adult male
6 masturbating in a movie theater while there are three
7 minors sitting next to him. So it was the actor and the
8 three minors that were observing in this public sexual
9 indecency.
10 The same with the Hamilton case. That was a
11 male that exposed himself to two minor girls on two
12 separate occasions. And he was charged with two
13 violations of public sexual indecency to a minor. Once
14 again, it's a different standard where the minors only
15 have to be present, whether they observe the conduct or
16 not.
17 In the case, the Court did discuss of whether
18 the violation can be someone acting alone or acting with
19 more than one person. The Court did find that it doesn't
20 require that two people -- and actually, this was talking
21 about the sexual intercourse because there was some
22 question with regards to that case.
23 But the Court did find that the public sexual
24 indecency can be one actor in the role or more than one
25 person acting and there being others watching.

1 Again, with the case of State v. Hamilton,
2 the Supreme Court of Arizona did state, in addressing the
3 constitutionality of the Arizona public sexual indecency
4 statute, that the statute was concerned with actions by
5 one or more in public that may be seen or observed by
6 others.
7 It basically says that it can be an action of
8 one or more people but must be observed by others, not by
9 the actor, whether that person wanted to act or not.
10 So, for those reasons, we ask that that count
11 be dismissed also.
12 THE COURT: All right. Thank you.
13 Mr. Lomayesva?
14 MR. LOMAYESVA: Thank you, your Honor.
15 I don't think the reply added very much to the
16 arguments that have already been made other than to
17 reduce the level of legal discourse to name-calling.
18 There's a couple points in both the reply and
19 the motion that I want to bring up. The first is
20 procedural posture of the case. Normally a motion
21 challenging probable cause occurs at the beginning of the
22 case, usually what they call a preliminary examination or
23 preliminary hearing, where the defendant will challenge
24 the person who's making the probable cause allegation,
25 whether or not probable cause exists.

1 Our code doesn't expressly state that this is a
2 separate hearing called a preliminary examination or
3 preliminary hearing, but it provides for it. And you see
4 it in the Rules of Evidence, which talks about the
5 applicability or nonapplicability of the Rules of
6 Evidence in preliminary examination.
7 Well, the defendant really isn't challenging
8 the probable cause. What they're challenging is to say
9 to this Court, look, if you accept the facts as the tribe
10 puts it, those facts still do not add up to a proper
11 criminal cause. I accept that.
12 So really what they're doing is they're asking
13 you to make a ruling on the law. And that is as the law
14 exists, the tribe shouldn't have a basis to charge the
15 defendant.
16 With that said, we challenge it in two distinct
17 ways. We challenge it based upon the aggravated --
18 whether sleep is a basis to find that one's capacity to
19 resist is substantially impaired. We challenge that as a
20 matter of law.
21 Second, we challenge the indecent exposure -- I
22 keep getting this wrong -- public sexual indecency
23 statute, whether a victim can also be the observer in
24 that.
25 So I will address the aggravated assault one

1 first. They are correct that in a footnote that the
2 Court of Appeals did not uphold the aggravated assault
3 charge in that case. But I think what that does is
4 really highlights, once you really look to see why that
5 is.
6 And it's sort of misleading to say that they
7 found that spraying the eyes did not amount to
8 substantially reducing their capacity to resist. Why am
9 I saying that? Because the Court of Appeals found that
10 they would not disturb that finding made by the trial
11 Court on appeal.
12 Then why uphold the aggravated assault charge?
13 Not because it didn't substantially impair his capacity
14 to resist. They said the first spray affected his eyes
15 and the second time, it caused him -- it did
16 substantially impair him. But it occurred after the
17 assault already started.
18 So they found that if the substantial
19 impairment occurs after the assault occurs, then it
20 cannot be an aggravated assault and that's why they
21 didn't uphold the aggravated assault charge against the
22 defendant in that case.
23 Importantly, what that means is that spraying
24 him with a spray in the eye to the point where it
25 substantially impairs, to where it affects his vision,

1 can be a basis for finding that his capacity to resist is
2 substantially impaired because that finding was upheld by
3 the Court of Appeals in that case.
4 So the fact that it didn't uphold it doesn't
5 impair the argument that you don't have to be bound. You
6 don't have to be -- it's enough that something occurs
7 that impairs your ability to resist or substantially
8 resist.
9 And in this case, it's the tribe argument that
10 when you are in a sleeping state -- and I don't think
11 there is much of a distinction between sleeping and being
12 unconscious in the sense that when you're sleeping, you
13 are not really conscious of your surrounding environment
14 or you have lesser consciousness of what is going on
15 around you. So I don't think that distinction is a
16 meaningful distinction.
17 But it does highlight the fact that when you
18 are asleep, you're less likely to resist because you
19 don't have that level of awareness to resist. When she
20 woke up, she was drowsy and even then, it's highly
21 unlikely that she was immediately able to put up a firm
22 resistance. Only becoming fully awake can she then fully
23 resist _____ her breast.
24 Now, I say this also because this is a
25 preexisting condition to the assault. This didn't occur

1 after the assault, like the case in Juvenile Action
2 JV-123196, where he was sprayed and then sprayed again
3 after the initial assault.
4 Here she was already asleep, making this
5 distinguishable from that case in the sense that the
6 Court of Appeals in that case or this case might have
7 found quite the opposite, that the aggravated assault
8 would have been upheld because the condition existed
9 prior to the assault starting.
10 Now, the defendant is asking you to make a
11 decision based on the law. My point is this is not
12 necessarily a legal question. This is a factual
13 question. This is for the jury to apply the facts to the
14 law to make a determination.
15 The jury may or may not find that this was an
16 aggravating factor. But I think this is a jury question
17 for the jury to decide. And with the proper
18 instructions, they should be able to do so.
19 We have had no law that precludes sleeping from
20 being an aggravating factor in an aggravated assault.
21 Now, the defendant said that there were no
22 other cases like this. Well, there are, in fact, plenty
23 of cases like this. There are plenty of assaults that
24 occur where a child is sexually molested while they are
25 sleeping and they awake to find the molestation

1 occurring.

2 Usually, though, those cases are in the area of

3 sexual molestation. Under the particular circumstances

4 of this code, though, that cannot be charged, sexual

5 molestation. But there is a number of cases dealing with

6 sexual molestation with very, very similar facts.

7 It's our position, and it remains our position,

8 that sleeping can be an impairment that affects their

9 ability to resist. And we believe it's a question for

10 the jury. We believe that a jury could make a

11 determination whether or not this person had that ability

12 or lacked that ability to form the necessary element of

13 the crime.

14 And we think this Court should allow it to go

15 to the jury so that the jury can make that determination.

16 We don't think this is a matter of law for the Court to

17 take away from the jury.

18 Second, has to do with public sexual indecency.

19 Now, I misspoke in my -- I used interchangeably in my

20 response the terms, "indecent exposure," and "public

21 sexual indecency." But the main cases on point and the

22 statute cited all deal with public sexual indecency. And

23 the prime case for that is the Whitaker case out of

24 Arizona.

25 Now, in that case, a guy was charged with

1 masturbating in front of his two daughters. And
2 masturbation takes it from simply being an indecent
3 exposure situation where one exposes one's private parts
4 in public, to the public, to public sexual indecency
5 where you're committing a sexual act and you are reckless
6 about whether or not the person seeing it is going to be
7 offended or alarmed.
8 So, in that case, they discuss the statute.
9 And that case had to do with where the defendant argued
10 that -- he said did this in his home; no one saw; his
11 home is a private place and not a public place. The
12 Court there held it doesn't matter. If you have an
13 expectation that someone could see you in your home, then
14 it is a public nature. It doesn't matter.
15 In fact, in that case, they said, no, that
16 objection -- they rejected that objection and found that
17 you could, in fact, in a private home commit public
18 sexual indecency, and then they quoted a number of cases.
19 Now, importantly, what is argued by the
20 defendant is that if the victim is also the witness who
21 observes the sexual conduct, then it's not really a
22 public sexual indecency. That's absolutely not the case.
23 Now, in Whitaker, they point out that it states
24 -- this is the Arizona statute, which is identical to our
25 statute -- it says: "A person commits public sexual

1 indecency by intentionally or knowingly engaging in any
2 of the following acts if another person is present." It
3 doesn't say persons; it says person.
4 The key words of that statute indicate only one
5 person, whether or not there's a victim. Our statute,
6 almost verbatim to that statute, says exactly the same
7 thing, if another person is present.
8 Now, theoretically, according to the plain
9 words of the statute, that would mean only one person has
10 to be present to observe the sexual act or contact and if
11 that person is a victim, it makes no difference. And
12 there's been no cases cited that say that somehow there's
13 a difference between those two.
14 In that case, they brought up sort of indicta
15 whether or not it has to be more than one person. And
16 the Court quoted a number of different cases which stood
17 for the proposition that only one person need be present
18 when the exposure occurred.
19 Now, mind you, they borrowed cases in support,
20 to prove their view -- to approve them from also the area
21 of public exposure where people expose themselves in any
22 sort of a public setting. And in a number of those
23 cases, people appeared to know in the presence of a
24 teenage babysitter -- that was in the Green case. In a
25 number of other cases, they decided, approving the case

1 law, that it only need be in front of one person and it
2 could be in a home.
3 Well, one of the major differences between
4 public sexual indecency and public exposure is that, one,
5 in public exposure, you're exposing yourself; and in
6 public sexual indecency, you're exposing other people to
7 view sexual acts which are reckless by whether or not
8 they're going to be _____ And that is why they
9 approvingly spoke of these other cases in the area of
10 public exposure.
11 And there have been very few cases from Arizona
12 -- the Whitaker case was one; State vs. Superior Court
13 of Maricopa was another, and the other case that was
14 cited by the defendant -- but I think you'll find in all
15 of those cases, there's no authority for the proposition
16 that the victim cannot also be the person who was subject
17 to the sexual contact.
18 And I'd just like to reiterate this point. It
19 really just states another person, not persons. And
20 without even reference to Arizona law and just looking at
21 the plain words of the statute, you have to conclude that
22 the legislature knew what they were doing when they said
23 person, not persons. They could have easily said
24 persons, but they didn't.
25 So we believe that there is no basis to find --

1 that there is no basis to dismiss based on the fact that
2 the victim was also a person who observed the sexual
3 contact. So when she awoke and saw her breast being
4 fondled, that was clearly a sexual act or contact. That
5 was enough to put it in the area of public sexual
6 indecency.
7 We believe that there is legitimate grounds for
8 these charges and they should not be dismissed, and
9 believe that these are jury questions. And we feel that
10 there is sufficient evidence to go forward on these
11 charges, and believe that these are questions for the
12 jury, not for the Court to answer. Thank you.
13 THE COURT: Thank you. Ms. Leon-Enriquez,
14 anything further?
15 MS. LEON-ENRIQUEZ: Yes, your Honor. Just to
16 go back and discuss what he was implying, I did agree
17 with the point to just decide the law in this matter.
18 But when there's no other facts presented and
19 the tribe acknowledges that sleeping is the only thing
20 that in their mind constitutes the substantial capacity
21 to resist, then it is proper for them not to determine if
22 that charge can be filed. The Court has the ability to
23 determine whether there's enough in that to be able to
24 charge in this matter.
25 As stated by the tribe, also, there are no

1 cases in which a person is molested and they're charged
2 with public sexual indecency.
3 Basically, the tribe is agreeing that the only
4 reason they're charging under this was because they
5 couldn't charge under molestation, even though it didn't
6 fit into this category of public sexual indecency. The
7 tribe is trying to form the facts of the case so that
8 they fit into a charge that was not meant to be charged
9 in that manner.
10 Additionally, the tribe tries to -- or states
11 that sleeping is equivalent to unconsciousness but, as
12 shown in the attachment from the National Library of
13 Medicine, being asleep is not the same thing as being
14 unconscious. Contrary to the tribe's statement, a
15 sleeping person will respond to _____ shaking, and an
16 unconscious person will not.
17 Basically, there is a huge difference between
18 being asleep and being unconscious. As a matter of fact,
19 I believe there's cases that talk about a person who is
20 drugged. The Court might find that to be a substantial
21 impairment, but sleeping is not one of those.
22 The tribe is also talking about the juvenile
23 case, the fact that after the first spray in the eyes,
24 that the Court still found that there was substantial
25 impairment. But the Court specifically stated in that

1 case that even though, from the first spray in the eyes,
2 even though his vision was blurred and he could still see
3 out of the other eye, that was not a substantial
4 impairment.
5 It was not until he was sprayed a second time
6 and he really couldn't see that then the Court said that
7 that could be an impairment. But they didn't charge it
8 as that. The Court didn't allow it to go forward
9 because, as stated by the tribe, the assault -- the
10 impairment happened afterwards.
11 But still, in the case, the Court still found
12 that being sprayed in the eyes and having blurred vision
13 was not substantial enough. The same thing in this case;
14 being asleep is not substantial enough.
15 The tribe also discusses the Whitaker case,
16 indicating that there is more to -- there are cases that
17 show the argument they're making. But, once again, the
18 WHitaker case is a masturbatory conduct case, in which
19 there's a person that's doing the conduct and that it's
20 being viewed by others.
21 The tribe did not mention any cases similar to
22 this where the person was charged with public sexual
23 indecency when they touched another person or molested a
24 child because it doesn't fit within that category.
25 The tribe was also discussing about one person

1 being present. I don't believe that that is what the
2 case was about. It was about the person being present,
3 but how many people were there? One person could be
4 acting or more than one person could be acting and that
5 acting viewed by others.
6 As the public sexual indecency that tracked
7 indecent exposure required at least one person to be
8 observing because if there is no person observing, then
9 there is no crime. The same thing _____ there has to be
10 somebody that's observing. And none of the cases have
11 shown that the person observing was one of the actors in
12 the case.
13 The cases have also shown that the statute is
14 concerned by actions of one or more people in public; in
15 other words, being seen or observed by others. So, even
16 if the defendant is an actor and the victim also an
17 actor, then it's not being observed by another.
18 So, in this case, the tribe is trying to make
19 the victim play the two roles in this matter and it just
20 doesn't fit. Once again, the tribe is trying to fit the
21 facts from a different type of possible charge into this
22 one, even though it doesn't fit.
23 And, your Honor, with regard to both charges,
24 the public sexual indecency and the aggravated assault,
25 if there's any ambiguity or there's some issue with that,

1 under the Rule of Lenity, it should be ruled in favor of
2 the defendant's interpretation. Thank you.
3 THE COURT: All right. Thank you.
4 So at this time the Court, having reviewed the
5 motion to dismiss and the response and reply, and after
6 hearing from the parties today on their oral arguments
7 regarding the motion to dismiss counts 1 and 3, the Court
8 finds that with regard to count 1 of the motion to
9 dismiss, count 1, aggravated assault, that in this
10 matter, the arguments hinge on the issue of whether or
11 not the alleged victim was substantially impaired.
12 And after hearing from the parties regarding
13 those arguments, at this time both parties have included
14 some references, there being a little bit about case law.
15 However, there is not anything that the Court has seen
16 from either party that's directly on point as to the
17 issue of aggravated assault.
18 The Court looks at the tribal code in the
19 matter and, because the tribal code does not define
20 specifically aggravated assault, the Court then looks to
21 Arizona law in the matter.
22 And then the Court heard from the parties
23 regarding a juvenile case and another state case. Again,
24 as the Court had indicated, there's not anything directly
25 on point as to the sleeping issue.

1 The Court does have in its file what defendant
2 has included as description, medical description, of
3 sleeping and whether or not that is incriminate.
4 However, the Court did hear from the tribe on
5 the argument of the juvenile case not directly being on
6 point. in that the impairment took place -- or the
7 assault -- took place after impairment -- actually the
8 argument there is that the Court believes that, with
9 regard to this matter, that the tribe's argument in the
10 matter of count 1, aggravated assault, that the Court
11 does see the tribe's argument and is going to deny count
12 1, the dismissal of count 1, aggravated assault, in this
13 matter. That will remain as a count defendant is charged
14 with.
15 In the matter of count 3, public sexual
16 indecency, at this time the Court also sees, as to the
17 matter of not having a direct case on point as to the
18 public sexual indecency, both counsel refer to arguments
19 of case law that refers to other types of cases.
20 And at this point, though, the Court has
21 reviewed the code section that defense counsel and tribe
22 have argued. And at this time the Court is going to
23 dismiss count 3, public sexual indecency, without
24 prejudice.
25 At this point the Court is ordering the

1 dismissal without prejudice as to count 3 on this matter.
2 Then the Court will proceed with counts 1 and 2.
3 I believe that there has been -- previous to
4 this in an earlier hearing, that the tribe had requested
5 a motion to amend. That is actually not going to be
6 addressed as count 3 is dismissed in this matter.
7 There were a couple of -- or at least one other
8 outstanding item which the Court will address. I believe
9 there's actually a couple; one I need updating on, and
10 the other is with regard to a jury instruction.
11 The parties have submitted briefs with regard
12 to jury instruction No. 23. And the Court did hear from
13 the parties in a previous hearing last week with regard
14 to the parties' submission on jury instruction No. 23.
15 The Court had a little bit of time to review those since
16 that was due earlier today by 11:30.
17 And at this time the Court would like to hear
18 briefly from the parties if there's anything that the
19 parties would like to present in oral arguments with
20 regard to whether or not the Court should include jury
21 instruction No. 23.
22 The Court will hear from the tribe on the issue
23 first.
24 MR. LOMAYESVA: Thank you, your Honor.
25 We believe it's inappropriate to allow the

1 defendant to use intoxication as a defense to any of the
2 requisite states. Our code states where there is a
3 question as to whether or not something applies or where
4 there is trouble defining a term, that you look to
5 Arizona law.
6 Arizona law is pretty explicit. Back in 1993,
7 the legislature amended 13-503 which states that
8 voluntary intoxication is not a defense to mental states
9 or to the crime.
10 Now, even before the change in the law, case
11 law in Arizona had already established that voluntary
12 intoxication is not a defense to either reckless or to
13 knowingly. If a defendant acts knowingly or recklessly,
14 it's not a defense.
15 And I cited defendant's own case, State vs.
16 Bravo, for the proposition that it's not a defense to
17 recklessness. State vs. Gallegos, 178 Ariz. 1, which
18 is also included in our brief, says that it does not
19 apply to knowingly.
20 In fact, the quote there says, "Arizona was
21 clear that it does not consider voluntary intoxication
22 with respect to defendant's culpable state of knowingly."
23 So, even prior to 1993 changes, which were effected on
24 January 1, 1994, recklessly and knowingly were not --
25 voluntary intoxication is not a defense.

1 Why that's important is that in this case,
2 aggravated assault and disorderly conduct require mental
3 states of either intentionally or knowingly. So if the
4 jury finds that he acted knowingly in these situations,
5 voluntary intoxication is not a defense.
6 Now, it may be held -- the argument may be made
7 that it requires it may be available in the area of
8 intentionally, but I would say that since 1993 or 1994,
9 that has not been a defense. Voluntary intoxication is
10 not a defense and that's pretty clear from the statute.
11 So we urge this Court to look to Arizona law to help
12 decide whether or not voluntary intoxication is a
13 defense.
14 I should add that in State vs. Gallego, there
15 is almost an identical argument made by the defendant in
16 that case where he argued where the statute defining
17 knowingly did not say anything about voluntary
18 intoxication. He argued that, therefore, the legislature
19 intended that voluntary intoxication was a defense. The
20 Court rejected that out of hand. And similarly in this
21 case, the Court should reject that argument out of hand,
22 which is what the defendant has been trying to argue.
23 Just because it's not mentioned does not mean
24 that there was an intent by this legislature, tribal
25 council, to make voluntary intoxication available either

1 to knowingly or intentionally. Thank you.

2 THE COURT: All right. Ms. Leon-Enriquez?

3 MS. LEON-ENRIQUEZ: Your Honor, it is

4 defendant's position that the Court doesn't need to look

5 any further than the tribal code to determine what is

6 required in this matter.

7 The tribal court specifically provides what the

8 culpable mental states are. It has a defense known as

9 recklessly. And it's only in the recklessly where the

10 code prohibits the use of voluntary intoxication with

11 respect to any acts that require recklessness.

12 Now, the tribal court does allow one to go or

13 to look at Arizona law if there is a meaning -- whenever

14 the meaning of a term used in the code is not clear on

15 its face. In this case, basically what the tribe is

16 trying to do is have the tribal court adopt Arizona law,

17 which is not law on the reservation. It's not part of

18 the tribal code.

19 The law in Arizona specifically states -- and I

20 believe it's cited on there as 13-503. That law

21 currently doesn't allow voluntary intoxication in any --

22 not intentionally, knowingly or recklessly.

23 However, prior to the adoption of that law, it did allow

24 in cases.

25 Now the tribe argues that the Gallego case is

1 similar to this case. However, it's not similar to this
2 case because that one was dealing with an Arizona statute
3 that prohibits that kind of -- it's a statute that isn't
4 also found here in the tribal code.
5 So the Court doesn't need to look any further
6 than it's written in the code itself, doesn't need to go
7 look at state law or adopt a code that's not also within
8 the tribal code.
9 Additionally, the tribe isn't asking the Court
10 to define anything; it's actually asking the Court to
11 adopt. And, again, the Gallego case is not really
12 dealing with the same issue because at the time of
13 Gallego, there was a lot of prohibiting. There was
14 Arizona law that was prohibiting and that can be seen in
15 the Gallego case also.
16 In looking at the tribal code as it is written,
17 if the Court is going to look at guidance from the State
18 of Arizona, it can look at the tenets of statutory
19 construction, which is the expression there in Latin,
20 which is a doctrine that provides that when the
21 legislature has specifically used a term in certain
22 places within the statute and excluded in another place,
23 the Court will not read that term in the section from
24 which it was excluded, which is basically what's happened
25 in this case.

1 The tribal code has three sections with
2 culpable mental states. The tribal council specifically
3 placed in the reckless section that voluntary
4 intoxication could not be used even for the mental state
5 in reckless but specifically left it out of the other
6 ones. So I believe that the Court doesn't have to look
7 any further than within the code itself to determine
8 intent in this case. Thank you, your Honor.
9 THE COURT: All right. And, Mr. Lomayesva,
10 anything further from the tribe on this?
11 MR. LOMAYESVA: Yes, your Honor. Well, the
12 code doesn't say specifically any definitions of
13 knowingly or intentionally, that voluntary intoxication
14 could be a defense. It doesn't say whether it can or
15 whether it cannot be used.
16 And in this case, they're trying to say that
17 because it doesn't say it, it must mean one result.
18 Well, that's not the case. I think you're incorrect. In
19 Arizona they tried the exact same argument when there
20 were separate definitions of knowingly, intentionally and
21 recklessly. And the Court rejected that argument.
22 Just because the legislature says it in one
23 area doesn't mean that they intended that they didn't
24 mean it in other areas. So that would be, in fact, the
25 opposite of what they're trying to say the Latin

1 expression says.

2 So there's no basis to find that the tribal

3 council intended that voluntary intoxication be a defense

4 to intentional or to knowing. And we'd ask that this

5 Court, in the absence of whether or not the tribal

6 council said it can look to Arizona law, and that's

7 provided for in the code where it says when terms or

8 meaning are unclear, you're required to go to Arizona law

9 to look for the answer. And I think if you do so,

10 Arizona law is clear that it is not a defense to either

11 knowing or intentional criminal acts. Thank you.

12 THE COURT: At this time the Court, having

13 heard from the parties regarding the defendant's proposed

14 jury instruction No. 23, after the parties having

15 submitted briefs as to whether or not the Court should

16 include jury instruction No. 23 in the jury instructions

17 for this jury next week, the Court finds that with regard

18 to the issue of looking at the Pascua Yaqui Tribal Code

19 and what it includes as far as the language of the two

20 descriptions of culpable mental states, and hearing from

21 the tribe on arguments as to looking at another

22 jurisdiction, the State of Arizona's description of

23 culpable mental states and what the law is in Arizona, at

24 this time there is -- and neither parties have either

25 addressed it or referred to the model penal code as to

1 any arguments there.

2 And at this point the Court will give the

3 decision of the jury instruction No. 23 to the parties by

4 9:00 a.m. in the morning tomorrow. I will include in the

5 order for today, as well, what the Court decides on that.

6 I do need to have a little bit more information

7 as to whether or not the Court is going to include jury

8 instruction No. 23 in the jury instructions for

9 Mr. Molina's jury trial. So at this point the Court will

10 impose its own deadline for itself to include that order

11 by 9:00 a.m. tomorrow morning.

12 As far as the other outstanding issue the Court

13 wanted to receive an update on is there was a discussion

14 last week or a request of a disclosure, a late disclosure

15 of Detective Garcia and a possible interview to be

16 conducted by the 30th of April.

17 Has there been an extension of the meeting time

18 for that?

19 MR. LOMAYESVA: My understanding is that the

20 defense counsel is available tomorrow afternoon.

21 Detective Garcia, of course, is out sick this week. He

22 has a bad cold. But despite this fact, he is willing to

23 come in tomorrow at 3:00 p.m. and be subject to an

24 interview.

25 THE COURT: All right.

1 MR. LOMAYESVA: So it's available. I don't
2 know whether the defendant wants to take advantage of it
3 or not, but it's available pursuant to this Court's
4 order.
5 THE COURT: Have you discussed that information
6 with the tribe, Ms. Leon-Enriquez?
7 MS. LEON-ENRIQUEZ: Your Honor, I did receive a
8 message on the phone and I have tried to contact
9 Mr. Lomayesva regarding that.
10 We did receive copies of CDs with interviews.
11 The problem I have is that because we use the same
12 transcriber, they won't give us the actual written
13 transcripts. So I don't know if the tribe can give us a
14 copy of the transcripts or if we're going to have to
15 figure out how to get those.
16 MR. LOMAYESVA: I have information on that.
17 THE COURT: All right.
18 MR. LOMAYESVA: My understanding is that
19 transcripts were made. They're in the process of being
20 corrected in the sense that they're going through them
21 and making any appropriate changes that have to be made
22 before they get certified. I've asked for them a number
23 of times from the police department but I don't have them
24 today.
25 We intended to cover that during the

1 deposition, since Detective Garcia is one of the ones
2 responsible for that. And as a result of the interview,
3 if we find that there is some basis to come back to court
4 and ask for something else, then we might be in a better
5 position at that point.
6 So I guess all I can say is that we have asked,
7 I've asked. I don't have them. I understand that
8 they're in the process, and opposing counsel can ask
9 directly of Detective Garcia tomorrow what's going on and
10 when they might be available. If they're not available
11 soon, then they can make an appropriate motion.
12 THE COURT: And the reason being -- can I get
13 this clear -- is that you go through the same
14 transcriber?
15 MS. LEON-ENRIQUEZ: Right, it's the same
16 transcriber. So I had called her to request a
17 transcription. She said I'd have to go through the
18 prosecutor's office since she had done their
19 transcription first.
20 Now, she is willing to retranscribe it.
21 Doesn't make any sense for her to get the CDs and have to
22 transcribe it all over again for us when she's already
23 done it.
24 MR. LOMAYESVA: Let me clarify. Our office did
25 not require or ask her to prepare a transcript. She's

1 responding to the police, not to the prosecutor's office.
2 If she had done it for us, I would have produced it. But
3 I'm not the one who sought to get the transcripts.
4 I've requested transcripts and was told they
5 were due by the 23rd. I still don't have them. I've
6 been asking. I talked to Mr. Garcia about it. He said
7 the preliminary copy of the transcript was sent to him
8 but he was reviewing it to correct for inaccuracies that
9 might have occurred during the interviews which he was
10 present at.
11 And my understanding is that once he returns
12 the corrections, then they will incorporate the
13 corrections and they will then produce the transcript.
14 So that's about as far as I know at this point.
15 MS. LEON-ENRIQUEZ: Your Honor, given the fact
16 that it seems that both the tribe and defense need these
17 transcripts and they're being hung up, that the
18 Court could order the police department to get that
19 information to us.
20 MR. LOMAYESVA: Your Honor, I'd ask to hold off
21 at least until after the interview. It might be totally
22 appropriate to ask for that and ask for it on an
23 expedited basis.
24 But, on the other hand, defense counsel might
25 be satisfied with the explanation for the untimeliness

1 given by Detective Garcia. I don't know. But I'd ask at
2 least you hold off on an order until after the interview.
3 THE COURT: Probably the only concern that I
4 have is the fact that the Court did give a deadline of
5 Wednesday, the 30th, in writing. And the interview, I
6 don't know if we can still keep that -- that will still
7 give us that extra time.
8 MR. LOMAYESVA: Your Honor, I guess it's
9 important for you to know that this is not withholding
10 information. They, in fact, have the interviews. They
11 have the recorded statements already in their possession
12 and they've probably already reviewed them. So this is
13 not like we're holding anything back. They have it
14 already.
15 What they don't have is a written transcript
16 they can look at, at this point, which is helpful because
17 sometimes you can look at stuff rather than hear it. But
18 they have the interview and they have the actual
19 statements that were made. So I'd still ask that you
20 hold off at least until after the interview at this
21 point, and it may be _____ I don't know.
22 THE COURT: As far as any deadline, the Court
23 just actually made that deadline because we're coming up
24 next week. It will be actually the 5th -- am I correct
25 -- of May.

1 MR. LOMAYESVA: You're correct.
2 THE COURT: Or May 6th is on a Tuesday. It's
3 always better sooner than later to obtain any disclosure,
4 especially when it's in regard to jury trials.
5 And if the parties -- actually I will hear any
6 -- or allow a motion if there is one after the interview,
7 after 3:00 o'clock on Thursday morning, by either party
8 with regard to any further disclosure issues. And this
9 is specific to the CD interviews, the taped interviews,
10 that the law enforcement has, or the police department.
11 The issue, though, is if the Court does send
12 out an order for the police department to have that
13 disclosed as soon as possible. We'll just have to go
14 from there as far as any issues, any other motions that
15 are based upon that not being available to the parties.
16 But as far as this, this was submitted or
17 received by defendant and tribe at the same time earlier
18 this month, the CDs?
19 MR. LOMAYESVA: The CDs have been disclosed for
20 quite a while already. I mean, and they can listen to
21 them and can hear what was said. It's not like they
22 don't know what's going on with the interviews. It's
23 just that transcripts are nicer to use when you're
24 actually trying to cite from them than the CDs. But we
25 have all the information already. We've made our

1 disclosure but don't have the transcripts. We've asked
2 for the transcripts.
3 I'd be happy to provide them. I've asked for
4 them. I've repeatedly asked for them, but that's the
5 explanation I got.
6 So, in terms of the cooperation of the
7 prosecutor's office, we've been attempting to do our part
8 in this matter by meeting the reasonable request of the
9 defendants.
10 MS. LEON-ENRIQUEZ: And, your Honor, we did
11 receive the CDs. I guess the basic issue is the fact
12 that because the tribe uses the same transcriber, that
13 issue comes up. She indicated that we'd have to go
14 through the tribe to be able to get it, which is kind of
15 difficult.
16 MR. LOMAYESVA: Well, I think the reason
17 they're holding off is because they want to make sure
18 that they're accurate, an accurate transcript of what
19 occurred during the interview.
20 And there are things that Detective Garcia had
21 seen or heard that, because of the different names that
22 are used, that the translator, who speaks primarily
23 English, can't understand and put as inaudible. So they
24 are trying to help her fill the gaps with the correct
25 spellings of things so that it wouldn't be inaudible and

1 would, in fact, show what was actually being said.
2 That's my understanding from the police as to why there's
3 a holdup.
4 That, and apparently Detective Garcia is out
5 sick this week and that clearly hasn't helped any matters
6 at all. I don't know if he was out sick last week, but
7 when I talked to him about interviews today, he was like,
8 hey, I'm out sick; do I really have to do this? I said,
9 "Yes, you've been ordered by the judge, so you need to do
10 this." So he's coming in.
11 THE COURT: At this time, regarding the
12 transcripts that were asked by both parties and I'm not
13 exactly sure why, even at this point, why that hasn't
14 been completed by now. Here we are one week from the --
15 a week and a day or so -- but a week from the jury trial
16 and that has not yet been received.
17 I'm not sure if law enforcement understands
18 that as much as the tribe is trying to do their job, that
19 law enforcement has some responsibility in following
20 through on cases. And even beyond the interviewing,
21 there are things that need to be completed in a timely
22 manner.
23 And at this time the Court is going to -- you
24 know, I may even set a deadline at this point only
25 because it's -- and I'm not sure how much either party is

1 going to rely on any of these transcripts, but it is
2 something that is in the hands of the police department,
3 which also in turn would be in the hands of the
4 prosecutor's office to put a fire under law enforcement
5 in order to get them to complete their job. And at this
6 point --
7 MR. LOMAYESVA: Your Honor, maybe put it on
8 Thursday by noon or 5:00 to get this out. But I would
9 like to make a record, though, that I have asked for
10 these things for quite a while now and I have not
11 received them.
12 So our office, you know, can only do so much.
13 Even though we may be responsible for what they do, we
14 don't have the ability to force them to do what they
15 don't do.
16 THE COURT: Well, at this point I am going to
17 make a deadline for that, and that will be May 1st, 2014,
18 for transcripts completed on the CD interviews, that
19 those transcripts being in the possession of Pascua Yaqui
20 Law Enforcement, that disclosure be completed or
21 submitted to the parties, specifically the tribe, so the
22 tribe can provide that to defense counsel by May 1st,
23 2014, and the time being at 12:00 noon on Thursday of
24 next week.
25 And if the tribe could then give a heavy hand.

1 You know, as much as the tribe says that the tribe has
2 attempted to obtain this information by request, what may
3 happen is that the tribe will have to document every
4 single request and have that submitted to the chief of
5 the law enforcement and/or others so that law enforcement
6 and those under the chief of police need to get their
7 work completed in a timely manner in order for the tribe
8 to do its job and in order for the defendant to have a
9 fair trial and a chance at getting the case completed the
10 way it should be in a timely manner.
11 MR. LOMAYESVA: The one thing I want to add,
12 though, is this is not a failure to disclose. We
13 disclosed --
14 THE COURT: No, and I'm not saying it's a
15 failure to disclose. It's information that should have
16 --
17 MR. LOMAYESVA: I mean, it's not openly
18 nondisclosure.
19 THE COURT: And I'm not holding anyone in
20 contempt. I'm just laying that down, that it should be
21 completed at an earlier time than how it is at this
22 point.
23 MR. LOMAYESVA: I understand.
24 MS. LEON-ENRIQUEZ: If I could ask --
25 THE COURT: Yes.

1 MS. LEON-ENRIQUEZ: Your Honor, is the Court
2 dismissing the public sexual indecency? I'd ask the
3 Court to remove any contact with minors. Mr. Molina does
4 have minor children that he hasn't been able to contact
5 because of the charges.
6 MR. LOMAYESVA: Your Honor, I would object.
7 And actually I'd ask that you, if you would, expedite the
8 hearing order so that -- I mean use the order to file a
9 special action on that issue. I believe it's a matter of
10 law.
11 I think this is an issue that the Court of
12 Appeals may or may not feel is appropriate and may or may
13 not uphold or not uphold. And if it doesn't uphold you,
14 I think it's appropriate to keep the _____ in place until
15 the Court of Appeals has either upheld or declined
16 jurisdiction of the action.
17 MS. LEON-ENRIQUEZ: Your Honor, if the count is
18 dismissed and he files a special action of the case in
19 this court, it has been dismissed, so we think it is
20 appropriate to do that.
21 MR. LOMAYESVA: Well, your Honor, the other
22 basis for that is that, even though that may have been
23 dismissed, the underlying cause of it is _____ trial
24 someone that's under the age of eighteen. And we think
25 that is sufficient basis to maintain no contact with

1 children.

2 So, even if that particular count has been been

3 dismissed, the underlying facts still exist; the

4 underlying bad behavior as alleged still exists. That's

5 a proper basis to maintain no contact.

6 THE COURT: So at this time the Court, having

7 heard from the parties regarding a motion to amend the

8 conditions of release in this matter, the Court finds

9 good cause to deny that motion to dismiss for the reason

10 that the tribe has included, that the alleged victim in

11 this matter is still a minor and that the Court will

12 remain with the previously ordered release conditions.

13 And then with regard to the Court's order, at

14 this time the Court will have this order ready for the

15 parties by 9:00 a.m. tomorrow morning. It may be earlier

16 than that, but the Court is going to have that ready for

17 the parties at 9:00 a.m. tomorrow morning.

18 MR. LOMAYESVA: Thank you, your Honor.

19 THE COURT: Court's adjourned.

20

21 * * *

22

23

24

25

1 C E R T I F I C A T E

2

3 I, Sue Baquet, a transcriber and non-certified

4 court reporter, do hereby certify that the foregoing

5 transcript was transcribed by me from an audio recording

6 and reduced to writing by me; that said transcript is a

7 true record of the recording transcribed to the best of

8 my ability.

9

10

11

12

13 Sue Baquet

14

15

16

17

18

19

20

21

22

23

24

25

1 IN THE PASCUA YAQUI TRIBAL COURT

2 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

3

4 PASCUA YAQUI TRIBE,) CASE NO. CR-14-196

5 Plaintiff,)

6 vs.)

7 SALOMON MOLINA,)

8 Defendant.)

9 ______________________________)

10

11

12

13 PRETRIAL CONFERENCE HEARING

14 APRIL 23, 2014

15

16

17 ORIGINAL

18

19 TRANSCRIBED FROM AUDIO RECORDING

20

21

22 ____

23 Kathy Fink & Associates

24 2819 E. 22nd Street
Tucson, Arizona 85713
520.624.8644

25

1 BEFORE: HON. MARGARET FLORES

2

3 APPEARANCES: FREDERICK LOMAYESVA, ESQ.
Deputy Prosecutor

4

PATRICIA LEON-ENRIQUEZ, ESQ.
5 For the Defendant

6 ALSO PRESENT: JESSICA TURK, ESQ.

7 DEFENDANT SALOMON MOLINA

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

I N D E X

	PAGE
Discussion re. Motion to Dismiss	4
Ruling re. Deft's Jury Instruction No. 9	20
Ruling re. Deft's Jury Instruction No. 12	23
Ruling re. Deft's Jury Instruction No. 15	39
Ruling re. Deft's Jury Instruction No. 20	47
Ruling re. Deft's Jury Instruction No. 21	56
Ruling re. Deft's Jury Instruction No. 23	67
Ruling re. Deft's Request for Disclosure	76
Ruling re. Amended Complaint	79

1 P R O C E E D I N G S

2

3 THE COURT: Good morning. Pascua Yaqui Tribal

4 Court is now in session in the matter of the Pascua Yaqui

5 Tribe versus Salomon Molina, Docket No. CR-14-196.

6 Today's date is April 23rd, 2014. And this is

7 a scheduled pretrial conference hearing.

8 Appearing on behalf of the tribe is

9 Mr. Lomayesva. The defendant is present and appears with

10 Court-appointed counsel, Ms. Patricia Leon-Enriquez.

11 At this time, are the parties ready to proceed

12 with the pretrial conference?

13 MR. LOMAYESVA: Yes, Your Honor.

14 MS. LEON-ENRIQUEZ: We are, your Honor. The

15 only question I have, your Honor, is the fact that with

16 the pretrial conference, I believe this Court indicated

17 that we would be addressing the motion to dismiss?

18 THE COURT: Yes. Is the defendant ready to

19 have that be addressed today?

20 MS. LEON-ENRIQUEZ: Actually we were just

21 talking about it. The problem is that I've just received

22 the response. I would also like to have the opportunity

23 to reply.

24 THE COURT: That's what I thought about as I

25 was reviewing that this morning. But I wanted to have

1 the opportunity to speak with both parties today on that
2 matter. So, before we proceed, first let me ask,
3 Ms. Leon-Enriquez, if you waive the reading of your
4 client's rights.
5 MS. LEON-ENRIQUEZ: Yes.
6 THE COURT: With that on the record as a
7 request, does the tribe have any objection?
8 MR. LOMAYESVA: Let me make sure I understand
9 what the question is.
10 THE COURT: All right.
11 MR. LOMAYESVA: Is the request to put off the
12 hearing on the motion to dismiss so that she has an
13 opportunity to file a reply?
14 MS. LEON-ENRIQUEZ: Yes.
15 MR. LOMAYESVA: All right. Now I understand.
16 Your Honor, I guess I will object. We both knew
17 that there was going to be simultaneous filing of
18 pleadings and I was ordered to file my response by
19 yesterday, which I did do. And we both knew that today's
20 date was going to be the date, so we were both put on
21 notice and we were both offered today. We have
22 expectation we were going to hear the motion to dismiss.
23 Frankly, if we're going to do that, if you
24 decide in favor of the motion to dismiss, then there's
25 really no need for the pretrial conference because,

1 otherwise, jury instructions, the motion in limine,
2 everything else, will be moot because there will be no
3 trial.
4 And I don't object if you give her some time,
5 like fifteen minutes, to review those documents. And, to
6 be fair to opposing counsel, what happened was we filed
7 the response yesterday. The staff filed around 4:00
8 o'clock. The response was not provided back to the
9 tribe, apparently, according to our staff, until this
10 morning, at which point we then distributed the response
11 to the defendant. So she just received the response
12 before this hearing.
13 So if she wants some time to review the
14 response, I think that would be appropriate to give her
15 some time. But I think today's date was the expectation.
16 We both knew we were going to hear the motion to dismiss.
17 I would like to hear this because if we don't hear it and
18 go through the other items, we basically will be doing it
19 as a moot issue if you decide in favor of the motion to
20 dismiss. However, I am confident, after reviewing the
21 law, that you won't.
22 THE COURT: Ms. Leon-Enriquez?
23 MS. LEON-ENRIQUEZ: Your Honor, as the tribe
24 indicated, we were under the understanding that the Court
25 -- actually there wasn't anything really discussed as far

1 as the Court actually hearing the issues on the motion.

2 The defendant is entitled to a reply, according

3 to the code. To expect the defendant to read through the

4 tribe's seven-page motion and be able to respond to it

5 immediately, I think is basically unfair. We're not

6 asking for a lot of time, but we would need some time to

7 file a reply.

8 MR. LOMAYESVA: Well, your Honor, just to point

9 out, the tribal order of April 11th says all motions and

10 disclosure matters shall be addressed at the pretrial

11 hearing on April 23rd, 2014, 9:00 o'clock. And the

12 motion to dismiss is an outstanding motion, so there was

13 an expectation that this motion will be decided.

14 If you do choose to grant a motion to continue,

15 my schedule is as follows. I'm going to be out of the

16 office the remainder of today, Thursday, and Friday. Our

17 trial starts when? The following week. I didn't bring

18 my schedule but I probably can make time next week to

19 hear a motion to dismiss. I then suggest that we

20 reschedule the entirety of the pretrial conference.

21 MS. LEON-ENRIQUEZ: Your Honor, if I may, with

22 regard to that, if the Court does grant us the motion to

23 file a reply, as far as the motion in limine, some of the

24 issues in the motion wouldn't be affected.

25 I understand that some of the jury instructions

1 would if the Court decided to dismiss some of the
2 charges, but those could just be eliminated if necessary.
3 THE COURT: And so, Ms. Leon-Enriquez, are you
4 then -- well, your request to allow the defendant to
5 reply, what is your time frame that you believe that you
6 may be able to submit a reply?
7 MS. LEON-ENRIQUEZ: I could do it by Friday.
8 THE COURT: So that, along with that, do you
9 feel that you can proceed with the motion in limine and
10 other items, or do you agree with the tribe if the Court
11 does grant that request for you to reply, then continue
12 the whole pretrial conference so that all matters can be
13 addressed at a later date, most likely early next week?
14 MS. LEON-ENRIQUEZ: Your Honor, I believe that
15 we can proceed with the pretrial conference as far as the
16 jury instructions, the motion in limine, and so on,
17 because if the Court were to grant the motion to dismiss
18 the charges, it would just be a matter of eliminating
19 them from the documents.
20 THE COURT: So at this time, the Court having
21 heard from the parties regarding the motion to dismiss,
22 that motion to dismiss having been submitted by defense
23 counsel, defendant, through counsel, prior to April 10th
24 -- this was one week before the tribal office's closing
25 down -- the tribe having then submitted their response to

1 that motion and the Court usually allowing some time for
2 reply, however, due to the time frame that the Court was
3 looking at, the Court did have the tribe submit within
4 their time frame, usually around ten days.
5 However, the jury trial was looming and there
6 was -- prior to the pretrial conference, there was no
7 other time allowable to have defendant submit a reply if
8 the Court were to include it in the order. So that is
9 the reason why the Court said the Court would address the
10 motions at the time of the pretrial conference today.
11 The Court will at this time grant the extra
12 couple of days for defendant to reply to that motion --
13 or the response to defendant's motion to dismiss.
14 As far as the remaining items that the Court
15 can address today, the Court will be able to address
16 those, and as far as what is included in the pretrial
17 conference that was addressing the jury instructions, the
18 voir dire script, the impanelment, criminal impanelment,
19 any juror questionnaires that have been submitted by the
20 parties. And I do believe that there now is the motion
21 in limine. So the Court can address what it can as far
22 as anything outside of that motion to dismiss.
23 I know, within that motion to dismiss, the
24 tribe has submitted the response. But at this point, the
25 Court is not going to address that as of yet, since

1 defendant is going to be allowed some time to reply.

2 On the pretrial conference, then, the Court

3 will set another date to address that motion to dismiss.

4 We have the 29th but I have a meeting in the morning.

5 Do we have time on Monday?

6 UNIDENTIFIED SPEAKER: Monday, 9:00 o'clock in

7 the morning.

8 MR. LOMAYESVA: Monday at 9:00 o'clock, because

9 if she files her reply on Friday, the first time I see it

10 is Monday morning, so I would ask for Monday afternoon or

11 Tuesday.

12 MS. LEON-ENRIQUEZ: Your Honor, if the tribe

13 would be willing, I could email a copy to him.

14 THE COURT: Email?

15 MR. LOMAYESVA: I'd just ask that we do it

16 Monday afternoon or Tuesday. I guess an email would

17 assist in the process.

18 THE COURT: It does look like there's an

19 afternoon time at 2:00 p.m. to address this matter before

20 a 3:30 hearing that I have.

21 MR. LOMAYESVA: We're going to need more than

22 that. If we're going to do arguments on the motion to

23 dismiss, I think it will take at least an hour.

24 THE COURT: Well, from 2:00 to 3:30, there's an

25 hour and a half.

1 MR. LOMAYESVA: I'm sorry, I thought you said
2 half an hour.
3 THE COURT: No, 2:00 to 3:30.
4 MS. LEON-ENRIQUEZ: On Monday?
5 THE COURT: Yes, Monday, April 28th, 2014, at
6 3:30 (sic), the Court will be addressing the motion to
7 dismiss in this matter.
8 And the Court will then also order that
9 defendant submit a reply to the tribe's response to
10 defendant's motion to dismiss. That shall be submitted
11 to this Court by close of business on April 25th. And
12 counsel did indicate that defense counsel would be able
13 to email that reply to the tribe, so that will allow some
14 time to review that reply, as far as the tribe.
15 So in this matter, then, as far as what the
16 Court had ordered to be submitted prior to today's
17 hearing, that was any voir dire script that would be
18 proposed and juror questionnaires and jury instructions.
19 There's also a motion in limine.
20 The tribe, have you reviewed the defendant's
21 documentation for impanelment and voir dire script?
22 MR. LOMAYESVA: Yes, your Honor. I think I can
23 make this a speedier process, too. In terms of the
24 defendant's supplemental disclosure, I have no objection.
25 THE COURT: All right. This is a supplemental

1 disclosure dated?

2 MR. LOMAYESVA: April 16th.

3 THE COURT: All right.

4 MR. LOMAYESVA: And in terms of the defendant's

5 motion in limine, I have no objection except as to No. 1,

6 and I don't think it's really an objection. I don't

7 object to the inclusion of the introduction of hearsay

8 unless there's a valid hearsay objection. But, other

9 than that, I don't have any objection to that.

10 And then there was also the questionnaire. I

11 don't object to the questionnaire. And the voir dire

12 script, all right. I have no objection to the proposed

13 criminal impanelment script.

14 But I do have several objections to the

15 proposed jury instructions and I have my own jury

16 instructions. But I think, in going over those, we might

17 be able to come to some agreements on the jury

18 instructions.

19 What I would propose is that we review the

20 defendant's jury instructions because my objections are

21 few and I think we can basically use the defendant's jury

22 instructions absent my objections to the jury

23 instructions.

24 THE COURT: So, then, for the record, I'd like

25 to see if I'm clear on this. With defendant's

1 supplemental disclosure that was submitted April 16th,
2 2014, there were a disclosure of three witnesses,
3 character witnesses, it looks like, that were submitted,
4 three names that the tribe has no objection to including
5 as witnesses?
6 MR. LOMAYESVA: That's correct.
7 THE COURT: And then on the motion in limine,
8 defendant's motion in limine dated April 22nd, there is
9 no objection from the tribe to the nine items that
10 defendant has included in that motion in limine except
11 for any hearsay exceptions for Item No. 1?
12 MR. LOMAYESVA: That's correct.
13 THE COURT: Now on the jury questionnaire,
14 defendant's juror questionnaire submitted to this Court
15 on April 22nd, 2014, there are no objections from the
16 tribe to using this juror questionnaire submitted by
17 defendant?
18 MR. LOMAYESVA: That's correct.
19 THE COURT: And criminal impanelment and voir
20 dire script submitted by defendant April 22nd, 2014,
21 there is no objection from the tribe to using this
22 criminal impanelment and voir dire script from the
23 defendant?
24 MR. LOMAYESVA: That's correct.
25 THE COURT: Now for jury instructions, I see

1 that the defendant submitted, along with all the other
2 documentation April 22nd, 2014, defendant's proposed jury
3 instructions. And the tribe has submitted on the same
4 date, April 22nd, the notice of filing jury instructions.
5 And the tribe has indicated that there are some
6 objections, so we should go through this. Are the
7 parties ready to proceed going through the jury
8 instructions today?
9 MR. LOMAYESVA: Yes, your Honor.
10 MS. LEON-ENRIQUEZ: Yes.
11 THE COURT: All right. And, Ms. Leon-Enriquez,
12 is there anything from the defendant regarding what the
13 Court has just reviewed?
14 MS. LEON-ENRIQUEZ: No, your Honor.
15 THE COURT: So we will now go through the
16 defendant's proposed jury instructions first; and then
17 after that, if need be, we'll go through what the tribe
18 has submitted as jury instructions.
19 MR. LOMAYESVA: Your Honor, I have no
20 objections to defendant's jury instructions 1 through 8.
21 Jury instruction No. 9 states -- I have an
22 objection to the extent that I've found that the
23 instruction is confusing. They put all three mental
24 states in the same instruction.
25 I think those are good statements of law, but I

1 think I would like to have them broken up into separate
2 mental states, like one instruction saying intentional,
3 one instruction saying recklessly, and one instruction
4 saying knowingly. I actually think those are better
5 instructions than the instructions I did based on Arizona
6 law, because these come from the code.
7 So I'm okay with them. I just want to see them
8 broken up into three instructions.
9 THE COURT: Ms. Leon-Enriquez?
10 MS. LEON-ENRIQUEZ: Your Honor, just in
11 response to that, the fact that these are -- the way it's
12 titled culpable mental states, it does include the three
13 of them as they are written in the code. I don't quite
14 understand what the intent would be in having them
15 separated.
16 MR. LOMAYESVA: I think the reason is that it
17 would be easier for the jury to digest and understand the
18 culpable states. I think it's easier just to have an
19 instruction like 9, intentional, and then the definition,
20 then a separate sentence, then a knowingly instruction,
21 and another one saying recklessly. I don't think it's
22 that difficult to do. I think you can use the exact
23 verbiage that's being used by the defendant.
24 I think it would be easier for the jury to
25 digest, understand, and apply that. And that's my

1 primary reason for why I think they should be broken up.
2 MS. LEON-ENRIQUEZ: Part of the reason that I
3 would be opposed to that is given the fact that some of
4 the charges require both mental states and to have
5 separate locations, it would be more confusing for the
6 jury.
7 MR. LOMAYESVA: I would actually think quite
8 the opposite. I think it would be easier. You're
9 absolutely right that if there are two mental states,
10 that makes it all the more important for the jury to be
11 able to understand what each mental state means.
12 And I think, from a lay perspective, for the
13 jury to see all these, if they saw a clear definition of
14 each one separately, they would be quickly digested. I
15 think it would be helpful for the jury to see and
16 understand and apply the law as it stands.
17 I actually have no objection to the actual
18 verbiage in the instruction because I think they're
19 accurate statements of law. I just think it would be
20 more appropriate to break them up. And I did so in my
21 instructions, but my instructions are based on Arizona
22 law.
23 I think it's appropriate to adopt the
24 defendant's verbiage, but I still think it's more
25 appropriate to break it up. I think it's easier for the

1 jury to take a look at that and understand it and then
2 apply it. And the whole point of jury instructions is to
3 get this to them, to have the jury apply the facts as
4 they see it to the law to render a decision in this case.
5 MS. LEON-ENRIQUEZ: Your Honor, part of the
6 reason that I have the objection I have is because I'm
7 not sure how the jurors actually get the documents, if
8 they're all the pages.
9 If all the culpable mental states are on one
10 page, it's easier for them than to have to shuffle around
11 paperwork to find what each of these means. I think it's
12 a lot easier for them if they're looking for a certain
13 mental state.
14 As I mentioned, in some of the charges, they
15 require different mental states within the same charge.
16 It's easier where they have it all in one place as
17 opposed to having to shuffle through different documents
18 to figure out what that one element is.
19 MR. LOMAYESVA: I disagree. They get the whole
20 package. They see the whole thing. I don't know if it's
21 stuck together or bound together, but it's no different
22 than having multiple instructions for multiple crimes,
23 which they will have here.
24 So there is absolutely no difference in my mind
25 having one sheet of -- well, I do have something

1 different in my mind. I think it's easier for them to
2 digest a shorter sentence or a shorter paragraph as
3 opposed to having to look through this whole thing.
4 MS. LEON-ENRIQUEZ: Part of the problem with
5 that, though, your Honor, is that by having them all
6 together, they can actually see what each one means and
7 make comparisons and see the differences between the
8 three.
9 THE COURT: All right. The source is the tribe
10 code, I see --
11 MR. LOMAYESVA: Yeah, but that's not my
12 objection. My objection was it's easier for them to see
13 it on three separate pages as opposed to one large one.
14 My objection is not that these are not
15 accurately written; I think they're accurately written.
16 It's just easier for them to digest it if it's on three
17 pages as opposed to one, much like I did in my
18 instruction.
19 I put intentional in one, knowing in another,
20 and reckless in a different one. I think mine are easier
21 to review and more quickly done than they are by looking
22 at this whole thing.
23 MS. LEON-ENRIQUEZ: One of the other problems I
24 see in separating them is that you have three different
25 culpable state instructions.

1 MR. LOMAYESVA: That's the law. There are
2 three separate states.
3 MS. LEON-ENRIQUEZ: But I can see that being
4 confusing. If the jurors are looking at one thing, you
5 know, these are the mental states, and it only states
6 one, they can easily look at other instructions.
7 THE COURT: In looking at it and taking your
8 advice, Mr. Lomayesva, and looking at the jury
9 instructions that you submitted, jury instruction No. 9,
10 just offhand, I'm looking at it right at the top, "for a
11 lay person, intentional." The next page, knowingly, next
12 page recklessly.
13 That actually does not -- I see it easier read
14 and understandable as I look at jury instruction No. 9,
15 culpable mental states, with all of them on the same
16 page, looking at them. I don't know if, you know, the
17 average lay person looking at this would be able to see
18 that they're in separate paragraphs; they're separate
19 sentences, that they would be able to view them.
20 I don't know if it needs to be bolded. That
21 would add a little bit extra to "intentionally" being
22 bolded, "knowingly" being bolded, recklessly. They could
23 distinguish them separately and would be able to digest
24 them as they are there and having them on the same page
25 with the header "Culpable mental states."

1 I think that it's understandable to me. And
2 looking at it in the perspective of an average juror, it
3 seems that that is sufficient for me.
4 MR. LOMAYESVA: I guess I would agree, then, if
5 we could bold the first letter to make sure that they
6 clearly understand the distinction between each of the
7 mental states involved. So perhaps it's a good solution.
8 THE COURT: All right. Any objections to that?
9 MS. LEON-ENRIQUEZ: No.
10 MR. LOMAYESVA: I have no objections to 10 and
11 11. I do have an objection to No. 12.
12 THE COURT: What was that, No. 12?
13 MR. LOMAYESVA: I have an objection to No. 12.
14 The reason why is I think it's excessive. The burden of
15 proof here is beyond a reasonable doubt. It's not clear
16 and convincing; it's not a preponderance of the evidence.
17 Also, the burden of proof is also gone over in
18 instruction No. 11 and I think it's excessive. And it
19 has a potential to confuse the jury by putting forward
20 other standards of proof that are not at issue in this
21 case. So I would object to No. 12 in its entirety. I
22 think it's sufficient to use No. 11, which is the burden
23 of proof upon the tribe.
24 THE COURT: Ms. Leon-Enriquez?
25 MS. LEON-ENRIQUEZ: Your Honor, I believe that

1 this instruction is actually necessary because it
2 instructs the jury so that they can actually make a
3 comparison as to what reasonable doubt really means. It
4 basically is as to the mental states, so they are able to
5 make a comparison as to the burden of the tribe.
6 MR. LOMAYESVA: Your Honor, this instruction
7 has a potential for being potentially prejudicial,
8 frankly. I mean, we're required to prove the case beyond
9 a reasonable doubt. There's no question about it. But
10 to pound it into the head of the jury over and over is an
11 attempt to create an uneven playing field.
12 The tribe is not seeking an advantage. All
13 we're trying to seek is a fair playing field in which to
14 prove our case. Either we can prove it or we can't prove
15 it. Either we prove it by the burden of proof of
16 reasonable doubt or we don't.
17 And I think No. 11 is adequate. We don't need
18 to go into it over again with No. 12 and hit them over
19 the head repeatedly, because that's almost suggesting
20 that the tribe may not have a case or there's an
21 excessively harder burden than beyond a reasonable doubt.
22 I would object on the basis that it's
23 prejudicial to the tribe. I would object on the basis
24 that it's duplicative of No. 11 and that it's already
25 covered and excessive.

1 MS. LEON-ENRIQUEZ: Your Honor, all that this
2 instruction does is it explains the different burdens of
3 proof. I don't see where the prejudice is.
4 The whole purpose of the jury instruction is so
5 that the jury can understand what it is that's required
6 for them, for them to be able to see that it's not a
7 preponderance of the evidence or it's not clear and
8 convincing, but to be able to tell the difference between
9 them and understand them and know the comparison of what
10 it is that they're looking for.
11 I don't understand why the tribe says it's
12 prejudicial to them. This is the burden that they have.
13 MR. LOMAYESVA: Well, we've already said in
14 instruction No. 11, burden of proof, it tells the jury,
15 this is the burden of proof.
16 Then she does it again in No. 12, and then goes
17 into preponderance of the evidence and clear and
18 convincing evidence. I think those standards are
19 nonapplicable in this case and will only have a tendency
20 to confuse the jury -- oh, what is preponderance of the
21 evidence, clear and convincing?
22 I have a feeling that that would just add to
23 any potential confusion, plus defendant's just simply
24 trying to reiterate the burden of proof over and over
25 again, which I have no doubt that they need to do, but it

1 is our burden of proof, beyond a reasonable doubt. I
2 think it's an appropriate standard. No. 11 is
3 appropriate but 12 is not.
4 I don't think No. 12 is an appropriate
5 standard. I think it's cumulative. It adds things that
6 aren't part of the case and it contributes to jury
7 confusion. And I think it's also prejudicial to the
8 tribe's position.
9 MS. LEON-ENRIQUEZ: Your Honor, again, I
10 disagree. This instruction is taken from a state case,
11 which is stated at the bottom of the instruction. This
12 actually gives the jurors more guidance as far as what it
13 is that they need to be looking for.
14 I don't think that it's confusing or anything.
15 It actually sets it out for them to know what it is that
16 they need to be looking for. They need an actual
17 definition of what all this means.
18 MR. LOMAYESVA: They have it in No. 11. I
19 mean, it's like saying the bowl's pretty, but look over
20 here at the red bowl. I think it's distracting and
21 confusing. I don't think there's any need for it. They
22 adequately cover the issue in No. 11.
23 THE COURT: At this time the Court is going to
24 grant the tribe's objection to that jury instruction, No.
25 12, and as the burden of proof is the definition and

1 explanation is included in jury instruction No. 11 --
2 although the Court does not believe, as the tribe does,
3 with regard to its being prejudicial -- it is cumulative
4 in regards to what the Court sees as other information
5 that does not have to be proven by the tribe as far as
6 other standards of proof.
7 So jury instruction No. 12 will not be included
8 in the jury instructions as far as defendant's jury
9 instructions.
10 How about 13?
11 MR. LOMAYESVA: There's no objection to 13 or
12 14.
13 The tribe has an objection to No. 15,
14 reasonable doubt. It's essentially the same basis as the
15 previous objection. Reasonable doubt is defined
16 separately here, but it's previously defined in jury
17 instruction No. 11, the second paragraph. So basically
18 we're getting the same definition over and over again in
19 No. 15 as we did in No. 11. And, as I said before, it's
20 duplicative. It's excessive and not necessary.
21 THE COURT: Ms. Leon-Enriquez?
22 MS. LEON-ENRIQUEZ: Your Honor, this is just an
23 explanation of what the burden of proof is. I don't --
24 MR. LOMAYESVA: I agree, that's exactly what it
25 is. But that's exactly what it was in jury instruction

1 No. 11, second paragraph. They're both attempts to
2 define reasonable doubt. That's why I said it's
3 cumulative and excessive.
4 But she is accurate; it is the definition of
5 reasonable doubt. She also put it in No. 11 in the
6 second paragraph. So why are we doing it twice? And I
7 would object because it is excessive.
8 THE COURT: The jury instructions No. 11 and
9 No. 15, the second paragraph of 11, is that verbatim or
10 is there something different about it?
11 MS. LEON-ENRIQUEZ: No --
12 THE COURT: Looks like there's something
13 different. So it is different, I can see that.
14 MR. LOMAYESVA: I guess I would think this. I
15 think it covers the same ground over and over again. And
16 it changes our -- they're not substantial differences;
17 they essentially cover the same ground and they are
18 essentially the same instruction.
19 What I would say is either take out the
20 paragraph 2 in No. 11 or take out No. 15. I think they
21 basically cover the same ground. If there's one
22 preferable, I'm open to either one. But I think to have
23 both of them is excessive.
24 MS. LEON-ENRIQUEZ: I just think it's
25 explanatory.

1 THE COURT: Let me hear Ms. Leon-Enriquez and
2 then I will hear from the tribe. Go ahead.
3 MS. LEON-ENRIQUEZ: Just that this is basically
4 just an explanation. As I said before, the whole purpose
5 of having the jury instructions is so that the jurors can
6 actually understand all these legal terms that are being
7 thrown about in the courtroom.
8 With regards to burden of proof and reasonable
9 doubt, these are legal concepts in the system. It is
10 something that the prosecutor has to prove in order to
11 convict Mr. Molina. I think it's central to the jurors
12 being able to understand those concepts.
13 MR. LOMAYESVA: I have no disagreement that
14 these are essential concepts. I'm just saying either No.
15 11 explains it or it doesn't explain it. If it doesn't
16 explain it, then we should get rid of the second
17 paragraph of No. 11 and use No. 15, or take out No. 15
18 because it's saying the same thing, maybe in slightly
19 different words, but it's pretty much the same
20 instruction.
21 So -- and I agree that the whole point of this
22 is to make the law clear to a jury so that they can apply
23 it to the evidence that they find convincing. But either
24 No. 11 is readable and understandable and on target, or
25 it's not. And if that's the case, then it's the fault of

1 paragraph 2 of No. 11, and No. 15 explains it better.

2 I have no objection to leaving 15 in if we took

3 out paragraph 2 in No. 11, or if we just simply took out

4 No. 15. I think, in that case, they won't be duplicated,

5 if we do either one of the two.

6 MS. LEON-ENRIQUEZ: But I still think it's two

7 different things, your Honor. One is talking about the

8 burden of proof, the burden that the tribe has. And the

9 jury instruction 15 is basically just explaining what

10 reasonable doubt is. So it's talking about two separate

11 things, one of them being an explanation of those two

12 words.

13 MR. LOMAYESVA: As I read the second paragraph,

14 it looks like it's trying to explain reasonable doubt.

15 "Proof beyond a reasonable doubt is" -- that means it's a

16 definition -- "is proof that means you are firmly

17 convinced." It goes on. So that's the second paragraph.

18 What she's attempted to do is explain what

19 proof beyond a reasonable doubt means. I have no

20 objection to that idea because that's an essential part

21 of the case and bears on the trial. But I do object to

22 saying it over and over again in the instructions.

23 THE COURT: All right. So if I were an average

24 juror looking at these jury instructions, if they were to

25 be these, instruction No. 11, burden of proof, it

1 explains the burden of proof, the tribe having the burden
2 of proving the defendant guilty beyond a reasonable
3 doubt.
4 Second paragraph includes proof beyond a
5 reasonable doubt, a little bit more of an explanation of
6 reasonable doubt. Then you go to -- which we will now
7 have to renumber -- the next jury instruction, evidence
8 of any kind. The next jury instruction, direct and
9 circumstantial, and then to what is now jury instruction
10 No. 15, reasonable doubt.
11 And in looking at that, how is that different,
12 or would I think of it as an explanation of reasonable
13 doubt or another jury instruction with reasonable doubt,
14 as it's titled, or a caption, and seeing it as a little
15 bit of a variation from the jury instruction No. 11?
16 MS. LEON-ENRIQUEZ: One of them -- this jury
17 instruction is talking about what the burden is. And
18 instruction 15 is basically just defining reasonable
19 doubt, that one section. That could be moved to where
20 it's maybe 12 and closer to the tribe's burden, if that
21 would make it clear.
22 MR. LOMAYESVA: That's not exactly correct. I
23 mean, burden of proof goes over the tribe's burden. This
24 is what we're required to prove. No objection.
25 Then it goes on to explain beyond a reasonable

1 doubt is proof. And then it goes on.

2 And then No. 15 is another definition of

3 reasonable doubt. And they are significantly different.

4 Then that's a separate definition because then

5 you're defining it in two distinct different ways. So if

6 they're distinctly different definitions of reasonable

7 doubt, that's problematic because then it's confusing to

8 everybody, including the lawyers.

9 If it's the same, then it's duplicative.

10 Either way, No. 15 is objectionable unless you take out

11 paragraph 2 of No. 11.

12 THE COURT: The citation on jury instruction

13 No. 11, that's standard from RAJI?

14 MS. LEON-ENRIQUEZ: Yes, your Honor.

15 THE COURT: And so where did the explanation of

16 reasonable doubt come from on instruction No. 15?

17 MS. LEON-ENRIQUEZ: I believe that's an

18 instruction that's been given in this court. I received

19 it from here.

20 MR. LOMAYESVA: I don't know which is the right

21 definition. I mean, is it the second paragraph on No. 11

22 or is it No. 15? I guess that's what the question then

23 becomes, as a matter of law.

24 THE COURT: I know these are defendant's jury

25 instructions, Ms. Leon-Enriquez, because on this,

1 specifically paragraph No. 2 of No. 11 and instruction
2 No. 15 ...
3 MR. LOMAYESVA: Your Honor?
4 THE COURT: With regard to that, is there a
5 preference defendant may have? Because the RAJI is the
6 two paragraphs. The reasonable doubt that's been used by
7 this Court, either we use one or the other, how I'm
8 seeing it as far as reasonable doubt.
9 It's included in No. 11 and having that again
10 on No. 15 does seem to me it would be cumulative for a
11 jury to look at that and, even though it does have
12 similar language, it's not exactly the same.
13 So, on No. 15, if the Court were to not accept
14 instruction No. 15, would there be any objection to
15 having that replace paragraph No. 2?
16 MR. LOMAYESVA: You mean use No. 15 and replace
17 it with the second paragraph of No. 11?
18 THE COURT: That's your suggestion,
19 Mr. Lomayesva? I was just asking if that --
20 MR. LOMAYESVA: I would not object to that.
21 THE COURT: Or is it simply best to leave the
22 jury instruction as RAJI has it on No. 11?
23 MS. LEON-ENRIQUEZ: If I may just have a moment
24 here?
25 THE COURT: Yes.

1 (Pause noted)

2

3 MS. LEON-ENRIQUEZ: Your Honor, just in

4 speaking to Ms. Turk here, my understanding is there

5 actually is a RAJI reasonable doubt instruction. I would

6 ask that the Court allow us to submit that.

7 THE COURT: Do you have that with you right

8 now?

9 MR. LOMAYESVA: Your Honor, the deadline was

10 yesterday. I don't know what it says. I mean, we're

11 here to decide these things.

12 You didn't continue the pretrial conference, so

13 I'd like to just go forward with what we have here today

14 and not add supplemental pleadings. Otherwise, I would

15 like to supplement my pleadings, as well. I've got

16 several things that I wouldn't mind doing but I've not

17 done them because I didn't do them by yesterday.

18 MS. LEON-ENRIQUEZ: Your Honor, we did submit

19 it but we have a reasonable doubt here we want to clarify

20 since the tribe is objecting to it.

21 THE COURT: Let me hear from one at a time.

22 Ms. Leon-Enriquez, go ahead.

23 MS. LEON-ENRIQUEZ: The tribe said that we

24 shouldn't be able to submit anything. We did submit it

25 yesterday but since they're objecting and want more

1 clarification, we would like to include the RAJI part of
2 the reasonable doubt instruction.
3 MR. LOMAYESVA: Your Honor, defendant misstates
4 my objection. My objection wasn't clarification. My
5 objection was that it's duplicative and excessive, that
6 it's already covered in jury instruction No. 11.
7 And then, after noticing that the two
8 definitions are different, one tribal, one state, there
9 is an issue as to which is the correct definition of
10 reasonable doubt, because the second paragraph of No. 11
11 clearly is a definition of reasonable doubt.
12 So, if that's the case, you suggested that we
13 put her No. 15 as a second paragraph in No. 11. That
14 actually might be a more accurate statement of tribal law
15 if that's what the tribe uses as its definition of
16 reasonable doubt, regardless of what the state says and
17 the RAJIs. So that would be an appropriate outcome.
18 But I do -- my objection still stands that it's
19 duplicative and excessive. Now, particularly
20 problematic, it contains two differing definitions of
21 reasonable doubt between No. 11 and No. 15. We should
22 choose one and not both, because we're setting ourselves
23 up for a conflict within the law even in our
24 instructions. And I don't think the RAJI could help us
25 at all with conflict.

1 MS. LEON-ENRIQUEZ: Your Honor, if there is a
2 RAJI instruction, then Mr. Molina would be entitled to
3 use that. The fact that the state uses both burden of
4 proof and reasonable doubt doesn't make it bad to use it
5 because the tribe hasn't used the RAJI here.
6 If we're able to give the Court a better
7 instruction, I don't see why it would be a problem.
8 MR. LOMAYESVA: I guess the problem is that
9 tribal law is more specific on the point of what is
10 reasonable doubt. We should probably use the tribal
11 version rather than the RAJI version because state law
12 may differ from tribal law in some respects, and that's
13 why I'm saying this.
14 MS. LEON-ENRIQUEZ: Just to clarify, you've
15 never said this actually came from the tribal court.
16 This is just something that has been used by the Courts
17 here, so it's not tribal code versus Arizona law.
18 MR. LOMAYESVA: Then why are we using it? I
19 mean, why are we putting this in there when you already
20 have the definition of reasonable doubt?
21 We're just confusing the matter by putting in a
22 second reasonable doubt instruction that is different
23 from the one that we're using in No. 11. That makes no
24 sense and it sets up conflict within our own
25 instructions, which is what we're trying to avoid.

1 MS. LEON-ENRIQUEZ: The problem, your Honor, is
2 that this is something that the Court was using. If RAJI
3 has an instruction for both burden of proof and
4 reasonable doubt, I don't see where they would be
5 confusing. They're separate for a reason.
6 THE COURT: And I'm not sure if you know
7 offhand if that RAJI definition or explanation of
8 reasonable doubt, if that is -- if you have reviewed that
9 at all and if that is any more simple or explanatory than
10 what you have in instruction No. 15.
11 MS. LEON-ENRIQUEZ: Actually, your Honor, I
12 don't know if --
13 MR. LOMAYESVA: Your Honor, I object. First of
14 all, we were supposed to get all this stuff in by
15 yesterday. And they say that they didn't get the RAJI
16 instruction in yesterday. I got my stuff in. She got
17 what she thought she was supposed to get in. And now
18 we're adding stuff.
19 If that's the case, I want to get in some stuff
20 I may have after I see whatever they're going to produce.
21 What else is she going to bring in? Is she going to
22 bring in stuff on Friday or Monday or Tuesday? It's got
23 to end somewhere.
24 MS. LEON-ENRIQUEZ: Your Honor, this
25 instruction was given --

1 THE COURT: Let me say this. I'm reviewing
2 this and if I request to have that RAJI in, then that's
3 what we'll do. So I'm reviewing this now prior to any
4 other time or the only other time we're going to come
5 back before the jury trial is next Monday to address the
6 motion to dismiss.
7 So at this time I'm trying to review what has
8 been submitted. And if there's anything else that can
9 help with the jurors, then that's what I would like to
10 see. And I would allow the tribe the same if the tribe
11 were to explain that maybe there's something from what
12 you've submitted that would be a little more explanatory,
13 then the Court will take that into consideration, as
14 well.
15 We haven't gone to your jury instructions. So
16 at this time, even if I get to see that, if the tribe
17 gets to see that today -- I don't know if you have that
18 on --
19 MS. LEON-ENRIQUEZ: We have it --
20 THE COURT: Electronically?
21 MS. TURK: Your Honor, I think it might be
22 incorporated in one of the instructions identified ...
23 (Pause noted)
24
25 MS. LEON-ENRIQUEZ: Your Honor, just in

1 speaking to Ms. Turk, the actual RAJI is instruction No.
2 12, which is the one that the Court struck.
3 THE COURT: So is it the standard that's
4 actually from -- so what would have been composed as that
5 --
6 MS. LEON-ENRIQUEZ: I mean, we can eliminate 15
7 if we get 12, which is a RAJI instruction.
8 THE COURT: Is there a RAJI instruction for
9 reasonable doubt?
10 MS. TURK: It's not a separate instruction,
11 your Honor. It's RAJI as it is in No. 12.
12 And RAJI actually has the equivalent of 11 and
13 12. That's why that's titled, "The burden of proof."
14 And then the next one is titled, "Standards for the
15 burden of proof." And the standards includes the
16 definition of reasonable doubt.
17 THE COURT: Which is No. 12?
18 MS. TURK: Correct.
19 MS. LEON-ENRIQUEZ: Your Honor, we would ask to
20 strike 15 as opposed to 12, since it is a RAJI
21 instruction.
22 MR. LOMAYESVA: We've already gone over 12. I
23 still have the same objection to No. 12. It's excessive,
24 cumulative, and confusing, because it has other burdens
25 of proof in it. And I object to No. 15.

1 I think the defendant does a fine job in jury
2 instruction No. 11, going over both the burden of proof
3 and what does reasonable doubt mean. If it's more
4 accurate to use the definition from the second paragraph
5 from jury instruction No. 15, I would not object to
6 striking the second paragraph of 11 and inserting No. 15
7 down there as the second paragraph, which was the
8 suggestion of this Court.
9 But I think to use both is to set up a sort of
10 inherent conflict on what the law is, because then you
11 start getting multiple definitions of reasonable doubt,
12 which is inappropriate.
13 MS. LEON-ENRIQUEZ: Your Honor, the problem I
14 have with that is that the RAJI has been around for years
15 and years. One -- I believe it's jury instruction 11 --
16 just talks about the burden of proof, whereas jury
17 instruction No. 12 talks about the standards of the
18 burden.
19 So if we eliminate 15 and just keep 12, which
20 are both RAJI and have been around and have not been
21 found to be confusing to a jury, I don't see why we can't
22 do that.
23 MR. LOMAYESVA: Well, probably for the same
24 reasons that earlier the objection was granted, because
25 it was confusing. It wasn't just a definition of

1 reasonable doubt; it was also definitions of
2 preponderance of the evidence and clear and convincing
3 evidence. Plus, it goes over the same ground covered in
4 No. 11.
5 I don't know, but I think No. 11 is fine the
6 way it is. But there was a suggestion that the defendant
7 wanted to keep No. 15 in. And that's why I wasn't going
8 to object to using it as a second paragraph to No. 11.
9 But No. 11 is fine the way it is.
10 But I think we should only have one definition
11 of reasonable doubt, not multiple definitions. And I
12 think if we do that, we set ourselves up for confusion
13 and possible errors of law.
14 MS. LEON-ENRIQUEZ: Again, I don't see what the
15 problem is. They're both RAJI instructions and they've
16 been around and I don't see how they could be errors of
17 law if they're RAJI instructions. They're there for the
18 purpose of explaining things to the jury.
19 MR. LOMAYESVA: The error is that you have
20 multiple definitions of what reasonable doubt is.
21 THE COURT: I don't see an issue with that,
22 since it's basically the same but worded in different --
23 there are different words used or explained slightly
24 different ways, not exactly that it's changing the
25 definition of reasonable doubt or explanation of

1 reasonable doubt.

2 MR. LOMAYESVA: Well, then it's cumulative. I

3 mean, either way, I had an objection.

4 If it's the same thing, then why are you doing

5 it? If it's different, then it's _____

6 THE COURT: At this time the Court is going to

7 exclude that jury instruction, No. 15, and move on from

8 that to No. 16.

9 MR. LOMAYESVA: 16 through 18, I have no

10 objection. I object to No. 19.

11 THE COURT: You object to 19?

12 MR. LOMAYESVA: I object.

13 THE COURT: And this is through tribal code,

14 straight from the tribal code?

15 MR. LOMAYESVA: The first paragraph is straight

16 from the tribal code and I don't object to it because

17 that is an accurate statement of the law and that's, in

18 fact, the exact same statement that I have in mine.

19 She then goes on and applies that below where

20 she says, "In order to find Mr. Salomon Molina guilty of

21 the charge" -- hold on just a second.

22 First of all, it's not exactly accurate. The

23 standard of proof is that reasonable doubt -- it's

24 knowledge or -- hold on one second.

25 I guess I just object to the second paragraph.

1 I think that the code speaks for itself and we should
2 just leave it at that.
3 And the first paragraph is not objectionable.
4 The second paragraph is. It's not exactly the same
5 wording that is used in the code. It says "engaged in
6 conduct." This almost sounds like an intent standard.
7 Or with knowledge.
8 THE COURT: All right. Ms. Leon-Enriquez?
9 MS. LEON-ENRIQUEZ: The section of the code is
10 at the top. The only thing that was done differently, at
11 the bottom is the definition of intentional. And
12 knowingly was inserted into the second -- it explains to
13 the jury what it is that they need to do, but without
14 using the intentional or knowing, the actual definition
15 of those two.
16 MR. LOMAYESVA: You know what? I withdraw my
17 objection. It's okay.
18 THE COURT: And I see what you're saying,
19 Ms. Leon-Enriquez. All right. So the tribe has no
20 objection to No. 19? No objection, then, to No. 19.
21 20?
22 MR. LOMAYESVA: Objection. My primary reason
23 for the objection is that aggravated assault here is also
24 premised on the -- based on the underlying assault.
25 There's an assault and then there's an underlying factor

1 to the assault.

2 In my jury instructions, I broke those up into

3 two distinct jury instructions. Assault was: "A person

4 commits assault by knowingly touching another person with

5 intent to injure, assault or provoke such other person."

6 And while she puts it here, I guess the first

7 two paragraphs are accurate. I guess I just find that it

8 would be better to break the two up. I just generally

9 object to the application of the facts to the

10 instruction, although I don't really find that the

11 statements of law are inappropriate.

12 I would just say, for ease of the jury, that I

13 would prefer that they be broken up between assault and

14 aggravated assault.

15 MS. LEON-ENRIQUEZ: Your Honor, with the rest

16 of that, this is one charge that he is being charged

17 with. He is not being charged with aggravated assault

18 and assault. I think that would actually be more

19 confusing to the jury to have to figure out that this

20 stuff is assault.

21 Right here it's all put together. It tells you

22 exactly that a person commits aggravated assault if a

23 person commits assault -- and assault is explained to

24 them right here in the same instruction. And it's

25 further explained to them what the elements are that they

1 need to find.

2 MR. LOMAYESVA: Your Honor, it's possible --

3 although I think there's evidence here to support our

4 allegations -- that he may be found guilty of the lesser

5 included charge of assault and not aggravated assault, in

6 which case, I think the two should be separated so that

7 the jury could find, if they don't find that the

8 aggravating factor is appropriate, they can still find

9 him guilty of assault, which is a lesser included charge

10 within the aggravated assault, because in order to commit

11 aggravated assault, you have to commit an assault.

12 THE COURT: Anything to that,

13 Ms. Leon-Enriquez?

14 MS. LEON-ENRIQUEZ: Your Honor, I think there's

15 a problem with that. I mean, the tribe could have

16 charged Mr. Molina with assault, but they didn't do so.

17 They went with aggravated assault. This basically

18 explains to them what all that means.

19 MR. LOMAYESVA: I don't see any issue here in

20 the law that's being proffered to the jury, why that's

21 appropriate. It is very possible that the jury says, oh,

22 she wasn't physically restrained or she wasn't

23 substantially -- her capability to resist wasn't

24 substantially compromised. They could still find him

25 guilty of assault.

1 MS. LEON-ENRIQUEZ: Your Honor, there's nothing
2 in the code that says he can be found guilty of a lesser
3 included offense.
4 MR. LOMAYESVA: There's nothing precluding it,
5 either.
6 THE COURT: So on the previous argument the
7 tribe had as to the objection --
8 MR. LOMAYESVA: Your Honor, these are pretty
9 serious charges here. And it's pretty well known that a
10 jury can find a lesser included charge if the greater
11 charge -- if the factors aren't found. In this case,
12 assault is a lesser included charge to the charge of
13 aggravated assault.
14 The very definition of aggravated assault
15 requires an assault and then you look to those
16 aggravating factors. In this case, we're arguing that
17 the victim's capacity to resist was substantially
18 impaired. And, of course, this is also an issue before
19 the Court in the motion to dismiss.
20 So even if you find in the motion to dismiss
21 that there is no basis to find that her capacity to
22 resist was substantially impaired, he's still capable of
23 being found guilty on the charge of assault, which is the
24 lesser included charge in the aggravated assault.
25 So I would ask that you keep the two separate

1 so that the jury, if it finds one and not the other, then
2 he may be still found guilty of the lesser included
3 charge.
4 MS. LEON-ENRIQUEZ: Your Honor, I'm going to
5 object to that because he was not charged with an assault
6 charge. So for the tribe to say that there should be a
7 separate instruction for assault so that the jury can
8 find him guilty of that charge, I think that's a problem.
9 MR. LOMAYESVA: Well, I don't think it's a
10 problem at all. If the defendant has some law to show
11 that it's a problem, I would be open and I would adjust
12 my position accordingly. But right now, all we have is
13 _____ and we don't have any law to support that as a
14 legal position.
15 MS. LEON-ENRIQUEZ: Exactly. If the tribe can
16 show something in the tribal court that says they can
17 find him guilty of a lesser charge, I'd like to see that,
18 too.
19 MR. LOMAYESVA: We have to find him guilty of
20 assault. That's a given. We have to do that in order to
21 find aggravated assault. So he will be found guilty of
22 assault if we find aggravated assault.
23 It's possible that he may not be found guilty
24 of aggravated assault. But it's well known that you can
25 charge and someone can be found guilty of a lesser

1 included charge. I don't think that's a hidden thing. I
2 don't think that's an unknown thing as a matter of law.
3 If you want, I can provide law. But just as
4 equally, the defendant can provide law that you can't do
5 that. But I don't see that happening right now.
6 MS. LEON-ENRIQUEZ: Then it would still go with
7 the tribal law. There's nothing in the tribal code that
8 says that Mr. Molina can be found guilty of a lesser
9 included offense.
10 MR. LOMAYESVA: On the other hand, there's
11 nothing that prevents it, either. So to say that there's
12 nothing that specifically allows it is not saying
13 anything.
14 THE COURT: On this matter in the second
15 amended criminal complaint -- which may be another one
16 based upon the motion to dismiss or other motion --
17 however, we're looking at that second amended criminal
18 complaint and the instruction -- the tribe has an assault
19 jury instruction and then an aggravated assault.
20 MR. LOMAYESVA: They're both essential because
21 you have to find the assault in order to find the
22 aggravated assault. That's why I included both of them.
23 So regardless of whether or not the lesser
24 included is found, he still has to be found guilty of
25 assault, either way.

1 MS. LEON-ENRIQUEZ: But that's only included in
2 this one instruction. He's only charged with aggravated
3 assault; he's not charged with assault. So to have it in
4 different places and having the jury try to figure out
5 where it's at, I think it makes it more confusing than to
6 have it all in one place and explained to them exactly.
7 The instruction is there.
8 MR. LOMAYESVA: No, because he's found guilty
9 of assault, he may not be found guilty of aggravated
10 assault, which the defendant's jury instruction sort of
11 leads the jury to find all or nothing. And I'm saying
12 it's not an all-or-nothing proposition.
13 There is another step that has to be found, as
14 well. Is he guilty of assault but not aggravated
15 assault, in which case he will be found guilty. He still
16 can be found guilty of assault but not aggravated
17 assault.
18 So this instruction, by combining the two,
19 forces the jury to do an all-or-nothing proposition. I
20 think it's inappropriate and there's no law to support
21 that.
22 MS. LEON-ENRIQUEZ: Your Honor, I think it's to
23 the contrary. There's no law to support what the tribe
24 is actually indicating here. As I mentioned before,
25 Mr. Molina is charged with aggravated assault. The

1 charge is explained here for the jury to make that
2 determination whether he's guilty or not of this charge.
3 To separate it, I think the jury will be
4 confused because they would think they have to find on
5 two separate charges, one of which was not charged. And
6 I think that would be confusing to them.
7 MR. LOMAYESVA: It's not confusing at all.
8 They have to find both of those. They have to find the
9 assault and they have to find the aggravating factor.
10 That's just the way the law is.
11 MS. LEON-ENRIQUEZ: And that's in the
12 instruction.
13 THE COURT: At this time the Court will include
14 jury instruction No. 20 of the defendant's instructions.
15 No. 21?
16 MR. LOMAYESVA: I object. I have -- hold on a
17 second.
18 (Recording ends)
19
20 MR. LOMAYESVA: I don't have any objection to
21 the first or second paragraph. I do find an objection to
22 the manner in which it's written up. "To find Mr.
23 Salomon Molina guilty," blah, blah, blah, and then it
24 goes on. "And another person was present and Mr. Molina
25 was reckless."

1 I don't know, that is an issue that's also
2 before the Court in the motion to dismiss. And since you
3 haven't decided that, I don't know if she means another
4 person other than the person being sexually assaulted, or
5 means that there has to be two other people present, or
6 can it be simply the person being assaulted.
7 And I think it's very confusing, especially
8 because of the issues she's raising in the motion to
9 dismiss. I would object. I think we should take the
10 whole section out and just leave the law, which is not
11 confusing.
12 I have broken it up into public sexual
13 indecency, and I also broke it up into sexual contact,
14 just to make it clear as to what both of those concepts
15 were. And I think it's easier to understand, frankly, by
16 breaking them up, although I would not be -- I guess I
17 would find it easier and I think it's preferable to do
18 that.
19 I do object to the way she's written this up,
20 especially where it says another person was present. I
21 know that's going to confuse the jury to believe that
22 some other witness other than the victim has to be
23 present, which I don't believe is the law.
24 So that would be a misstatement of the law if
25 that's how the jury took it. It kind of leads the jury

1 down that direction. And that would be an error of law
2 for them to apply it in that manner.
3 So I object. I think it's just an
4 inappropriate example of how it should be applied,
5 although the first two paragraphs I don't object to,
6 although I would urge this Court to break the two up.
7 MS. LEON-ENRIQUEZ: Your Honor, part of the
8 problem with that explanation is the language comes
9 directly from the code. It does require, as stated in
10 the code, that another person be present.
11 There's no explanation here given, and that's
12 something that the Court is going to determine when the
13 hearing comes about on the motion to dismiss. But here
14 there's no explanation.
15 The code does require another person to be
16 present. And that's one of the elements that has been
17 written here on No. 3. There's nothing else in the
18 explanation of the jury instruction that says that they
19 have to find that a third person was present. This comes
20 directly from the language of that code section itself.
21 The only thing that was changed, the only part
22 here, there has to be an intent to directly or indirectly
23 touch. The only thing that is different from No. 1 is
24 that intentionally was changed to the definition of
25 intentionally.

1 And on the second one, the knowingly part was
2 actually explained based on the definition of knowingly.
3 The other element is that another person needs to be
4 present. That's a part of the code which says if another
5 person is present. So there has to be another person
6 present. There's no other explanation here.
7 And also that Mr. Molina has to be reckless.
8 That's all part of the same language from the code. It
9 explains the different elements that the tribe will have
10 to prove.
11 THE COURT: And, Mr. Lomayesva, you had
12 requested that the Court break down -- what is it that
13 you wanted to have the Court break down?
14 MR. LOMAYESVA: Well, I think it would be
15 preferable -- like if you look at my instructions, public
16 sexual indecency and jury instruction sexual contact is
17 separate.
18 I would also add that because it's written
19 "public sexual indecency," the jury might think that you
20 have to be in a public place. But that position has been
21 firmly rejected in Arizona vs. Whitaker.
22 So I would prefer that you broke it down and
23 included language from Whitaker that public sexual
24 indecency can occur in one's home and does not have to be
25 committed in a public place, just so that they know that

1 And on the second one, the knowingly part was
2 actually explained based on the definition of knowingly.
3 The other element is that another person needs to be
4 present. That's a part of the code which says if another
5 person is present. So there has to be another person
6 present. There's no other explanation here.
7 And also that Mr. Molina has to be reckless.
8 That's all part of the same language from the code. It
9 explains the different elements that the tribe will have
10 to prove.
11 THE COURT: And, Mr. Lomayesva, you had
12 requested that the Court break down -- what is it that
13 you wanted to have the Court break down?
14 MR. LOMAYESVA: Well, I think it would be
15 preferable -- like if you look at my instructions, public
16 sexual indecency and jury instruction sexual contact is
17 separate.
18 I would also add that because it's written
19 "public sexual indecency," the jury might think that you
20 have to be in a public place. But that position has been
21 firmly rejected in Arizona vs. Whitaker.
22 So I would prefer that you broke it down and
23 included language from Whitaker that public sexual
24 indecency can occur in one's home and does not have to be
25 committed in a public place, just so that they know that

1 public sexual indecency can occur even in the bedroom or
2 in the living room or someplace inside the house and it
3 doesn't have to be in a village square or in a courtroom
4 or a large hall. So I guess I would object because it's
5 not explanatory enough.
6 And I would also object that I think that
7 another person was present is a little confusing, and
8 just leave the law as the law.
9 MS. LEON-ENRIQUEZ: Your Honor, I think the way
10 that the jury instruction is written up, it basically
11 explains that. I think the issue is going to be with
12 another person present. But this is just language that
13 comes directly from the code section itself. It's
14 nothing that was added to it.
15 As I mentioned before, the only thing that was
16 changed was the mental states to explain it better to the
17 jury by having this kind of is the same as with the other
18 section with the other instruction that explained
19 everything and the jury would have to go searching
20 through all the different instructions to try and figure
21 out what each of these means.
22 THE COURT: So as to jury instruction No. 21 of
23 the defendant's, the Court is going to include that jury
24 instruction in its --
25 MR. LOMAYESVA: Your Honor, I move, then, that

1 you include as a footnote my note in the public sexual
2 indecency instruction, that public sexual indecency can
3 occur in the home and does not have to be committed in a
4 public place, Arizona vs. Whitaker, 164 Ariz. 359, 793
5 P.2d 116 Ariz. App (1990).
6 I should add to that that that position was
7 directly affirmed by the Court at that time and follows a
8 number of other states in that our public sexual
9 indecency statute was taken almost verbatim from the
10 Arizona statute. So this is a case interpreting
11 basically our statute on public sexual indecency.
12 MS. LEON-ENRIQUEZ: Your Honor, I would just
13 ask the Court to hold off in adding that footnote because
14 I think this is one of the issues that's going to be
15 addressed at the hearing on Monday.
16 MR. LOMAYESVA: Your Honor, I don't think this
17 is an issue that's going to be raised on Monday. That's
18 not one of the objections raised in the motion to
19 dismiss.
20 The motion to dismiss was whether or not a
21 third party or someone other than the victim had to be
22 observing the public sexual indecency. That was the
23 issue that was raised by the defendant, not whether or
24 not it had to be in a public place. So this issue is not
25 going to be addressed on Monday.

1 And she had access to the same case I did
2 without citing it. So she's entirely aware of this case
3 and I don't think this is inaccurate.
4 THE COURT: Anything further from the
5 defendant?
6 MS. LEON-ENRIQUEZ: May I just have a minute,
7 your Honor?
8 THE COURT: Okay.
9 (Pause noted)
10
11 MS. LEON-ENRIQUEZ: Your Honor, I guess part of
12 the problem that I have with adding that instruction is
13 that I think that would tend to make it more confusing
14 for the jury. As indicated in jury instruction 21,
15 there's nothing in the elements that are required to be
16 proven that it be in a public place.
17 MR. LOMAYESVA: Your Honor, the reason for that
18 is because it is public sexual indecency and the jury
19 might say, oh, public sexual indecency, it has to be
20 committed in a public place. That's not the law.
21 It's clearly not the law. That very position
22 was rejected in that case. It clearly states what the
23 law is. You can look at the case. That's exactly what
24 it stands for.
25 And I think it helps the jury to understand

1 that if someone publicly, or exposes themselves in the
2 bedroom to another person, that can be public sexual
3 indecency and it doesn't have to be out on the street or
4 in the middle of the town square.
5 MS. LEON-ENRIQUEZ: That's not one of the
6 elements, your Honor. All that's required is to find
7 that it would be to directly or indirectly touch or
8 believe that another person was present and that the
9 person was reckless. There's nothing in there regarding
10 it having to be in a public place.
11 My objection is that I think it would tend to
12 confuse the jury by adding it.
13 MR. LOMAYESVA: I think it would help the jury.
14 I mean, you also have to take it in context of the law
15 itself. You may or may not remember this, but this was
16 in the common law. Public sexual indecency did have to
17 be committed in public. It did have to be observed by
18 multiple people. And the modern statutes rejected that
19 position.
20 However, they kept the title, public sexual
21 indecency. In Arizona vs. Whitaker, it basically said
22 we're not going to accept that point of view. It can be
23 done in a private location if there's an expectation that
24 people can observe, or another person in our case.
25 And inside other cases and other law, other

1 states have adopted that same reasoning. And the reason
2 for that is because the term, "public sexual indecency,"
3 might lead the jury to believe that it only has to occur
4 in a public location. And that's just not the case. It
5 doesn't have to occur in a public location. That's why
6 it's important to have this footnote in there, to inform
7 the jury that it doesn't have to be in a public location.
8 As, as I said, our statute is almost verbatim,
9 word for word, with the state statute.
10 THE COURT: All right. At this time the Court
11 does see that that note would be helpful, specifically
12 because the statute or the code section the defendant is
13 being charged with is sexual indecency.
14 And although Ms. Leon-Enriquez includes the
15 argument that the actual instruction does not have an
16 explanation or does not include that as part of what the
17 tribe is having to prove, at this time the Court does
18 believe that maybe that would be helpful to know as far
19 as the average juror.
20 And in that note, the tribe has included a
21 case, Arizona vs. Whitaker, and the footnote would then
22 -- and I don't see any actual case law aside from code
23 and RAJI that the defendant has included as footnotes.
24 So, with this, there should be a source or a note defined
25 --

1 MR. LOMAYESVA: Do you want a citation for
2 Whitaker or do you want --
3 THE COURT: Well, I'm thinking it should mirror
4 what the defendant has in their notes as a source, just
5 as the tribe has included that in their footnote.
6 MR. LOMAYESVA: I think it's appropriate to
7 include the citation, Arizona vs. Whitaker, in the
8 note.
9 The authority for the public sexual indecency
10 note is 4 PYTC 2-30.
11 And Whitaker is 164 Ariz. 359, 793 P.2d 116.
12 THE COURT: Yes, I see that there. And the
13 defendant has included that source.
14 MS. LEON-ENRIQUEZ: Your Honor, I suggest that
15 the footnote, because it's not part of --
16 THE COURT: Thank you. And I do see they're
17 included as the tribe has it except the note will include
18 a colon rather than semicolon, and include as the rest of
19 that sentence, "public sexual indecency can occur in
20 one's home and does not have to be committed in a public
21 place," including the citation.
22 Moving on to No. 22.
23 MR. LOMAYESVA: I have no objection.
24 THE COURT: No. 23?
25 MR. LOMAYESVA: Objection. Your Honor, that's

1 just simply not the law. I'd like to cite two separate
2 cases. The first one is State versus Bravo, which I
3 believe is cited by the defendant, and stands for the
4 proposition that intoxication is not a defense to
5 knowingly.
6 And there is further case law in State vs.
7 Gallego, a 1994 case, 178 Ariz. 1. So, first of all,
8 right off the bat, those two cases make this an
9 inappropriate instruction.
10 Second, I'd like to point out that Bravo was
11 decided in 1981. In 1993, the Arizona Revised Statutes
12 was changed. In 13-503, it states: "Temporary
13 intoxication resulting from the voluntary ingestion,
14 consumption, inhalation, or injection of alcohol, an
15 illegal substance under Chapter 34 of this title or other
16 psychoactive substances or the abuse of prescribed
17 medications does not constitute insanity and is not a
18 defense for any criminal act or requisite state of mind."
19 And that was passed after State vs. Bravo. So
20 it's a matter of Arizona law. Alcohol is not a defense
21 as to requisite state of mind.
22 THE COURT: And, Ms. Leon-Enriquez?
23 MS. LEON-ENRIQUEZ: Your Honor, I believe that
24 for the tribe, it is a defense. The reason for that is
25 if the Court were to look at the definitions of the

1 mental states --

2 MR. LOMAYESVA: Well, there's three mental

3 states, right? Intentional, knowing, and reckless.

4 Intoxication is not a defense to reckless, even before

5 the changes, nor to knowingly.

6 MS. LEON-ENRIQUEZ: The changes that you're

7 talking about are changes to the Arizona law, not to the

8 tribal law. The tribal code doesn't contain any similar

9 change in law.

10 Basically, you have intentional, knowingly, and

11 recklessly. And it is only in the recklessly where they

12 say that voluntary intoxication cannot be a defense.

13 It's only in recklessly where it's actually written.

14 So if the tribe had wanted it to be included in any of

15 the other sections, it could have easily added to that,

16 but it didn't.

17 Again, the tribe is talking about the change in

18 the Arizona law, in the Arizona Revised Statute, which

19 took place -- I believe it was effective in '94 -- which

20 said that it was no defense. But there's nothing similar

21 here in the tribal law.

22 MR. LOMAYESVA: The irony, of course, your

23 Honor, is that the defendant is citing Arizona law for

24 almost the opposite position by citing Bravo. I mean, it

25 is state law.

1 However, the code specifically says that where
2 there is a need for further explanation, this Court
3 should look to Arizona law. I'm asking this Court to
4 look to Arizona law to help decide this issue as to
5 whether voluntary intoxication is a defense.
6 Now, the defendant will invite you to go down
7 this road and make voluntary intoxication a defense to
8 these crimes. I don't think that's what the legislature
9 intended to do here or in the State of Arizona. I think
10 they intended not to allow that to occur and that's why
11 they passed this law.
12 I think this Court would be wise to look to
13 Arizona law and make a determination whether or not
14 voluntary intoxication is a defense. And part of the
15 reason for that is because it is a voluntary state. I
16 mean, no one forced them to get drunk and commit criminal
17 acts. And I think that's what the legislature thought,
18 too.
19 Otherwise, public intoxication, disorderly
20 conduct, assaults -- how many times do we have court
21 hearings where someone got drunk and they attack someone
22 else. If intoxication is a defense, does that mean that
23 they all get to raise voluntary intoxication as a defense
24 and they could meet the mental state for their crimes?
25 That would be absurd.

1 So I don't think that it is the law that it is
2 a defense. And I would move to strike it in its
3 entirety.
4 MS. LEON-ENRIQUEZ: Your Honor, as specified by
5 the tribe, they indicated that if there's a gap in the
6 tribal code, then there's authority for the Court to look
7 at Arizona law. However, there is no gap.
8 It's clear by looking at the code in this
9 section that the legislature looked at intentionally and
10 knowingly and specifically left out the language of
11 voluntary intoxication from those two mental states.
12 Now, it's true it's not a defense to the
13 charge; but the jury can look at whether the person had
14 the mental state required in these cases. And if the
15 Court is clear, it's not necessary to look at Arizona
16 law.
17 MR. LOMAYESVA: Well, it doesn't say, ah, you
18 can use voluntary intoxication as a defense to a crime or
19 to a mental state. It doesn't say anywhere in the code.
20 MS. LEON-ENRIQUEZ: It doesn't say, but the
21 fact that they specifically address that in the reckless
22 mental state and then did not add it to the other ones,
23 that pretty much tells you that it wasn't intended to be
24 included in either of those two.
25 MR. LOMAYESVA: Your Honor, if you step back

1 and think about this in the larger perspective, if you
2 agree or if the defendant's position is accurate, that
3 means anyone who comes into this court and says, oh, I
4 was drunk at the time I committed the assault or the
5 stabbing, that's a defense to the crime.
6 I don't think that's what anybody thought when
7 they passed any of these laws here or in the state. And
8 I'm certain that the tribal council didn't think that at
9 the time that public intoxication was a defense.
10 Otherwise, you can get drunk, beat your wife, and that's
11 a defense. You can stab someone and say, I was drunk,
12 and that's a defense. I could beat my kids but I was
13 drunk; that's a defense. I didn't have the requisite
14 mental state.
15 That's not what is intended by anyone, by any
16 legislature. And the fact that it doesn't specifically
17 say that it's not a defense, I don't think, precludes the
18 finding that you can look to Arizona law and say, yeah,
19 you're right, that's not a defense. We're not going to
20 find it here, either. Otherwise, that is certainly a
21 problematic position for this Court to take.
22 MS. LEON-ENRIQUEZ: Your Honor, I believe that
23 the tribe misstates the law. And actually it was
24 addressed in some of the other Arizona cases that it
25 didn't apply in those cases. I think this is maybe an

1 issue that we need to give more information to the Court
2 with regard to the cases.
3 But, either way, I think the law is clear here.
4 The statements that the tribe was making with regards to
5 a person assaulting and being lawless because the person
6 is drunk, that was addressed in some of the Arizona
7 cases. And I think the Court should be able to look at
8 those cases before following what the tribe is trying to
9 incense the Court by making statements that if they're
10 drunk, they get off scot-free.
11 Once again, it's stated here clearly. If the
12 legislature had intended to remove the voluntary
13 intoxication from the other mental states, it would have
14 done so, the same way that Arizona did when they passed
15 their code that said that that was not allowed for any
16 defense in any of the mental states.
17 That is something that was not done here in the
18 tribe. So for the tribe to then go and try to incense
19 the Court by saying that any person that's intoxicated
20 can get away with any crime, I think is a misstatement of
21 Arizona law also.
22 MR. LOMAYESVA: I don't think I'm trying to
23 incense the Court. All I'm trying to do is point out the
24 logical conclusion of this argument, which is it's a
25 defense then, suddenly, to anytime you're intoxicated --

1 whoops -- I didn't have the requisite mental state;
2 therefore, I didn't commit the crime.
3 Arizona, back in -- what was it, 1994, when it
4 was effective, what is that, like twenty years ago now --
5 rejected this position and said it's not a defense.
6 And if we look at the code, it asks us to look
7 to Arizona law where it's not clear from our code. I
8 think Arizona law is clear and I think it's equally as
9 clear here. It's just not a defense. And the
10 instruction's inherently flawed as a result of that and
11 should be rejected. And that is why I object.
12 MS. LEON-ENRIQUEZ: Your Honor, as the tribe
13 says, it's only if there's a gap in the law here. There
14 is no gap in the law. It's clearly stated on the tribal
15 code and it specifically states in the definitions under
16 the sex offenses here. I don't think there's any further
17 interpretation that's necessary.
18 MR. LOMAYESVA: I'd just point out, your Honor,
19 there's nowhere that says voluntary intoxication is a
20 defense. It doesn't say it anywhere.
21 MS. LEON-ENRIQUEZ: The three mental states,
22 the fact that they do specifically include it in the
23 reckless and did not include it in the two right above it
24 shows the intent to only apply it to the reckless.
25 THE COURT: In jury instruction No. 23, the

1 defendant's, the sections that are cited refer to the

2 bulleted items; is that correct?

3 MS. LEON-ENRIQUEZ: Yes, your Honor.

4 THE COURT: And then the --

5 MS. LEON-ENRIQUEZ: The bulleted items are just

6 the mental states that are required for those different

7 charges.

8 THE COURT: Correct. And then the explanation,

9 the first paragraph, intoxication, then that's referring

10 to State vs. Bravo.

11 MS. LEON-ENRIQUEZ: Even in Bravo, the Court

12 did find that if there was sufficient evidence of

13 intoxication, the jury could consider that fact in

14 determining whether the defendant had the necessary

15 culpable mental state of intentionally or knowingly

16 committing the act.

17 The Arizona cases do say that it's not a

18 defense to a crime, but that the jury can consider it

19 when determining whether the person had the necessary

20 mental states.

21 MR. LOMAYESVA: Your Honor, the code just did

22 not address whether or not in those areas, intentionally

23 or knowingly or even criminal negligence, whether or not

24 voluntary intoxication was a defense. It didn't address

25 it.

1 MS. LEON-ENRIQUEZ: Right, it specifically left
2 it out.
3 MR. LOMAYESVA: We don't know it specifically
4 left it out. There's no citation to say the legislative
5 history of this section.
6 So what happens when it's not known, you look
7 to the Arizona law to find an answer. Arizona law has an
8 answer since 1994 and that is it's not a defense.
9 MS. LEON-ENRIQUEZ: That's because there is an
10 actual code section in here that says it's not a defense
11 and it's something that the tribe doesn't have.
12 MR. LOMAYESVA: All I'm saying, your Honor, is
13 like someone commits murder, an intentional crime, but
14 they're intoxicated. Suddenly, are they not able to get
15 the requisite --
16 MS. LEON-ENRIQUEZ: Your Honor, I believe
17 Arizona law talks about both situations.
18 MR. LOMAYESVA: Well, that was not before us.
19 I mean, it's not cited right now. I mean, the only case
20 that was cited was Bravo and Bravo was decided before the
21 passage of this act, which was 1994.
22 What is Bravo? 198- --
23 MS. LEON-ENRIQUEZ: 1981, but even in Bravo,
24 they said that the jury could still consider it. The
25 Court specifically found that it's not a defense and

1 that's why it wasn't written up as a defense here. It
2 did say that the jury could consider it in determining
3 the necessary culpable mental state.
4 MR. LOMAYESVA: Your Honor, the law is clear
5 it's not a defense. And even if we look to Arizona law
6 -- but if you junk looking at Arizona law, then I don't
7 know what case law they're citing to suggest why you
8 should.
9 But the code is clear; you look to Arizona law.
10 And there is nothing on point here that says voluntary
11 intoxication is somehow a defense or diminishes the
12 mental status of a defendant so that they're not culpable
13 of a higher intent. There's nothing.
14 MS. LEON-ENRIQUEZ: Your Honor, it's written
15 within the mental states. They're all in the same
16 section. It's not like they're in different sections of
17 the code. And only in the reckless did the legislature
18 decide that voluntary intoxication was not going to be a
19 defense. They didn't include that in any of the other
20 ones.
21 The tribe wants the Court to use the Arizona
22 code where they specifically said that it was not a
23 defense on any of those. But there's no similar code
24 here in the tribe.
25 MR. LOMAYESVA: It was simply not addressed in

1 other sections. I don't think you can read that as a
2 rejection, that they believe that voluntary intoxication
3 was not a defense. I don't think you can read that into
4 that. That's what defense counsel wants you to do.
5 It's a matter of statutory interpretation. She
6 hasn't said anything in statutory interpretation to
7 support her position at this point.
8 THE COURT: At this point the Court is going to
9 table jury instruction No. 23 until Monday and let the
10 tribe and the defense counsel know whether that will be
11 included in the jury instructions. That is the only item
12 that will be outstanding unless -- we'll be addressing
13 the tribe's at this time.
14 So with regard, then, to the remaining jury
15 instructions, I do believe we've gone over several of the
16 tribe's because they've been included in the defendant's,
17 what defendant has submitted.
18 So, as far as disorderly conduct the tribe has
19 submitted, it's the first jury instruction that is
20 included in the jury instructions defendant had
21 submitted. And it is No. 19.
22 MS. LEON-ENRIQUEZ: Did the Court say that is
23 included?
24 THE COURT: Let me go back to my notes.
25 I do believe that that was not objected to by

1 the tribe. There was an objection but he withdrew that
2 objection.
3 And, just to note, this jury instruction, I
4 believe, was from a past instruction?
5 MR. LOMAYESVA: Yes.
6 THE COURT: So we'll just make sure that we
7 keep in mind.
8 Public sexual indecency, the Court had
9 addressed that in a defendant's jury instruction. 21?
10 And that would be included in the defendant's.
11 Sexual contact, I believe that that was also
12 included in that same jury instruction, 21, of
13 defendant's.
14 And the Court did address intentional,
15 knowingly, and recklessly, all included in the mental
16 states instruction of the defendant. And aggravated
17 assault was included as a jury instruction.
18 And then there was an additional disorderly
19 conduct at the end of what the tribe had submitted. And
20 that instruction is addressed in a different jury
21 instruction.
22 That's all that we have aside from the motion
23 in limine and the other documents that were submitted.
24 We have addressed everything except the motion to
25 dismiss.

1 MS. LEON-ENRIQUEZ: Actually, your Honor, there
2 is the other motion regarding disclosure.
3 THE COURT: There was a request for disclosure
4 dated March 18th defendant submitted. And as I look at
5 that, there were --
6 MR. LOMAYESVA: Your Honor, I'd like to know
7 what that is. I don't have it.
8 MS. LEON-ENRIQUEZ: Actually, the tribe
9 responded to it.
10 MR. LOMAYESVA: Which one was this?
11 MS. LEON-ENRIQUEZ: The one with the officers,
12 McKenna (ph) and Corleon (ph).
13 THE COURT: Yes, response on the 24th of March.
14 MR. LOMAYESVA: Was there a reply?
15 THE COURT: There was a reply dated March 31st.
16 Ms. Leon-Enriquez, we will be addressing your
17 request for disclosure. You have six items that you
18 submitted as disclosure requests.
19 MS. LEON-ENRIQUEZ: Some of the items were
20 provided.
21 THE COURT: The items included in your reply?
22 MS. LEON-ENRIQUEZ: Correct. There are only
23 two items that remain: Information from the two
24 officers, and the disclosure regarding the DNA swab test
25 results.

1 THE COURT: So the outstanding items are two.
2 One is the officers' supplemental -- actually, those were
3 submitted --
4 MR. LOMAYESVA: Your Honor --
5 THE COURT: -- the other items.
6 MR. LOMAYESVA: -- I thought the request was
7 for McKenna and Corleon?
8 THE COURT: It is, Officer McKenna and Officer
9 Corleon. Does the tribe have information as to those?
10 MR. LOMAYESVA: Yes, your Honor. I'll start
11 with the officer reports. Your Honor, I've made numerous
12 requests that McKenna and Corleon provide some statement
13 or supplement and I have not received anything. And I
14 will tell you, I've made numerous requests. I've made
15 numerous requests at the beginning of the case and
16 throughout the case.
17 I can tell you that we don't intend to use
18 Corleon as a witness, though, because he is involved with
19 the defendant. We're not going to call him at trial and
20 he will not be a witness. Therefore, his witness
21 statement, i.e., his supplement, is not required; and
22 that would include the exculpatory information.
23 I don't know what to say about McKenna. I can
24 make the request. I have not received it as of today's
25 date and I've asked. If this Court wants to call McKenna

1 and ask if there was a supplement prepared or a witness
2 statement, this Court can do so. However, I made the
3 appropriate request to McKenna.
4 I'd also say, though, that on a global scale,
5 we are only required to provide witness statements that
6 were made. And if he didn't write a supplement, he
7 didn't make a witness statement, we are not therefore
8 required to provide that as a matter of disclosure.
9 I'd also say that I don't think McKenna is
10 listed as a witness, as well. So, because he's not
11 listed as a witness, we would not be required to produce
12 his witness statement unless there was exculpatory
13 material.
14 He helped with two interviews of some of the
15 witnesses and recordings have all been provided to the
16 defendant. So they are completely aware of what those
17 are.
18 We are calling Officer Jacob Garcia, who will
19 be able, in rebuttal and in our case in chief, to talk
20 about those, if necessary. So any issues regarding those
21 witness statements, he will be able to address. And
22 McKenna's testimony would be essentially cumulative to
23 Garcia's testimony.
24 So I don't think there's anything more that we
25 can get from McKenna, although it's not for lack of

1 trying to obtain those statements. I did talk to
2 Corleon. He didn't have very much involvement. There
3 were two things that occurred that night, the shooting --
4 and he had responded briefly to this incident; and then
5 _____ quickly responded to the other. So even if he did
6 have a supplemental report, it won't be very much.
7 From my understanding, Corleon, there is
8 nothing exculpatory as to his guilt or to in mitigation
9 that would be appropriate under the rule. So I don't
10 think there's really a basis for Corleon's statements or
11 supplements. And as to McKenna, when I talked to him, he
12 didn't have anything that appeared to me to be
13 exculpatory as to his guilt or to reduce his punishment.
14 However, there were requests made and we have
15 not received them. I know we're responsible for them,
16 but we don't have them because they haven't made them or
17 they haven't been given to us, either way. I guess if
18 you want to call either one of them and ask them why not,
19 I think that would be appropriate.
20 I don't think, as a matter of law, though, that
21 they're required. They don't have any materials that
22 would be exculpatory. And for that reason, there would
23 be no prejudice. Either they don't have them because
24 they would not help them in any way. That's as to
25 McKenna and Corleon.

1 As to the DNA swab tests --

2 THE COURT: Let me stick with that. Witnesses

3 on March 10th, the first witness is Sgt. Michael McKenna.

4 So, as far as the tribe indicating whether or not you

5 thought that they would be _____ individual on the

6 witness list of the tribe.

7 MR. LOMAYESVA: Well, we're not going to call

8 either of these two witnesses.

9 THE COURT: So the tribe is not calling either

10 witness. Ms. Leon-Enriquez?

11 MS. LEON-ENRIQUEZ: Just clarifying, the tribe

12 isn't calling McKenna or Corleon?

13 MR. LOMAYESVA: Both.

14 MS. LEON-ENRIQUEZ: The other issue now is the

15 tribe indicated that they were calling Detective Garcia

16 but I don't see him disclosed. This is the first I'm

17 hearing of that.

18 MR. LOMAYESVA: You're right, he is not on our

19 list. Let me see if he's on our rebuttal list.

20 No, he's not.

21 Your Honor, given the fact that defendant was

22 allowed to call additional character witnesses, at this

23 time I'd ask to be allowed to call Jacob Garcia, not in

24 our case in chief, but as a rebuttal witness.

25 THE COURT: And, Ms. Leon-Enriquez?

1 MS. LEON-ENRIQUEZ: Your Honor, this is an
2 officer that was involved in the investigation. I think
3 he would still be required to have some information
4 regarding what he did in the case.
5 And as mentioned by the tribe, we did file for
6 character witnesses by the deadline date given by the
7 Court, which the tribe is now disclosing a new witness
8 after that deadline date. So I'm going to object to
9 that.
10 MR. LOMAYESVA: Your Honor, the defendant was
11 allowed a reply to our response, even though we were told
12 that we had to file everything by yesterday. Since the
13 Court has been using its discretion to allow variations
14 from the date that things were due -- I'm not asking for
15 long; all I'm asking is that we use him in rebuttal, not
16 in our case in chief.
17 And it's primarily for the purposes of
18 establishing foundation for the tapes that were disclosed
19 to defendant, statements made by the defendant and by
20 certain witnesses. Primarily, if they call the defendant
21 as a witness and he gives inconsistent testimony, I would
22 like to be able to produce and use his taped statement as
23 inconsistent statement. And in order to do that, I want
24 to use Mr. Garcia to help establish the foundation for
25 that tape-recording.

1 MS. LEON-ENRIQUEZ: If Mr. Garcia was involved
2 in the investigation with the officers that were holding
3 the investigation, I think we should have more
4 information with regard to his participation in the
5 investigation.
6 If the Court is inclined to allow him to come
7 in this late in the game, I would ask that the Court
8 allow us to depose him or interview him.
9 MR. LOMAYESVA: I would have no objection to a
10 deposition. We have to schedule it for Monday, though.
11 Are they going to get the court reporter for it?
12 THE COURT: With regard to the deposition, how
13 does that normally take place as far as recording of that
14 deposition?
15 MS. LEON-ENRIQUEZ: Well, I may have misspoken.
16 It doesn't necessarily have to be a deposition, just an
17 interview, to allow us to find out his involvement in the
18 case.
19 MR. LOMAYESVA: I have no objection. I will
20 try to obtain him. There might be some scheduling issues
21 but I think we can work through them.
22 THE COURT: This is Detective Jacob Garcia?
23 MR. LOMAYESVA: Uh-huh.
24 THE COURT: So we do have that motion to
25 dismiss to address on Monday afternoon. What deadline is

1 defendant wishing for on that? Because next week is one
2 week prior to that jury trial.
3 MR. LOMAYESVA: Your Honor, I'd ask that you be
4 flexible for next week in case there are scheduling
5 issues between my office, the Public Defender's office,
6 and Mr. Garcia, that we are able to work around our
7 schedules in order to set a time and date for the
8 interview. And I think maybe a deadline of next Friday
9 would be appropriate before trial.
10 MS. LEON-ENRIQUEZ: Your Honor, actually I
11 would ask for a closer deadline because if there's
12 anything that we need to look into, based on the
13 information that he gives, we have to be able to have the
14 time to do that.
15 MR. LOMAYESVA: How about Thursday?
16 MS. LEON-ENRIQUEZ: I'm thinking maybe
17 Wednesday.
18 MR. LOMAYESVA: We can shoot for Wednesday.
19 I'm not opposed to it but I'd ask that you still give us
20 the time, in case it absolutely can't be worked out,
21 until Thursday, but we will try to get it done by
22 Wednesday. I just don't want to have to come back and
23 say we couldn't do it because of our schedules; there
24 wasn't enough time.
25 THE COURT: At this time the Court's going to

1 include a deadline of the 30th of April, which is
2 Wednesday, for an interview to be conducted with the
3 Public Defender's office and Officer Jacob Garcia, with
4 the tribe present, and that the tribe submit written
5 disclosure of Detective Garcia and including Detective
6 Garcia as a rebuttal witness as indicated.
7 MR. LOMAYESVA: Written what?
8 THE COURT: Written disclosure that would
9 include Detective Garcia.
10 MR. LOMAYESVA: Got it.
11 THE COURT: The remaining item was the last
12 item on the disclosure request.
13 MR. LOMAYESVA: Swabs and the DNA test results.
14 THE COURT: Yes, test results.
15 MR. LOMAYESVA: We are not going to be
16 introducing the swabs on the DNA test results. The
17 victim's clothing were taken for DNA testing as well as
18 swabs were taken from the defendant.
19 We're notified by the lab that it would not be
20 possible to complete the DNA results by the time of the
21 trial, so we're going to have to forego the ability to
22 use the swabs in the DNA test results.
23 THE COURT: All right, so that would not be
24 used at trial.
25 MR. LOMAYESVA: Right.

1 MS. LEON-ENRIQUEZ: And that includes not
2 having the expert witness testifying?
3 MR. LOMAYESVA: That's correct. We won't use
4 the expert witness.
5 THE COURT: Any further discussion on that?
6 Anything else on the disclosure request items?
7 All right. So we set a date on Monday and a
8 deadline for Wednesday on interview of the rebuttal
9 witness. Is there anything else that we need to address
10 before we adjourn today?
11 MS. LEON-ENRIQUEZ: I have one other issue,
12 your Honor, and it has to do more with the complaint, the
13 fact that the complaint has the public sexual indecency
14 and public sexual indecency to a minor.
15 I would ask the Court to strike the "public
16 sexual indecency to a minor," since that's not relevant
17 to the matter. It could actually confuse and mislead and
18 unduly prejudice Mr. Molina with references to minor when
19 that has nothing to do with the actual case.
20 MR. LOMAYESVA: I have no objection to striking
21 that part of the caption and I could submit an amended
22 complaint. But if I could ask leave of the Court to not
23 do it until after we hear the motion to dismiss, because
24 if you grant the motion to dismiss, then there's no need
25 to file an amended complaint.

1 But I'd be happy to do that. Defendant is
2 correct. I have no objection to that request.
3 THE COURT: Ms. Leon-Enriquez, any response to
4 that?
5 MS. LEON-ENRIQUEZ: No, your Honor.
6 THE COURT: At this time the Court is going to
7 grant that request to strike reference to a minor, public
8 sexual indecency to a minor, specifically to a minor.
9 And the Court will not order at this time the
10 tribe to submit another amended criminal complaint until
11 we address the motion to dismiss on Monday.
12 Any change to defendant's release conditions
13 until next hearing?
14 MR. LOMAYESVA: No, your Honor.
15 THE COURT: Any objections to them remaining as
16 ordered?
17 MS. LEON-ENRIQUEZ: No, your Honor.
18 THE COURT: The Court will continue defendant
19 under previously ordered release conditions until we
20 address this matter on Monday.
21 MS. LEON-ENRIQUEZ: Would the Court like to
22 find anything with regards to the intoxication issue?
23 THE COURT: The addressing of the intoxication,
24 does the tribe have anything? Anything the tribe would
25 also like to submit regarding the intoxication issue?

1 MR. LOMAYESVA: Well, if defendants are going
2 to submit something, I want to submit something. We
3 could submit cross briefing on the issue on Monday, I
4 suppose.
5 THE COURT: Morningtime, and it's only because
6 I would like to have that --
7 MR. LOMAYESVA: Well, I would ask by noon,
8 because --
9 THE COURT: I would like to review that, so at
10 least I'd say by 11:30 a.m.
11 MR. LOMAYESVA: That's good.
12 THE COURT: Anything else?
13 All right. Court's adjourned.
14 (Recording ends)
15
16 * * *
17
18
19
20
21
22
23
24
25

1 C E R T I F I C A T E

2

3 I, Sue Baquet, a transcriber and non-certified

4 court reporter, do hereby certify that the foregoing

5 transcript was transcribed by me from an audio recording

6 and reduced to writing by me; that said transcript is a

7 true record of the recording transcribed to the best of

8 my ability.

9

10

11

12

13 Sue Baquet

14

15

16

17

18

19

20

21

22

23

24

25

PYT COA '14/05/08 PM02:54

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

By Frederick Lomayesva
Deputy Prosecutor

IN THE PASCUA YAQUI COURT OF APPEALS

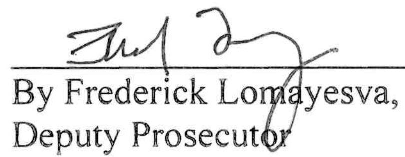
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Appellant, v. MOLINA, SALOMON F., Appellee.	))))))))))	Case No. CA-14-003 **NOTICE OF ARRANGEMENT OF TRANSCRIPTS**

Comes Now the Pascua Yaqui Tribe through Deputy Prosecutor Frederick Lomayesva, and gives notice of arrangement made for the preparation of transcripts pursuant to 3 PYTC §2-3-110(F)(4) and this Court's order of May 7, 2014. On this date, the Pascua Yaqui Tribe made arrangements for the preparation of transcripts from *Kathy Fink & Associates, Certified Court Reporters,* at an expected cost of $600. It is expected that transcripts may be available within one week for court hearing dates April 23, 2013, and April 28, 2014.

///

RESPECTFULLY SUBMITTED this 8 day of May, 2014.



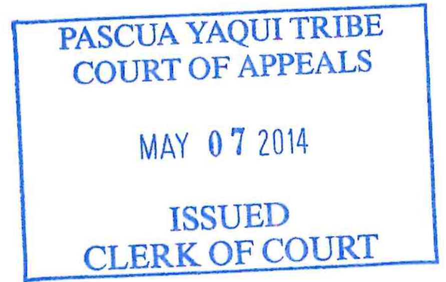
By Frederick Lomayesva,
Deputy Prosecutor

A copy of the foregoing motion was
Delivered this 8 day of May, 2014, to:

Patricia Leon-Enriquez, Esq.
Office of the Public Defender
Attorneys for Salomon Molina

No. CA-14-003

Pascua Yaqui Court of Appeals



Pascua Yaqui Tribe, Appellant,

vs.

Molina, Salomon Flores, Appellee,

Interlocutory Appeal of a Tribal Court Order in Case No. CR-14-196, the Honorable Margaret Flores presiding.

Frederick Lomayesva, Office of the Prosecutor of the Pascua Yaqui Tribe, 7777 Camino Huivisim, Tucson, AZ for the Appellant.

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

****

Order

On May 7, 2014, Appellant filed a Motion for Leave to File Court Recordings Instead of a Transcript. Motion is denied. Appellant shall submit a transcript for the relevant parts of the Tribal Court proceedings in CR-14-196. See 3 PYTC §2-3-110(F).

So ordered on this 7th day of May 2014.

Chief Justice, James Hopkins

PYTCOA '14/05/07 AM09:43

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

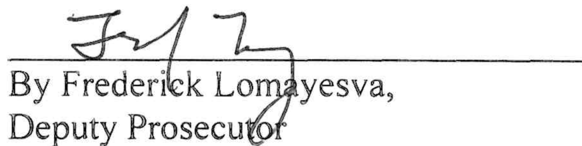
IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Appellant, v. MOLINA, SALOMON F., Appellee.	Case No. CA-14-003 MOTION FOR LEAVE TO FILE COURT RECORDINGS INSTEAD OF TRANSCRIPTS

Comes Now the Pascua Yaqui Tribe through Deputy Prosecutor Frederick Lomayesva, and moves for leave to file court recordings instead of transcripts for the reasons set forth in the attached memorandum of points and authorities which by this reference is incorporated herein and made a part hereof. The undersigned has discussed this motion with opposing counsel who does not object.

RESPECTFULLY SUBMITTED this 7 day of May, 2014.



By Frederick Lomayesva,
Deputy Prosecutor

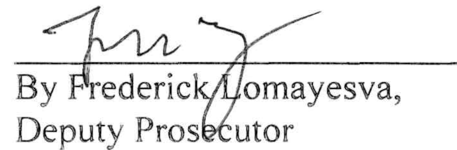
MEMORANDUM OF POINTS AND AUTHORITIES

The Pascua Yaqui Code requires the appellant to order transcripts within ten days of filing his notice of appeal. See 3 PYTC §2-3-110(F). The notice of appeal was filed on May 1, 2014. The code would require Appellant to order transcripts within ten days. The tenth day would be May tenth. There are two hearings that may be relevant to the determination of this appeal. They are April 22, 2014 and April 28, 2014. The court has recorded the hearings and made the recordings available.

This is an expedited appeal and the dead line for filing the opening brief is ten days after clerk of the trial court submits the *Index and Transmittal of the Record*. There is little time to obtain transcripts of the hearings and may be impossible to acquire before the Opening Brief is due. The hearings contain oral arguments on the motion to dismiss and the objection to the jury instruction. However, the issues in this case are pure issues of law. There are no contested issues of material fact relevant to the resolution of the legal issues before this court. "A transcript may not be necessary in an appeal that presents a pure question of law." See Alma v. Soto, CA-06-010, page 4 (PY Ct App., 3/9/07). Thus, it may not be necessary in this case to order transcripts as it present issues of law.

The trial court has made audio recording of the hearings. These recordings are available now. Because of the limited time and the nature of the issues, the Appellant requests leave to file the recorded hearings in lieu of the transcripts.

Respectfully Submitted this 7 day of May, 2014.



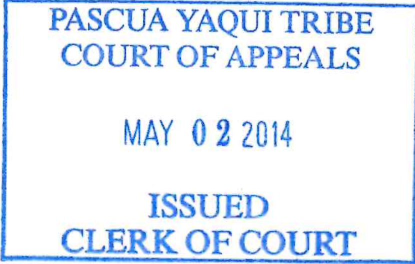
By Frederick Lomayesva,
Deputy Prosecutor

A copy of the foregoing motion was
Delivered this 7 day of May, 2014, to:

Patricia Leon-Enriquez, Esq.
Office of the Public Defender
Attorneys for Salomon Molina

No. CA-14-003

Pascua Yaqui Court of Appeals



Pascua Yaqui Tribe, Appellant,

vs.

Molina, Salomon Flores, Appellee,

Interlocutory Appeal of a Tribal Court Order in Case No. CR-14-196, the Honorable Margaret Flores presiding.

Frederick Lomayesva, Office of the Prosecutor of the Pascua Yaqui Tribe, 7777 Camino Huivisim, Tucson, AZ for the Appellant.

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

****

Order

I. Background

On May 1, 2014, the Tribe filed an interlocutory appeal seeking review of a tribal court order in case CR-14-196 for dismissing Count 3, a violation of 4 PYTC § 2-30(A)(1), Public Sexual Indecency as well as allowing the inclusion of Jury Instruction number 23 for the jury trial set for May 6, 2014. The Tribe also requested that this Court issue a stay of execution for the jury trial pending the outcome of this appeal. The Tribe has not submitted a petition for a stay from the trial court.

Defendant subsequently filed a Response to which the Tribe then filed a Reply.

II. Appeal and Request for Stay of Execution

Appellant must follow the filing requirements in 3 PYTC § 2-3-250 and file a petition to stay the trial with the trial court before asking this Court to issue a stay of execution of any order, judgment, or conviction in trial court. Appellant cannot request of a stay of execution of a trial

court order from the Court of Appeals in lieu of requesting it from the trial court. The Pascua Yaqui Tribal Code provides the following:

> (A) Filing requirements:
> (1) An appellant may file with the trial court a motion for a stay of execution of its ***judgment, order, or conviction*** at any time after the decision is final.
> (2) If the trial court denies the motion, it shall set for its reasons in writing.
> (B) Documents Forwarded. All original documents, orders, and other papers filed in the trial court relating to the stay of execution shall be included in the record on appeal forwarded to the appellate court.
> (C) Motion for Stay Denied.
> (1) If the trial court denies the motion for stay, ***and only in such case,*** a petition for a stay may be filed with the appellate court clerk, and the chief justice may grant the stay upon any conditions that protect the interests of the parties.
> (2) The trial court's order denying the stay shall be attached to the petition to the appellate court.
> (3) If the trial court grants the stay, a copy of the order granting the stay shall be filed with the appellate court clerk.

See 3 PYTC § 2-3-250 (emphasis added).

The Code requires that appellant file a motion for a stay of execution with the trial court first before coming to this Court with such a motion. The Code distinctly states that appellant may file a motion for a stay of execution for a final judgment, an order or a conviction, and the Code defines judgment as "any order that can be appealed, whether denominated an order, a judgment, a decree or otherwise." Any order that can be appealed includes orders that are the basis for interlocutory appeals. See 3 PYTC § 2-3-40(C)

If appellant were allowed to come directly to this Court with petitions to stay proceedings in trial court, it could lead to a delay of justice in trial court cases while issues are litigated in the Court of Appeals. This rule allows trial court judges to have a first, but not final, say in whether issuing a stay is sensible and necessary. Only when the trial court denies a motion for stay may appellant file a petition for a stay with this Court, and even then, the Code states that the chief justice ***may*** grant the stay to "protect the interests of the parties". See 3 PYTC § 2-3-250(C)(1) (emphasis added).

In this case, appellant filed an interlocutory appeal requesting an expedited briefing schedule and stay of execution of an upcoming jury trial in trial court. Appellant did not file a stay with the trial court first, as the Code demands. Although appellant filed an interlocutory

appeal based on an order, the Code is clear that the same filing requirements apply to all appeals. The interlocutory appeal filed for CR-14-196 will continue with an expedited briefing schedule, but the request for an order staying the May 6, 2014 trial is denied. Appellant must first request a petition for a stay with the trial court.

This Court requests an expedited issuance of the Index and Transmittal from the trial court clerk as well as expedited submission of any transcripts of proceedings necessary for inclusion in the record. At the issuance of the Index and Transmittal, appellant will have ten (10) days to submit an opening brief. Appellee will have ten (10) days to submit a response. Appellant will have ten (10) days to submit a reply.

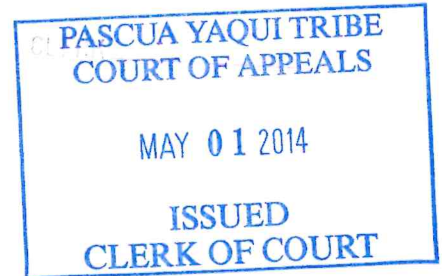
So ordered on this 2nd day of May 2014.

____

Chief Justice, James Hopkins

Pascua Yaqui Tribe
Office of the Prosecutor
7777 S Camino Huivisim, Bldg. A
Tucson, AZ 85757
(520) 879-6257 Telephone
(520) 879-6260 Facsimile

By Frederick Lomayesva,
Deputy Prosecutor



IN THE PASCUA YAQUI APPELLATE COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff, v. MOLINA, SALOMON FLORES Defendant.	Case No. CR-14-196 **REPLY TO DEFENDANT'S RESPONSE RE. TRIBE'S MOTION TO STAY PROCEEDINGS**

COMES NOW the Pascua Yaqui Tribe and Replies to Defendant's Response as follows:

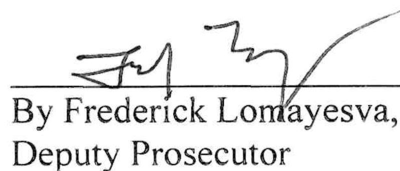
The defendant asserts that the Tribe is not entitled to a stay pursuant to 3 PYTC §2-3-240. Code Section 3 PYTC §2-3-240 does not apply to this case. This is not a normal appeal (which can only be taken from a final judgment). This is an interlocutory appeal. It is clear that 3 PYTC §2-3-240 addressed cases where a final judgment was issued and a party seeks to delay implementation of the judgment or conviction. It does not address an interlocutory appeal (or special action) where the

litigation is ongoing rather than completed. Issues raised by interlocutory appeal or special action often affect the outcome of the ongoing case. This is the case in this appeal.

This Court has discretion to order a stay pursuant to 3 PYTC §2-3-50. There are good reasons to issue a stay in this matter. The allegations, in this case, are that the defendant, Salomon Molina, groped a young girl's breast while she slept. She awoke, then screamed for her parents. The trial court has dismissed a count of public sexual indecency and now allows the defendant to use voluntary intoxication as a defense to the remaining charges. This case raises novel and important issues of tribal law that need resolution prior to trial.

Trial is set for May 6, 7, and 8. The legal issues involved in this case will take longer to brief and decide than the date set for trial. The Tribe agrees with the defendant that time is of the essence and has asked for an expedited briefing schedule. In contrast to defendant's rights, the victim in this case is entitled to her day in court to vindicate the alleged wrongs performed on her. There are good reasons for this court to exercise its discretion.

RESPECTFULLY SUMBITTED this __/__ day of May, 2014.



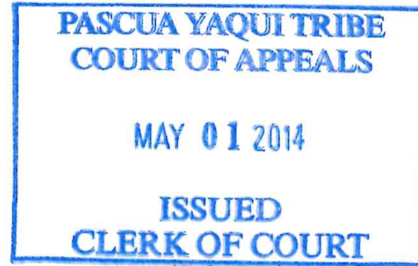
By Frederick Lomayesva,
Deputy Prosecutor

1 A copy of the foregoing was delivered
2 This __/__ day of May, 2014, to:
Patricia Leon-Enriquez
3 Office of the Public Defenders
4 Attorneys for the Defendant

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

Patricia Leon-Enriquez
PYT Bar No. 10186
COUNSEL FOR: Appellee



IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Appellant, vs. MOLINA, SALOMON, Appellee.	CR-14-196 **RESPONSE TO TRIBE'S REQUEST TO STAY MAY 6, 2014 TRIAL**

Appellee Salomon Molina, through counsel, hereby responds to the Tribe's request to stay Mr. Molina's May 6, 2014 jury trial.

On April 28, 2014, upon motion of the Defendant, the trial court dismissed Count 3 of the criminal complaint pending against Mr. Molina. On May 1, 2014, the Tribe filed Notice of Interlocutory Appeal with the Court of Appeals (hereinafter "Notice"). Contained within its Notice, the Tribe requested that the Court of Appeals stay Mr. Molina's May 6, 2014 jury trial until resolution of the appeal.

The Tribe's request to the Court of Appeals to stay Mr. Molina's jury trial is procedurally defective. According to the Pascua Yaqui Tribal Code, 3 PYTC § 2-3-250:

Section 250 Stay of Execution (– Formerly 3 PYTRAP Rule 23)

(A) Filing Requirements.

(1) The appellant may file with the **trial court** a motion for a stay of execution of its judgment, order, or conviction at any time after the decision is final.
(2) If the trial court denies the motion, it shall set forth its reasons in writing.

(B) Documents Forwarded. All original documents, orders, and other papers filed in the trial court relating to the stay of execution shall be included in the record on appeal and forwarded to the

appellate court.

(C) Motion for Stay Denied.

(1) **If the trial court denies the motion for stay, <u>and only in such case</u>, a petition for a stay may be filed with the appellate court clerk**, and the chief justice may grant the stay upon any conditions that protect the interests of the parties.

(2) The trial court's order denying the stay shall be attached to the petition to the appellate court.

(3) If the trial court grants the stay, a copy of the order granting the stay shall be filed with the appellate court clerk.

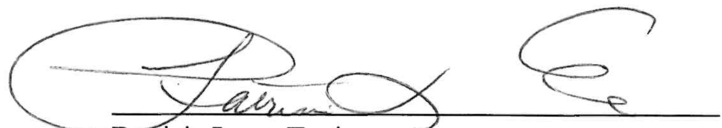
(emphasis added).

The Tribe did not file a request with the trial court to stay Mr. Molina's jury trial pending resolution of the Tribe's appeal. Because the Tribe failed to follow the very clear requirements of 3 PYTC § 2-3-250, the Court of Appeals is not in a position to entertain the Tribe's request. Mr. Molina respectfully requests that the Court of Appeals deny the Tribe's request to stay the proceedings.

If the Court of Appeals should decide that the Tribe's request to stay Mr. Molina's jury trial is not procedurally barred, then Mr. Molina substantively objects to the Tribe's request. Mr. Molina is entitled to a speedy trial under the laws of this Tribe, the Tribal Constitution and the Indian Civil Rights Act. Pursuant to 3 PYTC § 2-2-330(C), Mr. Molina is required to have a trial on this matter before June 16, 2014. Mr. Molina does not waive his right to a speedy trial and objects to any stay that would compromise his right to a speedy trial. The Defendant is not free pending trial. He is released on a cash bond and has been ordered not to have contact with any minor children, including his own children. These substantial restraints on his liberty do not support the Court issuing a stay of his trial pending resolution of this appeal.

DATED this 1st day of May 2014.

PASCUA YAQUI PUBLIC DEFENDER



Patricia Leon-Enriquez
Senior Staff Attorney

CERTIFICATE OF SERVICE

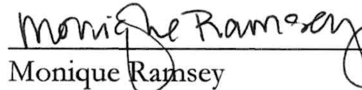
A copy of the foregoing was delivered this 1st day of May, 2014 to :

Fred Lomayesva

Office of the PYT Prosecutor

DATED this 1st day of May, 2014.

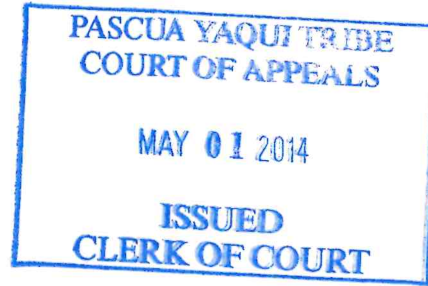
PASCUA YAQUI PUBLIC DEFENDER



Monique Ramsey
Legal Secretary

PASCUA YAQUI TRIBE
Office of the Tribal Prosecutor
7777 S Camino de Oeste
Tucson, AZ 85757
(520) 879-6257

By Frederick Lomayesva
Deputy Prosecutor



IN THE PASCUA YAQUI APPELLATE COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE Plaintiff/Appellant, v. MOLINA, SALOMON FLORES, Defendant/Appellee.	)	Case No. CR-14-144 **NOTICE OF APPEAL (INTERLOCUTORY)**

COMES NOW the Pascua Yaqui Tribe and give notice of its filing an interlocutory appeal of tribal court order filed on April 28, 2014, pursuant to *Rules of Appellate Procedure* (3 PYTC §2-3-10 et. seq.) and In re. Pascua Yaqui Tribe, CA-13-005 (2014).

The Plaintiff below is designated as the "Appellant" and the Defendant below is designated as the "Appellee."

The order appealed from is the tribal court order of April 28, 2014. A copy of the order is attached to this notice and by this reference are made a part of this notice.

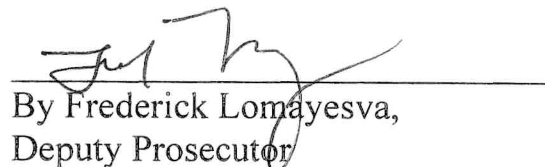
The Plaintiff (Appellant) designated the following parts of the order as being appealed:

1. Did the court err as a matter of law in dismissing count 3 of the Tribe's Criminal Complaint?

2. Did the court abuse its discretion when it admitted defendant's jury instruction 23 that voluntary intoxication is a defense to all mental states in opposition to established law?

This matter is set for trial on May 6, 2014. It is respectfully requested that an order be issued staying the trial pending the outcome of this appeal and an expedited briefing schedule be ordered.

RESPECTFULLY SUBMITTED this 1 day of May, 2014.



By Frederick Lomayesva,
Deputy Prosecutor

A copy of the foregoing Notice of Appeal was
Delivered this 1st day of May, 2014, to:

Patricia Leon-Enriquez, Esq,
Office of the Public Defender
Attorneys for the Defendant

1 IN THE PASCUA YAQUI TRIBAL COURT

2 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

3 PASCUA YAQUI TRIBE,	)	Case No.:CR-14-196
4 Plaintiff,	)	ORDER
5 vs.	)	
6 MOLINA, SALOMON FLORES,	)	
7	)	
8 Defendant.	)	

9 The Defendant, Salomon Flores Molina, appeared before this Court on April 28, 2014,
10 with legal counsel, Patricia Leon-Enriquez for his scheduled hearing on the Defendant's Motion
11 To Dismiss (Probable Cause) in the above-captioned matter. Frederick Lomayesva appeared for
the Tribe.

12 The Court reviewed the timely submitted Motion to Dismiss, the Tribe's Response and the
13 Reply to the Tribe's Response and the Court heard oral arguments. The Court finds as follows:

14 On February 27, 2014, the Tribe filed a "2nd Amended Criminal Complaint" alleging
15 violation of 4 PYTC § 1-130(B)(4), in Count 1, Aggravated Assault, by;

16 On or about February 16,2014 at approximately 12:44 a.m., at or near 5340 W. Vaka Moa,
17 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
18 victim's capacity to resist was substantially impaired, to wit: *grabbed the left breast of* AA
19 *(10121197) a minor, under he shirt while she was sleeping in her bed.*

20 and in Count 3, a violation of 4 PYTC § 2-30(A)(1), Public Sexual Indecency, by:

21 On or about February 16, 2014, at approximately 12:44 a.m., at or near 5340 W. Vaka
22 Moa, Tucson, AZ, Defendant did intentionally or knowingly engage in an act of sexual contact,
when another person was present, and the defendant was reckless about whether such other
23 person, as a reasonable person, would be offended or alarmed by the act, to wit: *defendant touched
the breast of* AA *(10127197),minor, while she slept, and awoke her with his fondling of her*
24 *person.*

25

26 The Court denies the Defendant's Motion to Dismiss Count 1: Aggravated Assault as the
alleged victim's capacity to resist may have been substantially impaired initially because she was
27 asleep and possibly drowsy after being fully awake. The Court further finds that the finding In the
28 Matter of Appeal in Juvenile Action No JV-123196, 172 Ariz. 74, 834 P2d. 160 (Ariz. App.,
1992) the Court held that physical restraint is unneccessary to be found guilty of aggravated
assault.

APR 28 2014 AM10:00

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

The Court grants the Defendant's Motion To Dismiss Count 3: Public Sexual Indencency as the Court looks to Arizona law, which is mirrored by the Pascua Yaqui Code and the intent of the law. As included in the Defendant's Reply, "The statute was clearly 'designed to protect the ***public*** from shocking and embarrasing ***displays*** of sexual activities.' *State v. Flores,* 160 Ariz. 235, 239, 772 P.2d 589, 593 (App.189) (emphasis added). Accordining to the facts presented in the probable cause statement and the criminal complaint, the only two individuals present at the time of the alleged incident were the alleged victim and the Defendant. No other person was present.

The Defendant, through counsel, moved the Court to amend the conditions of release in this matter for the reason that the Court dismissed Count 3 and the Defendant requested that the condition of no contact with minors be removed from his conditions of release. The Tribe objected because there continues to be an alleged minor victim in this matter. The Court finds good cause to deny the motion to amend the conditions of release.

Defense counsel also informed the Court that the Defendant received a cd copy of interviews conducted by law enforcement and that the transcripts of the interviews have been requested; however, the Defendant was told that he had to go through the Tribe for such transcripts. The Tribe informed the Court that he has requested the transcripts as well and that they are in the process of being completed. The Tribe suggested that the Court set a due date for the trancripts to be completed. Good cuase appears to order a due date for the transcribed interviews previously provided to the parties in the form of a compact disc to be completed by Pascua Yaqui Law Enforcement to be submitted to the Tribe's Prosecutor for use by the parties by **Thursday, May 1, 2014 at 12:00 noon.**

With regard to the Defendant's Jury Instruction number 23: Voluntary Intoxication, the Court finds that the Pascua Yaqui Tribal includes clear language when it prohibits voluntariy intoxication as a possible defense when a culpbable mental state is recklessness, the code does not include language which prohibits the use of voluntary intoxication as a defense when a violation of the Code calls for an intentional or knowing mental state. The Defendant's Jury Instruction number 23: Voluntary Intoxication shall be included in the jury instructions for this jury trial. The Court finds that this may be a matter for the Tribal Council to address in their legislative capacity.

IT IS ORDERED that the Court denies the Defendant's Motion to Dismiss Count 1: Aggravated Assault and the Court grants the Defendant's Motion To Dismiss Count 3: Public Sexual Indencency.

IT IS FURTHER ORDERED that the Defendant's Jury Instruction number 23: Voluntary Intoxication shall be included in the jury instructions for this jury trial.

IT IS FURTHER ORDERED that Pascua Yaqui Law Enforcement shall complete the transcribed interviews previously provided in compact disc form to the parties by **Thursday, May 1, 2014 at 12:00 noon.** The completed transcriptions shall be submitted to the Office of the Prosecutor by the due date to be forwarded to the Defendant.

IT IS FURTHER ORDERED that the Defendant's Motion to Modify Conditions of Release is denied and the Defendant shall continue released under the previously ordered release conditions. The Defendant shall continue to be released on a posted cash bond of $500.00. The Defendant shall continue to comply with the supervision of Pretrial Services and under standard Pretrial Release Conditions. The Defendant shall keep in contact Pretrial Services at their discretion. The Defendant shall have no contact with the address of 5340 W. Vaka Moa and shall have no contact whatsoever with the alleged victim, the minor with initials A.A., by telephone, text, third party, internet or electronic. The Defendant shall have no contact with minor children under the age of 18. The Defendant shall not consume or possess any alcoholic beverages and shall be subject to random breath alcohol testing Pretrial or Law Enforcement. The Defendant shall obey all laws and appear for all hearings in this matter.

SO ORDERED THIS 28TH DAY OF APRIL, 2014.

[signature]

Associate Judge, Pascua Yaqui Tribal Court

Cc: Date 4.29.14

✓ Tribe ✓ Defendant ✓ Defense Counsel ___Pretrial Services ___PY Detention ___ B.I.A. Contracted Detention Facility

Clerk