No. CA-17-002

Pascua Yaqui Court of Appeals

Michael Madrid, Petitioner,
vs.
Hon. Melvin Stoof, Judge, Pascua Yaqui Tribal Court,
and
The Pascua Yaqui Office of the Prosecutor, Real Party in Interest.

For Plaintiff: Sara L. Dent, Pascua Yaqui Public Defender

For Real Party in Interest: Oscar J. Flores, Chief Prosecutor; Alicia Renee Robertson, Deputy Prosecutor, Pascua Yaqui Office of the Prosecutor.

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Opinion & Order

I. Background

This case comes to the Appellate Court as a special action petition from a criminal defendant, Michael Madrid, requesting review of a trial court order requiring the defendant to submit to a buccal swab pursuant to 3 PYTC §2-2-390(A)(6).

II. Appellate Court Jurisdiction in Special Actions

The special action petition requests that this Court preliminarily determine whether or not the Appellate Court may exercise jurisdiction over a special action petition filed by a defendant in a criminal proceeding.

This Court previously held special action petitions are permitted in criminal matters where "no equally plain, speedy, and adequate remedy is available by appeal". *PYT v. Stoof, ex. rel. Lopez*, CA-18-001, *PYT v. Stoof, ex. rel. Flores,* CA-18-002; Rule 1(a), Ariz. R. P. Spec. Act.

In reviewing the merits and substance of the special action petition in this case, this Court declines to accept jurisdiction over this special action petition. Contrary to previous special action petitions before this Court, here, the special action petition was filed by a criminal defendant who has a constitutional right to appeal and an adequate statutory structure by which to pursue an appeal after trial. See 3 PYTC §2-3-30 *et. seq.* The appellate process will allow Petitioner to raise any and all legal arguments surrounding the constitutionality of 3 PYTC §2-2-390(A)(6), the trial court's application thereof, and any other issues preserved for appeal. Petitioner does have a plain, speedy, and adequate remedy available by appeal and special action review by the Appellate Court is not necessary at this time.

III. Order

The special action petition is DENIED. This case is REMANDED to the trial court to continue proceedings consistent with this Opinion.

Justice Kendra A. Martinez

We CONCUR:

Hon. Robert Miller

Hon. Rebecca Plevel

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

PASCUA YAQUI TRIBE, Appellee, vs. MADRID, Michael, Appellant.	APPELLATE CASE NO. CA-17-002 PASCUA YAQUI TRIBAL COURT NO. CR-17-079 (REFILE OF CR-17-020)

APPELLANT'S REPLY TO THE TRIBE'S RESPONSE TO SUPPLEMENTAL BRIEFING ON JURISDICTION

PASCUA YAQUI PUBLIC DEFENDER
Melissa L. Acosta
Chief Public Defender
PYT Bar #10185
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Tucson, AZ 85757
(520) 883-5013

Attorney for Appellant Michael Madrid

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STATE OF ARIZONA

Statutes

I. INTRODUCTION

Appellant, Mr. Madrid hereby submits the following reply to the Tribe's response to the Appellant's supplemental briefing regarding jurisdiction.

II. RELEVANT FACTS

On August 3, 2017 Mr. Madrid filed his Notice of Appeal in this case. (Record at 3; Record at 1.) Parties submitted briefing pursuant to the August 22, 2017 order of this Court and the Pascua Yaqui Code Rules on Appellate Procedure. Oral argument took place on May 10, 2018. On May 31, 2018 the Pascua Yaqui Court of Appeals issued its additional briefing order to address on the issue presented above relating to jurisdiction. On July 2, 2018, undersigned counsel for Mr. Madrid submitted their supplemental briefing addressing why this Court does have jurisdiction to hear his interlocutory appeal requesting that this Court overturn the June 20, 2017 trial court order permitting the taking of Mr. Madrid's DNA.

On August 2, 2018, the Tribe submitted their responsive brief indicating that this Court has jurisdiction to hear this matter. Nevertheless, the Tribe's brief, contains a material misstatement of fact – that is, the Tribe erroneously identifies itself as the party that is appealing on page 9 where it requests the Court to "accept jurisdiction of the Tribe's petition for special action." Mr. Madrid initiated this interlocutory appeal and agrees that this Court has jurisdiction to hear the matter.

In addition to agreeing that this Court has jurisdiction to hear this matter, the Tribe's supplemental briefing exceeds the scope of the Court's Order. First, it re-litigates issues that have already been briefed and argued before this Court at pages 10-12. The Tribe also inappropriately asks that this Court make a blanket finding that the Tribe always has a right to file interlocutory

appeals. ("Real Party in Interest's Supplemental Brief" at p. 13.) Mr. Madrid does not agree that this Court has jurisdiction in this case to decide if the Tribe has an absolute right to file interlocutory appeals as it is irrelevant to the matter at hand.

III. ARGUMENT

Neither Party Disputes That This Court Does Have Jurisdiction to Hear Appellant's Interlocutory Appeal; and Any Additional Discussion Relating to Any Other Issues Other than Jurisdiction Should Not Be Considered.

Both parties submitted briefs with law and argument to support interlocutory review in this case. Both parties likewise submitted briefing on when an interlocutory appeal may be heard under the standards established by the State of Arizona A.R.S. Special Actions, Rules of Proc., Rule 3 as there is little guidance provided by the tribal code. After initial briefing and oral argument, this Court requested supplemental briefing only on the issue of "whether [or not] the Pascua Yaqui Tribe Court of Appeals has jurisdiction to hear an interlocutory appeal in this criminal prosecution of the ruling by the Trial Court allowing a (buccal) cheek swab of the defendant to search for DNA evidence." If this Court were to embrace the standards set forth by the State of Arizona for Special Actions, it would be contrary to A.R.S. Special Actions, Rules of Proc., Rule 3 to find that the Tribe has an absolute right to interlocutory appeals.

IV. CONCLUSION

Based on the above, this Court should find that it does have jurisdiction to hear and make a ruling in this case. Moreover, no additional argument made by the Tribe in its responsive supplemental brief should be considered.

RESPECTFULLY SUBMITTED: August 17, 2018.

PASCUA YAQUI PUBLIC DEFENDER

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Attorney for Appellant Michael Madrid

CERTIFICATE OF COMPLIANCE

This brief complies with the provisions set forth in 3 PYTC Part II, Chapter 2-3.

PASCUA YAQUI PUBLIC DEFENDER

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Attorney for Appellant Michael Madrid

CERTIFICATE OF SERVICE

On August 17, 2018 the original and 3 copies of the *Supplemental Appellant Brief* were filed, and conforming copies were sent to the following:

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

Michael Madrid, Appellant

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Alicia Renee Robertson
Deputy Prosecutor

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

MADRID, MICHAEL,

Appellant.

Vs.

HONORABLE MELVIN STOOF
JUDGE, PASCUA YAQUI TRIBAL COURT
Appellee,

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR[1]
Real Party in Interest

APPEALS CASE NO: CA-17-002
TRIBAL COURT NO: CR-17-079

REAL PARTY IN INTEREST'S SUPPLEMENTAL BRIEF

COMES NOW, the Pascua Yaqui Tribe by and through the Pascua Yaqui Chief Prosecutor, OSCAR J. FLORES, and his Deputy, ALICIA RENEE ROBERTSON, and hereby respectfully submits the following Real Party in Interest's Supplemental Brief. The Tribe

[1] In Special Action pleadings the complaint names the body, officer, or person against whom relief is sought. However, "[i]f any public body, tribunal, or officer is named as a defendant, the real party or parties in interest shall be joined as defendants." Ariz.R.Spec.Act., Rule 2(a)(1). In such circumstances, the practice is to direct the writ in form to the court, but in fact leave its handling to the parties. *See* Ariz.R.Spec.Act., Rule 2, State Bar Committee Notes, section (a).

respectfully requests this Court take jurisdiction of this issue and to deny relief to Appellant by affirming the prior ruling of the Tribal Court Judge.

RESPECTFULLY submitted this 2nd day of August, 2018.

Oscar J. Flores
Chief Prosecutor

Alicia Renee Robertson
Deputy Prosecutor

Original filed with the
Clerk of the Pascua Yaqui Court of Appeals

On:_____

Copy of the foregoing provided to:

Hon. Melvin Stoof
Pascua Yaqui Tribal Court

Melissa Acosta
Pascua Yaqui Office of the Public Defender
Attorney for Appellant Michael Madrid

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PROCEDURAL POSTURE AND RELEVANT FACTS:

The Tribe hereby incorporates the facts as written in its Real Party in Interest's Response Brief previously submitted on October 23, 2017. The Tribe hereby submits this Supplemental Brief pursuant to this Court's order issued May 31, 2018.[2]

STATEMENT OF THE ISSUES:

1. **DOES THE PASCUA YAQUI COURT OF APPEALS HAVE JURISDICTION TO HEAR AN INTERLOCUTORY APPEAL IN THIS CRIMINAL PROSECUTION OF THE RULING BY THE TRIBAL COURT ALLOWING A (BUCCAL) CHEEK SWAB OF THE DEFENDANT TO SEARCH FOR DNA EVIDENCE?**

LAW AND ARGUMENT:

I.
THE PASCUA YAQUI TRIBE COURT OF APPEALS HAS JURISDICTION OVER INTERLOCUTORY APPEALS AND SPECIAL ACTIONS.

The Pascua Yaqui Tribal Rules of Appellate Procedure, s*ee generally* 3 PYTC § 2-3-30 *et seq.*, grant parties the right to appeal in most, but not all, circumstances. For instance, the Tribe does not have the right to appeal a judgment acquitting a defendant in a criminal case. 3 PYTC § 2-3-90(G); Art. I, § 1(c), Pascua Yaqui Const.; *Pascua Yaqui Tribe v. Montana*, CA-12-001 (PYT Ct. App. July 23, 2013).[3] Appellant, in his brief, misinterprets this provision to mean that the Tribe never has the right to appeal. Parties in civil cases *are* prohibited from filing any sort of interlocutory appeal. 3 PYTC § 2-3-90(F); *Global Cash Access, Inc. and Central Credit, LLC v. Gaming Enterprise Division of the Pascua Yaqui Tribe*, CA-14-0004 (PYT Ct. App. June 20, 2014). However, nothing in the Tribal code prohibits the Tribe from filing an interlocutory

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[2] The Tribe also submits the Motion Hearing Re: DNA. Attached *Tribe's Exhibit* 1.

[3] The Tribe may, however, appeal a dismissal, as suggested by this Court accepting jurisdiction and giving its recent ruling in *In the Matter of Alvarez*, CA-17-008 (P.Y.T. Ct. App. June 19, 2018).

appeal or "extraordinary writ" in criminal cases.[4] In cases where a defendant lacks an equally plain remedy on appeal after the conclusion of the case, defendants also have the ability to file an interlocutory appeal or "extraordinary writ" in criminal cases.

The Pascua Yaqui Tribal Code does not define what "interlocutory appeals," "special actions," or "extraordinary writs" are. *See generally* 3 PYTC § 2-3-40. However, pursuant to 1 PYTC § 2-30(H),[5] whenever the meaning of a term used in the code is unclear, either "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 also Pascua Yaqui Tribe v. Miranda*, CA-08-015 (PYT Ct. App. Mar. 29, 2009), at p.22. As a result, the Court of Appeals has turned to Arizona law for guidance as to how to proceed with interlocutory appeals and special actions. In *Montana*, CA-12-001, p. 1, the Court of Appeals was asked to determine whether the trial court erred by ordering that a minor victim be made available for an evidentiary hearing so that she could be questioned regarding allegations that she had been coached. The Court determined that "[a]lthough the Pascua Yaqui Rules of Appellate Procedure are silent on special actions," the matter fell squarely "within the Appellate Court's jurisdiction." *Id.* at 2.

Noting that prosecutors lack a right to appeal criminal convictions, the Court explained that "special actions emerged in the common law as specific remedial writs in the face of erroneous, excessive, arbitrary, and or capricious government actions." *Id.* The Court then turned to Arizona law. Arizona permits special action review only where no "equally plain,

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[4] Indeed, the Pascua Yaqui Court of Appeals has reviewed a number of interlocutory appeals filed by the Tribe. In its opinions, the Court has alternately referred to proceedings as "special actions", *Montana*, CA-12-001, p.1, *Pascua Yaqui Tribe v. Coleman*, CA-15-0003 (PYT Ct. App. Nov. 17, 2015), and "interlocutory appeals," *Pascua Yaqui Tribe v. Molina*, CA-14-003 (PYT Ct. App. June 6, 2014), *In re Pascua Yaqui Tribe*, CA-13-005 (PYT Ct. App. Jan. 28, 2014).

[5] 1 PYTC § 2-30 has two subsection H's, the first of which indicated that criminal "ordinances shall be construed according to the fair import of their terms, with a view to affect their object and to promote justice."

speedy, and adequate remedy is available by appeal." Rule 1(a), Ariz. R. P. Spec. Act.; *State ex rel. Romley v. Martin*, 203 Ariz. 46, 47, 49 P.3d 1142, 1143 (Ct. App. 2002); *Fragoso v. Fell*, 210 Ariz. 427, 429, 111 P.3d 1027, 1029 (App. 2005). Moreover, relief may only be granted in situations where the trial court: 1) fails "to exercise discretion which [it] has a duty to exercise," or to perform a lawful duty "as to which [it] has no discretion"; 2) proceeds or threatens "to proceed without or in excess of jurisdiction or legal authority"; or, 3) makes a determination that is "arbitrary and capricious[6] or an abuse of discretion."[7] Rule 3, Ariz. R. P. Spec. Act.; *see also Montana*, CA-12-001, p. 2. Acceptance of special action jurisdiction is discretionary. *Snyder v. Donato*, 211 Ariz. 117, 119, 118 P.3d 632, 634 (Ct. App. 2005); *Romley*, 203 Ariz. at 47, 49 P.3d at 1143 ; *c.f.* 3 PYTC § 2-3-210(D)(2) (suggesting that acceptance of special action jurisdiction in a particular case is discretionary, and not a decision that can serve as the basis of a motion to reconsider). "Special action jurisdiction is appropriate in matters of statewide importance, issues of first impression, cases involving purely legal questions, or issues that are likely to arise again." *Romley*, 203 Ariz. at 47, 49 P.3d at 1143 (appropriate forum for reviewing whether State could impeach the defendant with certain prior convictions at trial was via special action); *Synder*, 211 Ariz. at 119, 118 P.3d at 634 (special action regarding whether complex case designation was appropriate); *McGuire v. Lee*, 239 Ariz. 384, 386, 372 P.3d 328, 330 (App. 2016), (special action regarding whether juvenile could be tried as an adult); *State ex rel.*

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[6] A court's decision is considered capricious and arbitrary when the decision has no "reasonable basis in relevant facts.´ *Carlson v. Landon*, 187 F.2d 991, 1003 (9th Cir 1951).

[7] "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. A trial court abuses its discretion if it makes an error of law in reaching its decision or makes a discretionary finding of fact that is not justified by reason." *State v. Fell*, 242 Ariz. 134, 136, 393 P.3d 475, 477 (Ct. App. 2017), review denied (Nov. 16, 2017) (*internal citations and quotations omitted*); *see also McGuire v. Lee*, 239 Ariz. 384, 386, 372 P.3d 328, 330 (App. 2016), *rev. denied Dec. 13, 2016* "An abuse of discretion includes an error in interpreting or applying the law.")

McDougall v Tvedt, 163 Ariz. 281, 284, 787 P.2d 1077, 1080 (App. 1989) (jurisdiction over State's special action denied because it was filed after the defendant's conviction became final).

In *Montana*, the Pascua Yaqui Court of Appeals made no detailed references to Rule 1(a), Ariz. R. P. Spec. Act, or related state case law, the issue that the Court was tasked to review met all of the requirements of the rule and related precedent. The Tribe had no plain, adequate or speedy remedy by way of appeal because it had no right to appeal an acquittal. The question involved was a purely legal one, and involved an issue that — at the time — was a question of first impression. Finally, it was a question that was likely to arise again unless the Court of Appeals had the opportunity to provide future litigants with guidance. It was for these reasons that this Court accepted jurisdiction.

The issue raised in this case are similarly appropriate for interlocutory review. The central issue involved here is whether the trial court's ruling — which held that Appellant must submit to a buccal swab — was arbitrary, capricious, or an abuse of discretion. This is a purely legal issue that will require this Court to interpret Pascua Yaqui Rules of Evidence; specifically, PYTC § 2-2-390 (A)(6). It is an issue that is likely to arise again in one form or another in future criminal cases. Moreover, based on the Tribe's research, it is an issue of first impression for this Court.[8] Furthermore, once Defendant's buccal swabs have been taken and analyzed, Defendant would lack any remedy upon conclusion of the case to undo the disclosure of his genetic information. *See Wells v. Fell*, 231 Ariz. 525, 526, 297 P.3d 931, 932 (Ariz. App. 2013) (accepting jurisdiction in a special action brought by a Defendant who had been ordered by the trial court to disclose materials to the prosecution). For these reasons, this Court should accept jurisdiction of the Tribe's petition for special action.

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[8] The Tribe was able to locate only one case where a somewhat similar issue was raised. *See Pascua Yaqui Tribe v. Valenzuela*, CA-08-013 (PYT Ct. App 2008).

II.
BOTH TRIBAL AND ARIZONA LAW HISTORICALLY ALLOW FOR THE REASONABLE TAKING OF SAMPLES FOR PHYSICAL CHARACTERISTICS.

Under Pascua Yaqui Tribal Law, 3 PYTC § 2-2-390 (A)(6) specifies that, upon written request of the prosecutor, a defendant shall "[p]ermit the taking of samples of his or her hair, blood, saliva, urine or other specified materials which involve no unreasonable intrusions of his or her body." The applicable Arizona Revised Statute is similar to the Tribe's statute for physical characteristics. *See* Ariz. Rev. Stat. Ann. § 13-3905.

The Pascua Yaqui Court of Appeals specifically recognized that the former 3 PYT R. Crim. P. Rule 39(A)(6) (now 3 PYTC § 2-2-390 (A)(6)) as well as HIPPA, Section 164.512 permitted the taking of a blood sample from a defendant to test for the presence of a disease and that Rule 39 was quite clear. *Valenzuela*, CA-08-013 at p. 2.

In *Maryland v. King,* the United States Supreme Court held that a buccal swab of the inside of one's cheek for the purposes of obtaining DNA was, in fact, a search under the Fourth Amendment. *Maryland v. King*, 133 S. Ct. 1958, 1963, 186 L. Ed. 2d 1 (2013). "[T]he fact that the intrusion is negligible is of central relevance to determining whether the search is reasonable and thus 'the ultimate measure of the constitutionality of a governmental search,' *Maryland v. King*, 133 S. Ct. at 1963, 186 L. Ed. 2d 1, *citing Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 652, 115 S.Ct. 2386, 132 L.Ed.2d 564 (Wash. 1995). The Court went on to highlight that the need for a warrant was "greatly diminished" when the arrestee was already in justified police custody supported by probable cause. *Maryland v. King*, 133 S. Ct. 1958, 1963, 186 L. Ed. 2d 1 (2013) As such, the search must be analyzed as to "reasonableness, not individualized suspicion." *Id. quoting Samson v. California,* 547 U.S. 843, 855, n. 4, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006). The Court went on to indicate that the government does in fact have an

interest in identifying the correctly accused person. *Maryland v. King,* 133 S. Ct. at 1963–64, 186 L. Ed. 2d, *citing Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 191, 124 S.Ct. 2451, 159 L.Ed.2d 292, (indicating that the government has interest in identifying "who has been arrested and who is being tried").

Reasonableness is determined by balancing "'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.' " *King*, 133 S. Ct. at 1963, 186 L. Ed. 2d 1, q*uoting Wyoming v. Houghton,* 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408. P. 1970(1999). [9] In this balance, "great weight is given to both the significant government interest at stake in the identification of arrestees and DNA identification's unmatched potential to serve that interest." *King*, 133 S. Ct. at 1963, 186 L. Ed. 2d 1. The *King* Court determined that the government interest does not completely outweigh an individual's right to privacy. When comparing the substantial government interest and the effectiveness of DNA identification, to the actual intrusion, the intrusion of a cheek swab, according to the Court, was minimal. *King*, 133 S. Ct. at 1964–65, 186 L. Ed. 2d 1.[10]

Weighing the Appellant's right to privacy in this case against the Tribe's legitimate interests, it is clear that the Tribe's interest in identification outweighs any privacy concerns. In addition, when analyzing the magnitude of the intrusion as the *King* court did, swabbing Appellant's cheek is, at most, minimal. The case before the Court can be distinguished from *Winston* as the Tribe is not requesting that Defendant undergo surgery. Again, the Tribe is requesting the Defendant's cheek be swabbed with a sterile Q-tip to collect a small sample of

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[9] This case was not followed on state law grounds in Washington, *State v. Parker*, 139 Wash. 2d 486, 987 P.2d 73 (Wash. 1999).

[10] The reasonableness inquiry considers two other circumstances in which particularized suspicion is not categorically required: "diminished expectations of privacy [and a] minimal intrusion." *Maryland v. King*, 133 S. Ct. at 1964–65, 186 L. Ed. 2d 1, *citing Illinois v. McArthur,* 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001).

buccal cells. This is a minimal intrusion, imposes no health or safety risks, and is not nearly as severe as the request made in *Winston.* As such, because the intrusion is minimal and reasonable, and controlling Tribal law is constitutional, the Tribe respectfully requests this Court uphold the trial Court's ruling.

The Tribe also requests this Court incorporate the Points and Authorities cited to and argued in its Real Party in Interest's Response Brief previously submitted on October 23, 2017. Appellant argues that DNA can be used for paternity and various other tests. However, as discussed above, both Arizona courts, and this Court in *Valenzuela* found a swab of this nature has been to be minimally intrusive, reasonable, and not a violation of a defendant's rights. Additionally, while Appellant concedes his presence at the crime scene, he does not admit to the damage that was caused to the headlight. In addition, he may at the time of trial change his mind. Regardless, the burden of proving each and every element of every offense charged belongs to the Tribe. In this case, that includes the intent of the Defendant to commit a theft or other felony once he entered the incident location. As a result, where the Defendant's blood was found inside the home is important, because it could lead reasonable jurors to infer that the location it was left suggested the requisite intent the Tribe is required to prove. As such, the Tribe should be allowed to swab Defendant's cheek and present the results in its case in chief. Both Tribal Law and Arizona law allow for the reasonable taking of samples for physical characteristics. Accordingly, the Tribe respectfully requests that this Court uphold the trial court's ruling.

CONCLUSION

For the foregoing reasons, the Tribe acknowledges that the Pascua Yaqui Tribe Court of Appeals has jurisdiction over Appellant's interlocutory appeal as well as special actions filed by the Tribe. In addition, the trial court's order is in compliance with Tribal, State and Federal law, and the Tribe respectfully requests the Court of Appeals to uphold the trial court's decision to require that the Defendant submit to a buccal swab.

RESPECTFULLY submitted this 2nd day of August, 2018.

Oscar J. Flores
Chief Prosecutor

Alicia Renee Robertson
Deputy Prosecutor

TRIBE'S EXHIBIT 1

IN THE PASCUA YAQUI TRIBAL COURT

CITY OF TUCSON, COUNTY OF PIMA, STATE OF ARIZONA

PASCUA YAQUI TRIBE,	)	NO. CR17-079
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MICHAEL MADRID,	)	
	)	
Defendant.	)	Tucson, Arizona
	)	June 20, 2017

BEFORE: THE HONORABLE MELVIN STOOF, JUDGE OF THE PASCUA YAQUI TRIBAL COURT

APPEARANCES: ALICIA RENEE ROBERTSON, ESQ.
appearing for Plaintiff

SARA DENT, ESQ.
appearing for Defendant

RE: MOTION HEARING RE: DNA

Christine McGarvey
Legal Transcription Services Plus

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WITNESS(ES)
N/A

THE COURT: Good morning. Please me seated. This is CR17-079, Pascua Yaqui Tribe versus Michael Raymond Madrid. And this matter was reset on Motion for Evidence of Physical Characteristics by Tribe. Sara Dent is here, along with Alicia Renee Robertson. Is your --

MISS DENT: I would be requesting to waive his presence, Your Honor. The last time I spoke to him, he had broken his ankle.

THE COURT: Okay. So you're waiving presence?

MISS DENT: Yes.

THE COURT: Okay. Waiver of presence of Michael Madrid. And this is your Motion, Miss Robertson. What is it you're asking for?

MISS ROBERTSON: Uhm, well, Your Honor, the Tribe was asking for, uhm, a DNA sample to be taken

from, uh, the Defendant. As in our Motion that was previously filed, uhm, we cited two, uh, the Pascua Yaqui previous, uh, Criminal Rule 39(A)(6), which is now, now 2-239086, uh, permitting the taking of a blood sample from the Defendant to t4est for their presence of disease. We cited, uh, *PYT v. Valencia*, wherein fact we're actually testing to, uh, for identifiers and that they do not fall under the auspices of the Fourth Amendment, uhm, and, and in that Motion, we cited, uh, *State v. Wedding*, which is, uhm, 171 Ariz. 399. Uhm, as we previously argued, Your Honor, uhm, we, we feel that this is an element of the crime and we do have to prove, uhm, that it was the Defendant and it was his blood that was on that taillight, uhm, and it seems as though the case law is in line with that. Uhm, *Schmerber v. California* indicates that taking the, uh, blood tests are not an unreasonable search and seizure under the Fourth Amendment, and, uhm, *Maryland v. King*, that a buccal swab test for DNA was not unreasonable, uh, an unreasonable search of the defendant, but rather

a reasonable intrusion that would, that outweighed the defendant's privacy. And, Your Honor, uh, the Tribe feels that a buccal swab of the inside of the Defendant's mouth is not a, uhm, large intrusion, it's minimal, and therefore, we're asking that his DNA be taken.

MISS DENT: Uhm, Your Honor, the Constitutional standard is not whether it's a minimal intrusion, it's whether, number one, the search is reasonable; and number two, that there's nexus to an actually specified crime that's, uhm, alleged. Uh, we would disagree with the (inaudible) to how the case law has been interpreted. All lf the case law involving taking of DNA are felony cases. And the, in its motion, the Tribe misstates the law by saying that collection of DNA doesn't constitute a search under the Fourth Amendment. Uhm, and in fact, it does, even a buccal cheek swab is a search requiring their warrant or an exception, uhm, such as the two-prong test of whether it is reasonable and whether it is connected.

Uhm, and under *Maryland v. King*, which is a 2013 case from the Supreme Court, uhm, it could be taken even in, as part of a booking procedure if it's just a common practice. Uhm, Tribal law and Constitutional law do allow for the taking of DNA and under the cited Tribal t--, P--, Pascua Yaqui dash--, Section 2-2-39(A)(6), it does allow for a Prosecutor to request that, uhm, but there are limitations that are placed on those requests as I stated earlier, that the request has to be reasonable, and it has to be, uhm, connected to a particular crime. Uhm, there is also case law saying that there also must be a showing prior to the granting of that request, that the government has to show that there is usable DNA to compare it to, uhm, and that can be found in U.S. v. Castillo, which is out of the Southern District of Florida from 2016, uhm, before the request can be granted. Uh, Mr. Madrid argues that it is not reasonable because this is a *deminimis* misdemeanor criminal damage charge that is a property crime and is not a violent crime whatsoever. Identify

is not in question. It's a broken taillight, not a murder or a rape charge. And the blood on the taillight at best would show presence and that he had contact with the taillight, not that he actually broke it. There are three eyewitnesses listed by the Tribe that will able to expound and actually identify what happened to the taillight. Uh, all the case law examples in these lines of DNA collection, uhm, cases have things in common, such as the defendant committed felony offenses of rape or murder or firearms or drug distribution, things like that, where, uh, either identify is in question or because of the seriousness of the offense, they want to have their DNA on record. Uhm, some of these people were on probation or parole where they had an already limited expectation of the privacy, uhm, of that person, and for searches, uhm, or their DNA was taken as part of the booking process, or perhaps the identify was in question of who actually committed the crime. In each of these cases, there was an individualized suspicion that was established and a

totality of the circumstances, uh, test was applied before or the request was either denied or granted. Here we have a taillight that's broken. It's a misdemeanor charge. Defendant, by his testimony or by his, he, he has been, he has said, stated that he already his DNA taken of him at booking last year, and he believes that it was Officer Wells that took that, he took, was taken, a cheek swab was taken at that time. Uhm, identify is not in question, and in fact, Mr. Madrid doesn't even deny breaking that taillight as we have stated all along. Uhm, three are three eyewitnesses listed by the Tribe. Uhm, even if this Court should find that that passes the reasonable test, the Tribe has not shown that they have enough DNA to even compare anything that they would take from Mr. Madrid now, again, or that in their written Motion, they also did not put a limitation on what the purpose was for; in their Motion, they merely said that they wanted it for testing without saying what for. The Tribe cites to the Pascua Yaqui Court of Appeals case,

uhm, *Pascua Yaqui Tribe v. Valenzuela*, which is a Court of Appeals case dash CA08-013, which did allow for blood to be taken. Uhm, that case is easily distinguishable in this case, because it was about officer safety and preventing a harm to the officers. Uhm, there was blood needed to be taken because of, uh, allegations of possible disease and that the officers had physical contact with those blood products, and it was necessary to prevent harm, and it was for a very limited purpose. Here, nowhere in any of the charges in the Complaint or in the Probable Cause Statement did Mr. Madrid have contact with any other human being The only allegation is that there is a blood smear on a taillight. Again, there has been no particular specific purpose needed or stated. There are three witnesses that are better able to create that nexus for the presence of a broken taillight, and Mr. Madrid, uhm, it's not been shown that there is enough DNA to have anything to compare it to, and it would just show presence, at most, which is not disputed and neither is

his identity. Again, this is a misdemeanor property crime, not a violent crime or even a serious felony charge. Uhm, with regards to the *Schmerber* case that the Court I believe cited previously in the Tribes c--, cites now, that was a DUI case involving exigent circumstances in the effervescent nature of alcohol, uhm, disappearing and the necessity for taking that at the time of the incident. Uhm, with driving cases, you also have, uhm, Admin Per Se's, and driving is a privilege and not a right, and a Fourth Amendment Constitutional protection against rights for unreasonable searches to your person, it is a right and not a privilege. So it's Mr. Madrid's position that the Tribe has failed to establish that for a *deminimis* property crime, that the Tribal interests outweighs his Constitutional right to prevent unreasonable intrusions or searches of his person.

MISS ROBERTSON: A couple of things, Your Honor, uhm, with regards to, uhm, Counsel's first argument that, uh, the standard is not minimal, the

Tribe agrees, uh, the, the standard is whether or not that, uhm, taking, obtaining of the DNA is reasonable and the Tribe would argue that a minimal buccal swab is in fact, uhm, not only minimal but also reasonable in this particular case. In, uhm, the *Wedding* case, the, uhm, defendant actually, or the Tribe actually determined, or excuse me, the, the State actually determined that, uhm, there was probable cause to detain the defendant to obtain fingerprints, head and pubic hairs and blood and saliva samples. Uhm, that is much more than what, what I see in this particular case. Defense Counsel also argues that this is simply a misdemeanor and the, therefore, we shouldn't, uhm, we should therefore not have to obtain DNA or present that before, uhm, the jury. And the Tribe disagrees. Uh, the nature of the particular crime is not what is at issue here, whether or not it's a misdemeanor or a felony in inconsequential, uhm, even if the Court doesn't entertain that sort of argument, there are other charges in this particular case. There's not

just the injury to public property, but there's the aggravated assault and evidence that, uhm, the Defendant punched or hit the, uhm, the taillight, uh, will s--, will either go to the credibility of either of the witnesses in this case. If the Defendant testifies and says, no, that didn't happen or if the witnesses say, yes, it did happen, that's going to the totality of circumstances. So it's not just to prove that particular charge, but to prove, to prove that those events happened the way in which, uh, the, the, we anticipated the victims will get on the stand and testify. Uhm, as I argued before, uhm, the Court is well aware that jurors can accept and reject any evidence that's presented. Eyewitnesses can testify and say that, you know, the sky was blue, and the jurors can decide to accept or reject it. That goes with all the evidence that the Tribe presents. The Tribe could present, uhm, the eyewitness testimony; the Defendant could testify and admit to striking, uh, the, the back taillight; and the Tribe could even present

his DNA. However, jurors can then decide to accept some of that information, accept part, part of it, or not accept any of it at all. That is going to be up to the jurors and since we cannot, uhm, be inside the minds of the jurors is up to the Tribe to present all the evidence, uhm, that we can obtain. In this particular instance, Your Honor, uhm, a buccal swab of the Defendant is a minimal intrusion and we ask that the Court grant the Tribe's Motion.

THE COURT: In, uh, reviewing the cases of, particularly *Maryland v. King*, uh, which involved a search, the, uh, *Maryland v. King* case involved a defendant being brought into custody and then the issue was a reasonable, uh, expectation of privacy of an individual taken into police custody. And, uh, whether there actually diminished, uh, based on, for Fourth Amendment purposes, if there's an interest in the State in obtaining, uh, DNA characteristics, so the, uhm, Court in *King*, U.S. Supreme Court, found that, uh, when the officers made the arrest, supported by probable

cause, the whole, for a serious offense, and bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is like fingerprint and photographic, legitimate police booking procedure, uh, that is reasonable under the Fourth Amendment. And part of its logic was this buccal swab test is a quick and painless procedure. Uh, it requires no surgical intrusion beneath the skin. Uh, it would pose no great threat to the arrestee's health of safety. And, uh, then that could be combined, uh, well, in that, that particular, uh, system in Maryland, they had the, uh, CODIS, Combined DNA System, uh, which connected DNA laboratories to local state and national levels, uh, but the framework in deciding the issue of, uh, whether this is intrusive under buccal swab, uh, you simply go inside a person's cheek for a DNA sample in the search, and the question is, is that reasonable, is it a reasonable search under the Fourth Amendment… And the Court has to weigh the interests of the government prosecuting the case versus

the privacy interest of a defendant. And, uh, and sear--, and deciding whether the, uh, search is reasonable, uh, the, uh, Supreme Court set out to test the ultimate measure of Constitutionality of a government search. Uhm, and the reasonable, and I think you referred to some of these, uhm, uh, these, uh, big exigency cases, and the DUI cases, for instance, uhm, and again, the blood test is something that in *Schmerber* that did address the issue of, uh, having to preserve the blood sample for purposes of, uh, alcohol content. Uh, this particular situation is a, uh, DNA testing. Uh, the Tribe has established, or at least in its Motion, indicated that the officer did in fact take a swab of the blood on the, uhm, headlight, headlamp, uh, tail lamp, I should say, and based on that, uh, they have a sample against which a new DNA sample may be compared. So the officer, uh, proce--, proceeded to collect a swab of the blood from the broken tail lamp and they had preserved into evidence. So, in balancing, uhm, reasonableness of,

the Court gives great weight to both the significant Government interest at stake and the identification of the blood on that, uh, tail lamp, and also the DNA identifiers, identifiers, uh, of the arrestee. So, I, uh, the Court does find that it does, uh, have a legitimate Governmental interest, uhm, and, uh, as part of that interest, it's not very intrusive. Uh, it doesn't, uh, take anything but a swab testing inside the, uh, the mouth of, uh, Defendant. Again, reasonableness has to be considered, uhm, in the extent of an individual's legitimate privacy expectations, uh, which necessarily diminished when they're into custody. Uh, but again, I, I contrast that with the *Schmerber* case and with the, uh, ser--, exigent circumstance case which is the *Maryland v. King* case, uh, did so, uh, those searches differ from those, uh, so-called special need searches, uhm, and that the, uhm, *Indianapolis v. Edmond* case, that's actually mentioned in the *Maryland v. King*, and I compare and contrast that. But, uh, the reasonableness inquiry considers two other

circumstances in which particularized suspicion is not categorically required, uh, but rather diminished expectations of privacy at a minimal intrusion. So, uh, the *Maryland, Maryland v. King* case basically stands for someone can be brought into custody based on a probable cause, uh, there's the diminished expectation of privacy, but is the, was the buccal swab tested, basically minimally intrusive, and they found that it was. Uhm, so notwithstanding, uhm, an arrestee's diminished privacy expectation, a buccal swab test involves a brief and minimal intrusion, citing to the *Schmerber* case, *Maryland v. King*, says: It is virtually no risk, uh, no trauma or pain. So the Court is going to grant the request to get a DNA sample from the Defendant, uh, based on the *Maryland/King* case, which I think supports the fact that the Government can ha--, try to prove an element of the crime, uh, that, uh, they need to identify that DNA sample, and they already have the sample that was taken by the officer and the swab from the taillight. So I

will grant the request for the, uh, swab testing. I'll also, uhm, order that when the DNA sampling is done, that you notify the Defense Counsel, so Defense Couns-, Counsel can observe the swab testing. So I'll go ahead and grant the, uh, request for DNA testing.

MISS DENT: Your Honor, we would ask that you, with granting that, that it's for the limited purpose of the taillight only.

THE COURT: Any objections?

MISS ROBERTSON: That's fine, Your Honor. There was blood that was found on another pie--, uh, a candy bag or something of that nature, but I don't anticipate needing that tested.

THE COURT: Okay. So limited purpose of comparison to the blood on taillight.

MISS ROBERTSON: And, Your Honor, am I under the correct understanding that this is still stayed and so, because I believe that Defense Counsel filed a Motion to, for a Stay for the, the swab pending the Appeal. Is that correct?

MISS DENT: Yes. I'm not really sure how that works, just, uh, --

MISS ROBERTSON: So I'm not going --

THE COURT: -- (inaudible) on the Record and, uhm, --

MISS ROBERTSON: I, I'm, --

MISS DENT: -- all that.

MISS ROBERTSON: -- I'm not going to have the, him be swabbed until after the Appeal goes through.

THE COURT: Uh, this was remanded back to the Court. I've got a May 1st, 2017 Order, is all I have in my file. I don't have a, uh, other stay, but it says, it says under CA17-002, Pascua Yaqui Court of Appeals, Michael Madrid versus Pascua Yaqui Tribe, Interlocutory Appeal, on Decision of Pascua Yaqui Trial Court Order case CR17-079, uh, Sara Dent, Public Defender, Alicia Robertson, Office of the Prosecutor, on April 19th, 2017, the Tribal Court issued the index and the transmittal for the Appeal of PYP versus Madrid, CR17-079. The Tribal Court also made clear

that the audio and basis for a transcript of the March 28, 2017 hearing, was not recorded and is unavailable. On April 21st, 2017, the Court issued an Order requesting that the parties file a statement with this Court, referring to the Court of Appeals, uh, clarifying whether they could agree to a stipulated agreement of the March 28, 2017 hearing as allowed under 3PYT, Section 23-110(G) and (H), Appellant responded that a stipulation pursuant to 3PYT, Section 23-110(G) and (H) is not possible in this case. And then additionally it is not possible to arrive at an agreed upon written statement of facts that accurately reflect the March 28, 2017 hearing. Appellee came to the same conclusion. Since facts in evidence from the March 28, 2017 hearing are at issue in this Appeal, and because no audio of the March 28, 2017 hearing is available, and the parties cannot agree to a stipulated agreement, or agree upon a written statement of facts, the Court orders that the case be remanded to the Tribal Court and the issues from the March 28, 2017

proceeding be reheard. So this is the rehearing. Now, I don't know, I have not received any other stay.

MISS DENT: I have a stay, Your Honor, that's actually, uhm, signed by Your Honor from April the 4th, and it says Order Granting Stay of Order to Obtain DNA Sample Pending Court of Appeals Decision.

THE COURT: Well, I've got the Court of Appeals Order now. So, uhm, the case is un-stayed. Well, the May 1st Order from the, uhm, Court of Appeals, you know, in effect is a, overruling of my stay of, uh, April 4th, because they're telling me, no, it's not longer stayed, Trial Court, --

MISS DENT: Uh, we are --

THE COURT: -- I'm ordering you to do this.

MISS DENT: -- happy to file a renewed Motion for Stay, uh, today, Your Honor

THE COURT: Okay. Okay. Uh, so I granted, it says Order Granting Stay of Order to Obtain DNA Samples Pending Court of Appeals Decision, April

4th. So I, am I finding we, there's follow-ups, on April 4th, Defendant's Counsel filed a Motion to Stay to Obtain DNA Sample, because he's filed an appeal and the Court should grant Stay of the Order to Obtain DNA Testing Pending the Resolution of the Appeal. So, it is ordered that the Court grant the Defendant's Motion to Stay Order to Obtain DNA Sample until the Court of Appeals resolves the matter. So, as far as I'm concerned, the main first Order that remands it back to me resolved the Court of Appeals matter. So the Stay is lifted --

MISS DENT: Okay.

THE COURT: -- as a matter of order. Uhm, --

MISS ROBERTSON: So she'll have f--, file another --

THE COURT: Yeah. You'll have to re-file --

MISS DENT: Okay.

THE COURT: -- a stay in order for me to

make a ruling on it. So I'll go ahead and grant the, uh, request. I do have, uh, two or three orders ahead of you. I'm hoping to get to this probably by this afternoon or tomorrow morning, so --

MISS ROBERTSON: Thank you.

THE COURT: And at that time, you can get a transcript, we do have a transcript this time. We did record it… right?

MISS ROBERTSON: Yes, we did.

THE COURT: We have a transcript, and I'll have my order out and then you can do what you need to do.

MISS ROBERTSON: Thank you, Your Honor.

THE COURT: Okay. Thank you.

MISS DENT: Thanks, Judge.

THE COURT: Thank you. Court's adjourned.

COURT CLERK: All rise.

[END OF MOTION HEARING RE: DNA]

[Transcriber's Certification Follows:]

C E R T I F I C A T E

I certify that, to the best of my ability, the foregoing is a true and accurate transcription of the original digitally recorded court proceeding in the case referenced on page 1 above.

Transcription Completed: July 27, 2018

CHRISTINE McGARVEY
LEGAL TRANSCRIPTION SERVICES PLUS
TRANSCRIBED BY: CHRISTINE McGARVEY

SIGNED BY: Christine McGarvey
CHRISTINE McGARVEY

CERTIFICATE OF SERVICE

I hereby certify that the Tribe's pleading was delivered this date to:

Ben Casey
Ben.Casey@pascuayaqui-nsn.gov
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7777 S. Camino Huivisim
Tucson, AZ 85757

And that one (1) copy of the Tribe's pleading was delivered, sent by certified mail, this date to:

Melissa Acosta
Melissa.Acosta@pascuayaqui-nsn.gov
7474 S. Camino de Oeste
Tucson, AZ 85757

And that one (1) copy of the Tribe's pleading was delivered this date to:

Associate Judge Melvin Stoof
Pascua Yaqui Tribal Court
7777 S. Camino Huivisim
Tucson, AZ 85757

Dated this 2nd day of August, 2018.

PASCUA YAQUI PROSECUTOR

Oscar Flores
Chief Prosecutor

PASCUA YAQUI PROSECUTOR

Alicia Renee Robertson
Deputy Prosecutor

Sworn before me this 2nd day of August, 2018

Yvette L. Gradillas
Notary Signature

YVETTE L. GRADILLAS
Notary Public - State of Arizona
PIMA COUNTY
My Commission Expires
July 13, 2020

No. CA-17-002
Pascua Yaqui Court of Appeals

Michael Madrid, Appellant,

vs.

Pascua Yaqui Tribe, Appellee,

Interlocutory Appeal of a decision of the Pascua Yaqui Trial Court Order in Case No. CR-17-079, the Honorable Melvin Stoof presiding.

Sara Dent, Pascua Yaqui Public Defender, 4725 W. Tetakusim, #B, Tucson AZ 85757 for Appellant.

Alicia R. Robertson, Office of the Prosecutor of the Pascua Yaqui Tribe, 7777 Camino Huivisim, Tucson, AZ for Appellee.

Opinion

On April 19, 2017 the Tribal Court issued the index and transmittal for the appeal of PYT v. Madrid, CR-17-079. The Tribal Court also made clear that the audio and basis for a transcript of the March 28, 2017 hearing was not recorded and is unavailable.

On April 21, 2017 this Court issued an order requesting that the parties file a statement with this Court clarifying whether they could agree to a stipulated agreement of the March 28, 2017 hearing as allowed under 3 PYTC §2-3-110 (G) and (H). Appellant responded that a stipulation pursuant 3 PYTC §2-3-110 (G) and (H) is not possible in this case and that additionally it is not possible to arrive at an agreed upon written statement of facts that accurately reflect the March 28, 2017 hearing. Appellee came to the same conclusion.

Since facts and evidence from the March 28, 2017 hearing are at issue in this appeal and because no audio of the March 28, 2017 hearing is available and the parties cannot agree to a stipulated agreement or agree upon a written statement of facts, this Court orders that the case be remanded to Tribal Court and the issues from the March 28, 2017 proceeding be re-heard.

So ordered this 1st day of May 2017.

Chief Justice James Hopkins

Sent via electronic mail this 1st day of May 2017 to:

Sara Dent
Senior Staff Attorney, Pascua Yaqui Tribe

Alicia R. Robertson
Deputy Prosecutor, Pascua Yaqui Tribe

Ben Casey
Administrative Attorney, Pascua Yaqui Tribal Court

Rene Garcia
Chief Court Clerk, Pascua Yaqui Tribal Court

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Appellee, vs. MADRID, Michael, Appellant.	APPELLATE CASE NO. CA-17-002 PASCUA YAQUI TRIBAL COURT NO. CR-17-079 (REFILE OF CR-17-020)

SUPPLEMENTAL APPELLANT BRIEF RE: JURISDICTION

PASCUA YAQUI PUBLIC DEFENDER
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(520) 883-5013

Attorney for Appellant Michael Madrid

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TABLE OF AUTHORITIES

TRIBAL

STATE OF ARIZONA

Cases

Statutes

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OTHER

I. ISSUE

Whether the Pascua Yaqui Tribe Court of Appeals has jurisdiction to hear an interlocutory appeal in this criminal prosecution of the ruling by the Trial Court allowing a (buccal) cheek swab of the defendant to search for DNA evidence.

II. RELEVANT FACTS

Mr. Madrid respectfully requests to incorporate the facts and arguments included in his initial Appellate Brief. On May 31, 2018 the Pascua Yaqui Court of Appeals issued its additional briefing order to address on the issue presented above relating to jurisdiction.

III. ARGUMENT

A. The Pascua Yaqui Court of Appeals has jurisdiction and discretion to hear Mr. Madrid's case as interlocutory appeals are permitted in criminal matters and criminal defendants are not prohibited from filing appeals.

Mr. Madrid is permitted to file an interlocutory appeal in this case pursuant to the Rules of Appellate Procedure, Appeals, 3 PYTC § 2-3-90 (F) which states the following: (F) Interlocutory Appeals. Interlocutory appeals shall not be permitted in civil cases. The plain language of 3 PYTC § 2-3-90 (F) states that interlocutory appeals are only prohibited in civil cases, therefore, interlocutory appeals are permitted in criminal matters. 3 PYTC § 2-3-90 (G) further narrows the scope of appeals in general, prohibiting government appeals in criminal matters. There exists no similar prohibition for criminal defendants, therefore, generally, criminal defendants have a right to file interlocutory appeals as well as to file direct appeals. The appellate court has the sole discretion to accept or reject an interlocutory appeal. 3 PYTC § 2-3-170.

Because the Pascua Yaqui Tribal Codes do not provide a definition of interlocutory appeals or further detail on when they are permitted, the PYTC Rules of Construction direct parties to refer

to the definition provided by the State of Arizona "unless such meaning would undermine the underlying principles and purposes of this Code." 1 PYTC § 2-30.

Interlocutory appeals in the State of Arizona are also called "Special Actions" A.R.S. Special Actions, Rules of Proc., Rule 4. Special Actions in Arizona exist to address only three issues:

> (a) Whether the defendant [of the petition] has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
>
> (b) Whether the defendant [of the petition] has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
>
> (c) Whether a determination was arbitrary and capricious or an abuse of discretion.

A.R.S. Special Actions, Rules of Proc., Rule 3.

Mr. Madrid is arguing that the taking of his blood, based on the unique facts of this case addressed in the Appellant Brief and his Reply Brief, is a violation of his Fourth Amendment rights and contrary to the Pascua Yaqui Constitution, Art. I, sec. 1(b) to be free of unreasonable searches and seizures. He is also arguing that 3 PYTC § 2-2-390 (A) (6) is overbroad and unconstitutional and cannot be utilized to obtain DNA where there is no showing of reasonableness. A special action or an interlocutory appeal to the Pascua Yaqui Court of Appeals is proper in this case. *See*, e.g., *Arizona Portland Cement Co. v. Arizona State Tax Court*, 185 Ariz. 354, 357, 916 P.2d 1070, 1073 (Ct. App. 1995) (granting special action relief where the trial court compelled a cement company to produce private business records and financial information without granting the company's corresponding motion for protective order); *Blazek v. Superior Court* (Segrave), 177 Ariz. 535, 536, 869 P.2d 509, 510

motion for protective order); *Blazek v. Superior Court* (Segrave), 177 Ariz. 535, 536, 869 P.2d 509, 510 (Ct. App. 1994) ("a special action is the appropriate means of relief when a party is ordered to disclose what she believes is privileged material").

Taking DNA from a criminal defendant is extremely invasive and differs from the taking of papers or property for the purposes of a criminal investigation. DNA can be used to not only identify persons at a crime scene, but it can also be used to establish paternity or to determine genetic defects and predisposition to diseases or behaviors[1]. Identity is not at issue in this case as the Mr. Madrid has repeatedly admitted to his presence at the crime scene. While the Pascua Yaqui Tribal Code does not provide much guidance on when the Court of Appeals has jurisdiction over interlocutory appeals, the Pascua Yaqui Appellate Rules explicitly state that the review is discretionary but that the rules relating to appeals may be suspended and that the rules relating to appeals are to be construed to do justice. 3 PYTC § 2-3-50. Mr. Madrid does not contest his presence at the crime scene and as such permitting the taking of his DNA was an abuse of discretion and does not serve a legitimate legal purpose in this case.

IV. CONCLUSION

Wherefore, Mr. Madrid respectfully requests that this Court find that it has jurisdiction to hear an interlocutory appeal in this criminal prosecution of the ruling by the Trial Court allowing a (buccal) cheek swab of the defendant to search for DNA evidence. Mr. Madrid further requests that

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[1] *See e.g.*, Thomas May, PhD. "Sociogenetic Risks - Ancestry DNA Testing, Third-Party Identity, and Protection of Privacy," The New England Journal of Medicine; (20 June 2018) (for a discussion of potential misuse of DNA information. Available at: https://www.nejm.org/doi/full/10.1056/NEJMp1805870?query=featured_genetics.

this Court overturn the trial court's final order from June 20, 2017 permitting the taking of Mr. Madrid's DNA and remand this case for further proceedings.

RESPECTFULLY SUBMITTED: July 2, 2018.

PASCUA YAQUI PUBLIC DEFENDER

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Chief Public Defender
Pascua Yaqui Public Defender
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

Attorney for Appellant Michael Madrid

CERTIFICATE OF COMPLIANCE

This brief complies with the provisions set forth in 3 PYTC § 2-3-130 – Formerly 3 PYTRAP Rule 11.

PASCUA YAQUI PUBLIC DEFENDER

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Tucson, AZ 85757
(520) 883-5013

Attorney for Appellant Michael Madrid

CERTIFICATE OF SERVICE

On July 2, 2018 the original and 3 copies of the *Supplemental Appellant Brief* were filed, and conforming copies were sent to the following:

Kendrick Wilson, Deputy Prosecutor
Office of the Prosecutor
Pascua Yaqui Tribe
7777 S. Camino Huivisim Building C.
Tucson, AZ 85757

PASCUA YAQUI PUBLIC DEFENDER

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Tucson, AZ 85757
(520) 883-5013

Attorney for Appellant Michael Madrid

No. CA-17-002

Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribe, Plaintiff/Appellee

v.

Michael Madrid, Defendant/Appellant.

Appeal of a Trial Court Order in Case No. CR-17-079, the Honorable Melvin Stoof presiding.

For the Public Defender:	Sara L. Dent, Pascua Yaqui Public Defender 7474 S. Camino de Oeste, Tucson AZ 85757 for the Appellant.
For the Office of the Prosecutor:	Oscar J. Flores, Jr., Office of the Prosecutor of the Pascua Yaqui Tribe, 7777 Camino Huivisim, Tucson, AZ for the Appellee.

Additional Briefing Order

The Court of Appeals orders additional briefing in this case on the question of whether this Court has jurisdiction to hear an interlocutory appeal in this criminal prosecution of the ruling by the Trial Court allowing a (buccal) cheek swab of the defendant to search for DNA evidence.

The Public Defender will file its opening brief by Monday July 2, 2018; the Office of the Prosecutor will file its response brief by Friday August 3, 2018; and the reply brief, if any, will be filed by Monday August 20, 2018.

So ORDERED this 31 day of May, 2018

Robert J. Miller

Robert J. Miller
Interim Chief Justice

No. CA-17-002

Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribe, Appellee

v.

Madrid, Michael, Appellant.

For the Office of the Prosecutor: Oscar J. Flores, Jr., 7777 S. Camino Huivisim Bldg. A, 2nd Floor, Tucson, AZ 85757

For the Public Defender: Sara L. Dent, 7474 S. Camino de Oeste Tucson, AZ 85757

Order Regarding Oral Argument

Thirty (30) minutes of oral argument will be held in this case at 1:30 p.m. on May 10, 2018 in Courtroom 3.

So **ORDERED** this 3rd day of April, 2018.

Robert J. Miller
Interim Chief Justice
Pascua Yaqui Court of Appeals

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Appellee, vs. MADRID, Michael, Appellant.	APPELLATE CASE NO. CA-17-002 PASCUA YAQUI TRIBAL COURT NO. CR-17-079 (REFILE OF CR-17-020)

APPELLANT REPLY BRIEF

PYT COA '17/11/06 PM0331

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ARGUMENT

I. Tribes Request To Take Mr. Madrid's DNA is a Not A Reasonable Taking.

Mr. Madrid maintains that this request for a search without a warrant, or an articulated exception, for a de minimus property crime, is not reasonable under any authority.

Tribe cites to a myriad of authority for performing these searches, all examples of serious crimes that rise to felony level, and involve injury to humans. All of the caselaw analysis involves the rubric of identifying perpetrators of serious offenses, including serial rape, violent gun and drug offenses, and assaultive behavior. This lone charge is an allegation that a taillight was broken, which cannot be proven by the mere presence of blood. There is no direct nexus between presence and causation, without a witness to draw the connection; Tribe has listed three such witnesses who would be able to provide the identical information to a fact finder, that Mr. Madrid was present. Mr. Madrid has repeatedly stipulated to this fact, as it is central to his self-defense argument.

Mr. Madrid whole heartedly agrees that it is important to examine A.R.S. § 13-3905 and its substantially different relationship to PYTC § 2-2-390 (A) (6), because under the Arizona statute an order may be issued only after a showing of: reasonable cause for belief that a **felony** has been committed; procurement of evidence described may contribute to the identification of the individual who committed such offense; and the evidence cannot be otherwise obtained.[1] Under the Tribal Code, the litmus test for permitting a sample to be taken is the reasonableness with which it is taken, and its direct connection to a crime that has been committed. PYTC § 2-2-390 The Arizona statute further contains additional limitations which allows the statute to satisfy the Fourth Amendments

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[1] Id., (A)(1)-(3).

constitutional threshold of reasonableness. These limitations are not present in § 2-2-390 of the PYTC which makes the code overbroad, and therefore unconstitutional, making it per se unreasonable.

Tribe does not allege that this sample is needed to show that a felony has been committed, or that the identity of the person alleged to have committed the crimes charged is in question, as indicated in Wedding. There is no nexus between the presence of the blood, and a crime that has been committed, as required by Tribal Code. Tribe's assertion that this intrusion is necessary to bolster its witnesses credibility cannot measure with Mr. Madrid's constitutional right to the privacy of his person.

II. Per Definition of Tribal Code, All Tribal Offenses are Misdemeanors

Tribe cites to 4 PYTC § 4-20 as controlling authority as to the lack of definition regarding a felony or misdemeanor level offense; Mr. Madrid disagrees. As Tribe points out so eloquently, "any provision of this code constituting an offense shall be subject to punishment by a fine of not more than $5000.00 or by imprisonment in jail for not more than one year or both." 4 PYTC § 4-20; See also Tribe's Response, p.14, lines 4-7. The widely accepted definition of a felony, as delineated in Black's Law Dictionary, is as follows: "A serious crime usually punishable by imprisonment for more than one year or by death." Examples include murder, rape, arson, and burglary. (Black's Law Dict., 7th Ed.; 1999) It is simply not a reasonable violation of the 4th amendment right to privacy of one's own body, to allow for a fishing expedition by the government in a misdemeanor property crime, especially given the totality of the circumstances already stated in this case.

CONCLUSION

Mr. Madrid maintains that the taking of his DNA is a search under the Fourth Amendment and as such he is afforded certain protections. While Tribal Code may allow for a sample to be taken, it fails to protect community members from unreasonable searches and overreaching by the Tribe.

Under any level of authority, the taking of Mr. Madrid's DNA is a violation of his Fourth Amendment right to be free of unreasonable searches. The trial court erred in granting the Tribe's unreasonable "minimally intrusive" request to take a sample of Mr. Madrid's DNA, regardless of the method of collection.

RESPECTFULLY SUBMITTED this 6th day of November, 2017.

PASCUA YAQUI PUBLIC DEFENDER

Sara L. Dent
Senior Staff Attorney
Attorney for Appellant

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Alicia Renee Robertson
Deputy Prosecutor

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

MADRID, MICHAEL,

Appellant.

Vs.

HONORABLE MELVIN STOOF
JUDGE, PASCUA YAQUI TRIBAL COURT
Appellee,

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR[1]
Real Party in Interest

APPEALS CASE NO: CA-17-002
PASCUA YAQI TRIBAL COURT NO: CR-17-079

REAL PARTY IN INTEREST'S RESPONSE BRIEF

COMES NOW, the Pascua Yaqui Tribe by and through the Pascua Yaqui Chief Prosecutor, OSCAR J. FLORES, and the undersigned Deputy Prosecutor, ALICIA RENEE ROBERTSON, and hereby respectfully submits the following Real Party in Interest's

[1] In Special Action pleadings the complaint names the body, officer, or person against whom relief is sought. However, "[i]f any public body, tribunal, or officer is named as a defendant, the real party or parties in interest shall be joined as defendants." Ariz.R.Spec.Act., Rule 2(a)(1). In such circumstances, the practice is to direct the writ in form to the court, but in fact leave its handling to the parties. *See* Ariz.R.Spec.Act., Rule 2, State Bar Committee Notes, section (a).

Response Brief . The Tribe respectfully requests this Court to deny relief to Appellant and uphold the prior ruling of the Defendant Tribal Court Judge.

RESPECTFULLY submitted this 23rd day of October, 2017.

Oscar J. Flores
Chief Prosecutor

Alicia Renee Robertson
Deputy Prosecutor

Original filed with the
Clerk of the Pascua Yaqui Court of Appeals

On:_____

Copy of the foregoing provided to:

Hon. Melvin Stoof
Pascua Yaqui Tribal Court

Sara Dent
Pascua Yaqui Office of the Public Defender
Attorney for Appellant Michael Madrid

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TABLE OF AUTHORITIES

PROCEDURAL POSTURE AND RELEVANT FACTS:

Appellant's trial court case was a previously dismissed and refiled. On February 23, 2017, the Tribe filed a Motion for Physical Characteristics requesting Appellant's buccal swabs for DNA testing. Appellant filed a motion objecting and the Tribe on March 16, 2017 filed its reply. In its Reply, the Tribe further explained how Defendant's swab would be used for comparison:

> In the criminal complaint, Count 4 alleges that Defendant injured public property to wit that he "punched the rear tail light of Tony Orosco's truck, breaking it." In Officer Machado's report, he indicates, in pertinent part: "I looked at the truck and observed that the right rear tail lamp was broken. I could also see a small blood smear at the broken area of the lens." The officer then proceeded to collect a swab of the blood from the broken tail lamp and preserved it for evidence.
>
> In his response, Defendant claims that the Tribe is seeking Defendant's blood for purposes unrelated to the charges. However, defense is mistaken, as count 4 specifically alleges that Defendant injured the victim's car. If the blood on the truck is in fact Defendant's, this would be direct evidence that he in fact caused the damage.

See Tribe's Reply, Tribe's attached Exhibit 1.

The trial court then set a hearing for March 28, 2017 on the motion. After reviewing each of the party's motions and hearing oral argument, the Court ruled in favor of the Tribe. *See Court's Ruling, Tribe's attached Exhibit 2.* Appellant filed his first notice of Appeal and also requested a Stay of Proceedings from the Trial Court. Appellant's stay was granted. Upon request of the record, it became apparent that the oral argument was not preserved. On June 20, 2017, a second hearing on the motion was held. Again, the Tribe prevailed. *See Court's Second Ruling, Tribe's attached Exhibit 3.* Appellant then filed his second request to Stay Proceedings on June 22, 2017 which was granted. Also, he field his second Notice of

Appeal on August 3, 2017. Appellant now files this appeal claiming that the trial court erred in granting the Tribe's Motion.

STATEMENT OF THE ISSUES:

1. **WAS THE TRIBAL COURT'S DECISION TO GRANT TRIBE'S REQUEST TO OBTAIN APPELLANT'S DNA SAMPLE A REASONABLE AND MINIMAL INTRUSION IN COMPLIANCE WITH THE INDIAN CIVIL RIGHTS ACT AND BY INCORPORATION, THE FOURTH AMENDMENT?**

LAW AND ARGUMENT:

I.

BOTH TRIBAL AND ARIZONA LAW AND A HISTORY OF CASE LAW ALLOW FOR THE REASONABLE TAKING OF SAMPLES FOR PHYSICAL CHARACTERISTICS.

Under Pascua Yaqui Tribal Law, 3 PYTC § 2-2-390 (A) (6) specifies that upon written request of the prosecutor, a defendant shall "[p]ermit the taking of samples of his or her hair, blood, saliva, urine or other specified materials which involve no unreasonable intrusions of his or her body."

Similar to the Tribe's statute for physical characteristics, the Arizona statute reads as follows:

> **A.** A peace officer who is engaged, within the scope of the officer's authority, in the investigation of a felony may make written application upon oath or affirmation to a magistrate for an order authorizing the temporary detention, for the purpose of obtaining evidence of identifying physical characteristics, of an identified or particularly described individual residing in or found in the jurisdiction over which the magistrate presides. The order shall require the presence of the identified or particularly described individual at such time and place as the court shall direct for obtaining the identifying physical characteristic evidence. The magistrate may issue the order on a showing of all of the following:
> 1. Reasonable cause for belief that a felony has been committed.
> 2. Procurement of evidence of identifying physical characteristics from an identified or particularly described individual may contribute to the identification of the individual who committed such offense.
> 3. The evidence cannot otherwise be obtained by the investigating officer from either the law enforcement agency employing the affiant or the department of public safety.

Ariz. Rev. Stat. Ann. § 13-3905.

The Pascua Yaqui Court of Appeals specifically recognized that the former 3 PYT R. Crim. P. Rule 39(A)(6) (now 3 PYTC § 2-2-390 (A) (6)) as well as HIPPA, Section 164.512 permitted the taking of a blood sample from a defendant to test for the presence of a disease and that Rule 39 was quite clear. *PYT v. Valenzuela*, CA-08-013, p. 2.

In *Maryland v. King,* the United States Supreme Court held that a buccal swab of the inside of one's cheek for the purposes of obtaining DNA was in fact a search under the Fourth Amendment. *Maryland v. King*, 133 S. Ct. 1958, 1963, 186 L. Ed. 2d 1 (2013). "[T]he fact that the intrusion is negligible is of central relevance to determining whether the search is reasonable and thus 'the ultimate measure of the constitutionality of a governmental search,' *Maryland v. King*, 133 S. Ct. at 1963, 186 L. Ed. 2d 1, *citing Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 652, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)[2]. The Court went on to highlight that the need for a warrant was "greatly diminished" when the arrestee was already in justified police custody supported by probable cause. *Maryland v. King*, 133 S. Ct. 1958, 1963, 186 L. Ed. 2d 1 (2013) As such, the search must be analyzed as to "reasonableness, not individualized suspicion." *Id. quoting Samson v. California,* 547 U.S. 843, 855, n. 4, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006)[3].

Reasonableness must be weighed by balancing "'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.' " *Maryland v. King*, 133 S. Ct. at 1963, 186 L. Ed. 2d 1, q*uoting*

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[2] This case was not followed on state law grounds in Washington in *York v. Wahkiakum School Dist. No. 200*, Wash., March 13, 2008.

[3]This case was not followed on state law grounds in Iowa in *State v. Short*, Iowa, July 18, 2014.

Wyoming v. Houghton, 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408. P. 1970(1999). [4] In this balance, "great weight is given to both the significant government interest at stake in the identification of arrestees and DNA identification's unmatched potential to serve that interest." *Maryland v. King*, 133 S. Ct. at 1963, 186 L. Ed. 2d 1.

The Court went on to indicate that the government does in fact have an interest in identifying the correctly accused person. *Maryland v. King,* 133 S. Ct. at 1963–64, 186 L. Ed. 2d, *citing Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 191, 124 S.Ct. 2451, 159 L.Ed.2d 292, (indicating that the government has interest in identifying "who has been arrested and who is being tried"). The Maryland Court also indicated that officers use not only criminal history but also show mugshots to potential witnesses, use databases to compare fingerprints and even use sketch artists. *Maryland v. King*, 133 S. Ct. at 1963–64, 186 L. Ed. 2d 1 (2013). The only difference with fingerprints and this DNA analysis "is the unparalleled accuracy DNA provides." *Id.*

The *Maryland* Court determined that the government interest does not completely outweigh an individual's right to privacy. When comparing the substantial government interest and the effectiveness of DNA identification, to the actual intrusion, the intrusion of a cheek swab, according to the Court, was minimal. *Maryland v. King*, 133 S. Ct. at1964–65, 186 L. Ed. 2d 1.[5] The Court further analyzed the intrusion against privacy rights:

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[4] This case was not followed on state law grounds in Washington, *State v. Parker*, Wash., November 4, 1999.

[5] The reasonableness inquiry considers two other circumstances in which particularized suspicion is not categorically required: "diminished expectations of privacy [and a] minimal intrusion." *Maryland v. King*, 133 S. Ct. at 1964–65, 186 L. Ed. 2d 1, *citing Illinois v. McArthur,* 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d 838.."

> An invasive surgery may raise privacy concerns weighty enough for the search to require a warrant, notwithstanding the arrestee's diminished privacy expectations, but ***a buccal swab, which involves a brief and minimal intrusion with "virtually no risk, trauma, or pain***," *Schmerber v. California,* 384 U.S. 757, 771, 86 S.Ct. 1826, 16 L.Ed.2d 908, does not increase the indignity already attendant to normal incidents of arrest.

Maryland v. King, 133 S. Ct. at 1964–65, 186 L. Ed. 2d 1 (2013). The Court further analyzed the DNA sample in that a Defendant's privacy was not unconstitutional as such private information as Defendant's genetic traits or private medical information would not be revealed through the analysis. *Id.*

In assessing the "magnitude of the intrusion," the Court pointed to whether or not the "procedure may threaten the safety or health of the individual." *Maryland v. King*, 133 S. Ct. at 1979, 186 L. Ed. 2d 1 (2013), *citing Winston v. Lee,* 470 U.S. 753, 760, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985). The *Maryland* Court determined that was not the case with a gentle swab of the cheek, requiring no beneath the skin surgery, and posing no physical danger. *Id.*

In *State v. Wedding*, 171 Ariz. 399, 831 P.2d 398 (Ct. App. 1992), the appellant challenged the constitutionality of A.R.S. 13-3905, *see e.g. PYT v. Miranda*, CA-08-015, p.22 (Ct. App. 2009) ("[W]hile decisions of the Arizona . . . [c]ourts are not controlling authority in this Court, they are highly persuasive"). The appellant claimed that the statute does not require probable cause and permits detention of the person for the taking of physical evidence beyond that which is permitted by the fourth amendment and without probable cause. *Wedding*, 171 Ariz. at 402–03, 831 P.2d at 401–02. The appellant in *Wedding* argued that United States Supreme Court cases have implicitly required probable cause when officers conduct bodily intrusions to obtain physical evidence under the fourth amendment. *Wedding*, 171 Ariz. at 402–03, 831 P.2d at 401–02, *citing Schmerber v.*

California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (holding that subsequent to a DUI arrest, due to exigent circumstances, officers could take blood samples with probable cause, yet without a search warrant). The appellant in *Wedding* goes on to argue that the Court has implied that with prior judicial authorization and under "narrowly defined circumstances, detention for finger-pointing might be justified on less than probable cause." *Wedding*, 171 Ariz. at 402–03, 831 P.2d at 401–02, *citing Davis v. Mississippi,* 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969),[6] *and Hayes v. Florida,* 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985).[7] However, the appellant argued "that detention to obtain the other types of physical evidence enumerated in the Arizona statute is authorized only if there is a showing of probable cause," and he claimed this required probable cause was simply not present in his case. *Wedding*, 171 Ariz. at 402–03, 831 P.2d at 401–02,

The appellant pointed to the United States Supreme Court decision in *Winston v. Lee,* 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985) as authority to overturn the Court's previous ruling. *State v. Wedding*, 171 Ariz. 399, 402–03, 831 P.2d 398, 401–02 (Ct. App. 1992). In its own ruling, the *Wedding* Court cited to *State v. Grijalva,* 111 Ariz. 476, 533 P.2d 533, *cert. denied,* 423 U.S. 873, 96 S.Ct. 141, 46 L.Ed.2d 104 (1975)[8] where the Arizona Supreme Court upheld the constitutionality of A.R.S. 13-3905. *State v. Wedding*, 171 Ariz. at 403, 831 P.2d at 402 (indicating that statute was ARS 13-1424 at the time). The Court determined not only that probable cause in the *Wedding* case existed, but also that officers

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[6] Declined to Extend by Tenenbaum v. Williams, 2nd Cir.(N.Y.), October 13, 1999.

[7] Not Followed as Dicta U.S. v. Calhoun, D.Ariz., July 24, 2013.

[8] Distinguished by State v. Jones, Ariz., July 10, 2002

who processed the scene had substantial physical evidence in the form of hair and seminal fluid that made obtaining Appellant's head, pubic hair, blood and saliva necessary for the purposes of comparison. *Wedding*, 171 Ariz. at 404-05, 831 P.2d at 403-04.

The *Wedding* court did recognize that under certain circumstances a bodily intrusion may be so substantial as to qualify as an unreasonable search even when probable cause exists, however, that was simply not the argument was not raised by Appellant. As such, his motion was denied. *State v. Wedding*, 171 Ariz. at 405, 831 P.2d at 404.

In *State v. Grijalva,* the Arizona Supreme Court held that under the statute, probable cause to believe that the suspect committed the crime is not a necessary requirement for the ***temporary detention*** of a person to obtain evidence of physical characteristics. 111 Ariz. at 479, 533 P.2d at 536. The Court highlighted that reasonableness is the primary inquiry in determining whether there is a fourth amendment violation, considering "all of the circumstances of the particular governmental invasion of a citizen's personal security." *State v. Grijalva* 111 Ariz. at 478, 533 P.2d at 535, quoting *Terry v. Ohio,* 392 U.S. 1, 19, 88 S.Ct. 1868, 1878–79, 20 L.Ed.2d 889 (1968). The Court also stated that there must be a nexus between the detainee and the crime and that it must be made clear that there is reasonable cause to believe that that crime has been committed and is "punishable by at least one year in state prison." *Grijalva*, 111 Ariz. at 479, 533 P.2d at 536 (1975). The Court went further in its analysis:

> [R]easonableness requires a balancing between the public necessity and the extent to which an individual's interest in privacy is invaded. Certainly the interest of society in the investigation of felonies is very high and the statute requires that it must be otherwise impossible to obtain the necessary identification evidence except in this manner. The degree of intrusion into the person's privacy is relatively slight. Photographs, more so than fingerprints, involve none of the probing that the Davis

court found to mark a search of an unreasonable nature. ***Similarly, clipping several head hairs is only the slightest intrusion upon the body, if any at all, and does not constitute anything unreasonable.***

Grijalva, 111 Ariz. at 479, 533 P.2d at 536 (1975) (Citations omitted) (Emphasis added).

In *Winston v. Lee*, 470 U.S. 753, 760, 105 S. Ct. 1611, 1616, 84 L. Ed. 2d 662 (1985)[9] the Court determined reasonableness of surgical intrusions the occurred beneath the skin must be determined on a case-by-case basis and depended upon whether the "community's need for evidence outweigh[ed] the substantial privacy interests." As a guide, the Court used *Schmerber v. California*, 384 U.S. 757, 771, 86 S. Ct. 1826, 1836, 16 L. Ed. 2d 908 (1966). *Id.*[10]

In the case before the *Winston* court, the prosecution claimed it needed a vital piece of evidence, a bullet, which was lodged in the defendant's left collarbone and requested that the Court require Defendant to undergo surgery. *Winston*, 470 U.S. at 764–66, 105 S. Ct. at 1619, 84 L. Ed. 2d 662. However, the Court determined that the prosecution had "substantial additional evidence" that Defendant was the perpetrator. *Id.* In addition, the Court indicated that "the intrusion on respondent's privacy interests entailed by the operation can only be characterized as severe." *Winston*, 470 U.S. at 764–66, 105 S. Ct. at 1620, 84 L. Ed. 2d 662. The Court found that "[t]he Fourth Amendment is a vital safeguard of the right of the citizen to be free from unreasonable governmental intrusions into any

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[9] Declined to Extend by Stehney v. Perry, D.N.J., November 6, 1995.

[10] Overruling Recognized by State v. Adkins, N.J., May 4, 2015. In *Schmerber v. California*, the United States Supreme Court held that obtaining a blood sample, while the perpetrator was in the hospital, for the purposes of a DUI investigation was a reasonable test to measure the accused's blood alcohol level and did not violate the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 771, 86 S. Ct. 1826, 1836, 16 L. Ed. 2d 908 (1966)

area in which he has a reasonable expectation of privacy." *Winston*, 470 U.S. at 767, 105 S. Ct. at 1620, 84 L. Ed. 2d 662. The Court held that ordering respondent to undergo such a surgery, which involved medical risks, simply to obtain evidence would be unreasonable under the Fourth Amendment. *Winston*, 470 U.S. at 764–66, 105 S. Ct. at 1620, 84 L. Ed. 2d 662.

As the *Wedding* court found that the Arizona Statute, which is strikingly similar to the Tribe's statute, was in fact constitutional, so should this Court find that the Tribe's statute is constitutional. In addition, as the Arizona Supreme Court held in *Grijalva*, this Court should find that probable cause is not required for temporary detention for obtaining physical characteristics as it falls in line with the Tribal statute. Again, reasonableness is key to this balancing test.

When weighing the Appellant's right to privacy with the Tribe's legitimate interest, the Tribe's interest in identification outweighs any privacy concerns. In addition, when analyzing the magnitude of the intrusion as the *Maryland* court did, swabbing Appellant's cheek is minimal. The case before the Court can be distinguished from *Winston* as the Tribe is not requesting that Defendant undergo surgery. Again, the Tribe is requesting a buccal swab which is a minimal intrusion. It is not nearly as severe as the request made in *Winston* and involves little to no health or safety risks. As such, because the controlling Tribe law is constitutional, the intrusion is minimal and reasonable, the Tribe respectfully requests this Court uphold the trial Court's ruling.

III.
THE OFFENSE WITH WHICH APPELLANT IS CHARGED IS NOT CATERGORIZED AS A FELONY OR MISDEMEANOR.

With regards to penalties for offenses, 4 PYTC § 4-20 of the code is controlling: "Every person convicted of a violation of any provision of this code constituting an offense shall be subject to punishment by a fine of not more than $5,000.00 or by imprisonment in jail for not more than one year or both."

Appellant argues that the Tribe is asking for an invasion of Appellant's privacy for a misdemeanor property crime. However, the Code does not specify whether this offense is a misdemeanor or felony. Regardless of its classification, this offense is punishable by up to a year in jail. As such, his argument that this crime is de minimus in comparison to other State crimes, holds no weight has the Tribe is sovereign.

IV.
APPELLANT DISTINGUISHES HIS CASE FROM UNPUBLISHED CASES.

The Federal Rule of Appellate Procedure allow for use of unpublished cases or cases deemed "not precedent" in appeals if the opinion was issued after January 1, 2007. Fed. R. App. P. 32.1. While unpublished opinions are persuasive, courts have found that these opinions are not binding. *Gibbs v. United States*, 865 F. Supp. 2d 1127 (M.D. Fla. 2012), aff'd, 517 F. App'x 664 (11th Cir. 2013).

Appellant cites to *United States v. Castillo*, No. 16-20626-CR, 2016 WL 6158133, at *1 (S.D. Fla. Oct. 24, 2016) claiming that this case is somehow similar to the one before this Court. In that case, the appellant claimed that prosecution was lacking probable cause because it had yet to confirm that any usable DNA whatsoever had been found on the firearm, ammunition, magazine or holster. *Id.* He therefore argued that the oral swab request was premature. *Id.*

In that case the prosecution needed to determine if there was in fact touch DNA on those items. Here, unlike in *Castillo*, officers saw blood on the taillight, swabbed the blood, and placed it into property and evidence. In *Maryland v. King*, fluids were left behind as the result of a rape. This is similar to the case before the court—blood was left on a taillight.

Appellant also argues that *United States v. Robinette*, No. 13-CR-0003 AWI BAM, 2013 WL 211112, (E.D. Cal. Jan. 18, 2013) can be distinguished from his case in terms of seriousness. He indicates that because the case involved charges of sexual exploitation of children and transportation with intent to engage in criminal sexual activity and were of a serious nature this was a major part of the court's consideration in granting the motion for buccal swabs. *Id.* at *10. However, the Court noted these factors when referring to the basis of the probable cause that was obtained with the grand jury. *Id.* at *10. More importantly, the Court held:

> Obtaining and analyzing DNA is a search or seizure which implicates Fourth Amendment concerns. ***But such procedure is reasonable in these certain circumstances, given the minimal intrusion*** which it entails and the legitimate government interest in the identification of the individual and the investigation and prosecution of unsolved and future criminal acts by the use of DNA.

Id. at *10. Because Defendant left behind his blood and the intrusion is minimal, the Tribe respectfully requests this Court uphold the trial court's order.

CONCLUSION

For the foregoing reasons, that the trial court's order is in compliance with Tribal, State and Federal law, the Tribe respectfully requests the Court of Appeals to uphold the trial court's decision to require the Defendant to submit to a buccal swab.

RESPECTFULLY submitted this 23rd day of August, 2017.

Oscar J. Flores
Chief Prosecutor

Alicia Renee Robertson
Deputy Prosecutor

TRIBE'S EXHIBIT 1

PASCUA YAQUI TRIBE
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TUCSON, ARIZONA 85746
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Alicia Renee Robertson
Deputy Prosecutor

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE

Plaintiff,

vs.

MADRID, MICHAEL RAYMOND

Defendant

Case No.: CR-17-079

REPLY TO DEFENDANT'S RESPONSE TO TRIBE'S MOTION FOR PHYSICAL CHARACTERISTICS AND REQUEST FOR HEARING

Comes now the Pascua Yaqui Tribe by and through counsel undersigned, and hereby respectfully requests that this Court order the Defendant to provide a DNA sample for scientific testing over Defendant's objection.

In the criminal complaint, Count 4 alleges that Defendant injured public property to wit that he "punched the rear tail light of Tony Orosco's truck, breaking it." In Officer Machado's report, he indicates, in pertinent part: "I looked at the truck and observed that the right rear tail lamp was broken. I could also see a small blood smear at the broken area of the lens." The officer then proceeded to collect a swab of the blood from the broken tail lamp and preserved it for evidence.

In his response, Defendant claims that the Tribe is seeking Defendant's blood for purposes unrelated to the charges. However, defense is mistaken, as count 4 specifically alleges that Defendant injured the victim's car. If the blood on the truck is in fact Defendant's, this

would be direct evidence that he in fact caused the damage. The Pascua Yaqui Court of Appeals specifically recognized that the former 3 PYT R. Crim. P. Rule 39(A)(6) (now 3 PYTC § 2-2-390 (A) (6)) as well as HIPPA, Section 164.512 permitted the taking of a blood sample from a defendant to test for the presence of a disease. *PYT v. Valenzuela*, CA-08-013. Such identifiers do not fall under the auspices of Fourth Amendment protection, as collection of this information does not constitute a search under the Constitution. *See State v. Wedding*, 171 Ariz. 399, 831 P.2d. 398 (Ariz. App. 1992).

Because this evidence is needed to prove an essential element of the crime and because such identifiers do not fall under the Fourth Amendment and does not constitute a search, the Tribe respectfully requests that this Court grant its motion.

RESPECTFULLY submitted this 16th day of March, 2017.

PASQUA YAQUI OFFICE OF THE PROSECUTOR

Alicia Renee Robertson
Deputy Prosecutor

ORIGINAL delivered and filed this:
date to:

Clerk of the Court
Pascua Yaqui Tribal Court

A copy delivered to:

Office of Public Defender
Sara Dent
Attorney for Defendant

By:

TRIBE'S EXHIBIT 2

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff, Vs. MADRID, MICHAEL, Defendant.	)	Case No. CR-17-079 ORDER TO OBTAIN DNA SAMPLE

On March 28, 2017, the defendant appeared with his counsel, Sara L. Dent and Alexandra Salcido, objected to the Tribe's request for DNA testing on their client.

Alicia Renee Robertson argued that the Court of Appeals case *PYT v. Valenzuela* case permitted the taking of a defendant's blood, under 3 PYTC§ 2-2-290(A)(6), (formerly 3 PYT R.Crim P. Rule 39(A)(6), for the presence of a disease, and such was found by that Court as a compelling public interest to permit blood testing where officer's public health and safety was at stake and intrusion on a defendant's right to privacy was minimal. Defendant argues that such testing was not related to any alleged charge and that such testing is an unreasonable search and seizure under the 4th amendment's right to be free of such unreasonable searches.

The cases cited by prosecution include references to *Schmerber v. California*, (citation omitted), a U.S. Supreme Court case that held taking of blood tests were not an unreasonable search and seizure under the 4th amendment, under limited circumstances, and to *Maryland v. King*, which held that a buccal swab test for DNA was not an unreasonable search of a defendant, but rather, it was a reasonable intrusion that outweighed the defendant's privacy interests, based on the Court's finding that there was some governmental interest in identifying of an individual brought into custody through DNA testing, based on a valid arrest supported by probable cause, and that a defendant's "expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks." Id. at 133 S. Ct. 1958, 1980 (2013). Because the Tribe has established the need for the DNA evidence to prove an essential element of the alleged crime, DNA swab testing in not an unconstitutional invasion of privacy or unreasonably intrusive.

The Court should order that the Tribe arrange for a time and date for DNA testing, so long as defense counsel is present during such testing.

IT IS ORDERED that for good cause shown, the court shall grant the Tribe's motion to obtain DNA buccal swab testing, for good cause shown, and the Tribe shall notify the defendant's counsel of the date and time of such planned testing, so that Ms. Dent may be present at that time of testing on the defendant.

SO ORDERED THIS 28th DAY OF MARCH, 2017.

PASCUA YAQUI TRIBE JUDICIAL BRANCH

Judge, Pascua Yaqui Tribal Court

CC: Date 3/28/2017

✓ Tribe ✓ Defendant/Counsel ___ Detention

Clerk

TRIBE'S EXHIBIT 3

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff, Vs. MADRID, MICHAEL Defendant.	)	Case No. CR-17-079 ORDER TO OBTAIN DNA VIA SALIVA SWAB

On June 20, 2017, on remand from the Court of Appeals, the court held a re-hearing on the Tribe's request for an order to perform DNA saliva swab testing on the defendant, and his counsel, Sara Dent, should be present when the tests are conducted. Ms. Dent waived the presence of her client, and Alicia Renee Robertson argued for the Tribe.

The Tribe argues that the court has authority to issue an order for buccal swab tests for DNA, pursuant to 3 PYTC § 2-2-390(a)(6)&(F) which permits the court to order that defendant provide the prosecutor with samples of "hair, blood, saliva, urine, or other specified materials which involve no unreasonable intrusion of his or her body."

The Tribe argues that the DNA testing will establish whether blood samples collected by the investigating officer from a tail lamp can be matched against the DNA sample of the defendant to prove an element of the crime of injury to public property, and also to other crimes, for example if the Tribe's witnesses testify they saw the defendant commit an aggravated assault in addition to punching the tail lamp, such evidence may support the credibility of the testifying witnesses' account and therefore goes to the totality of the circumstances.

The defendant objects because the alleged crime is not a felony, as in Maryland v. King, that it is not a reasonable search because the alleged crime is a misdemeanor, a de minimis issue. Additionally, the defendant argues that there must be a nexus of the testing to the crime alleged.

Citing to *State v. Wedding* and *Maryland v. King*, the Tribe asserts that the buccal swab test for DNA is a minimally intrusive tests, much less intrusive that the blood tests allowed in Schmerber v. California, and would be a reasonable search related to proving a particular crime took place and that there is a sample against which it may be tested, now in

police custody. The Tribe argues that in the *Wedding* case, the Arizona court found that upon an arrest supported by probable cause, the state could obtain saliva, blood, fingerprints, and pubic hair, all of which were much more intrusive than a minimally intrusive buccal swab. The Tribe also argues it will only be using the DNA for the sole purpose of comparing the DNA sample with the blood sample collected from the tail light in this case.

In *Maryland v. King*, the U.S. Supreme court noted the when officers make an arrest supported by probable cause to hold for a serious offense and bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure. The Supreme Court held that the "expectation of privacy were not offended by the minor intrusion of a brief swab of the cheek." 133 S.Ct. 1958, 1980 (2013). The *King* court found that using a buccak swab test inside a person's cheek to obtain a DNA sample is a search under the fourth amendment, but is a negligible intrusion and therefore a reasonable search "the unlitimate measure of the constitutionality of a governmental search." (Citing affirmatively to *Vernonia Sch, Dist 47J v. Acton*, 515 U.S. 646, 652). The test of reasonable applied by the King court is determined by weighing "the promotion of legitimate governmental interests" against :the degree to which [the search] intrudes upon an individual's privacy," *Wyoming v. Houghton* 526 U.S. 295, 300. The King court found that a buccal swab involved a brief and minimal intrusion with "virtually no risk, trauma, or pain," *Schmerber v. California*, 384 U.S. 757, 771.

The court finds that because the officer took a swab sample of blood from the taillight in this incident, there is a DNA sample against which the sought after DNA from the defendant is sought. There is a legitimate governmental interest in matching the DNA sample to blood on the headlight to establish whether the defendant's blood is on the tail lamp to support both the allegation of the injury to public property, and also to support any testimony of eyewitnesses, who may state they saw the defendant placing his blood on the tail light. The buccal swab testing in the cheek is minimally intrusive and the Court should grant the Tribe's request for a saliva swab tests (Buccal) because such is not unreasonably intrusive. The sampling shall be administered at a time to be arranged between the prosecutor and defendant's counsel, so long as defense counsel is present during such testing. The Court

should issue an order that no law enforcement personnel shall attempt to interview Mr. Madrid, unless his counsel is present.

IT IS ORDERED that for good cause shown, the court shall grant the Tribe's motion to obtain DNA via saliva swab, for good cause shown, at a time to be arranged between the prosecutor and the defendant's counsel, so long as Ms. Dent may be present at that time of testing on the defendant. Pascua Yaqui Law enforcement personnel shall not attempt to interview Mr. Madrid, unless his counsel is present.

SO ORDERED THIS 20th DAY OF JUNE, 2017

Judge, Pascua Yaqui Tribal Court

CC: Date 06/20/17
__X__ Tribe __X__ Defendant/Counsel ____ Detention

Clerk

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Appellee, vs. MADRID, Michael, Appellant.	APPELLATE CASE NO. CA-17-002 PASCUA YAQUI TRIBAL COURT NO. CR-17-079 (REFILE OF CR-17-020)

APPELLANT BRIEF

Sara L. Dent
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PASCUA YAQUI PUBLIC DEFENDER
7474 South Camino de Oeste
Tucson, AZ 85757
(520) 883-5013

Attorney for Appellant

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STATEMENT OF THE FACTS AND PROCEEDINGS

Mr. Madrid was originally arraigned on November 1, 2016, stemming from charges alleged to have occurred on October 31, 2016. (Please see Exhibit A, Initial Hearing Order from November 1, 2016; CR-17-020, attached; see also Record at 44 and 45) At that time, he was in custody and a $2500.00 cash bond was set, ensuring that he would remain in custody until the matter was resolved. On December 23rd, 2016, the trial court granted Mr. Madrid's motion to modify his conditions of release as part of negotiations with Tribe, and suspended the $2500.00 bond which allowed him to be released after being in the custody of the Pascua Yaqui Tribe for fifty-three (53) days. (Please see Exhibit B, attached) Mr. Madrid was prepared at that time to go to trial, but the assigned prosecutor at that time was not prepared to go forward and after being denied his continuance, decided to dismiss the case outright. (Please see Exhibit C, attached.)

Tribe refiled the identical complaint against Mr. Madrid (less the allegations involving Jessica Williams) on January 4, 2017. (See Record at 44 and 45) Mr. Madrid was arraigned on the refiled complaint on February 13, 2017, and this time he was released on his own recognizance. (Record at 36 and 37) On February 23, 2017, Tribe filed a Motion for Physical Characteristics, specifically requesting the court to order Mr. Madrid to provide a DNA sample for scientific testing. (Record at 33, page 1, lines 15 and 16) Tribe cited to the Pascua Yaqui Tribal Code (3 PYTC § 2-2-390(A)(6)) for the mandate that a defendant shall allow for this taking of his personal property, so long as there is no "unreasonable intrusions" of his body. (Id) Tribe also cited to a Pascua Yaqui Appellate ruling (Pascua Yaqui Tribe v Valenzuela, CA-08-013), as well as to Arizona case law as authority for their request, and that this was not a 'search' as contemplated by the Fourth Amendment. Record at 33,

page 1, lines 23-26 and page 2, lines 1 and 2) Tribe concluded this request without delineating what specifically the DNA was to be used for, other than for "scientific testing." (Record at 33, page 2, lines 3-5)

Mr. Madrid objected, citing in general the Tribe's lack of connecting the request to a particular crime he has been charged with, as required by the Code; the case cited as authority was easily distinguishable from the facts in Mr. Madrid's case, making this request unreasonable; and that the Fourth Amendment provides a right to be free from unreasonable searches. (Record at 30)

On March 28, 2017, a hearing was held with oral argument in addition to briefings filed; Tribe's request was granted (Record at 23). April 4, 2017, the trial court stayed the Order, pending an appeal of that decision. (Record at 19) After initiating the process of appealing the Order dated March 28, 2017, it was discovered that there was no record from which to draw from for the appeal and it was determined that a new hearing would be held. (Record at 16)

On June 20, 2017 at a second hearing including oral arguments, Tribe again prevailed in their request for DNA from Mr. Madrid, with the court finding that Tribe's argument for a buccal swab would not be an "unreasonable intrusion" of Mr. Madrid's person and allowable under the Tribal Code. (Record at 5) Tribe began their argument with stating that this request is not a search under the Fourth Amendment, and that it would be a minimal intrusion. (Recording of the Proceedings at 00:50-02:30; hereinafter, RoP at xx:xx-xx:xx; See also RoP at 09:05-11:45) Tribe argued at this hearing that the blood sample collected from a tail light of a vehicle (Note: the probable cause statement (Record at 45, page 5) indicates that not only are there three witnesses to clearly identify who broke the tail light, but that the officer indicates that he observed only a "small blood smear at the broken area of the lens" of the tail light) would prove that the tail light was broken by the person

who matched the blood found there, as well as somehow bolster the credibility of the witness testifying as to other matters. (Record at 5; RoP at 09:05-11:45)

The trial court found that there was a legitimate government interest under the analysis done in Maryland v King, 133 S.Ct. 1958 (2013) and Schmerber v California, 384 US 757, as well as referring to State v Wedding, 171 Ariz. 399, 831 P.2d 398 (Ariz. App. 1992) (Record at 5; RoP at 11:45-17:25) Trial court additionally found that there was a diminished expectation of privacy when a person is arrested, and this request was a minimal intrusion. (Id)

Mr. Madrid argued that: This was a search under the Fourth Amendment, contrary to Tribe's contention that it was not, and that a warrant or an exception was required; All existing case law of taking a defendant's DNA were felony level crimes of violence or drug trafficking, where identity was in question, and that the crime alleged here is a misdemeanor property crime with three eyewitnesses listed that could testify; While tribal law and constitutional law allow for the taking of DNA from a defendant, this request must both be 1) reasonable, and 2) there must be a connection to a particular crime; The case law cited, including the Pascua Yaqui Appellate findings, are easily distinguishable from the facts in this case, and are not supportive of a finding of reasonableness; All analysis in determining whether a search under the Fourth Amendment is reasonable is subject to a "totality of the circumstances" test; and that the Tribe failed to prove their interest outweighed Mr. Madrid's interest in the privacy of his person. (RoP at 02:30-08:55)

On June 22, 2017, the trial court granted a Stay of the Order to obtain DNA sample, and on August 3, 2017 the Notice of Appeal was filed. (Record at 3; Record at 1)

ISSUE PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT ERRED IN GRANTING TRIBE'S REQUEST TO OBTAIN DNA SAMPLE.

ARGUMENT

I. Taking Mr. Madrid's DNA is a Search Under the Fourth Amendment and requires Analysis Beyond the Over Broad "Reasonably Intrusive" Standard of Tribal Code.

The taking of a DNA sample is considered a search under the Fourth Amendment because any intrusion into the human body is an invasion.[1] The Fourth Amendment's function is to protect people from intrusions that are not justified or are made in an improper manner.[2] The ultimate measure of a government search is whether the search "reasonable".[3] The Fourth Amendment text does not explicitly state that a warrant must be obtained however the United States Supreme Court has required that a warrant must be obtained in order for a search to be considered reasonable, unless an exception applies.[4] Therefore, the government must obtain a warrant in order to take the defendant's DNA, unless there is an exception that applies.

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[1] Maryland v. King, 133 S.Ct. 1958, 1968–69, 186 L. Ed. 2d 1 (2013) ("It can be agreed that using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search"); See also Schmerber v. California, 384 U.S. 757, 770, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); Cupp v. Murphy, 412 U.S. 291, 295, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973); Terry v. Ohio, 392 U.S. 1, 24–25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

[2] Id., King, 133 S.Ct. at 1969; Schmerber, 384 U.S. at 768, ("[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.")

[3] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652, 115 S. Ct. 2386, 2390, 132 L. Ed. 2d 564 (1995) ("the ultimate measure of the constitutionality of a governmental search is 'reasonableness'").

[4] Kentucky v. King, 563 U.S. 452, 549, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011).

The United States Supreme Court has found that laws that require defendants to submit to a search or make it a crime to refuse to such search violate the Fourth Amendment. The Court has held that the Fourth Amendment does not permit warrantless blood tests in drunk driving cases and motorists cannot be deemed to have consented to such tests "on pain of committing a criminal offense."[5] Additionally, the United States Supreme Court has found that urine tests were "searches" within the meaning of the Fourth Amendment and that such tests were unreasonable searches absent a person's consent.[6] It would follow that the taking of a defendants DNA would also be considered a search and would therefore the government would need to obtain a warrant.

A. **Arizona State Law Does Not Support the Search of Mr. Madrid's Person Without a Warrant or an Exception.**

In addition to citing to Tribal Code PYTC § 2-2-390 (A)(6), the Tribe cites to State v. Wedding, 171 Ariz. 399, to support its statement that collection of the defendant's DNA does not

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[5] Birchfield v. North Dakota, 136 S. Ct. 2160, 2186, 195 L. Ed. 2d 560 (2016) ("in the Fourth Amendment setting, this standard does not differ in substance from the one that we apply, since reasonableness is always the touchstone of Fourth Amendment analysis... and applying this standard, we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.").

[6] Ferguson v. City of Charleston, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) (The Court examined the validity of a South Carolina State hospital policy that was developed in response to the rising use of cocaine in pregnant mothers. The policy set forth a procedure in which hospital staff was to collect a urine and test for drugs so that the results could be used in subsequent criminal proceedings. The policy included a process were police were to be notified without delay and the patient would be arrested if the patient tested positive for cocaine twice or missed an appointment with a substance abuse counselor.)

constitute a search under the Constitution. In Wedding, the police obtained an order of detention for obtaining evidence of identifying physical characteristics pursuant to an Arizona Statute that is similar to the Tribal Law in this case. The order authorized the taking of the defendant's fingerprints, hair, blood, and saliva. However, the court in that case did not hold that the collection of a person's DNA is not a search; the court held that the statute[7] did not violate the Fourth Amendment or the Arizona Constitution. Additionally in Wedding, the order was obtained during a multi-agency investigation of the case known as the "leasing agent rapist." The facts of that case involved six women who were assaulted on different occasions and law enforcement's lack of identification of a suspect. The order itself was issued only after there was a substantial amount of investigation into the defendant and the reasonable cause standard was satisfied by the evidence.

It is important to note that A.R.S. § 13-3905 is substantially different from PYTC § 2-2-390 (A) (6) because the Arizona statute authorizes a peace officer who is engaged in the investigation of a felony to request temporary detention of a defendant for the purpose of obtaining evidence of identifying physical characteristics.[8] Under the Arizona statute an order may be issued only after a showing of: reasonable cause for belief that a felony has been committed; procurement of evidence described may contribute to the identification of the individual who committed such offense; and the evidence cannot be otherwise obtained.[9] The Arizona statute further contains additional limitations which allows the statute to satisfy the Fourth Amendments constitutional threshold of

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[7] A.R.S. § 13-3905. Detention for obtaining evidence of identifying physical characteristics.

[8] Id., (A).

[9] Id., (A)(1)-(3).

reasonableness. These limitations are not present in § 2-2-390 of the PYTC which makes the code overbroad, and therefore unconstitutional.

In this matter, Tribe is requesting an invasion into Mr. Madrid's person for a misdemeanor property crime, stating that the mere presence of blood near the property damage somehow is equivalent to evidence of causation. There are no allegations that this DNA is needed to show that a felony has been committed, or that the identity of the person alleged to have committed the crimes charged is in question, as indicated in Wedding. There is no nexus between the presence of the blood, and a crime that has been committed, as required by Tribal Code. Furthermore, Tribe also argued that the taking of Mr. Madrid's DNA was needed to somehow bolster the credibility of its own witnesses, which is on its face unreasonable. Mr. Madrid has a constitutional right to the privacy of his person, and Tribe failed to name any exception that would allow for a search that invaded his body without a warrant. The trial court held that according to Wedding, that when a person is arrested they have a diminished expectation of privacy. Mr. Madrid was first arrested on October 31, 2016. He was held in the custody of the Pascua Yaqui Tribe for 53 days, where his expectation of privacy was concededly diminished. At no time during this period of custody or booking process did Tribe make a request for a DNA sample. Mr. Madrid is currently released on his own recognizance and is not in custody, and therefore he has a right to demand his constitutional protections against being subjected to unreasonable searches by the Tribe.

B. Pascua Yaqui Tribal Law Does Not Support the Constitutionality of Taking Mr. Madrid's DNA.

At any time after the filing of the complaint, upon written request of the prosecutor, the defendant, in connection with the particular crime with which he or she is charged, shall permit the taking of samples of his or her hair, blood, saliva, urine or other specified materials which involve no unreasonable intrusions of his or her body PYTC § 2-2-390. The Code expressly states that there must be a connection present between the prosecutor's request and with a particular crime that the defendant is being charged and only when such requests do not involve an unreasonable intrusion of the defendants body. Here, (1) there is no connection between the need for the defendant's DNA and the charges and (2) the request is unreasonable because the Tribe is not specifying exactly what it is to be tested for. Furthermore, the one allegation of damaging the taillight of a vehicle is not a felony charge, cannot be proven by the mere presence of a small blood smear when Mr. Madrid's presence in the area is not in question; a search of someone's person is not reasonable when it is to bolster the credibility of eyewitness's testimony. The Constitutionality of the Tribal Law that authorizes the taking of blood samples has never been answered by the Pascua Yaqui Court of Appeals.

The Pascua Yaqui Tribal Court of Appeals has stated that Pascua Yaqui Tribal Law explicitly authorizes the involuntary taking of blood samples from criminal defendants.[10] The Tribe

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[10] Pascua Yaqui Tribe v. Valenzuela, No. CA-08-013 (Sep. 15, 2008) (the relevant issues raised in this case was not the constitutionality of taking the blood sample but whether the Trial Court erred in reopening the case to rule on disclosure of the test results and whether the Trial Court erred in disclosing those results to Tribal officials.).

cites Pascua Yaqui Tribe v. Valenzuela, and states that the Pascua Yaqui Court of Appeals has permitted the taking of a defendant's blood for the purposes of testing for the presence of a disease. However, the present case is distinguishable from the circumstances in Valenzuela because the public interest argument that was raise in Valenzuela is not present. Here, there is no evidence that has been presented to suggest that any Tribal officers were "forced into contact with [the defendant's] blood during the performance of their duties"[11] or that disclosure of the defendant's DNA is necessary to prevent any harm to the Tribe. There are absolutely no allegations whatsoever that Mr. Madrid came into contact physically with any other person in relation to this case, negating any argument that prevailed in Valenzuela. Additionally, in Valenzuela there are no facts present in the opinion to suggest that the defendant ever raised the issue of whether § 2-2-390 (A) (6) was overbroad and unconstitutional, and there are no facts that the defendant in that case refused or objected to submitting to the taking of his DNA.

C. **Federal Case Law Does Not Support the Reasonableness of the Taking of Mr. Madrid's DNA.**

The trial court cites to Maryland v. King to support its holdings, but Mr. Madrid argues that his case is distinguishable. In King, Defendant filed a motion to suppress his DNA evidence because the DNA was obtained when he was arrested in 2009 for an unrelated matter and later used to link him to an unsolved crime in 2003. The court held that when officers make an arrest that is supported by probable cause for a serious offense that it is reasonable under the Fourth Amendment for the arrestee's DNA to be taken because it is a legitimate police booking procedure.

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[11] Id., Valenzuela, *4.

In Mr. Madrid's case, his alleged charge is not a serious offense or felony, nor was his DNA taken during his booking procedure when he had a lessened expectation of privacy. Mr. Madrid is released on his own recognizance and is not in custody.

Trial court also quoted Schmerber v California as authority for the taking of Mr. Madrid's buccal swab as being minimally intrusive and therefore somehow a reasonable search under the Fourth Amendment. Schmerber was a case involving a drunk driver who had been involved in an automobile accident that sent him to the hospital for his injuries. The court in Schmerber found that in view of the substantial interests in privacy involved, Mr. Schmerber's right to be free of unreasonable searches and seizures applied to the withdrawal of his blood, but under the facts in his case there was no violation of that right. The court came to that conclusion based on the finding that there was probable cause for the arrest and the same facts as established probable cause justified the police in requiring Schmerber to submit to a test of his blood-alcohol content. In view of the time required to bring petitioner to a hospital, the consequences of delay in making a blood test for alcohol, and the time needed to investigate the accident scene, there was no time to secure a warrant, and the clear indication that in fact evidence of intoxication would be found rendered the search an appropriate incident of petitioner's arrest. Mr. Madrid's case is easily distinguishable from Schmerber; most notably there are no exigent circumstances present requiring the taking of DNA without a warrant, bolstered by the fact that the request for a DNA sample came almost four months after his arrest and booking.

There are no shortage of examples of DNA samples being taken, after a thorough analysis was completed under the rubric of a reasonable Fourth Amendment search. Every single case is distinguishable from Mr. Madrid's case. In United States v Hinton, ---Fed.Appx.---, 2017 WL 19130

(11th Cir. 2017), the Defendant was indicted on charges of committing a robbery under the Hobbs Act, and using firearms during a crime of violence. Defendant moved to suppress evidence of a DNA match between a sample taken at the scene and a profile that was created and kept from a prior felony offense. The court held that the district did not err in denying the defendant's motion to suppress because Defendant's privacy interests, as a probationer, were reduced and did not outweigh the government's strong interest in creating a permanent identification records for convicted felons for law enforcement purposes. In this matter, the alleged charge that is connected to this DNA sample is not a crime of violence, nor is it a felony. Mr. Madrid was not on probation, and therefore subject to a limited expectation of privacy, making any taking of his DNA an unreasonable search.

In United States v. Castillo, No. 16-20626-CR, 2016 WL 6158133 (S.D. Fla. 2016), the request for the defendant's DNA was not part of any routine booking procedure and was related to a fact-specific, case- specific application based on that theory that there is probable cause to believe that the DNA obtained would yield relevant evidence. The court held that the warrant request was premature because the purpose of the DNA is to compare it to DNA found on the firearm and related items and if there is no usable DNA found on these items then there can be no comparison. In this matter, no warrant was even requested, and no showing by the Tribe was ever made that the "small blood smear at the broken area of the lens" mentioned in the probable cause statement was a usable amount to be able to compare to any DNA sample taken from Mr. Madrid.

In a case that specifically addresses the taking of buccal swabs, U.S. v. Robinette, No. 13-CR-0003 AWI BAM, 2013 WL 211112 (E.D. CA 2013), it is also distinguishable from Mr. Madrid's case. The facts of this case involved a defendant charged with Sexual Exploitation of Children, and Transportation with Intent to Engage in Criminal Sexual Activity, and the buccal swabs were taken

while he was in the custody of the U.S. Marshalls. There, Defendant argued that there will be irreparable harm if the DNA sample is taken because once the DNA sample is taken, loaded into a database, and profiled then it cannot be undone and the sample is subjected to repeated searches. The court held that the swab was constitutional as a minimal intrusion because the defendant is lawfully within the custody of the Government, the crime the defendant were charged with are serious, and proper identification of a defendant is a compelling state interest. None of these factors exist in Mr. Madrid's case, leaving the request for his DNA for a de minimus property crime inherently unreasonable.

CONCLUSION

The taking of a DNA sample from a person, regardless of the method, is a search under the Fourth Amendment and as such provides certain protections. The Pascua Yaqui Tribal Code may allow for a sample to be taken, but it must also provide protections against unreasonable searches, which it fails to do. The trial court erred in finding that a "minimally intrusive" search equals a reasonable search under the Fourth Amendment, eliminating the need for a warrant or for an exception to needing a warrant.

Under scrutiny at Tribal, State, or Federal level, the taking of Mr. Madrid's DNA given the totality of the circumstances of this case is a violation of his Fourth Amendment right to be free of unreasonable searches. The trial court erred in granting the Tribe's request to take a sample of Mr. Madrid's DNA, regardless of the method of collection.

RESPECTFULLY SUBMITTED this 21st day of September, 2017.

PASCUA YAQUI PUBLIC DEFENDER

Sara L. Dent
Senior Staff Attorney
Attorney for Appellant

Original delivered this date to:

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Pascua Yaqui Chief Public Defender - Melissa.Acosta@pascuayaqui-nsn.gov

Exhibit ‘A’

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, PLAINTIFF, vs. MADRID, MICHAEL RAYMOND, DEFENDANT.	Case No. CR-17-020 INITIAL HEARING ORDER

On November 1, 2016, the defendant, Michael Raymond Madrid, in custody, appeared with his legal counsel, Sara Dent, for an initial hearing. G. Allen Osburn appeared for the Tribe. Tracy Nielsen appeared for pre-trial services. The alleged victim, Jessica Williams also appeared. The Court should grant the Tribe's unopposed motion to amend the complaint to change the defendant's address.

The defendant waived reading of his rights, and based on the probable cause affidavit and complaint, the court finds that probable cause exists to believe that the defendant may have committed the offense of Count One, Aggravated Assault, Count Two, Aggravated Assault, Count Three, Aggravated Assault, Count Four, Assault, Domestic Violence, Count Five, Battery, Domestic Violence, Count Six, Injury to Public Property, Count Seven, Disorderly Conduct, Count Eight, Threatening or Intimidating, Count Nine, Threatening or Intimidating Count Ten, Threatening or Intimidating, Count Eleven, Endangerment, Count Twelve, Endangerment, and Count Thirteen, Endangerment. The Tribe recommended a $2,500.00 cash bond hold due to the serious nature of the alleged offense, based on two prior failures to appear, and pre-trial agrees that the defendant may pose a threat to not appear and a threat to the community if released. The Tribe recommends pre-trial supervision, restrictions on weapons alcoholic beverages and drugs, and a no contact order to all alleged victims. Defendant requested a lowered bond, because he is a resident in the community with connections to the community, and is studying at the culinary institute. Based on the seriousness of the allegations, of use of a weapon, and two prior failures to appear, the Court should set a $2,000.00 cash bond. The defendant should be ordered to have no contact with the alleged victims, and not possess alcoholic beverages, drugs or paraphernalia. The Court adopts the recommendation of Ms. Williams who indicated she would be safe in her person and property, if the court were to grant a not harm or harass order as to her.

The Court denies the defendant's motion to dismiss Count 4 and Count 5, for lack of probable cause, because the probable cause statement at pages 5 and 6 indicate that eyewitnesses saw a man punch a woman, and probable cause may be based on such a hearsay probable cause identification.

The defendant entered a not guilty plea to all counts, the court should set a jury trial, subject to Ms. Dent filing a formal request for a jury trial.

IT IS ORDERED that the defendant, Michael Raymond Madrid, shall be released on a $2,500.00 cash bond, he shall appear at all future hearings, obey all laws, and the defendant shall not contact the alleged victims, Tony Orosco, Stephanie Hererra, the minors. A.O. 7/2003, and M. O. 3/1999, not harm or harass Jessica Williams, and he shall report to pre-trial services and follow all standard release conditions. He shall not possess alcoholic beverages, drugs or drug paraphernalia, he shall be subject to random urinalysis testing, and he shall not possess weapons or dangerous implements.

A jury trial shall be scheduled for January 17, 2017 at 9:30 a.m., and a pre-trial conference shall be held on January 11, 2017 at 10:00 a.m..

In the event the defendant cannot post his cash bond, then the court shall issue a transport order.

THIS IS THE ONLY NOTICE OF HEARINGS YOU WILL RECEIVE.

IT IS FURTHER ORDERED that the Court shall grant the Tribe's unopposed motion to amend the complaint to change the defendant's address to 7324 S. Camino Cocoim.

SO ORDERED THIS 1st DAY OF NOVEMBER, 2016.

PASCUA YAQUI TRIBE ★ JUDICIAL BRANCH

Associate Judge, Pascua Yaqui Tribal Court

cc: Date: 11/1/16
✓ Tribe ✓ Defendant/Counsel ✓ Detention ✓ Pre-trial
Clerk

Exhibit ‘B’

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE Plaintiff, Vs. MADRID, MICHAEL, Defendant.	CASE NO. CR-17-020 ORDER GRANTING PARTIES' REQUEST TO MODIFY RELEASE CONDITIONS AND ORDER DENYING REQUEST TO CONTINUE JURY TRIAL AND PRE-TRIAL

On December 23, 2016, the defendant's counsel, Sara L. Dent, requested that the Court modify its prior order as to release conditions, so that the defendant may be released on a suspended bond of $2,500.00, the Tribe's G. Allen Osburn does not object, and the defendant should be released. The Court should modify the order for release of the defendant, for good cause shown.

Notwithstanding the parties' agreement to continue, the request to continue the jury trial and pre-trial should be denied for lack of good cause shown and as untimely.

DISRUPTION OF CONTINUING CRIMINAL JURY TRIAL COURT CALENDARS

The effect of the court re-setting a jury trial date would result in delay.

The Pascua Yaqui Rules of Criminal Procedure provides in pertinent part as follows:

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

3 PYTC § 2-2-20, **Purpose and Construction.**

3 PYTC § 2-2-330 was amended to read that "[t]he court **may grant** a continuance **where good cause has been established.**" Id., at (E). (emphasis added). Granting a continuance is discretionary. It is not a right or mandated by the code. A continuance is not a right or entitlement, and it should be only granted for good cause shown.

The court also has a duty under the ABA Standards related to the function of the Trial Judge:

> **Standard 6-1.5. Obligation to use court time effectively and fairly**
>
> (a) **The trial judge has the obligation to avoid delays, continuances, and extended recesses, except for good cause.** In the matter of punctuality, the observance of scheduled court hours, and the use of working time, the trial judge should be an exemplar for all other persons engaged in the criminal case. The judge should require punctuality and optimum use of working time from all such persons.

ABA Standard 6-1.5, Function of Trial Judge. (emphasis added).

On November 1, 2016, the defendant entered a not guilty plea, and the court set a jury trial, based on the defendant's oral request to do so. On November 3, 2016, a written request for a jury trial was submitted by Ms. Dent, in which the defendant stated that the Defendant "is unable to waive any applicable time limits." Because of the court's busy docket, the court had to reschedule certain civil matters and re-set other matters to accommodate for setting a jury trial within the Speedy Trial Statute, because the defendant **did not waive time limits**. The Court denies the request for a second continuance request, for lack of good cause shown.

The judges of the Pascua Yaqui Court must maintain a strict calendar control which leads to the more expeditious and efficient administration of justice. 3 PYTC § 2-2-20, **Purpose and Construction.** As a result, once a case had been set for trial, a continuance of that trial date will only be granted for good cause shown. 3 PYTC § 2-2-330(E). The defendant, after having received his jury trial date, because he **did not waive time limits**, asks for a new setting on a date for scheduled trial, because his counsel now states "all time limits are waived." The Court is constantly reviewing the status of the court docket to determine if new dates can be added to the list of dates available for scheduling before the presiding judge in the case. Such rescheduling becomes increasingly difficult where every attorney in defense cases does not waive time limits, or where different counsel request continuances. Priority for available court dates is given to cases that are being scheduled for trial for the first time over cases which are being continued and rescheduled. Priority will be given to those defendants who are in custody

over those who are out of custody. As such, the court has already thoroughly reviewed its extremely busy docket, did everything within its authority to set the trial timely for a jury trial, and for lack of good cause shown, the court should deny the defendant's motion to continue the trial for a second trial date.

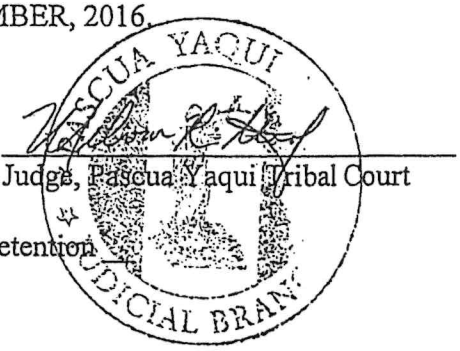
INCONVENIENCE TO POTENTIAL JURORS AND COMMUNITY MEMBERS

Although the parties have stipulated to the continuance of a pre-trial and jury trial, the court denies the request, for lack of good cause shown, and as an untimely filing. The Court clerk has already sent 150 notices to prospective jurors to appear on January 17, 2017, the court must specially accommodate its calendar for jury trial settings, and such late continuance requests by the parties subject the court and the Tribe to a substantial financial burden to re-schedule lengthy cases, a disruption of the court calendar, forcing rescheduling of other criminal and civil matters that had been set at other later dates and times due to the statutory scheduling priorities that must be given to criminal jury trial settings. The clerks would need to notify all prospective jurors of the trial cancellation and re-setting, send out new mailings, new postage, new entries into the court required records showing which jurors were served, were not served, have been excused, etc., and all of these tasks, multiplied by 150 potential jurors, are all time consuming and burdensome actions for the court's staff that waste valuable staff time and take them away from other important work and record keeping tasks for the court, the Tribe, and the public. Additionally, the parties' dilatory motion would inconvenience some members of the jury pool, who may have already made arrangements with their employers, doctors, families, babysitters and child care costs for young children, or to others with whom the prospective jurors may have long-standing appointments or engagements.

IT IS ORDERED that the unopposed request for modification of the prior court order release conditions is granted, for good cause shown. The defendant shall be released from custody immediately, under prior conditions of release, but the $2,500.00 bond shall be suspended. The defendant shall report to pre-trial immediately upon his release.

IT IS FURTHER ORDERED that the parties' request to continue the jury trial and pre-trial hearing shall be denied for lack of good cause shown, and as not a timely filing.

SO ORDERED THIS 23rd DAY OF DECEMBER, 2016.



Judge, Pascua Yaqui Tribal Court

Cc: Date: 12/23/16
/ Tribe / Defendant / Counsel / Pre-trial __ Detention __

Clerk

Exhibit ‘C’

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff, Vs. MADRID, MICHAEL, Defendant.	)	CASE NO. CR-17-020 ORDER OF DISMISSAL

On December 27, 2016, the Tribe's G. Allen Osburn made a motion to dismiss, because the Tribe no longer wishes to prosecute. The Court should grant the unopposed motion to dismiss without prejudice to re-filing.

IT IS ORDERED that for good cause shown, the case shall be dismissed without prejudice to re-filing. The trial set January 17, 2017 at 9:00 a.m. and pre-trial set for January 11, 2017 at 10:00 a.m. shall be vacated, and the case shall be closed.

SO ORDERED THIS 27th DAY OF DECEMBER, 2016.

Judge, Pascua Yaqui Tribal Court

CC: Date 12/27/16
1 Tribe 1 Defendant/Counsel

Clerk

DEC 2016

IN THE PASCUA YAQUI COURT OF APPEALS

NO: CA-17-
RE: NO. CR-17-079

Before the Pascua Yaqui Tribal Court

Pascua Yaqui Tribe, Plaintiff
Vs.
Michael Madrid, Defendant

INDEX LISTING

Pursuant to 3PYTAP Rule 9(A)(2), and having received notice of an appeal by the appellant as is required by 3 PYTRAP Rule 7(D), I, Rene Garcia, Chief Court Clerk, hereby submit to the Pascua Yaqui Court of Appeals the following list of items that comprise the Pascua Yaqui Trial Court Record in the above referenced trial court case.

Document	Date Filed
1. Notice of Appeal	8/03/17
2. Notice of Change of Address	6/29/17
3. Order Granting Stay of Order to Obtain DNA	6/22/17
4. Motion to Stay Order to Obtain DNA sample	6/21/17
5. Order to Obtain DNA Swab via saliva	6/20/17
6. Order Continuing Hearing on Evidence of Physical Characteristics.	5/31/17
7. Motion to Continue	5/26/17
8. Court Process Log	5/12/17
9. Change of Address Form	5/09/17
10. Court Process Log	5/11,17
11. Order Re-Setting Hearing on Defendant's Motion	5/04/17
12. Motion to Continue	5/03/17
13. Court Process Log	5/3/17
14. Order Re-Setting Hearing	5/2/17
15. Madrid Appeal	5/1/17
16. Notice Regarding Missing Transcript	4/27/17
17. Notice of Appeal	4/4/17
18. Court Process Log	4/5/17
19. Order Granting Stay of Order	4/4/17
20. Order Setting Pretrial Hearing	4/4/17
21. Motion to Stay Order to Obtain DNA Sample	4/4/17
22. Request for Jury Trial	3/28/17
23. Order to Obtain DNA Sample amended	3/28/17
24. Reply to Defendant's Response	3/16/17

25. Tribe's Response to Defendant's Request for Disclosure	3/16/17
26. Court Process Log	3/7/17
27. Order Setting Hearing on Defendant's Motion	3/6/17
28. Minute Order	3/6/17
29. Request for Disclosure	3/3/17
30. Response to Tribe's Motion	3/3/17
31. Defendant's Notice of Defenses and Disclosure	3/3/17
32. Minute Order	2/24/17
33. Motion for Physical Characteristics	2/23/17
34. Tribe's Notice of Witnesses and Disclosure	2/23/17
35. Court Process Log	2/15/17
36. Initial Hearing Order	2/13/17
37. Recognizance Release	2/13/17
38. Request for Legal Counsel	2/13/17
39. Court Process Log	2/7/17
40. Order Granting Continuance	1/30/17
41. Court Process Log	1/19/17
42. Criminal Summons	1/19/17
43. Criminal Summons	1/19/17
44. Criminal Complaint	1/4/17
45. Probable Cause Statement	1/4/17

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR
7777 S. Camino Huivisim
Bldg. A, 2nd Floor
Tucson, Arizona 85757
(520) 879-6251
Alicia Renee Robertson
Deputy Prosecutor

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

MADRID, MICHAEL ,
Petitioner,

vs.

HONORABLE MELVIN STOOF
JUDGE, PASCUA YAQUI TRIBAL COURT

Real Party in Interest:

PASCUA YAQUI TRIBE[1]

Respondents

APPEALS CASE NO: CA-17-002

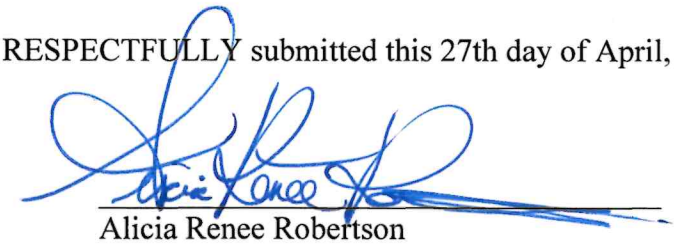
TRIBAL COURT NO: CR-17-079

NOTICE REGARDING MISSING TRANSCRIPT

COMES NOW, the Pascua Yaqui Tribe by and through the Pascua Yaqui Chief Prosecutor, OSCAR J. FLORES, and the undersigned Deputy Prosecutor, ALICIA RENEE ROBERTSON, and hereby respectfully submits the following in response to this Court's order dated April 21, 2017. Given Petitioner's response, the parties cannot enter into a stipulation pursuant to 3 PYTC§ 2-3-110 (H). The Tribe submits this response in good faith.

[1] [1] In Special Action pleadings the complaint names the body, officer, or person against whom relief is sought. However, "[i]f any public body, tribunal, or officer is named as a defendant, the real party or parties in interest shall be joined as defendants." R.Ariz.Spec.Act., Rule 2(a)(1). In such circumstances, the practice is to direct the writ in form to the court, but in fact leave its handling to the parties. *See* R.Ariz.Spec.Act., Rule 2, State Bar Committee Notes, section (a).

RESPECTFULLY submitted this 27th day of April, 2017.



Alicia Renee Robertson
Deputy Prosecutor

Sent via electronic mail this 28th day of April, 2017.
Chief Justice James Hopkins
Clerk of the Pascua Yaqui Court of Appeals

On:_____

Copy of the foregoing provided to:

Hon. Melvin Stoof
Pascua Yaqui Tribal Court

Sara Dent
Pascua Yaqui Office of the Public Defender
Attorney for Petitioner Michael Madrid

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

Sara L. Dent
PYT Bar No 10257
AZ Bar No 025979
WA Bar No 49141

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff/Appellee, vs. MADRID, MICHAEL, Defendant/Appellant.	Court of Appeals Case No: Trial Court Case No.: CR-17-079 **NOTICE OF APPEAL**

Pursuant to 3 PYTC Part II, Chapter 2-3, Section 90, Pascua Yaqui Tribe Rules of Appellate Procedure, counsel for Appellant Michael Madrid respectfully files a Notice of Appeal in the Appellate Court from the Order to Obtain DNA Sample entered in this action by the Pascua Yaqui Tribal Court on March 28, 2017. A copy of the Court's Order is attached hereto as required by Section 90, Pascua Yaqui Rules of Appellate Procedure.

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

DATED this 4th day of April, 2017.

PASCUA YAQUI PUBLIC DEFENDER

Sara L. Dent
Senior Staff Attorney

CERTIFICATE OF SERVICE

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

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

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

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

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

O.J. Flores
Chief Prosecutor
Office of the Prosecutor of the Pascua Yaqui Tribe
7474 South Camino de Oeste
Tucson, AZ 85757

DATED this 30th day of March, 2017.

PASCUA YAQUI PUBLIC DEFENDER

Lilian Contreras
Office Manager

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff, Vs. MADRID, MICHAEL, Defendant.	)	Case No. CR-17-079 Amended ORDER TO OBTAIN DNA SAMPLE

On March 28, 2017, the defendant appeared with his counsel, Sara L. Dent and Alexandra Mojado objected to the Tribe's request for DNA testing on their client.

Alicia Renee Robertson argued that the Court of Appeals case *PYT v. Valenzuela* case permitted the taking of a defendant's blood, under 3 PYTC§ 2-2-290(A)(6), (formerly 3 PYT R.Crim P. Rule 39(A)(6), for the presence of a disease, and such was found by that Court as a compelling public interest to permit blood testing where officer's public health and safety was at stake and intrusion on a defendant's right to privacy was minimal. Defendant argues that such testing was not related to any alleged charge and that such testing is an unreasonable search and seizure under the 4th amendment's right to be free of such unreasonable searches.

The cases cited by prosecution include references to *Schmerber v. California*, (citation omitted), a U.S. Supreme Court case that held taking of blood tests were not an unreasonable search and seizure under the 4th amendment, under limited circumstances, and to *Maryland v. King*, which held that a buccal swab test for DNA was not an unreasonable search of a defendant, but rather, it was a reasonable intrusion that outweighed the defendant's privacy interests, based on the Court's finding that there was some governmental interest in identifying of an individual brought into custody through DNA testing, based on a valid arrest supported by probable cause, and that a defendant's "expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks." Id. at 133 S. Ct. 1958, 1980 (2013). Because the Tribe has established the need for the DNA evidence to prove an essential element of the alleged crime, DNA swab testing in not an unconstitutional invasion of privacy or unreasonably intrusive.

The Court should order that the Tribe arrange for a time and date for DNA testing, so long as defense counsel is present during such testing.

IT IS ORDERED that for good cause shown, the court shall grant the Tribe's motion to obtain DNA buccal swab testing, for good cause shown, and the Tribe shall notify the defendant's counsel of the date and time of such planned testing, so that Ms. Dent may be present at that time of testing on the defendant.

SO ORDERED THIS 28th DAY OF MARCH, 2017.

PASCUA YAQUI TRIBE ★ JUDICIAL BRANCH ★

Judge, Pascua Yaqui Tribal Court

CC: Date 3/28/2017

✓ Tribe ✓ Defendant/Counsel ___ Detention

Clerk