

**No. CA-17-003**  
**Pascua Yaqui Tribe Court of Appeals**

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Pascua Yaqui Tribe, Office of the Prosecutor, Appellant

v.

Honorable Melvin Stoof, Judge Pascua Yaqui Tribal Court, Appellee,

(Real Party in Interest: Frank Jaimez, CA-17-005).

For the Appellant:

Oscar J. Flores, Chief Prosecutor  
Laura Berglan, Attorney General

For the Appellee Real Party in Interest:

Melissa L. Acosta, Chief Public Defender

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**Opinion**

In this case, the tribal government appealed an order of the trial court that the prosecutor had to plead and prove the non-Indian status of the real party in interest. The prosecution proceeded and the real party in interest was convicted with the prosecutor pleading and proving to the jury the non-Indian status of the real party in interest.

The conviction of the real party in interest renders this appeal moot. The Tribe has suffered no injury for which this Court can grant any remedy. The appeal is dismissed.

So ORDERED this 20th day of July, 2018.

  
\_\_\_\_\_  
Hon. Robert Miller

We CONCUR:

  
\_\_\_\_\_  
Hon. Rebecca Plevel

  
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Hon. Robert Blaeser

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

PASCUA YAQUI TRIBE,  
OFFICE OF THE PROSECUTOR

Petitioner,

vs.

HONORABLE MELVIN STOOFF  
JUDGE, PASCUA YAQUI TRIBAL COURT

Real Party in Interest:

FRANK JAIMEZ<sup>1</sup>

Respondents

**APPEALS CASE NO: CA-17-003**

**TRIBAL COURT NO: CR-16-236**

**PETITIONER'S REPLY BRIEF**

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<sup>1</sup> 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).

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## **I. PROCEDURAL POSTURE**

The Tribe incorporates by reference the facts and procedural history as set forth in its Petition for Special Action filed April 28, 2017, with the following additions:

On May 19, 2017, the Attorney General filed a petition for intervention and reconsideration with this Court. On April 10, 2018, this Court requested that the parties submit supplemental briefing as to three specific issues: 1) whether the Court of Appeals has jurisdiction to consider a special action or interlocutory appeal filed by the Tribe in a criminal case; 2) whether the trial court erred by requiring the Tribe to prove that a defendant is a non-Indian as an element of the domestic violence crimes for which he had been charged; and, 3) whether this Court has jurisdiction to review, as a full appellate panel, the previous decision rendered individually by Chief Justice Hopkins. On May 25, 2018, the Real Party in Interest, through counsel, submitted his supplemental briefing. The Pascua Yaqui Prosecutor's Office and the Pascua Yaqui Attorney General jointly submit the following supplemental brief for this Court's consideration.

## **II. THIS COURT HAS JURISDICTION TO HEAR A SPECIAL ACTION, OR INTERLOCUTORY APPEAL, BY THE TRIBE AGAINST THE TRIAL JUDGE IN A CRIMINAL CASE.**

Contrary to Real Party in Interest's argument, this Court does have jurisdiction to hear a special action, or interlocutory appeal, by the tribe against the trial judge in a criminal case. This is true for several reasons: 1) the plain language of 3 PYTC §§ 2-3-90(F), 2-3-210(D)(2), and 2-3-260; 2) the Constitution of the Pascua Yaqui Tribe does not contain a "cases or controversies" jurisdictional requirement for this Court; 3) the issue on appeal is not moot; and 4) even if the issue on appeal were moot, the "capable of repetition yet evading review" exception to mootness applies.

### *A. 3 PYTC §§ 2-3-90(F), 2-3-210(D)(2), and 2-3-260*

The Pascua Yaqui Code statutorily provides for appellate jurisdiction over special actions, including in criminal matters. 3 PYTC § 2-3-210(D) setting forth when petitions for

reconsideration are not allowed, provides in subsection (2) that such petitions are not allowed for “an order declining to accept jurisdiction of a petition for special action.” Further, the Pascua Yaqui Code provides for special actions at common law. 3 PYTC § 2-3-260, which sets forth the extraordinary writ process, specifically makes available the extraordinary writ process against a tribal court judge. When an extraordinary writ is filed against a judge, “the respondent judge may advise the appellate court clerk and all parties that he does not intend to respond to the petition....” *Id.*, at (C)(5). So, not only is special action available against a judge, but jurisdiction over such action is vested in this Court. In fact, the only prohibition on such actions is that an interlocutory appeal is not permitted in civil cases. 3 § PYTC §2-3-90(F).

The plain language of these statutes give this Court discretion to accept or decline jurisdiction of a petition for special action. To find otherwise renders the language of these statutes superfluous. “It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441 (2001) (citing *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120 (2001)).<sup>2</sup> The canon of superfluity is strongest when an interpretation would render superfluous another part of the same statutory scheme. *Marx v. General Revie Corp.*, 568 U.S. 371, 372, 133 S.Ct. 1166 (2013). If this Court did not have jurisdiction to hear special actions, there would be no need to specify in 3 PYTC § 2-3-210(D) that petitions for redetermination are not permitted when this Court declines to accept jurisdiction over a special action. Just as, if this Court did not have jurisdiction to hear interlocutory appeals in criminal cases, there would be no reason to specify in 3 PYTC § 2-3-90(F)

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<sup>2</sup> *PYT v. Miranda*, CA-08-015 p.22 (Ct. App. 2009), (“[W]hile decisions of the Arizona and United States . . . [c]ourts are not controlling authority in this Court, they are highly persuasive.”).

that interlocutory appeals in civil cases are not permitted. In fact, adopting a contrary position would “render the express exception insignificant, if not wholly superfluous.” *Andrews, supra* at 31.

*B. There is no “cases or controversies” jurisdictional requirement for this Court.*

Article VIII of the Constitution of the Pascua Yaqui Tribe establishes the Judiciary Branch, and vests jurisdiction in the courts “in all cases in law and equity arising under [the] constitution and the laws, traditions, customs or enactments of the [Tribe]....” At Section 2. Further, such jurisdiction is vested in “all civil and criminal matters wherein members or non-members of the [Tribe] are parties, unless otherwise expressly prohibited by Federal or tribal laws.” *Id.* This Court, in turn, has “the power of judicial review over all civil and criminal matters appealed from the [Tribal] Court. *Id.* at Section 5.

Real Party in Interest argues that the federal cases and controversies standing doctrine should apply to the matter at hand. However, the lack of a controversy requirement in the Constitution of the Pascua Yaqui Tribe renders such application inappropriate. The Constitution of the United States permits federal courts “to decide legal questions only in the context of actual ‘Cases’ or ‘Controversies,’ Art. III, § 2, and an actual controversy must exist at all stages of the review.” *Alvarez v. Smith*, 558 U.S. 87, 130 S.Ct. 576 (2009) (*citing Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330 (1975)). Therefore, without a present controversy, or when an issue has become moot, the federal court lacks jurisdiction. In contrast, the Constitution of the Pascua Yaqui Tribe provides that the Tribal Court has jurisdiction over “all cases in law and equity arising under [the] constitution and the laws, traditions, customs or enactments of the [Tribe]....” At Section 2. The matter presently before the Court is a case in law; specifically, whether or not the Tribe must

prove that an individual is a non-Indian as an element of a prosecution pursuant to 25 U.S.C. § 1304(b)(1).

*C. The issue on appeal is not moot*

Even if this Court were to find that Section 2 of the Constitution of the Pascua Yaqui Tribe imposed a “cases or controversies” standard similar to that of the Constitution of the United States, which the Tribe does not concede, the matter before this Court is not moot. In addition to the above-stated live issue before this Court, and contrary to Real Party in Interest’s assertion of mootness, the underlying criminal conviction (in which the contested jury instruction was issued) has been appealed to this Court. Real Party in Interest states in its *Response to Tribe’s Petition for Intervention and Reconsideration* that “Mr. Jaimez has appealed the conviction, and that appeal remains stayed pending resolution of this issue.” At. p. 4. So, neither the underlying criminal matter nor the legal question have become moot.

*D. The matter on appeal is “capable of repetition yet evading review”*

Assuming *arguendo* that this Court determined both the “cases and controversies” matter and the mootness matter in favor of Real Party in Interest, this Court should still accept jurisdiction over the present action because the issuance of the contested jury instruction is one that is capable of repetition yet evading review. *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 31 S.Ct. 279 (1911); *Moore v. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493 (1969) (both discussing the capable of repetition yet evading review exception to the mootness rule). This exception to mootness applies where “1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and 2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” *Federal Election Com’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 450, 127 S.Ct. 2652 (2007) (*citing Spencer v. Kemna*, 523 U.S. 1, 17, 118 S.Ct. 978 (1998)).

Satisfying the second prong of the test, as the Tribe continues to bring cases pursuant to 25 U.S.C. § 1304(b)(1), the trial court will continue to issue the jury instruction in contention thus providing a reasonable expectation that the Tribe will be subject to the same action again. Satisfying the first prong of the test, the Tribe has no other adequate remedy at law to fully litigate the challenged action as neither the Tribe nor prosecutor is allowed to “appeal a judgment acquitting a defendant in a criminal case.” 3 PYTC § 2-3-90(G). The lack of an adequate remedy at law invokes this Court’s jurisdiction in equity, and “extraordinary writs<sup>3</sup> are used by courts to provide petitioner relief not available in the ordinary course of appeal.” *People v. Superior Court of Guam*, 2001 Guam 26 (2001); *see also Ex parte Fahey*, 322 U.S. 258, 260, 67 S.Ct. 1558 (1947) (extraordinary remedies should be resorted to only where appeal is a clearly inadequate remedy). Because the action at hand is capable of repetition yet evading review, and there exist no adequate remedies at law to address the action, any potential for mootness is overcome and the extraordinary writ is invoked.

Contrary to Real Party in Interest’s assertion, the ability to file an interlocutory appeal is not the same as the ability to file an appeal from a final order. It is precisely the ability of the Tribe to file an interlocutory appeal in a criminal case that is in question before this Court. Real Party in Interest cannot argue both that this Court lacks jurisdiction because the Petitioner can file an interlocutory appeal *and* that this Court statutorily lacks jurisdiction to entertain an interlocutory appeal.

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<sup>3</sup> Under federal law, these actions may take the form of a Writ of Mandamus. Such a writ is acknowledged in the Pascua Yaqui Rules of Appellate Procedure 3 PYTC § 2-3-260. However, in a writ of mandamus, the reviewing court usually does not review the decisions of the lower court until there is final judgment in the case. In this case, the Tribe is precluded from any appeal as soon as final judgment is rendered.

Similarly, Real Party in Interest's contention that *United States v. Loughner*, 672 F.3d 731 (9<sup>th</sup> Cir. 2012) counsels against this Court's exercise of jurisdiction is unavailing. As Real Party in Interest's Response rightly points out, *Loughner* specifically finds that such jurisdiction is appropriate under the collateral order doctrine (at least in the view of the Ninth Circuit Court of Appeals) when the interim decision "1) conclusively determines the disputed question, 2) resolves an important issue completely separate from the merits of the action, and 3) is effectively unreviewable on appeal from a final judgement." *Id.* at p. 10. Real Party in Interest's analysis of the second prong of the test, however, is where the argument falls apart. Despite Real Party in Interest's claim that the non-Indian nature of the Defendant was tied to the merits of the action, 25 U.S.C. § 1304(b)(1) recognizes jurisdiction regardless of the Defendant's Indian or non-Indian status. Thus, the status of the Defendant is, in fact, a matter separate from the merits of the action.

Although Petitioner contends that the jurisdiction question can be satisfied by the plain language of the Pascua Yaqui statutes cited herein and that this Court is also vested with jurisdiction in equity to hear this matter, should this Court determine otherwise, there are sound public policy reasons for this Court to find that it has jurisdiction in this matter. Both 3 PYTC § 2-3-90(G) and Art. I, Section 1(c) of the Pascua Yaqui Constitution prevent the Tribe from appealing a judgment of acquittal. Should this Court find that it entirely lacks jurisdiction to hear a special action, the Tribe would essentially lose all ability to seek appellate review of decisions of the Tribal Court. Such a severe limitation on the ability of this Court to review decisions of the Tribal Court would allow decisions that are contrary to black letter law to stand. Moreover, this form of pre-trial appeal is the only action available to the Tribe for review of an issue that substantively affects both trial and the rights of victims.

**III. THE TRIAL COURT ERRED IN REQUIRING THE TRIBE TO PROVE THAT THE DEFENDANT IS A NON-INDIAN AS AN ELEMENT OF ITS CHARGE AND CASE.**

25 U.S.C. § 1304(b)(1) provides that “the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction *over all persons.*” (*Emphasis added*). The statute goes on to list numerous exceptions to a participating Tribe’s special domestic violence criminal jurisdiction, including if the victim and the defendant are both non-Indians or if the defendant lacks ties to the participating Indian tribe. 25 U.S.C. § 1304(b)(4). Contrary to Real Party in Interest’s Response at p. 12, there is no delegation of jurisdiction to the Tribe. Rather, 25 U.S.C. § 1304(b)(1) is an affirmation of the Tribe’s inherent special domestic violence criminal jurisdiction over all persons. Moreover, and in spite of Real Party in Interest’s attempt to distract this Court with a rendition of the Yerington Paiute Law and Order Code, the Constitution of the Pascua Yaqui Tribe vests the Tribal Court with jurisdiction over members and non-members of the Tribe, unless expressly prohibited by Federal and tribal laws. As there is no prohibition to overcome in regards to the Indian or non-Indian status of a 25 U.S.C. § 1304(b)(1) defendant, such status cannot be an element of the crime. Given the plain language of 25 U.S.C. § 1304, the Tribe can establish jurisdiction over a defendant the Tribe believes to be a non-Indian, regardless of whether the defendant is in fact a non-Indian, so long as it can prove that the victim *is* an Indian (25 U.S.C. § 1304(b)(4)(A)(i)), that the defendant has sufficient ties to the Reservation (25 U.S.C. § 1304(b)(4)(B)), and that the offense is one of domestic violence or dating violence (25 U.S.C. § 1304(c)). “If the plain meaning of the statute is unambiguous, that meaning is controlling.” *United States v. Williams*, 659 F.3d 1223, 1225 (9th Cir. 2011).

Contrary to the dicta found in *Tribe v. Stoof*, CA-17-003 (2017) as recited by Real Party in Interest in its Response at p. 14, there is no language in 3 PYTC § 1-1 that limits the Tribe's jurisdiction to crimes committed by Indians against Indians. This lack of language was, in fact, recognized by this Court in *Stoof*. This Court's determination in *Stoof* that proving the Indian status of a defendant in the ordinary course of a criminal trial where the Tribe's jurisdiction is federally limited, does not equate to a finding that proof of a defendant's non-Indian status is required where there is no federal limitation on the Tribe's inherent jurisdiction. Real Party in Interest's attempts to persuade this Court otherwise through its jurisdictional arguments fail to make this extremely important distinction. Where inherent jurisdiction is present, the Indian or non-Indian status of a defendant is irrelevant.

As a practical matter, should this Court find that the Tribe must prove the Indian or non-Indian status of a Defendant as an element of a prosecution pursuant to 25 U.S.C. § 1304(b)(1), this Court will be severely limiting the effectiveness of 25 U.S.C. § 1304(b)(1) to address domestic violence issues on the Reservation. There are currently 567 federally recognized Indian tribes in the United States. *See* 83 Fed. Reg. 4235 (Jan. 30, 2018). Many tribes, including the Pascua Yaqui Tribe, maintain their own enrollment lists and do not report enrollment to a centralized database at the Bureau of Indian Affairs. Furthermore, a defendant could be a member of an unrecognized tribe, a state recognized tribe, or a tribe that does not provide certified Certificates of Degree of Indian Blood. What would constitute sufficient proof that an individual is not an enrolled member of any of the myriad tribes across the United States, or otherwise lacks Indian blood? Would a genealogy report need to be commissioned? How is the Tribe to prove a negative without the cooperation and testimony of the defendant? These questions cannot be resolved if this Court finds that the Tribe must prove a defendant is non-Indian as an element of a prosecution pursuant

to 25 U.S.C. § 1304(b)(1). Domestic violence abusers could simply escape justice by refusing to corroborate their non-Indian status.

Real Party in Interest argues that even if the jury instruction was in error, the error is harmless because the Tribe prevailed at trial. Real Party in Interest is incorrect, however, as, in addition to the arguments in Part I of this Reply, Real Party in Interest filed a Notice of Appeal of the jury verdict on June 30, 2017. A briefing schedule has yet to be issued. Should this Court, in resolving the appeal, order that Real Party in Interest is entitled to a new trial, the same issue of the jury instruction would again present itself.

**IV. THIS COURT HAS JURISDICTION TO HEAR THE ATTORNEY GENERAL'S JUNE 21 MOTION FOR FULL APPELLATE PANEL REVIEW AFTER THE TRIBE LOST ITS APRIL 28 AND MAY 19 MOTIONS BEFORE CHIEF JUSTICE HOPKINS BECAUSE, AMONG OTHER REASONS, HE SAT INDIVIDUALLY AS THE COURT OF APPEALS.**

On April 28, 2017 and May 19, 2017 the Tribe's Attorney General filed Petitions for Intervention and Reconsideration citing the compelling interests to "protect sovereignty and jurisdiction" (3 PYTC § 2-5-10(A)(1)) and in "assuring that decisions made by the court do not adversely impact the safety, welfare, and self-governance of the Tribe and that such decisions are consistent with the Tribe's governmental interests" (3 PYTC § 2-5-10(A)(4)). This Court, through the sole action of its Chief Justice, entered Orders denying the April 28<sup>th</sup> and May 19<sup>th</sup> petitions. On June 21, 2017, the Tribe's Attorney General then filed a Motion for Full Appellate Panel Review, pursuant to 3 PYTC § 2-3-80, on the grounds that the lack of a three-justice panel rendered the Court of Appeals not in compliance with 3 PYTC § 1-2-30(B). Again, the Attorney General cited the compelling interests set forth in 3 PYTC §§ 2-5-10(A)(1) and (4).

Real Party in Interest asserts that no such compelling interests are present in this case. This is clearly disingenuous. Whether or not the Tribe has to establish an additional jurisdictional

element when exercising its inherent jurisdiction in a prosecution pursuant to 25 U.S.C. § 1304(b)(1), strikes at the heart of the Tribe's jurisdiction and sovereignty. It also implicates tribal governmental interests. There is no requirement in the Constitution of the Pascua Yaqui Tribe nor the Pascua Yaqui Code that requires the Tribe to show actual injury in order to have standing to protect the compelling interests set forth in 3 PYTC § 2-5. Real Party in Interest's contention otherwise is insupportable.

Even if this Court were to find that the June 21<sup>st</sup> motion was procedurally improper, which the Tribe does not concede, this Court has the discretion to "suspend the requirements" of the Rules of Appellate Procedure, and "may order proceedings in accordance with its discretion." 3 PYTC § 2-3-50. While this Court required that this specific issue be briefed, it appears that this Court has *de facto* exercised this discretion with its April 3, 2018 and April 10, 2018 Orders.

Moving forward, should this Court find that the June 21<sup>st</sup> motion was procedurally improper, there is good cause for this Court to suspend strict adherence to the Rules of Appellate Procedure. The statute authorizing the Court of Appeals requires the inclusion of three judges. 3 PYTC § 1-2-30(B). Failure to have a three-justice panel results in an improperly constituted court of appeals. As such, the judgements entered by former Chief Justice Hopkins must be vacated and a properly constituted panel must be formed to consider the petitions. *See Nguyen v. U.S.*, 539 U.S. 69, 82, 123 S.Ct. 2130 (2003) ("this Court has never doubted its power to vacate a judgement entered by an improperly constituted court of appeals").

Real Party in Interest begins and ends its argument alleging that the Tribe did not suffer prejudice as a result of the improperly constituted court. Unfortunately for Real Party in Interest, such prejudice is not the relevant inquiry. It is "inappropriate...to assess the merits of petitioner's convictions or whether the fairness, integrity or public reputation of the proceedings were impaired


by the composition of the panel.” *Id.* at 80. Thus, the court “invalidate[s] the judgment of a Court of Appeals without assessing prejudice...when the error alleged was the improper composition of that court.” *Id.* at 81; *see also United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 80 S.Ct. 1336 (1960).

The improperly constituted Court of Appeals affects the compelling interest that the Tribe holds to protect its “sovereignty, jurisdiction, and validity of tribal laws.” 3 PYTC § 2-5-10(A)(1). It further impacts the Tribe’s interest in self-governance and ensuring that court decisions are consistent with governmental interests. 3 PYTC § 2-5-10(A)(4).

**V. CONCLUSION**

For the foregoing reasons, the Tribe respectfully requests that this Court accept jurisdiction and reverse the trial court’s order as contrary to law.

RESPECTFULLY submitted this 11th day of June, 2018.



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Deputy Prosecutor



Laura Berglan  
Attorney General

No. CA 17-003

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

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PASCUA YAQUI TRIBE, OFFICE OF THE PROSECUTOR

*Plaintiff-Petitioner,*

v.

HONORABLE MELVIN STOOF, TRIAL JUDGE OF PASCUA YAQUI COURT

REAL PARTY IN INTEREST:

FRANK JAIMEZ,

*Defendant-Respondent.*

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On Petition for Intervention and Reconsideration from the Pascua Yaqui Tribal Court  
No. CR-16-236

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**REAL PARTY IN INTEREST'S RESPONSE TO TRIBE'S PETITION FOR  
INTERVENTION AND RECONSIDERATION**

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## I. JURISDICTIONAL STATEMENT

### A. Tribal Court Jurisdiction

The Tribal Court had jurisdiction in this case to proceed with charges against Mr. Jaimez, a non-Indian, pursuant to 25 U.S.C. § 1304, Tribal Jurisdiction Over Crimes of Domestic Violence. This statute endows “Special Domestic Violence Criminal Jurisdiction” granted by the Violence Against Women Act (VAWA) pursuant to 25 U.S.C. §1304 Without the special domestic violence criminal jurisdiction, the Tribe would not have been able to charge Mr. Jaimez. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) The Tribe successfully argued this “special jurisdiction” at trial, and the Tribe successfully established subject matter jurisdiction over the trial case.

### B. Appellate Court Jurisdiction

The Court of Appeals lacks jurisdiction to hear this case. There has been no jurisdiction cited for this Court to hear the Petition for Reconsideration and Intervention and Motion for a Full Appellate Review filed by the Interim Attorney General after the Court of Appeals ruled against the Tribe in its April 28<sup>th</sup> and May 19<sup>th</sup> motions. The Tribe lacks standing in this case as it has not shown an injury suffered that requires redress by the court and should be prevented from intervening in this matter. Lastly because the Tribe successfully convicted Mr. Jaimez at trial, the issue relating to the jury instruction is moot. Jurisdictional issues are further briefed *infra* at IV(B) and (D).

## II. ISSUES PRESENTED FOR REVIEW

- A. Does the Tribe have standing to file a special action where there is no injury suffered and the Tribe successfully convicted Mr. Jaimez at trial?
- B. Does the Pascua Yaqui Tribe Court of Appeals have authority to hear a special action or interlocutory appeal, by the Tribe against the trial judge in a criminal case?
- C. Did the trial court err in requiring the Tribe to prove that Mr. Jaimez, the Real Party of Interest in this case, is a non-Indian in CR-16-236 as an element of its charge and case?
- D. Does this Court have jurisdiction to hear the Interim Attorney General's June 21 motion for full appellate panel review after the Tribe lost its April 28 and May 19 motions before Chief Justice Hopkins because he sat individually as the Court of Appeals?

### III. STATEMENT OF THE CASE

#### A. Summary of Proceedings

The Real Party in Interest provides the following statement of the facts and proceedings. All facts are drawn from the complaint and record, and other exhibits submitted by the Tribe and Mr. Jaimez during these proceedings. Mr. Jaimez makes no admissions.

On September 13, 2016, the Tribe charged Mr. Jaimez with one count of malicious mischief, domestic violence, 4 PYTC § 1-400/3-10 (A), under the Tribe's special domestic violence criminal jurisdiction pursuant to 25 U.S.C. § 1304. Petitioner's Exhibit One (Criminal Complaint and Probable Cause Statement). The complaint alleges that the alleged victim, Ms. Ayde Luz Sewa Leyva Jaimez, is an enrolled member of the Pascua Yaqui Tribe, and that Mr. Jaimez is a "person over whom the Tribe has special domestic violence criminal jurisdiction pursuant to 25 U.S.C. § 1304." *Id.* The complaint further alleges that Mr. Jaimez is married to an enrolled member of the Pascua Yaqui Tribe, that he lived on the Pascua Yaqui Indian Reservation at the time of the offense, and that the offense was committed within the exterior boundaries of the Pascua Yaqui Indian Reservation. *Id.* Specifically, the Probable Cause Statement sworn to by Officer Kevin Wells states that Mr. Jaimez "is not an enrolled tribe [sic] member of any federally recognized Tribe but is under the Violence Against Women Act (VAWA) and married to Ayde Sewa Leyva, a Pascua Yaqui Tribe Member." *Id.*, page 3, paragraph 5.

At a pre-trial hearing on April 11, 2017, the Tribe requested the following jury instruction with regard to jurisdiction:

The Tribe must prove all the elements below beyond a reasonable doubt:

1. The Tribe must prove beyond a reasonable doubt that Ms. Aydeluz Sewa Leyva Jaimez is an Indian.

2. That Mr. Jaimez:
  - (i) Resided in the Pascua Yaqui community;
  - (ii) Was employed by the Pascua Yaqui Tribe; or
  - (iii) Was a spouse, intimate partner, or dating partner of
    - (i) A member of the Pascua Yaqui Tribe
    - (ii) An Indian who resides on the Pascua Yaqui Reservation
3. That the offense occurred on the Pascua Yaqui Reservation

If you find that any element above has not been proven beyond a reasonable doubt deliberations cannot proceed.

The Trial Court, *sua sponte*, ruled, over the Tribe's objection, that the Tribe must also prove beyond a reasonable doubt the non-Indian status of the Defendant. *See* Petitioner's Exhibit Two.

On April 28<sup>th</sup>, 2017, seventeen days after the Honorable Judge Melvin Stoof's pre-trial order, the Petitioner filed a Petition for Writ of Special Action, citing the Arizona Rules of Procedure for Special Actions, and alleging that no Tribal or Federal Authority existed on point which would provide the Tribe with the relief requested. In filing its Petition, Petitioner joined the Honorable Melvin Stoof, Judge, Pascua Yaqui Tribal Court, as a Respondent. On May 2<sup>nd</sup>, 2017, the Pascua Yaqui Court, by and through its administrative attorney, filed a response to the Petitioner's Petition. Subsequently, the Honorable Respondent withdrew its Response on May 4<sup>th</sup>, 2017.

This Court denied the Tribal Prosecutor's Petition for Special Writ and the case proceeded to trial, where the Tribal Prosecutor prevailed despite the jury instruction it sought to exclude. Subsequently, Tribe, through the Office of the Attorney General, filed a Petition for Intervention and Motion for Reconsideration. This Court denied that petition and motion prior to the deadline for response. The Tribe then filed a Motion for Full Appellate Panel Review. This Court stayed the matter to allow the assembly of a Full Appellate Panel. Mr. Jaimez has appealed the conviction, and that appeal remains stayed pending resolution of this issue.

## **B. Summary of Argument**

The Tribe's petition should be denied because this Court lacks authority and jurisdiction to consider the Tribe's Petition. The Petitioner successfully convicted the Defendant, Mr. Jaimez, meaning the Tribe suffered no harm requiring redress and the Tribe's Petition should be denied.

## IV. ARGUMENT

### A. Standard of Review

The standard of review for a special action petition has not been established in the Pascua Yaqui Nation. The Tribe relies heavily on Arizona State law to bring this action. Under Arizona State case law, the standard of review in appeals on a “court's decision to give a jury instruction [is] abuse of discretion.” However, [appellate courts] review de novo whether the given instruction correctly states the law.... And [...] to determine if they “adequately reflect the law. “*State v. Solis*, 236 Ariz. 285, 286, ¶ 6, 339 P.3d 668, 669 (App. 2014) (external citations omitted). If a determination is made that an instruction was given in error, the Court must then decide whether it was “structural error, harmless error or fundamental error.” *Id.*

If this Court adopts this logic, the Tribe would be correct in asserting that this Court would review de novo whether the instruction requiring the jury to find that Mr. Jaimez was a non-Indian was a correct statement of law. However, if after review the Court finds that there was an error and it was harmless, the analysis stops and the appeal should be denied.

Nevertheless, the Tribe now seeks to argue for a different standard of review than was raised in the Prosecutor's original Petition for Writ of Special Action. Previously, the Tribal Prosecutor had argued for an Abuse of Discretion standard regarding the review of a Trial Court's adoption of jury instructions. The Tribe now argues that this Court owes no deference to the lower court's ruling. Since this was not raised in the previously filed Petition for Writ of Special Action, it should not be considered now.

**B. The Pascua Yaqui Court of Appeals does not have Jurisdiction to Hear this Petition and the Tribe has no Standing to Request any Form of Relief Because Issue is now Moot.**

The Tribe alleges that this Court retains jurisdiction in this matter because: (1) it accepted jurisdiction to hear a special action in this matter; (2) the Petition for Reconsideration is not barred by 3 PYTC § 2-3-32 as improper; and (3) the Petition for Reconsideration was timely filed within 15 days of the Court's opinion pursuant to 3 PYTC § 2-3-32. However, issues of jurisdiction in nature must be addressed before proceeding to the relief requested.

As discussed above, the Tribal Prosecutor was successful at trial in exercising subject matter jurisdiction over Mr. Jaimez despite the jury instruction given. No live or actual controversy exists, the jury instruction was already given, and the Tribe cannot now request a new trial without twice putting Mr. Jaimez in jeopardy. Nor does the Tribe need a new trial, as the Tribal Prosecutor prevailed below.

The standing doctrine states the following:

In the federal courts, standing requirements are firmly rooted in Article III of the U.S. Constitution. Indeed, the founders, at the constitutional convention of 1787, circumscribed federal jurisdiction carefully with the requirement that matters brought before the courts must constitute real "cases or controversies." *See* U.S. Const. art. III, § 2, cl. 1. In short, cognizable injury personal to those seeking redress would have to be shown. The case or controversy requirement provides clear recognition of the separation of powers principle that was central to the creation of our national government. *See* The Federalist No. 78 (Alexander Hamilton); *see also Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). To ensure separation of the powers of government under the U.S. Constitution, federal courts have consistently established doctrines "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Allen*, 468 U.S. at 750, 104 S.Ct. 3315 (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

The federal standing doctrine requires that a court refrain from addressing a case on its merits unless the parties can assert facts that give rise to an actual case or controversy. It is "perhaps

the most important of [the Article III] doctrines.” *Id.* To establish federal standing, a party invoking the court's jurisdiction “must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.” *Id.* at 751, 104 S.Ct. 3315.”

*Bennett v. Napolitano*, 206 Ariz. 520, 524–25, 81 P.3d 311, 315–16 (2003).

Although this is not U.S. federal court the exercise of the Special Domestic Violence Criminal Jurisdiction granted by the Violence Against Women Act (VAWA) is predicated on providing defendants with rights similar to those they would have under the United States Constitution. *See* 25 U.S.C. § 1302. The Tribal Constitution does not contain the “cases and controversies” language in the U.S. Constitution, but here, Arizona law may be instructive. *See, PYT v. Miranda*, CA-08-015 p.22 (Ct. App. 2009) (holding that “while decisions of the Arizona . . . [c]ourts are not controlling authority in this Court, they are highly persuasive.”).

Article VI of the Arizona Constitution, the judicial article, does not contain the specific case or controversy requirement of the U.S. Constitution. But, unlike the federal constitution in which the separation of powers principle is implicit, our state constitution contains an express mandate, requiring that the legislative, executive, and judicial powers of government be divided among the three branches and exercised separately. This mandate underlies our own requirement that as a matter of sound jurisprudence a litigant seeking relief in the Arizona courts must first establish standing to sue. *Bennett v. Napolitano*, 206 Ariz. 520, 525, 81 P.3d 311, 316 (2003) *citing* Article III, Arizona Constitution. (Footnotes omitted.)

Like the Arizona Constitution, the Tribal Constitution also contains a mandate in Article IV separating explicitly the powers of the legislative, executive, and judicial branches of our government.

As the Tribe notes in its introduction, the Tribe has granted itself, by statute, the right to intervene in cases to protect tribal sovereignty and jurisdiction. *See* Petition, page 1, citing 3

PYTC § 2-5-10(A)(1). The Tribe asserts that this is such a case without explanation. While 3 PYTC § 2-5-10(A)(4) articulates that “[t]he Tribe has an interest in assuring that decisions made by the court do not adversely impact on the safety, welfare and self-governance of the Tribe and that such decisions are consistent with the Tribe's governmental interests,” the Code does not repeat this language in 3 PYTC § 2-5-20(A) when describing the Tribe’s right to notice, nor in 3 PYTC § 2-5-30(A) when discussing the Tribe’s right to intervene. The Code states that “the Tribe may intervene as a matter of right in any action or proceeding in the Tribal Court that implicates tribal sovereignty or jurisdiction or challenges the validity of any tribal law.”

The case before the Court does not challenge the validity of any tribal law. The Tribe may, therefore, only intervene *via* this statute when it can show that tribal sovereignty or jurisdiction is implicated. It is not implicated here. At trial, Mr. Jaimez was found guilty despite the instruction given by the Tribal Court. The jury instruction given in this case merely outlines the burden of the Tribal Prosecutor to prove the identity of the parties beyond a reasonable doubt. Since the Tribal Prosecutor is clearly able to meet this burden, as evidenced by the result at trial, sovereignty and jurisdiction have not been negatively impacted. The Tribe can show no injury that may be redressed, and therefore lacks standing to petition this Court for any relief. For this reason, The Tribe should not be permitted to intervene in this matter.

The Tribe’s intervention should also be denied as the issue is now moot. Much like the standing doctrine, discussed above, mootness is jurisdictional:

Mootness can be characterized as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” Mootness is a jurisdictional issue, and “federal courts have no jurisdiction to hear a case that is moot, that is, where no actual or live controversy exists.” “If there

is no longer a possibility that an appellant can obtain relief for his claim, that claim is moot and must be dismissed for lack of jurisdiction.” *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) citing *Cook Inlet Treaty Tribes v. Shalala*, 166 F.ed 986, 989 (9<sup>th</sup> Cir. 1999) and *Ruyalcaba v. City of L.A.*, 167 F.ed 514, 521 (9<sup>th</sup> Cir. 1999). Internal citations omitted.

**C. The Pascua Yaqui Court of Appeals does not have Authority to Hear a Special Action or, Interlocutory Appeal by the Tribe against the Trial Judge in a Criminal Case.**

**1. Authority in Interlocutory Appeals**

The Tribal Code is unclear regarding the rules of interlocutory appeals. It does not state who can file an interlocutory appeal and under what circumstances. Only two things in the code are clear regarding interlocutory appeals: 1) there is no right to file an interlocutory appeal in civil cases; and 2) “[t]he chief justice shall have the authority to review each appeal and summarily dismiss an appeal based on lack of jurisdiction, frivolity, a party’s failure to prosecute, filing of interlocutory appeal, and other similar reasons.” *See* 3 PYTC § 2-3-90 and 3 PYTC § 2-3-170 accordingly. The Ninth Circuit has held the following:

Ordinarily, an appellate court may hear appeals only from a district court’s final decision. 28 U.S.C. § 1291. Under the collateral order doctrine, however, we may review a district court’s preliminary or interim decision when it: “(1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment.”

*United States v. Loughner*, 672 F.3d 731, 742 (9th Cir. 2012) (external citations omitted).

If this Court applies the logic of *Loughner*, it would find that the Tribe cannot meet the second prong of the collateral order doctrine because the Tribe’s interlocutory appeal did not seek to resolve an important issue completely separate from the merits of the action. The second prong requires that the issue not be related to the defendant’s innocence or guilt. The issue appealed in the *Loughner* case was whether or not the District Court could forcibly medicate a

federal pre-trial defendant with anti-psychotic medication. The Ninth Circuit reviewed the three prong test of the collateral order doctrine above finding that:

[T]he district court's involuntary medication order falls within the collateral order doctrine. First, the order conclusively determined the disputed question—whether there is any legal basis to medicate Loughner forcibly and whether Loughner has a legal right to a judicial hearing before involuntary medication. **Second, the involuntary medication issue is important and completely separate from the merits of the action—i.e., whether Loughner is guilty or innocent of the crimes charged.** Finally, the issue is effectively unreviewable because “[b]y the time of trial [Loughner] will have undergone forced medication—the very harm that he seeks to avoid.”

*Id.* (external citations omitted). The jury question at issue cannot be completely separated from the merits of the action, *i.e.* whether or not Mr. Jaimez, a non-Indian, was guilty of the alleged act of domestic violence against an Indian pursuant to the Tribe’s special jurisdiction.

## 2. Special Actions

Similarly, there are no provisions for raising special actions in tribal court set out in the Pascua Yaqui Code. Even if this Court were to adopt the rules relating to Special Actions in the State of Arizona, the Tribe incorrectly applied the Arizona Rules of Procedure for Special Actions to the facts of this case. In the State of Arizona, special action is only permitted where no appellate relief is available. *See* 17B Ariz. Rev. Stat. Special Actions, Rules of Proc., Rule 1(a) (“...Except as authorized by statute, the special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal; and nothing in these rules shall be construed as enlarging the scope of the relief traditionally granted under the writs of certiorari, mandamus, and prohibition.”)

The Tribe filed an interlocutory appeal in this case relating to the jury instruction in question. The case was considered by the appellate court and the appellate court denied the Tribe's petition. Clearly appellate review was available in this case. Nevertheless, the Tribe successfully convicted Mr. Jaimez. Filing a special action after appellate review and successful conviction of a defendant is not proper and it is a waste of judicial resources. It is especially wasteful when the Tribe no longer has standing to raise a claim and the issue is moot.

**D. The Tribal Court Properly Applied the law When Instructing the Jury that they Would Need to Find that Mr. Jaimez was a Non-Indian Because the Tribe Only has Special Jurisdiction in Domestic Violence Cases Granted by Federal Statute Where the Defendant is a Non-Indian.**

Mr. Jaimez respectfully requests to incorporate arguments filed by previous counsel, William Soland, in the Defendant's Response to the Tribal Prosecutor's original Petition for Special Writ, which it incorporates here by reference as though fully set out below. As discussed in Defendant's previous Response to the Petition for Special Writ, there is no indication that the Tribal Court abused its discretion by requiring the Tribe to prove that Defendant is a non-Indian, as this is an essential element of the offense. The Federal Government cannot delegate jurisdiction to the Tribe that the Tribe already possesses under its inherent authority. Since, 25 U.S.C. § 1304 could not delegate to the Tribe jurisdiction over Indians, which it already has, its delegation is specifically a delegation of authority over non-Indians.

The Tribe argues that the Tribal Court's interpretation of 25 U.S.C. § 1304 misapplies the law. In doing so, they claim that "a defendant must raise as an affirmative defense that he or she is a non-Indian when a tribe is invoking its own inherent tribal criminal jurisdiction." See Petition, Page 4. For this proposition, The Tribe cites *Eagle v. Yerington Paiute Tribe*, in which the Ninth Circuit held that "the Tribe was not required to plead and prove Dawn Eagle's Indian

Status beyond a reasonable doubt when Dawn Eagle did not raise the issue.” *Id*, citing *Eagle v. Yerington Paiute Tribe*, 603 F.3d 1161, 1164 (9<sup>th</sup> Cir. 2010). This may be correct under the law of the Yerington Paiute Tribe, but not in this jurisdiction. Indeed, in *Eagle*, the court noted that although *federal* law did not require the tribal prosecution to prove Indian status as an essential element of every tribal misdemeanor case, the *tribal* law expressly provided it. The Yerington Paiute Law and Order Code on the dispositive question read as follows:

Section 1-20-030 provides that the “Tribal Court shall have criminal jurisdiction over all offenses enumerated in this Law and Order Code ... when committed within the jurisdiction of the court by any Indian...” Section 1-21-030 of the Code specifies that the “burden of raising the issue of non-jurisdiction (status as a Non-Indian) shall be upon the person claiming the exemption from jurisdiction but the burden of proof of jurisdiction (status as an Indian) remains with the prosecution.

The Ninth Circuit therefore suggested that:

[The Tribal Code] implicitly contemplates that a defendant’s challenge will come at a point in the case when the prosecution can introduce the required proof. Here, Dawn Eagle waited until after the close of evidence at trial – a point when the time to prove her Indian status had passed – before she raised the issue. Dawn Eagle waited too long.

*See Eagle v. Yerington Paiute Tribe*, 603 F.3d at 1164-65.

It is therefore clear that it is up to each individual tribe to determine whether Indian status is an essential element. This issue is not one of first impression for this Court, which found in *PYT v. Miranda* that “Indian status of a defendant must be determined to establish the Tribal Court’s criminal jurisdiction.” *PYT v. Miranda*, CA-08-015, page 18 (Pascua Yaqui Court of Appeals, 2009) Citing *In re Certified Question*, No. 98AC00004 (Hopi 2001). Because this Tribe has already determined that Indian status is an essential element, to be proven by the Tribal Prosecutor at trial it cannot be said to be an affirmative defense. The Tribal Attorney General

cannot rely on case law from other jurisdictions when there is already clearly settled law in this Court's prior written opinions.

The Tribe argues that "if the defendant is Indian, the tribal court has proper jurisdiction. If the Defendant is not Indian (like this case) the tribal court has proper jurisdiction. The defendant's Indian status is not an essential element to the court's jurisdiction as it has jurisdiction in both cases." Petition for Intervention, page 4. This does not follow logically. This Court, in its previous ruling on this matter, found that:

The Tribe has inherent authority to prosecute crimes committed by Indians against Indians within the external boundaries of the Pascua Yaqui Indian Reservation. *See, e.g.*, The Constitution of the Pascua Yaqui Tribe, Article II, Jurisdiction; 3 PYTC §§ 1-1-10 and 1-1-20. Therefore, 25 U.S.C. § 1304 provides that federally recognized Indian tribes have special jurisdiction over non-Indians in crimes of domestic violence. The Senate Report on the VAWA Reauthorization explains that this special domestic violence criminal jurisdiction would apply "in a very narrow set of cases over non-Indians who voluntarily and knowingly established significant ties to the tribe." 18 VAWA Reauthorization, S. 1925, H.R. 4271, §904 (§204(d)(2)); SAVE Act, S. 1763, H.R. 4154, §201 (§204(d)(2)). Petitioner is correct that the specific words stating that the Tribe must prove a defendant's status as an Indian or a non-Indian are not present in the statute. Still, it is clear that Congress's intent in passing 25 U.S.C. § 1304 was to expand a participating tribe's jurisdiction over persons it could not otherwise exercise jurisdiction over. *Tribe v. Stoof*, CA-17-003 (2017).

This is not a misreading of the law and is entirely consistent with the relatively limited authority on point for this issue. While the Tribe may exercise jurisdiction over Indians or non-Indians, they must still prove which set of facts applies, since in this jurisdiction, Indian status or lack thereof is an essential element of an offense.

In every criminal case, proof of jurisdiction is an essential element. Special Jurisdiction Over Crimes of Domestic Violence is only granted to the Tribe where it can prove that subject

matter jurisdiction over a non-Indian exists. It is not then only a requirement that the Tribe prove that the alleged victim is an Indian, but also that the defendant is a non-Indian. This is precisely why the complaint in this case alleges that “the Tribe has special domestic violence criminal jurisdiction pursuant to 25 U.S.C. § 1304”. Petitioner’s Exhibit One. It is also why the probable cause statement, relied upon by the trial court to find jurisdiction, specifically states that Mr. Jaimez is a “Non-Tribal Member,” i.e., a non-Indian. *Id.* Without this allegation and the probable cause statement, Mr. Jaimez would have moved for dismissal of the charges for lack of subject-matter jurisdiction at the arraignment.

Special Jurisdiction over Crimes of Domestic Violence granted under 18 U.S.C. § 1304 requires that tribes afford non-Indian defendants in tribal courts the same protections afforded to federal defendants. The Ninth Circuit is adamant that the Government must prove the status of Indians facing charges pursuant to 18 U.S.C §§ 1152 and 1153. In fact, the Ninth has routinely held that “the defendant's Indian status is an essential element ... which the government must allege in the indictment and prove beyond a reasonable doubt.” *See United States v. Alvarez*, 831 F.3d 1115 (9th Cir. 2016); *United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015) (“Under the IMCA, “the defendant's Indian status is an essential element ... which the government must allege in the indictment and prove beyond a reasonable doubt.” *U.S. v. Bruce*, 394 F.3d 1215, 1223-24 (9<sup>th</sup> Cir. 2005); *U.S. v. Reza Ramos*, 816 F.3d 1103, 1113 (9<sup>th</sup> Cir. 2016);

Thus, if Indian Status is an element to assert jurisdiction over an Indian in Federal Court, the same must hold true when prosecuting a non-Indian on tribal land since federal law grants the jurisdiction. Proof of jurisdiction beyond a reasonable doubt is a requirement in any criminal case whether that case be tried on the Pascua Yaqui Reservation or the United States District Court for the District of Arizona.

Based on the standard of review applied in Arizona State court, if this Court found that the jury instruction was issued in error, the error would be harmless as the Tribe succeeded in convicting Mr. Jaimez, thus suffering no harm.

**E. This Court does not have jurisdiction to hear the Interim Attorney General's June 21 motion for full appellate panel review after the Tribe lost its April 28 and May 19 motions before Chief Justice Hopkins because he sat individually as the Court of Appeals.**

Mr. Jaimez rejects that this court had jurisdiction to hear the interlocutory appeal on this particular issue for the reason stated in *supra* at IV (B) and (D).

## V. CONCLUSION

For the reasons stated above, the Petition should be denied. If this Court should find, despite the arguments above, that the offending jury instruction should not have been given and that the error was not harmless, Mr. Jaimez respectfully requests a new trial pursuant to 3 PYTC 2-2-280(C). Defendant's strategy at trial was based upon this Court's prior ruling regarding the jury instructions to be given. If this Court finds that that jury instruction was improper, Defendant should have the right to a new trial with the proper jury instruction.

RESPECTFULLY SUBMITTED:

May 25, 2018.

PASCUA YAQUI PUBLIC DEFENDER



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

Attorney for Frank Jaimez

**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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(520) 883-5013

Attorney for Frank Jaimez

## CERTIFICATE OF SERVICE

On May 25, 2018 the original Response Brief was filed, and conforming copies were provided to:

Oscar J. Flores, Chief Prosecutor, and  
Kendrick Wilson, Deputy Prosecutor  
7777 S. Camino Huivisim  
Tucson, AZ 85757

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

Ben Casey, Administrative Attorney, Pascua Yaqui Tribal Court  
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Laura Berglan, Attorney General, Pascua Yaqui Tribe  
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Attorney for Frank Jaimez

No. CA-17-003

**Pascua Yaqui Tribe Court of Appeals**

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**Pascua Yaqui Tribe, Office of the Prosecutor,**

**v.**

**Honorable Melvin Stoof, Judge Pascua Yaqui Tribal Court,**

**(Real Party in Interest: Frank Jamiez, CA-17-005).**

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

For the Attorney General: Laura Berglan, 7777 S. Camino Huivisim Bldg. C  
Tucson, AZ 85757

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

**Second Order Regarding Briefing Schedule and Oral Argument**

Pursuant to the unopposed motion of the Pascua Yaqui Tribe Public Defender, to extend the date of filing its' Response Brief, this Court orders that the brief be filed by Friday May 25, 2018.

Counsel for the Office of the Prosecutor (jointly with the Attorney General if the Attorney General desires to appear) will file its Reply Brief, if any, by Monday June 11, 2018.

The parties are free to address any points they wish, but the Court specifically requests assistance with these three issues:

1. Does the Pascua Yaqui Tribe Court of Appeals have authority to hear a special action, or interlocutory appeal, by the Tribe against the trial judge in a criminal case?
2. Did the trial court err in requiring the Tribe to prove that the defendant Jaimez, in CA-17-005, is a non-Indian as an element of its charge and case?

3. Does this Court have jurisdiction to hear the Interim Attorney General's June 21 motion for full appellate panel review after the Tribe lost its April 28 and May 19 motions before Chief Justice Hopkins because he sat individually as the Court of Appeals?

A decision on holding oral argument will be rendered after this Court reviews the briefs.

So **ORDERED** this 10th day of April, 2018.



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

PASCUA YAQUI PUBLIC DEFENDER  
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(520) 883-5013

Melissa L. Acosta  
PYT Bar No. 10185

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,  
Petitioner,

vs.

Honorable Melvin Stoof, Judge Pascua Yaqui  
Tribal Court,  
(Real Party in Interest: Frank Jaimez, CA-17-  
005).

Respondent

) APPELLATE CASE NO. CA-17-003  
)  
) PASCUA YAQUI TRIBAL COURT NO.  
)  
) CR-16-236

**UNOPPOSED MOTION FOR  
EXTENSION OF RESPONSE BRIEF**

COMES NOW Respondent, by and through counsel undersigned and, pursuant to 3  
PYTC § 2-3-70(B) requests the Honorable Court grant an extension of the deadline for filing its'  
Response brief in this matter, as Respondent requires more time for preparation of its response.  
Original counsel for Respondent is no longer employed by the Pascua Yaqui Tribe Public  
Defender's Office and the office is currently short staffed. Undersigned Defense Counsel is over  
extended in terms of case load and administrative duties in order to prepare a response by the  
deadline imposed of April 24th. Undersigned Defense Counsel is obligated to attend meetings  
regarding TLOA and a Director's Retreat held out of town from April 16th – 18th. Respondent is

respectfully seeking a 30 day extension to submit its response. Respondent has contacted Attorney General Laura Berglan, and Chief Prosecutor Oscar J. Flores and both have stated they have no objection to this extension. Pursuant to 3 PYTC § 2-3-70(B), “[t]he time for doing any act provided for in these rules, or by order of the appellate court, or by any applicable law, may be shortened or extended upon stipulation of the parties and filed with the appellate court, or upon written motion for good cause shown....” As the parties have agreed to the extension, Appellant respectfully requests that the Court grant the extension as stipulated.

RESPECTFULLY REQUESTED this 9th day of April, 2018.

PASCUA YAQUI PUBLIC DEFENDER



---

Melissa L. Acosta  
Chief Public Defender

**CERTIFICATE OF SERVICE**

I hereby certify that Mr. Jaimez's Motion for Extension was delivered electronically this date to:

Ben Casey  
Ben.Casey@pascuayaqui-nsn.gov  
Tribal Court Administrative Attorney  
Pascua Yaqui Court of Appeals  
7474 South Camino de Oeste  
Tucson, AZ 85757

---

and that one (1) copy of Mr. Jaimez's Motion for Extension was delivered this date to each :

Oscar Flores  
Oscar.Flores@pascuayaqui-nsn.gov  
Chief Prosecutor  
Office of the Prosecutor of the Pascua Yaqui Tribe  
7777 S. Camino Huivisim, Bldg A  
Tucson, AZ 85757

And:

Laura Berglan  
Laura.Berglan@pascuayaqui-nsn.gov  
Attorney General  
Office of the Attorney General  
7777 S. Camino Huivisim, Bldg C  
Tucson, Az 85757

DATED this 9<sup>th</sup> day of April, 2018.

PASCUA YAQUI PUBLIC DEFENDER



---

Melissa L. Acosta  
Chief Public Defender

PASCUA YAQUI PUBLIC DEFENDER

7474 S. Camino de Oeste

Tucson, AZ 85757

(520) 883-5013

William R. Soland

PYT Bar No. 10266

THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,

OFFICE OF PROSECUTOR

Petitioner,

vs.

HONORABLE MELVIN STOOFF, JUDGE,

PASCUA YAQUI TRIBAL COURT

Real Party In Interest:

JAIMEZ, FRANK

Respondents

) Appeals Case No.: CA-17-003

) Tribal Court Case No.: CR-16-236

) REAL PARTY IN INTEREST'S  
) MOTION TO STRIKE TRIBE'S MOTION  
) FOR FULL APPELLATE PANEL REVIEW

Comes now Real Party in Interest FRANK JAIMEZ, through counsel, and hereby moves to strike, pursuant to 3 PYTC § 2-3-210(D), Tribe's Motion for Full Appellate Panel Review, dated June 21, 2017.

//

//

//

//

DATED this 30 day of June, 2017.

PASCUA YAQUI PUBLIC DEFENDER



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William R. Soland  
Deputy Public Defender

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## INTRODUCTION

Frank Jaimez, Real Party in Interest, asks this Court to strike Tribe's most recent Motion in the above captioned matter as it is prohibited under the Pascua Yaqui Rules of Appellate Procedure. In the alternative, Mr. Jaimez requests that the relief sought by Tribe be denied, or, if granted, that he be given time to file a substantive written response both to Tribe's Motion for Full Appellate Panel Review and also to Tribe's original Petition for Intervention and Reconsideration.

## PROCEDURAL HISTORY

On April 28, 2017, the Office of the Prosecutor filed a Petition for Special Writ in this matter. After Real Party In Interest Frank Jaimez responded, this Court denied the Petition for Special Writ on May 8, 2017. A jury trial was held in the Pascua Yaqui Tribal Court on May 9<sup>th</sup> and 10<sup>th</sup>, at which Mr. Jaimez was found guilty on the sole charge in the Complaint. On May 19<sup>th</sup>, 2017, Tribe filed a Petition for Intervention and Reconsideration. On June 5, 2017, the day on which Mr. Jaimez's response to Tribe's Petition would have been due, this Court denied the relief sought by Tribe. Tribe now seeks to have the matter re-heard by a three judge appellate panel.

## MOTION TO STRIKE

Although not styled as such, Tribe's Motion is a request for the Court to reconsider its ruling on Tribe's previous Petition for Intervention and Reconsideration. Such a filing is specifically prohibited by the Code. Pursuant to 3 PYTC § 2-3-210(D) no party shall file a petition for reconsideration of an order denying a petition for reconsideration. The June 5

1 Opinion that Tribe now requests a three judge panel to review was, indeed, an order denying a  
2 petition for reconsideration. As such Tribe's Motion is prohibited by the Code and should be  
3 struck as improper.

4 RESPONSE IN THE ALTERNATIVE

5 Should this Court find that Tribe's Motion is not prohibited by the Code, Mr. Jaimez  
6 respectfully requests that this Court provide him with the opportunity to file a substantive  
7 response both to Tribe's most recent Motion, and to the original Petition for Intervention and  
8 Reconsideration. This Court's Order denying reconsideration was issued early on the date of  
9 June 5, 2017, which was the last day on which Mr. Jaimez would have been able to file a written  
10 response. Mr. Jaimez was not prejudiced in any way by the Court's ruling in his favor. However,  
11 if the Court is considering reconsidering whether to reconsider its previous opinion, Mr. Jaimez  
12 would like time both to develop written responses to the Petition to Reconsider as well as this  
13 most recent Motion.  
14

15 by:

Respectfully submitted this 30th day of JUNE, 2017

16 

17 \_\_\_\_\_  
18 William R. Soland,  
19 Deputy Public Defender  
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Original filed with the Pascua Yaqui Court of Appeals:

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On: June 30, 2017

A copy of the foregoing was sent to:

Oscar J. Flores, Chief Prosecutor

Kendrick Wilson, Deputy Prosecutor

Hon. Judge Melvin Stoof, Pascua Yaqui Tribal Court

Ben Casey, Administrative Attorney, Pascua Yaqui Tribal Court

Amanda Lomayesva

Interim Attorney General, Pascua Yaqui Tribe

1 PASCUA YAQUI PUBLIC DEFENDER  
4725 W. Calle Tetakusim, Building B  
2 Tucson, AZ 85757  
(520) 883-5013

3 William R. Soland  
4 Office of the Public Defender  
Attorney for Appellant  
5 PYT Bar No. 10266

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

9	PASCUA YAQUI TRIBE,	)	Court of Appeals Case No.:
10		)	
11	Plaintiff/Appellee,	)	Tribal Court Case No.: CR-16-236
12	vs.	)	
13	JAIMEZ, FRANK,	)	<b>NOTICE OF APPEAL</b>
14	Defendant/Appellant.	)	
15		)	

16  
17 COMES NOW the Appellant, FRANK JAIMEZ, by and through counsel, pursuant to 3  
18 PYTC § 2-3-90(A), 3 PYTC § 2-3-90(B), 3 PYTC § 2-3-100(B)(1) and 3 PYTC § 2-3-100(B) of  
19 the Pascua Yaqui Tribe Rules of Appellate Procedure, and respectfully files a Notice of Appeal  
20 in the Pascua Yaqui Tribal Appellate Court from the Order entered in this action by the Pascua  
21 Yaqui Tribal Court on June 1, 2017. The Appellant is appealing the Trial Court's Judgment of  
22 Conviction, the denial of her Motion for Judgment of Acquittal Notwithstanding the Jury  
23 Verdict, the request for new trial which denied by implication, the denials of written and oral  
24 Motions to Dismiss for lack of subject matter jurisdiction, as well as evidentiary rulings and jury  
25 instructions at trial.

1 A copy of the Pascua Yaqui Tribal Court's Order is attached hereto as required by 3  
2 PYTC § 2-3-90(A)(1), Pascua Yaqui Rules of Appellate Procedure.

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

6 RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of June, 2017.

8 PASCUA YAQUI PUBLIC DEFENDER

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11 

---

William R. Soland  
12 Deputy Public Defender

13  
14 Original of the foregoing delivered to PYT  
15 Court and filed:

16 Copy of the foregoing provided to PYT  
17 Prosecutor by:

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**CERTIFICATE OF SERVICE**

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

Clerk of the Court of Appeals  
Pascua Yaqui Court of Appeals  
7777 S. Camino Huivism  
Tucson, AZ 85757

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

Pascua Yaqui Tribal Court  
7777 S. Camino Huivism  
Tucson, AZ 85757

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

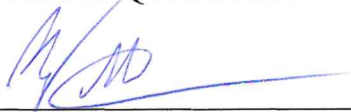
Deputy Prosecutor Kendrick Wilson  
Office of the Prosecutor of the Pascua Yaqui Tribe  
7777 S. Camino Huivism  
Tucson, AZ 85757

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

Amanda Lomayesva, Interim Attorney General  
Office of the Attorney General  
7777 S. Camino Huivism  
Tucson, AZ 85757

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of June, 2017.

PASCUA YAQUI PUBLIC DEFENDER



\_\_\_\_\_  
William R. Soland  
Deputy Public Defender

1 IN THE PASCUA YAQUI TRIBAL COURT

2 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

3 PASCUA YAQUI TRIBE, ) CASE NO. CR-16-236  
4 PLAINTIFF, )  
5 vs. ) ORDER DENYING MOTION  
6 JAIMEZ, FRANK ) FOR JUDGMENT OF ACQUITTAL  
7 DEFENDANT. ) NOTWITHSTANDING THE VERDICT  
8 )

9 On June 1, 2017, the Court reviewed the defendant's motion for judgment of acquittal  
10 notwithstanding the verdict, the Tribe's response, and the defendant's reply, and it should deny  
11 the motion.

12 The Court in deciding such a motion must consider only the evidence and any inferences  
13 therefrom, and must do so in the light most advantageous to the non-moving party.

14 In this case, the court finds that the testimony of Aydeluz Sewa Leyva Jaimez as to the  
15 non-Indian status of the defendant, who is her husband, was her personal opinion, that her  
16 opinion as to her husband's status was important to her because she wanted to enroll their  
17 daughter in the Tribe, and she needed to know about his blood quantum for enrollment  
18 purposes, so the child may be eligible to receive tribal benefits. As noted in the court's ruling  
19 over the defendant's objection, the victim's wife could provide her lay opinion as to the non-  
20 Indian status. She was not presented as an expert, and opinion testimony of a lay witness is  
21 allowable when it is rationally based on the witness' perception and helpful to clearly  
22 understand the witnesses' testimony or to determining a fact in issue. F.R.Evid 701(a)(b); 3  
23 PYT R.Evid. 43. The victim's opinion was based on personal knowledge (see Fed. Evid. Rule  
24 602), *U.S. v. Kaplan*, 490 F3d 110, 118-119 (2d Cir 2007) (lay opinion inadmissible absence  
25 of evidence that it was based on first hand knowledge), and the opinion of Ms. Leyva Jaimez  
26 that her husband was non-Indian was an opinion that a reasonable person could draw from the  
27 underlying facts, *U.S. v. Riddle*, 103 F3d 423, 428-429 (5<sup>th</sup> Cir. 1997).

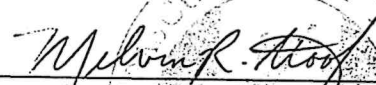
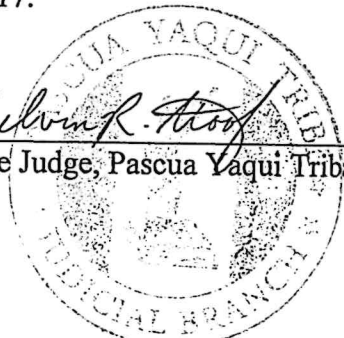
28 The jury reviewed all evidence and concluded, based on the victim's credibility, that a  
reasonable inference could be drawn by the jury that the defendant was a non-Indian. The  
"court should not substitute its own determination of the credibility of the witnesses, the weight  
of the evidence and the reasonable inferences to be drawn for that of a jury." *U.S. v. Mariani*,  
725 F2d 862, 865 (2<sup>nd</sup> Cir. 1984).


1 The jury made its decision based on the credibility of witnesses and surrounding  
2 circumstances, including the testimony of Ms. Aydeluz Sewa Leyva Jaimez, and her testimony  
3 was substantial evidence, based on the weight the jury gave such testimonial evidence. The  
4 evidence presented at trial by the Tribe as to the defendant's non-Indian status was sufficient  
5 evidence to establish beyond a reasonable doubt that the defendant was a non-Indian, who was  
6 a spouse of the victim, his wife, with whom he shared a child in common, she was an Indian,  
7 and that the act of domestic violence occurred on the Pascua Yaqui Reservation. The defendant  
8 himself admitted that he was not enrolled in any Indian tribe. There was nothing in the court  
9 record that indicated the jurors did not understand the jury instruction as given to them by the  
10 court, or that they did not consider all substantial evidence in the record. *Tak Sun Tan v.*  
11 *Runnels*, 413 F.3d 1101, 115 (9<sup>th</sup> Cir. 2014) (Reviewing courts presume jurors follow the  
12 court's instructions absent extraordinary situations).

13 The court should deny the defendant's motion to dismiss, for lack of good cause shown,  
14 because the Tribe has met its burden in establishing the defendant's guilt beyond a reasonable  
15 doubt, as determined by a jury, who weighed all of the evidence in reaching their conclusions.

16 **IT IS ORDERED** that the Court denies the defendant's motion for judgment of  
17 acquittal is denied, for lack of good cause shown.

18 SO ORDERED THIS 1<sup>st</sup> DAY OF JUNE, 2017.

19   
Associate Judge, Pascua Yaqui Tribal Court  


20 cc: Date 06-01-17  
21  Tribe  Defendant  Counsel  
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Clerk

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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,

Plaintiff,

Vs.

JAIMEZ, FRANK,

Defendant.

CASE NO. CR-16-236

**JUDGMENT ON A JURY VERDICT**

This action was tried by a jury with Judge Melvin R. Soof presiding, and the jury has rendered a verdict, a copy of which is attached to this judgment.

**IT IS ORDERED** that the defendant having been found guilty by the jury as to Count One, Malicious Mischief, Domestic Violence, shall be ordered to appear for a sentencing hearing on that Count on June 7, 2017 at 9:00 a.m. In the event the defendant is transferred to another detention facility, the court shall issue a transport order.

**THIS IS THE ONLY NOTICE OF HEARING YOU SHALL RECEIVE.**

**IT IS FURTHER ORDERED** that probation shall provide a pre-sentence report to the court, no later than June 2, 2017.

SO ORDERED this 9<sup>th</sup> day of May, 2017.

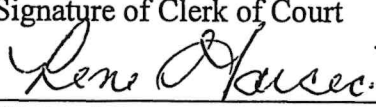
  
Judge, Pascua Yaqui Tribal Court



I certify a copy of the foregoing has been mailed to the respective parties' legal counsel.

Date: May 9, 2017

Signature of Clerk of Court

  
Clerk of Court

1  
2 IN THE PASCUA YAQUI TRIBAL COURT  
3 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

4 PASCUA YAQUI TRIBE,

5 Plaintiff,

6 vs.

7 JAIMEZ, FRANK,

8 Defendant.

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) CR-17-236

)  
) SPECIAL VERDICT FORM  
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9  
10 We, the jurors, duly empaneled and sworn in the above entitled action, upon our oath, do find as follows:

11 ISSUE:

CHECK ONE

BOX BELOW:

12 Q.1: Do you find that the Tribe has proven beyond a reasonable doubt that Mr.  
13 Jaimez is a spouse, intimate partner, or dating partner of Ms. Sewa Leyva?  NO  YES

14 Q.2: Do you find that the Tribe has proven beyond a reasonable doubt that an act  
15 of domestic violence occurred?  NO  YES

16 [If the jury's response to Q.1 or Q.2 is "No," then the jury MUST find the defendant not guilty below.  
17 If the jury's response to Q.1 AND Q.2 is "Yes," then the jury must go to Q.3 below, and find that the  
18 defendant is either guilty or not guilty.]

19 CHARGE:

CHECK ONE

BOX BELOW:

20 Q.3 CT. 1: MALICIOUS MISCHIEF – DOMESTIC  NOT GUILTY  GUILTY  
21 VIOLENCE

22  
23 SO DATED this 9 day of May, 2017.

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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, )  
Plaintiff, )  
Vs. )  
JAIMEZ, FRANK, )  
Defendant. )

Case No. CR-16-236

ORDER DENYING DISMISSAL  
DUE TO LACK OF SUBJECT MATTER  
JURISDICTION

On February 20, 2017, the court reviewed the defendant's motion to dismiss, Tribe's response and defendant's reply, the parties' stipulation to allow the court to rule on defendant's motion to dismiss without an evidentiary hearing or oral argument, and the court should deny the defendant's motion to dismiss, for lack of good cause shown.

Federal law defines a "crime of violence" to include such elements as "the use, attempted use, or threatened use of physical force against the person *or property* of another." 18 U.S.C. 16(a). (emphasis added). There are no reported cases as to whether destruction of property of an intimate partner constitutes an act of "violence." However, the "use" of force against one's property may constitute a "crime of violence" under 18 U.S.C. 16(a), in light of a recent Supreme court case expanding what may be considered as "use" of force constituting a crime of domestic violence that triggered a finding of a violation of the federal gun prohibition against persons convicted of domestic violence.

In a recent U.S. Supreme Court case, *Voisine v. U.S.*, (citation omitted), (2016) in analyzing what misdemeanor domestic violence offenses constitute a crime for purposes of application of 18 U.S.C. 922(g)(9), (federal gun prohibition against possession of weapons by a convicted domestic violence perpetrators), the court expanded the definition of domestic violence to include reckless assault. The Supreme Court defines "use" of force to include an act of employing something, and that the qualifying act be volitional. The court states:

Consider a couple of examples to see the ordinary meaning of the word "use" in this context. . . now suppose a person throws a plate against the wall near where his wife is standing. The hurl counts as a "use" of force even if the husband did not know for certain (or have as an object), but only recognized a substantial risk, that a shard from the plate could ricochet and injure his wife. . . the word "use" does not exclude from 922 (g)(9)'s compass an act of force carried out in conscious disregard of its substantial risk of causing harm.

1 *Voisine v. U.S.*, at p. 6.

2 The Court concluded that the definition of a “misdemeanor crime of violence” contains no  
3 exclusion for convictions based on reckless behavior:

4 A person who assaults another recklessly uses force, no less than one who carries out  
5 that same act knowingly or intentionally.

6 Destructive acts that aren’t directed at a victim may still be considered domestic violence.  
7 Although destruction of property is typically considered a vandalism crime, in the context of  
8 intimate party relationships, destroying property of an intimate partner may be considered as  
9 abusive behavior, supporting an alleged crime of domestic violence.

10 The American Academy of Experts in Traumatic Stress through numerous articles on  
11 domestic violence (citations omitted), have defined various forms of what conduct constitutes  
12 domestic violence, that include physical abuse, emotional abuse and verbal, or non-verbal  
13 abuse. Forms of emotional abuse include verbal and non-verbal abuse, such as threats or  
14 intimidation to gain compliance, destruction of the victim’s personal property and possessions,  
15 or threat to do so. Violence to an object, such as a wall, piece of furniture, pets, in the presence  
16 of an intended victim, can be used as a way of instilling fear of further violence.

17 The Department of Justice, Office of Violence against Women, in its web site,  
18 [www.justice.gov/ovw/domestic-violence](http://www.justice.gov/ovw/domestic-violence), defines domestic violence as a “pattern of abusive  
19 behavior that is used by one partner to gain or maintain power or control over another intimate  
20 partner. . . . **Psychological abuse:** elements of psychological abuse include – but are not limited  
21 to – causing fear by intimidation; . . . **destruction of pets and property.”** (emphasis added).

The probable cause statement in this case contains the description that Mr. Jaimez tried:

22 to break a small table inside the residence but that he never touched her but that she is  
23 afraid of him and was crying when officers arrived at the residence.

24 Context is everything. The mere breaking of a piece of furniture, in and of itself, may  
25 constitute only malicious mischief or vandalism, but when the “use” of force on someone’s  
26 personal property nearby an alleged victim is used with intent to create an atmosphere of  
27 intimidation of an intimate partner, such an act may constitute an act of domestic violence.  
28

1           **IT IS ORDERED** that the complaint shall not be dismissed for lack of subject matter  
2 jurisdiction, because the court has subject matter jurisdiction, based on the alleged destruction  
3 of property which may constitute a threat of violence as defined by the domestic violence  
4 definitions under tribal and federal law.

5           SO ORDERED THIS 20<sup>th</sup> DAY OF FEBRUARY, 2017.



6  
7  
8 CC: Date 02.20.17  
9      Tribe    Defendant    Counsel

10     *[Signature]*  
11 Clerk

**No. CA-17-003**  
Pascua Yaqui Court of Appeals

---

**In Re Pascua Yaqui Tribe, Petitioner**

Petition for Intervention & Reconsideration of Court of Appeals order dated May 8, 2017; and concerning Special Action Writ regarding Pascua Yaqui Trial Court in Case No. CR-16-236, the Honorable Melvin Stoof presiding.

Kendrick Wilson, Office of the Prosecutor, 7777 S. Camino Huivisim, Bld.A, Tucson AZ 85757.

Honorable Melvin Stoof, Respondent, 7777 S. Camino Huivisim, Bld. B, Tucson AZ 85757.

Party in Interest, Frank Jaimez represented by William Soland, Office of the Public Defender, 7474 S. Camino de Oeste, Tucson AZ 85757.

\*\*\*\*\*

**Opinion**

This Court has reviewed the Pascua Yaqui Tribe's Petition for Intervention & Reconsideration and hereby adopts its prior decision rendered on May 8, 2017. This Court held that the Tribal Court judge did not abuse his discretion by allowing the introduction of jury instructions permitting the jury to consider whether Petitioner had proven that Defendant is a non-Indian beyond a reasonable doubt under 25 U.S.C. § 1304. The Tribe's Petition for Intervention and Reconsideration is hereby denied.

So ordered on this the 5th day of June, 2017.



---

James Hopkins, Chief Judge

UNITED STATES DISTRICT COURT

for the  
District of Arizona

United States of America  
v.

Ernesto Orduno  
*Defendant*

)  
)  
) Case No. CR 16-1962-TUC-JGZ(BGM)  
)  
)

SUBPOENA TO TESTIFY AT A HEARING OR TRIAL IN A CRIMINAL CASE

To: Pascua Yaqui Attorney General

**YOU ARE COMMANDED** to appear in the United States district court at the time, date, and place shown below to testify in this criminal case. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place of Appearance: U.S. District Courthouse 405 W. Congress Tucson, AZ 85701-5040	Courtroom No.: 5B Date and Time: June 20, 2017 at 9:30 a.m.
---	--

You must also bring with you the following documents, electronically stored information, or objects (*blank if not applicable*):

Testimony given on January 18, 2017 from Detective Vanisi related to Ernesto Orduno.

Date: April 28, 2017

CLERK OF COURT



s/ Brian D. Karth, Clerk

The name, address, e-mail, and telephone number of the attorney representing (*name of party*) The United States of America, who requests this subpoena, are:

AUSA ERICA L. SEGER  
Assistant United States Attorney  
405 W. Congress, Suite 4800  
Tucson, AZ 85701  
520-620-7300  
erica.seger@usdoj.gov

Case No. CR 16-1962-TUC-JGZ(BGM)

PROOF OF SERVICE

This subpoena for *(name of individual and title, if any)* Pascua Yagui Attorney General  
was received by me on *(date)* 4/29/2017.

I served the subpoena by delivering a copy to the named person as follows: Amanda Lopez  
Attorney General, Pascua Yagui on *(date)* 5/1/2017; or

I returned the subpoena unexecuted because:

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also  
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of  
\$ \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00

I declare under penalty of perjury that this information is true.

Date: 5/1/2017

Amy Renee Ferron  
*Server's signature*

Amy Renee Ferron Special Agent  
*Printed name and title*

275 N. Commerce Park Loop, Tucson, AZ 85734  
*Server's address*

Additional information regarding attempted service, etc:

Print

Save As...

Add Attachment

Reset

Tanya C. Sproule

Assistant Director of Finance & Operations

(520) 879-5257 office

(520) 306-0678 cell

[Tanya.Sproule@pascuayaqui-nsn.gov](mailto:Tanya.Sproule@pascuayaqui-nsn.gov)



GSA c/o USDA-OCFO  
2300 Main Street - 2SE  
Kansas City, MO 64108

CORNELIA V. CRUZ  
PASCUA YAQUI TRIBAL COURT  
7474 S CAMINO DE OESTE  
TUSCON, AZ 85746



GSA c/o USDA-OCFO  
2300 Main Street - 2SE  
Kansas City, MO 64108

**Fleet**  
05/21/2017

**Address/Customer Information**

CORNELIA V. CRUZ  
PASCUA YAQUI TRIBAL COURT  
7474 S CAMINO DE OESTE  
TUSCON, AZ 85746

**Customer Codes**

Account Code: 14978B

**Statement Information**

Statement Number: F0141585  
Amount Due: \$1,791.30  
Due Date: 07/05/2017

**Contact Us**

Phone Number: 800-676-3690  
Fax Number: 816-823-5507  
Email Address: KC-Accs-Receiveable.Finance@gsa.gov

**Remit to Address**

GSA: Payment for NON-IPAC Fleet Bills  
Lockbox 979083  
St. Louis, MO 63197-9000

**Statement Summary**

Initial Charges	\$1,791.30
Discount	\$0.00
Surcharge	\$0.00
Interest Charges	\$0.00
Penalty Charges	\$0.00
Admin Charges	\$0.00
Bill Amount	\$1,791.30
Collected	\$0.00
Applied Credit	\$0.00
Adjustments	\$0.00
<b>Amount Due</b>	<b>\$1,791.30</b>

**Credit Summary**

Applied Credit	\$0.00
Unapplied Credit	\$0.00
<b>Total Credit</b>	<b>\$0.00</b>

**Instructions**

To ensure proper credit, please write your statement number on your payment document.

Pay by IPAC  
ALC 47000016  
TAS 047 X4534001  
BPN/DUNS +4 964253686

**GSA 789:**

I certify that the items listed herein are correct and proper for payment from and to the Appropriation(s) designated:

Date: Authorized by:  
Phone Number:  
Amount:  
Line of Accounting:

Account Code: 14978B  
 CORNELIA V. CRUZ  
 PASCUA YAQUI TRIBAL COURT  
 7474 S CAMINO DE OESTE  
 TUSCON, AZ 85746

Statement Number:

F0141585  
 05/21/2017

**Credit Summary**

Applied Credit	\$0.00	Initial Charges	\$1,791.30
Unapplied Credit	\$0.00	Discount	\$0.00
Credit Total	\$0.00	Surcharge	\$0.00
		Interest Charges	\$0.00
		Penalty Charges	\$0.00
		Admin Charges	\$0.00
		Bill Amount	\$1,791.30
		Collected	\$0.00
		Applied Credit	\$0.00
		Adjustments	\$0.00
		Amount Due	\$1,791.30

**Fedcode:**

Region	FMC	Class	Tag	Entry date	Reference ID	Description	Sales	Action	Body	Miles	Start	End	Driven	Rate	Days/Months	Rate	Accessories	Charge	Total Charge
09	A13	10	5266M	04/2017	FLT042120170144119	AFV SURC HARGE	X3			0	0	0	0	0.0000	0	0.00	0.00	\$5.75	
				04/2017	FLT042120170144120		A1	2	1203	39,785	40,070	285	0.1120	0	181.00	0.00	\$212.92		
				04/2017	FLT041320170003675	15552	A1	3	4120	67,894	69,368	1,474	0.2030	12	153.00	2.00	\$362.42		
				04/2017	FLT041320170003676		A1	1	4250	3	103	100	0.2520	19	162.00	0.00	\$127.80		
				04/2017	FLT042120170144123	AFV SURC HARGE	X3			0	0	0	0	0.0000	0	0.00	0.00	\$5.75	
				04/2017	FLT042120170144124		A1	2	4275	60,530	61,695	1,165	0.2480	0	261.00	0.00	\$549.92		
				04/2017	FLT042120170144125	AFV SURC HARGE	X3			0	0	0	0	0.0000	0	0.00	0.00	\$5.75	
				04/2017	FLT042120170144126		A1	2	6175	24,713	24,928	215	0.2050	0	254.00	0.00	\$298.07		
<b>Total for Fedcode: 3,239 \$1,568.38</b>																			

**Fedcode: OP**

Region	FMC	Class	Tag	Entry date	Reference ID	Description	Sales	Action	Body	Miles	Start	End	Driven	Rate	Days/Months	Rate	Accessories	Charge	Total Charge
09	A13	10	6862K	04/2017	FLT042120170144122	OOTP	A1	2	1203	28,228	28,551	323	0.1120	0	181.00	0.00	\$217.17		
				04/2017	FLT042120170144121	AFV SURC HARGE	X3			0	0	0	0	0.0000	0	0.00	0.00	\$5.75	
<b>Total for Fedcode: OP 323 \$222.92</b>																			
<b>Total for Account code: 14978B 3,562 \$1,791.30</b>																			

-----AFV SURCHARGE SALES CODE CHANGES-----

The GSA Sales Code for Alternative Fuel Vehicle (AFV) Surchage billing transactions will change from "X1" to "X3". The Sales Code is indicated on Customer Statements and on Detailed Billing files retrieved from VCSS. Only the Sales Code is changing. All other aspects of AFV Surcharge transactions, including the Description, will remain the same. This change will be effective beginning with the April 2012 billing transactions.

-----STR is now online and offers Heavy Equipment-----

The Short Term Rental (STR) now offers heavy equipment. Submit your requests for vehicle and equipment with the new online request system WebSTR. Go to [www.gsa.gov/str](http://www.gsa.gov/str) for details and to submit your rental request. All charges will appear on your monthly bill as a separate line item. Fuel cards are available for both vehicles and equipment. GSA Fleet STR makes procurement and payment fast and easy.

Fleet Services Card

The Wright Express Fleet Services Card allows GSA Fleet to track all card purchases. Please remind drivers to use the card only for valid purchases. All maintenance and repair transactions greater than \$100 for GSA Fleet vehicles require authorization by the Maintenance Control Center (1-866-400-0411) before the work is done (\$500 maximum for emergency repairs). Agencies will be billed for inappropriate or invalid purchases.

Accident Management Center and Maintenance Control Center

The phone number for the GSA Fleet Vehicle Assistance Center (combination of Accident Management Center and Maintenance Control Center) is 1-866-400-0411.

Billing Questions

If you have questions about a charge on your bill, you may contact the following: Your Fleet Service Representative (FSR), Billing Customer Service Help Desk at (816) 926-7037, your accounting technician or [kc-accts-receivable.finance@gsa.gov](mailto:kc-accts-receivable.finance@gsa.gov)

Reviewing Charges

If you entered your LOA in Speed Pay and all of your charges continue to appear on a Non-IPAC Bill, please review the correctness of the Fiscal Station Number (FSN) that you entered.

You may review charges on your GSA bill by going to our VCSS website, <http://vcss.gsa.gov>. For general system/login ID/password issues, please contact: GSA OCFO Service Desk 1-866-450-6588. You may also contact the Billing Customer Service Help Desk on (800) 676-3690, your accounting technician or [kc-accts-receivable.finance@gsa.gov](mailto:kc-accts-receivable.finance@gsa.gov).

Charge and Credit will be reported on customer agency statement of transactions for:

Acct Period End: \_\_\_\_\_ Paying Office Contact \_\_\_\_\_ Telephone No. \_\_\_\_\_

I certify that the items listed herein are correct and proper for payment from and to the Appropriation(s) designated: \_\_\_\_\_

Date: \_\_\_\_\_ Authorized by: \_\_\_\_\_

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, )  
OFFICE OF THE PROSECUTOR, )  
) )  
Petitioner, )  
) )  
v. )  
) )  
THE HONORABLE MELVIN )  
STOOF, a Judge of the Pascua )  
Yaqui Tribal Courts, )  
) )  
Real Party In Interest: )  
) )  
FRANK JAIMEZ, )  
) )  
Respondents. )  
\_\_\_\_\_ )

APPELLATE CASE NO.  
CR-17-003

TRIBAL COURT CASE NO.  
CR-16-236

PYT 009 17/05/19 AM 10:40

**PETITION FOR INTERVENTION & RECONSIDERATION**

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Office of the Attorney General  
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Attorneys for the Pascua Yaqui Tribe

## **INTRODUCTION**

Pursuant to 3 PYTC §2-3-32, Petitioner, The Pascua Yaqui Tribe (hereinafter referred to as the “Tribe”) petitions this court for reconsideration of its Opinion issued May 8, 2017, in the above captioned and numbered matter. The Pascua Yaqui Tribe has a compelling interest to protect tribal sovereignty and jurisdiction. See 3 PYTC §2-5-10(A)(1). Further, the tribe has an interest in assuring that decisions made by the court do not adversely impact on the safety, welfare, and self-governance of the Tribe and that such decisions are consistent with the Tribe’s governmental interests. See 3 PYTC §2-5-10(A)(4). As this appellate matter affects the scope of the Tribe’s criminal jurisdiction and to potentially adversely impact the safety, welfare, and self-governance of the Tribe, the Tribe has a statutory right to intervene in this matter. See 3 PYTC §2-5-30(A)(1).

## **JURISDICTION**

This Court accepted jurisdiction to hear a special action in this matter. This matter is not an appeal. On May 8, 2017, the Court filed its Opinion denying the relief requested by the Petitioner. The May 8, 2017, Opinion is not: 1) an order denying a petition for reconsideration; 2) an order declining to accept jurisdiction of a petition for special action; or 3) a decision denying an appeal. Therefore, this Court has proper jurisdiction to hear this matter pursuant to 3 PYTC §2-3-32, as it is timely filed within fifteen (15) days of the filing of the Court order.

## **ISSUES PRESENTED**

1. Was it an error for the Court of Appeals to find that the tribal court did not abuse its discretion?

## ARGUMENT

### A. Standard of Review

The court abuses its discretion when it commits an error of law. “A trial court abuses its discretion if it commits an error of law. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 50, ¶ 27, 156 P.3d 1149, 1155 (App.2007).” See *First Financial Bank, N.A. v. Claassen*, 238 Ariz. 160, 162, 357 P.3d 1216, 1218 (Ct. App. 2015). See also *Romer-Pollis v. Ada*, 223 Ariz. 300, 303, 222 P.3d 916, 919 (Ct. App. 2009) (“A court abuses its discretion when “it commits an error of law in reaching a discretionary conclusion, ...”) and *Rasor v. Nw. Hosp., LLC*, 239 Ariz. 546, 554, 373 P.3d 563, 571 (Ct. App. 2016) (“An abuse of discretion occurs if the court commits legal error in reaching a discretionary conclusion, or if the record lacks substantial evidence to support its ruling.”) Thus, when the trial court commits an error of law, it commits an abuse of discretion.

This Court does not owe deference to the Tribal Court’s interpretation of law. “We review the interpretation and application of statutes *de novo*. *Schwarz v. City of Glendale*, 190 Ariz. 508, 510, 950 P.2d 167, 169 (App.1997) (citation omitted).” *First Financial Bank, N.A. v. Claassen*, 238 Ariz. 160, 162, 357 P.3d 1216, 1218 (Ct. App. 2015). In this case, the question raised was an issue of law. This court reviews interpretation of law *de novo*. This Court does not owe deference to the Tribal Court’s interpretation of Federal statutes.

### B. The Tribal Court’s interpretation of 25 U.S.C. §1304 misapplies the law.

The Tribal Court asserted that 25 U.S.C. §1304 requires the Tribe to prove that the defendant is a non-Indian. The Court’s and Respondent’s (the Defendant below) analysis

inappropriately conflates federal criminal jurisdiction (pursuant to the *Major Crimes Act* and the *Federal Enclaves Act*) with tribal special domestic violence criminal jurisdiction (pursuant to the *Indian Civil Rights Act*).

1. *Federal Enclaves Act, 18 USC §1152*

The *Federal Enclaves Act*, 18 USC §1152, extends general federal criminal jurisdiction to Indian country. However, it exempts from its coverage crimes where both the defendant and victim are Indians.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

See 18 USC §1152. The Ninth Circuit rejected that the *Act* required the Prosecutor to allege and prove the defendant's non-Indian status. "We accordingly hold that the Government need not allege the non-Indian status of the defendant in an indictment under section 1152, nor does it have the burden of going forward on that issue." See *United States v. Hester*, 719 F.2d 1041, 1043 (9<sup>th</sup> Cir., 1983) see also *United States v. Reza-Ramos*, 816 F.3d 1110, 1120 (9<sup>th</sup> Cir. 2016) ("The burden of proving the applicability of the statutory exception in § 1152 is on the defendant..."). In the Ninth Circuit, the burden is not on the government to prove the defendant's non-Indian status.

The Ninth Circuit's holding makes particular sense where the victim's Indian status is known and alleged. In *Hester*, the victims' Indian status was alleged in the indictment, but the defendant's status was not. Only if the defendant were an Indian, then the indictment would fail. The Court saw 18 USC §1152 as extending federal criminal jurisdiction with an exception –

crimes committed by Indian against Indians. Thus, where the victim's Indian status is known, it is the exception to the general extension of jurisdiction that jurisdiction would fail. The Court placed the burden on the party who is trying to prove the exception. In *Hester*, the Court cited:

*McKelvey v. United States*, 260 U.S. 353, 43 S.Ct. 132, 67 L.Ed. 301 (1922), in which the Supreme Court squarely rejected a contention that an indictment under the Securities Act must allege the non-applicability of an exception.

By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it.

*Id.* at 357, 43 S.Ct. at 134. *United States v. Hester*, 719 F.2d 1041, 1042 (9th Cir. 1983). Like *Hester*, the victim's Indian status in this case is alleged. The ruling in *Hester* is more relevant in the sense that it addresses almost the identical facts in this case.

In addition to the holding in *Hester*, there are significant differences between 18 U.S.C. §1152 and 25 U.S.C. §1304 that makes a comparison a poor. A federal prosecution under §1152 must demonstrate that the defendant and victim are of different races. A tribal prosecution under §1304 does not.<sup>1</sup> The tribal court has jurisdiction if the defendant is Indian or non-Indian as the victim must be an Indian. See 25 U.S.C. §1304 (b)(4)(B)(iii). Thus, if the defendant is Indian, the tribal court has proper jurisdiction. If the defendant is not Indian (like this case) the tribal court has proper jurisdiction. The defendant's Indian status is not an essential element to the court's jurisdiction as it has jurisdiction in both cases. This underlying difference renders the

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<sup>1</sup> In *Hester*, the Ninth Circuit held where the victim's identity has been established, it is the exception (the defendant's status as a non-Indian) that disrupts federal jurisdiction pursuant to 18 U.S.C. §1152. In *McKelvey v. United States*, 260 U.S. 353, 357, 43 S. Ct. 132, 134, 67 L.Ed.2d 301 (1922), the Supreme Court rejected a contention that an indictment under the Securities Act must allege the non-applicability of an exception. In this case, the tribal Court has jurisdiction whether the defendant is Indian or non-Indian, there is no statutory exception requiring special allegations.

holding in *United States v. Prentiss* irrelevant as the tenth circuit took the position that the status of the defendant was an essential element under 18 U.S.C. §1152. If the other elements of §1304 are alleged, then the defendant's non-Indian status is not an essential element to establishing tribal court jurisdiction.

Similarly, a defendant must raise as an affirmative defense that he or she is a non-Indian when a tribe is invoking its own inherent tribal criminal jurisdiction. "While the Tribe only has jurisdiction over Indians, the Tribe has not made status as an Indian an essential element of the crime, and Congress has not required it to do so. Thus, the Tribe was not required to plead and prove Dawn Eagle's Indian status beyond a reasonable doubt when Dawn Eagle did not raise the issue." *Eagle v. Yerington Paiute Tribe*, 603 F.3d 1161, 1164 (9th Cir. 2010).

### C. Conclusion


It is clear that the non-Indian status of the defendant is treated under 18 U.S.C. §1152 as an affirmative defense. This approach is similar to how federal courts look at inherent tribal criminal jurisdiction where the defendant must raise their status as a non-Indian as a defense. In both cases, the courts are not requiring the tribe to allege within their complaint or prove (if not raised) the defendant's non-Indian status.

Importantly, the defendant's status is not an essential element under 25 U.S.C. §1304. A defendant may be charged for domestic violence in Pascua Yaqui Tribal Court if the victim is an Indian. If the defendant is non-Indian, the court has jurisdiction pursuant to 25 U.S.C. §1304, and if the defendant is Indian, the court has jurisdiction pursuant to its own inherent sovereignty. In both cases, where the victim has been alleged to be an Indian, the court has jurisdiction. The

defendant's Indian or non-Indian status is irrelevant. It is not an essential element necessary to prove the charge.

For all of the reasons cited, the Pascua Yaqui Tribe requests that this Court grant it petition for intervention and reconsideration.

RESPECTFULLY SUBMITTED 19<sup>th</sup> day of May, 2017.



Amanda Lomayesva,  
Attorney General  
Pascua Yaqui Tribe

### Certificate of Service

A copy of the foregoing was delivered this 19<sup>th</sup> day of May, 2017, to:

OJ Flores, Chief Prosecutor

Defendant

The Honorable Melvin Stoof

**No. CA-17-003**  
Pascua Yaqui Court of Appeals

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**In Re Pascua Yaqui Tribe**

Extraordinary Writ regarding Pascua Yaqui Trial Court in Case No. CR-16-236, the Honorable Melvin Stoof presiding.

Kendrick Wilson, Office of the Prosecutor, 7777 S. Camino Huivisim, Bld.A, Tucson AZ 85757.

Honorable Melvin Stoof, Respondent, 7777 S. Camino Huivisim, Bld. B, Tucson AZ 85757.

Party in Interest, Frank Jaimez represented by William Soland, Office of the Public Defender, 7474 S. Camino de Oeste, Tucson AZ 85757.

\*\*\*\*\*

**Opinion**

**Jurisdiction**

Petitions for extraordinary writs, other than those for mandamus, prohibition, or habeas corpus shall conform so far as practicable to the procedures prescribed in this rule. 3 PYTC § 2-3-260. Although this petition was filed as a Special Action Writ, it is closer to a writ of mandamus. The Court of Appeals proceeds with this case pursuant 3 PYTC § 2-3-260.

**Summary**

The issue before this Court is whether the Respondent Court abused its discretion by allowing the introduction of jury instructions permitting the jury to consider whether Petitioner has proven that Defendant is a non-Indian beyond a reasonable doubt under 25 U.S.C. § 1304. This Court holds that Respondent Court did not abuse its discretion.

## Procedural Background

On April 28, 2017 Petitioner filed a Petition for Special Writ pursuant 3 PYTC §2-3-260(D) asking that this Court find that Respondent Court abused its discretion in allowing a jury instruction requiring Petitioner to prove beyond a reasonable doubt that Defendant is a non-Indian. On May 1, 2017 the Tribal Court administrative attorney filed a Response to Special Writ Request and a Supplement to Response to Special Writ on behalf of Respondent Court. On May 4, 2017 Respondent Court withdrew its Response to Special Writ Request and Supplement to Response to Special Writ. Real Party in Interest Jaimez filed a Motion to Strike Tribe's Petition for Special Writ and a Response in the Alternative on May 4, 2017. Jury trial for this case is scheduled for May 9th, 10th, and 11<sup>th</sup> of 2017.

### I. Jury Instruction

Petitioner contends that Respondent Court erred in allowing Proposed Jury Instruction #17 which reads:

#### Instruction No. 17

The Tribe must prove all the elements below beyond a reasonable doubt:

- 1) The Tribe must prove beyond a reasonable doubt that Ms. Aydeluz Sewa Leyva Jaimez is an Indian.
- 2) That Mr. Jaimez:
  - i) *is a non-Indian*
  - ii) resided in the Pascua Yaqui Community
  - iii) was employed by the Pascua Yaqui Tribe
  - iv) was a spouse, intimate partner, or dating partner of
    - i) a member of the Pascua Yaqui Tribe
    - ii) an Indian who resided on the Pascua Yaqui reservation
- 3) That the offense occurred on the Pascua Yaqui reservation.

If you find that any element above has not been proven beyond a reasonable doubt deliberations cannot proceed. (Emphasis ours)

The question before this Court is whether this instruction is improper since 25 U.S.C. §1304 is silent regarding proving Defendant's status as an Indian or non-Indian.

A court's formulation of jury instructions is reviewed for abuse of discretion. *See PYT v. Molina*, CA-14-003 citing *United States v. Garcia-Rivera*, 353 F.3d 788, 791-92 (9th Cir. 2003) (citing *United States v. Hicks*, 217 F.3d 1038, 1045 (9th Cir. 2000)). In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation. *Id.* "The trial court has substantial latitude so long as its instructions fairly and adequately cover the issues presented." *Id.*

The Tribe has inherent authority to prosecute crimes committed by Indians against Indians within the external boundaries of the Pascua Yaqui Indian Reservation. *See, e.g.*, The Constitution of the Pascua Yaqui Tribe, Article II, Jurisdiction; 3 PYTC §§ 1-1-10 and 1-1-20. Therefore, 25 U.S.C. § 1304 provides that federally recognized Indian tribes have special jurisdiction over non-Indians in crimes of domestic violence. The Senate Report on the VAWA Reauthorization explains that this special domestic violence criminal jurisdiction would apply "in a very narrow set of cases over non-Indians who voluntarily and knowingly established significant ties to the tribe." 18 VAWA Reauthorization, S. 1925, H.R. 4271, §904 (§204(d)(2)); SAVE Act, S. 1763, H.R. 4154, §201 (§204(d)(2)). Petitioner is correct that the specific words stating that the Tribe must prove a defendant's status as an Indian or a non-Indian are not present in the statute. Still, it is clear that Congress's intent in passing 25 U.S.C. § 1304 was to expand a participating tribe's jurisdiction over persons it could not otherwise exercise jurisdiction over.

The issue of whether the defendant's non-Indian status is an essential element of jurisdiction pursuant §1304 is novel for this Court because §1304 is relatively recent law. Still, several older federal statutes and federal case law address the issue of a defendant's non-Indian status as an element of a crime and provide guidance for tribal courts. Federal courts have held that for the purposes of 18 U.S.C. §1152 (General Crimes Act) the prosecutor must prove the

defendant's and victim's status as non-Indian or Indian. *See U.S. v. Prentiss*, 206 F3d 960 (10<sup>th</sup> Cir. 2000) (holding that the government has the burden of proving the non-Indian or Indian status of both the defendant and the victim in a federal prosecution under 18 U.S.C. §1152). *See, for example, U.S. v. Reza Ramos*, 816 F.3d 1103 (9<sup>th</sup> Cir. 2016).

The instruction proposed by Respondent Court is consistent with federal interpretation of similar statutes. Respondent Court's proposed jury instruction was not misleading nor was it inadequate to guide a jury's deliberation on the issues presented. For these reasons, this Court finds that Respondent Court did not abuse its discretion.

**So ordered** this 8th day of May 2017.



---

Chief Justice James Hopkins

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

3 William R. Soland  
PYT Bar No. 10266  
4

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

8 PASCUA YAQUI TRIBE,	) Appeals Case No.: CA-17-003
	)
9 OFFICE OF PROSECUTOR	) Tribal Court Case No.: CR-16-236
	)
10 Petitioner,	) REAL PARTY IN INTEREST'S MOTION
	) TO STRIKE TRIBE'S PETITION FOR
11 vs.	) SPECIAL WRIT
	) AND
12 HONORABLE MELVIN STOOF, JUDGE,	) RESPONSE IN THE ALTERNATIVE
	)
13 PASCUA YAQUI TRIBAL COURT	)
	) <b><u>(EXPIDITED RULING REQUESTED)</u></b>
	)
14	)
15 Real Party In Interest:	)
	)
16 JAIMEZ, FRANK	)
	)
17 Respondents	)

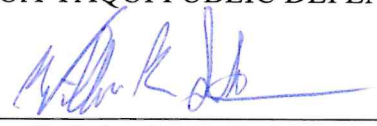
18  
19 Comes now Real Party in Interest FRANK JAIMEZ, through counsel, and hereby Moves  
20 to Strike the Tribe's Petition for Special Writ for the reason that it is improperly filed pursuant to  
21 Arizona's Rules of Procedure for Special Actions rather than this Tribe's Rules of Appellant  
22 Procedure. In the alternative, Mr. Jaimez requests that this Court deny the Tribe's Petition  
23 because the trial court's order is not contrary to law and does not constitute an abuse of  
24 discretion.

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DATED this 9<sup>th</sup> day of May, 2017.

PASCUA YAQUI PUBLIC DEFENDER



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William R. Soland  
Deputy Public Defender

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*United States v. Frega*, 179 F.3d 793 (9<sup>th</sup> Cir. 1999) 10  
*United States v. McBratney*, 104 U.S. 621 (1882) 13  
*United States v. Prentiss*, 206 F.3d 960 (10<sup>th</sup> Cir. 2000) 15, 16  
*United States v. Ramon Torres and Tony Fish*, 733 F.2d 449 (7<sup>th</sup> Cir. 1984) 15, 16  
*United States v. Reza Ramos*, 816 F.3d 1103 (9<sup>th</sup> Cir. 2016) 15  
*United States v. Zepeda*, 792 F.3d 1103, 1110 (9<sup>th</sup> Cir. 2015) 11, 12

**Tribal Authority**

Constitution of the Pascua Yaqui Tribe, Art. 2 7, 16  
 Constitution of the Pascua Yaqui Tribe, Art. 6 7  
 1 PYTC § 1-1-10 7, 16  
 1 PYTC § 1-1-20 7, 16  
 1 PYTC § 2-30(H) 7  
 3 PYTC § 2-3-90 *et seq* 7, 8  
 3 PYTC § 2-3-130(A)(4)(a) 5  
 3 PYTC § 2-3-260 *et seq* 5, 8, 9  
 3 PYTC § 2-3-280 8  
 4 PYTC § 1-400 5  
 4 PYTC § 3-10(A) 5

**Federal Authority**

General Crimes Act, 18 U.S.C. § 1152 13  
 Violence Against Women Act, 25 U.S.C. § 1304 *et seq* 5, 11, 12, 13, 14, 15, 16, 17  
 Writs, 28 U.S.C. § 1651 8  
 Federal Rules of Appellate Procedure, Rule 21 8

1 FACTS AND PROCEDURE

2  
3 Mr. Jaimez objects to Petitioner’s Statement of Facts as they are not properly before this  
4 Court. The Pascua Yaqui Rules of Appellate Procedure (“Appellate Rules”) clearly provide that  
5 a Statement of Facts should only include “facts necessary for understanding the issues  
6 presented.” 3 PYTC § 2-3-260(A)(1). The Tribe includes alleged “facts” that are wholly  
7 irrelevant to the issues before this Court. Furthermore, the Appellate Rules prohibit the inclusion  
8 of “evidentiary matters unless material to a proper consideration of the issues presented, in which  
9 instance reference shall be made to the record or page of the transcript where such evidence  
10 appears.” 3 PYTC § 2-3-130(A)(4)(a).

11 The Petitioner’s Statement of Facts unquestionably fails to comport with the Rules of  
12 Appellate Procedure.

13 The Real Party in Interest provides the following statement of the facts and proceedings.  
14 All facts are drawn from the Complaint and Record and no admissions are made by Mr. Jaimez  
15 as to any issues presently before the trial court.

16  
17 On September 13, 2016, the Tribe charged Mr. Jaimez with one count of malicious  
18 mischief, domestic violence, 4 PYTC § 1-400/3-10 (A), under the Tribe’s special domestic  
19 violence criminal jurisdiction pursuant to 25 U.S.C. § 1304. *See* Petitioner’s Exhibit One. The  
20 complaint alleges that the alleged victim, Ms. Ayde Luz Sewa Leyva Jaimez, is an enrolled  
21 member of the Pascua Yaqui Tribe, and that Mr. Jaimez is a “person over whom the Tribe has  
22 special domestic violence criminal jurisdiction pursuant to 25 U.S.C. § 1304.” *Id.* The complaint  
23 further alleges that Mr. Jaimez is married to an enrolled member of the Pascua Yaqui Tribe, that  
24 he lived on the Pascua Yaqui Indian Reservation at the time of the offense, and that the offense  
25 was committed within the exterior boundaries of the Pascua Yaqui Indian Reservation. *Id.*

1 Specifically, the Probable Cause Statement sworn to by Officer Kevin Wells states that Mr.  
2 Jaimez “is not an enrolled tribe [sic] member of any federally recognized Tribe but is under the  
3 Violence Against Women Act (VAWA) and married to Ayde Sewa Leyva, a Pascua Yaqui Tribe  
4 Member.” *Id.*, page 3, paragraph 5.

5 At a pre-trial hearing on April 11, 2017, the Tribe requested the following jury instruction  
6 with regard to jurisdiction:

7  
8 The Tribe must prove all the elements below beyond a reasonable  
doubt:

- 9  
10 1. The Tribe must prove beyond a reasonable doubt that Ms. Aydeluz  
Sewa Leyva Jaimez is an Indian.  
11 2. That Mr. Jaimez:  
(i) Resided in the Pascua Yaqui community;  
(ii) Was employed by the Pascua Yaqui Tribe; or  
12 (iii) Was a spouse, intimate partner, or dating partner of  
(i) A member of the Pascua Yaqui Tribe  
13 (ii) An Indian who resides on the Pascua Yaqui Reservation  
14 3. That the offense occurred on the Pascua Yaqui Reservation  
If you find that any element above has not been proven beyond a  
15 reasonable doubt deliberations cannot proceed.

16 The Trial Court, *sua sponte*, ruled, over the Tribe’s objection, that the Tribe must also  
17 prove beyond a reasonable doubt the non-Indian status of the Defendant. *See* Petitioner’s Exhibit  
18 Two. Mr. Jaimez remains in custody and this matter is set for Jury Trial on Tuesday, March 9,  
19 2017 at 9am. *Id.*

20 On April 28<sup>th</sup>, 2017, seventeen days after the trial court’s order dated April 11<sup>th</sup>, 2016, the  
21 Petitioner filed its Petition for Writ of Special Action, citing the Arizona Rules of Procedure for  
22 Special Actions, and alleging that no Tribal or Federal Authority existed on point that would  
23 provide the Tribe with the relief requested. In filing its Petition, Petitioner joined the Honorable  
24 Melvin Stoof, Judge, Pascua Yaqui Tribal Court, as a Respondent. On May 2<sup>nd</sup>, 2017, the Pascua  
25

1 Yaqui Court, by and through its administrative attorney, filed a response to the Petitioner's  
2 Petition. Subsequently, the Honorable Respondent withdrew its Response on May 4<sup>th</sup>, 2017.

3 MOTION TO STRIKE: RIGHT OF APPEAL AND JURISDICTION  
4

5 Respondent, Real Party in Interest, Frank Jaimez, respectfully requests that the Petition  
6 be stricken for failure to comport with the Tribal Code. Petitioner instead to elected to use  
7 inapplicable state rules of procedure despite available remedies under the Tribal Code. In Pascua  
8 Yaqui Tribal Court, the Tribal Code is the controlling authority. *See, generally*, Constitution of  
9 the Pascua Yaqui Tribe, Article VI. *See, also, Id*, Article II; 3 PYTC §§ 1-1-10 & 1-1-20. Only  
10 when the Tribal Code is silent should foreign authority be used. 1 PYTC § 2-30(H).<sup>1</sup> Similarly,  
11 federal and state case law, while persuasive in this jurisdiction, are not considered controlling  
12 authority. *See, PYT v. Miranda*, CA-08-015, p. 22 (Ct. App. 2009) (“While decisions of the  
13 Arizona and United States Supreme Courts are not controlling authority in this court, they are  
14 highly persuasive.”) Nothing in our Tribal Code permits us to adopt wholesale rules of procedure  
15 from foreign jurisdictions that conflict with our own rules of procedure. Rules from other  
16 jurisdictions are moot when procedure is already provided by the Code.

17 As Petitioner acknowledges, the Pascua Yaqui Code recognizes a right of parties to  
18 appeal in most circumstances. However, in criminal matters, this right to appeal a judgment of  
19 acquittal does not exist for the Tribe. 3 PYTC § 2-3-90(G). Petitioner correctly notes that the  
20 Appellate Rules also recognize the use of interlocutory appeals and “extraordinary” writs. *See* 3  
21

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22  
23 <sup>1</sup> It should be noted that the relevant section of the Tribal Code includes two subsections “H.” The section cited here is  
24 the “second” subsection H, which states, “[w]henver the meaning of a term used in this Code is not clear on its face or  
25 in the context of the Code, such term shall have the meaning given to it by the laws of the State of Arizona, unless such  
meaning would undermine the underlying principles and purposes of this Code.”

1 PYTC § 2-3-90(F) and 3 PYTC § 2-3-260(D). Petitioner then concludes that there are no  
2 procedures set out for such writs, and therefore embarks on an explanation of Arizona’s  
3 streamlined procedure for such writs. This is despite Petitioner’s own acknowledgement, in  
4 footnote 2, that under federal law such actions may take the form of Writs of Mandamus, which  
5 are provided for in the Tribal Rules of Appellate Procedure. *See* Petition, page 6, footnote 2,  
6 citing 3 PYTC § 2-3-260. Without citing authority, the Petitioner argues that a writ of mandamus  
7 is typically not issued until after a final judgment. *Id.* It is unclear why this would be the case, as  
8 nothing in 3 PYTC § 2-3-260 places such a limitation on extraordinary writs. Nor is such a  
9 prohibition found in the Federal equivalent, Federal Rule of Appellate Procedure 21, or that  
10 rule’s authorizing statute, 28 U.S.C. § 1651. Indeed, “The traditional use of the writ in aid of  
11 appellate jurisdiction both at common law and in the federal courts has been to confine an  
12 inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its  
13 authority when it is its duty to do so.” *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1946).  
14 This would seem to be precisely the remedy that Petitioner seeks.

15         Alternatively, Petitioner could have requested that Respondent Court certify the question  
16 to the Court of Appeals pursuant to 3 PYTC § 2-3-280, which provides that “The trial court...  
17 may certify a question involving Pascua Yaqui Tribal law to the appellate court. The certified  
18 question must control the outcome of the case pending before the certifying court.” In this case,  
19 the Tribe has certainly alleged that the issue raised controls the outcome of a pending case before  
20 the trial court.

21         In any event, Petitioner has chosen not to conform its pleading to remedies provided for  
22 within the Tribal Code, but instead to invoke state law and state remedies that are not applicable  
23 in this jurisdiction. Accordingly, the Tribe’s Petition should be struck for failure to conform to  
24 the Tribal Rules of Appellate Procedure.

1 In electing to rely upon inapplicable Arizona court rules, the Petitioner has attempted to  
2 improperly circumvent Respondent Court’s limited right to respond that exists within the Tribal  
3 Rules of Procedure<sup>2</sup>. Under Arizona law, it may be argued that the Respondent Court lacks  
4 standing to file a written response to a special action. *See, e.g., Hurles v. Superior Court, In and*  
5 *For County of Maricopa*, 174 Ariz. 331 (1993). Had the Tribe properly proceeded under the  
6 Pascua Yaqui Tribal Rules of Appellate Procedure, however, “[a]ll parties in the trial court, other  
7 than the petitioner, may be deemed respondents.” 3 PYTC § 2-3-260(C)(4). Furthermore, the  
8 rules explicitly provide that whether the trial court responds to a request for such an  
9 extraordinary writ is within the discretion of the trial court: “The respondent judge may advise  
10 the appellate court clerk and all parties by letter that he does not intend to respond to the petition,  
11 but the petition shall not be taken as admitted.” *Id* at (C)(5).

12 On the merits, Petitioner purports to argue for an expansive view of Tribal Court  
13 authority. That Petitioner would, simultaneously, ignore applicable Tribal authority<sup>3</sup> displays a  
14 questionable view of Tribal Sovereignty, and the authority of Tribal courts. Because Petitioner  
15 has chosen to file under inapplicable Arizona rules, their Petition should be stricken, and not  
16 heard by this Court.

17 In the alternative, Respondent, Real Party in Interest, Responds as below.

18  
19 STATEMENT OF THE ISSUES

20 **WHETHER THE TRIBAL COURT ABUSED ITS DISCRETION BY REQUIRING THE**  
21 **TRIBE TO PROVE THAT THE DEFENDANT IS A NON-INDIAN.**

22  
23  
24 \_\_\_\_\_  
25 <sup>2</sup> As discussed below, this right arises from 3 PYTC § 2-3-260(C)(4-5), and is limited to Extraordinary Writs.

<sup>3</sup> And in doing so, circumvent the Respondent Court’s limited right to Respond.

LAW AND ARGUMENT

I. **THE TRIBAL COURT HAS NOT ABUSED ITS DISCRETION BY REQUIRING THE TRIBE TO PROVE THAT THE DEFENDANT IS A NON-INDIAN.**

The Petition argues that the Tribal Court has abused its discretion by requiring a jury instruction that places the burden on the Tribe to prove beyond a reasonable doubt that Defendant is a non-Indian. Under Tribal law, “[a] court’s formulation of jury instructions is reviewed for abuse of discretion.” *Pascua Yaqui Tribe v. Molina*, CA-14-003 (2014), citing *States v. Garcia-Rivera*, 353 F.3d 788, 791-92 (9<sup>th</sup> Cir. 2003) (internal citations omitted). The Court in *Molina* found that “[i]n reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury’s deliberation. *Id.*, citing *United States v. Frega*, 179 F.3d 793, 806 (9<sup>th</sup> Cir. 1999) (internal citations omitted). “The trial court has substantial latitude so long as its instructions fairly and adequately cover the issues presented.” *Id.*

As discussed below, there is copious authority that outlines the need for the Tribe to prove Indian or non-Indian status of both a defendant and an alleged victim as part of their case in chief. The instruction proposed by the Respondent Court is not misleading, and is not inadequate to guide a jury’s deliberation on this issue. Indeed, the instruction ordered by the Respondent Court is detailed, informative, and specific, and relies upon an understanding of Tribal and federal authority that is precisely calculated to ensure that Mr. Jaimez’s due process rights are ensured. For these reasons, the Respondent Court cannot be said to have abused its discretion in this case.

1 **II. DEFENDANT’S INDIAN STATUS OR STATUS AS A NON-INDIAN IS AN**  
2 **ESSENTIAL ELEMENT FOR THE TRIAL COURT’S JURISDICTION PURSUANT TO**  
3 **25 U.S.C. § 1304 AND RELEVANT FEDERAL AUTHORITY.**

4 The tribal status of an alleged victim and a defendant are jurisdictional issues in all  
5 criminal matters arising within the external boundaries of the Pascua Yaqui Indian Reservation.  
6 As the Tribe acknowledges, a tribal court’s special domestic violence criminal jurisdiction is a  
7 limited jurisdiction under 25 U.S.C. § 1304. Prior to the passage of 25 U.S.C. § 1304, the Pascua  
8 Yaqui Tribal Court’s criminal jurisdiction was limited by U.S. federal law to cases in which the  
9 defendant was an Indian. *See, Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

10 The Petitioner correctly points out that, for courts of limited jurisdiction, such as Federal  
11 courts, the prosecution must prove the required Indian/ non-Indian status. As the Tribe concedes,  
12 “the defendant’s Indian status is an essential element which the government must allege in the  
13 indictment and prove beyond a reasonable doubt.” *United States v. Zepeda*, 792 F.3d 1103, 1110  
14 (9<sup>th</sup> Cir. 2015) (en banc) (quoting *United States v. Bruce*, 394 F.3d 1215, 1229 (9<sup>th</sup> Cir. 2005))  
15 (quotation marks and alteration omitted). Specifically, special domestic violence criminal  
16 jurisdiction is defined in 25 U.S.C. § 1304 as “criminal jurisdiction that a participating tribe may  
17 exercise under [section 1304] *but could not otherwise exercise.*” (Section 1304(a)(6)). It is  
18 therefore clear that the legislative intent of 25 U.S.C. § 1304 was to expand this limited  
19 jurisdiction to those over whom the court could not previously exercise jurisdiction, namely,  
20 non-Indians. Nothing in § 1304 abrogates the existing requirement that the Tribe must prove  
21 Indian or non-Indian status beyond a reasonable doubt as a jurisdictional element.

22 The Petitioner argues that “[i]n statutory construction, our starting point is the plain  
23 language of the statute.” *Petition*, citing *Children’s Hosp. & Health Ctr. V. Belshe*, 188 F.3d  
24 1090, 1096 (9<sup>th</sup> Cir. 1999). But the Petitioner fails to explain how this “plain language” standard  
25

1 illuminates the conflict between § 1304(a)(6), which grants jurisdiction over persons that the  
2 Tribe “could not otherwise exercise” jurisdiction over, and § 1304(b)(1), which uses the term “all  
3 persons.” Petitioner also fails to explain how § 1304 removes the *Zepeda* requirement that the  
4 prosecution must prove the required Indian/ non-Indian status.

5 Pursuant to the Tribal Code, the Tribe may take up to one year to draft and revise a  
6 complaint before filing it with the tribal court in a criminal matter. In doing so, the Tribal  
7 prosecutor must analyze the facts of the case to ensure that the complaint conforms to the law. In  
8 the case below, the Tribe’s complaint specifically alleged that Mr. Jaimez was a person over  
9 whom the Tribe had special domestic violence criminal jurisdiction. The attached affidavit from  
10 the police indicated that this was based upon his non-Indian status. The Tribe therefore made the  
11 decision to proceed under the special domestic violence jurisdiction, and took upon themselves  
12 the burden of proving beyond a reasonable doubt that Mr. Jaimez was, as outlined in §  
13 1304(a)(6) a person over whom the Tribe “could not otherwise exercise jurisdiction.” In other  
14 words, the Tribe must prove, beyond a reasonable doubt, Mr. Jaimez’s non-Indian status in order  
15 to exercise the special jurisdiction that they chose when they filed the complaint.  
16

17 The Tribe’s reliance on the “all persons” clause of § 1304(b)(1) is misplaced. The Tribe  
18 may, indeed exercise jurisdiction over “all persons,” but must still prove Indian/non-Indian status  
19 of those persons. Expanding the pool of individuals over which the Tribe may exercise  
20 jurisdiction does not relieve the Tribe from proving the facts of the case beyond a reasonable  
21 doubt. If Mr. Jaimez were an Indian, the Tribe would be required to prove that he was an Indian  
22 subject to jurisdiction beyond a reasonable doubt. Petitioner would not need to resort to special  
23 domestic violence jurisdiction. On the other hand, if Mr. Jaimez were not an Indian, then the  
24  
25

1 Tribe could use its special domestic violence jurisdiction, but still must make its case beyond a  
2 reasonable doubt, and prove Mr. Jaimez's alleged non-Indian status.

3 **III. PETITIONER'S INTERPRETATION OF 25 U.S.C. § 1304 WOULD VIOLATE**  
4 **REAL PARTY IN INTEREST'S DUE PROCESS RIGHTS.**

5 Disturbingly, the Petitioner argues that "[e]xpanding jurisdiction to *all persons* who do  
6 not meet the exceptions listed in 25 U.S.C. § 1304(b)(4) has practical applications as well. For  
7 instance, the Tribe would be able to prosecute an individual who happened to be an Indian, even  
8 if the Tribe could not prove such defendant's enrollment status..." Petition, page 10, lines 20-  
9 24. (emphasis original). The Tribe is arguing for the ability to prosecute alleged Indians without  
10 the requirement of proving their status beyond a reasonable doubt. The Tribe may not simply  
11 free itself of its burden of proof in this manner. At the tribal, state, and federal level, prosecution  
12 of crimes occurring within the external boundaries of an Indian Reservation requires proof  
13 beyond a reasonable doubt of the Indian status or non-Indian status of the defendant and victim.  
14 These are both jurisdictional elements that must be proven beyond a reasonable doubt. Allowing  
15 the Tribe to circumvent this would be a denial of Mr. Jaimez's due process rights.

16 Historically, federal courts have had exclusive jurisdiction over offenses by non-Indians  
17 against Indians. 18 U.S.C. § 1152, the General Crimes Act. Under the General Crimes Act, non-  
18 Indians are immune from tribal court jurisdiction. *Oliphant v. Suquamish Indian Tribe*, 435 U.S.  
19 191 (1978). Until recently, there were four general exceptions to the coverage of § 1152, three of  
20 them legislative and the fourth judicially created. The three legislative exceptions are outlined in  
21 the second paragraph of 18 U.S.C. § 1152 as follows:

22 This section shall not extend (1) to offenses committed by one  
23 Indian against the person or property of another Indian, nor (2) to  
24 any Indian committing any offense in Indian country who has been  
25 punished by the local law of the tribe, or (3) to any case where, by  
treaty stipulations, the exclusive jurisdiction over such offenses is  
or may be secured to the Indian tribes respectively.

1 The fourth exception to the broad coverage of § 1152 was created by the Supreme Court in *U.S.*  
2 *v. McBratney*, 104 U.S. 621 (1882), holding that absent treaty provisions to the contrary, the  
3 state has jurisdiction over a crime committed by a non-Indian against another non-Indian.

4 The fifth exception to 18 U.S.C. § 1152's exclusive jurisdiction over non-Indians for  
5 crimes against Indians in Indian country is a federal legislative one, and it results from the  
6 recently-enacted 25 U.S.C. § 1304, Tribal Jurisdiction Over Crimes of Domestic Violence,  
7 which allows for "Special Domestic Violence Criminal Jurisdiction" which "means special  
8 domestic violence criminal jurisdiction that a participating tribe may exercise under this section  
9 *but could not otherwise exercise.*" 25 U.S.C. § 1304(a)(6)(emphasis added). The very term  
10 "*Special Domestic Violence Criminal Jurisdiction*" makes clear that the narrow purpose of this  
11 federal legislation is to expand the tribal court's jurisdiction over non-Indians. Without this  
12 federal legislation, the Tribal Court could not exercise criminal jurisdiction over any non-Indian  
13 defendant, based on *Oliphant*. The *Oliphant* court found that Tribes had no inherent subject  
14 matter jurisdiction over non-Indian misdemeanors. 435 U.S. 191, 211. *Oliphant*, though  
15 repugnant to the issue of tribal sovereignty, raised Constitutional concerns as to what guarantees  
16 non-Indian defendants have in tribal courts. The Special Domestic Violence Criminal  
17 Jurisdiction statute attempts to address these concerns by requiring a Tribe to guarantee rights to  
18 non-Indian defendants, including "the right to a trial by an impartial jury that is drawn from  
19 sources that- (A) reflect a fair cross section of the community; and (B) do not systematically  
20 exclude any distinctive group in the community, *including non-Indians,*" and "all other rights  
21 whose protection is necessary under the U.S. Constitution...." 25 U.S.C. § 1304(d)(3-4).  
22 (emphasis added).

23 The burden of proving that a non-Indian defendant is subject to this court's Special  
24 Domestic Violence Criminal Jurisdiction falls upon the Tribe, because it is an element of subject  
25 matter jurisdiction, as the Tribe alleged in the Complaint. While there is no Tribal or federal

1 statute or rule that governs how a prosecutor must provide its proof of the Indian or non-Indian  
2 status of a defendant or a victim in an Indian Country prosecution, 25 U.S.C. § 1304 was  
3 designed to ensure certain Constitutional guarantees to non-Indians in tribal courts, including  
4 guarantees of procedural due process. This guarantee includes the need for a prosecutor to prove  
5 that a tribal court has territorial, personal, and subject matter jurisdiction.

6 Although 25 U.S.C. § 1304 may be silent as to the requirement of a prosecutor to prove  
7 the status of a non-Indian defendant, this duty arises out of federal case law. Because the Tribe  
8 seeks to use Special Domestic Violence Criminal Jurisdiction provided for by federal law,  
9 federal case law applies. There is no case law pursuant to 25 U.S.C. § 1304 that addresses  
10 whether a tribal prosecutor must prove beyond a reasonable doubt the status of a non-Indian  
11 defendant, due in large part to the relatively recent implementation of the statute. Numerous  
12 cases establish that the government must prove beyond a reasonable doubt that a defendant is an  
13 Indian. *See, for example, U.S. v. Reza Ramos*, 816 F.3d 1103, 1113 (9<sup>th</sup> Cir. 2016). Prosecutors in  
14 federal court cases have a burden of proving beyond a reasonable doubt that a defendant is an  
15 Indian, because “Indian status is a jurisdictional element...” *U.S. v. Bruce*, 394 F.3d 1215, 1223-  
16 24 (9<sup>th</sup> Cir. 2005). By analogy, under one case involving whether a federal prosecutor must  
17 establish such proof as to the status of a non-Indian or Indian victim and a non-Indian or Indian  
18 status of a defendant, the Seventh U.S. Circuit Court of Appeals found that a jury must  
19 determine, as a question of fact, both the defendant’s Indian status as Indian or non-Indian, and  
20 the victim’s status as an Indian or non-Indian. *See, U.S. v. Ramon Torres and Tony Fish*, 733  
21 F.2d 449 (7<sup>th</sup> Cir. 1984). Similarly, the Tenth Circuit Court of Appeals followed the rationale of  
22 the *Torres-Fish* Court, and found that the government has the burden of providing the non-Indian  
23 or Indian status of both the defendant and the victim in a federal prosecution of an interracial  
24 crime committed within the external boundaries of an Indian Reservation. *See, U.S. v. Prentiss*,  
25 206 F.3d 960 (10<sup>th</sup> Cir. 2000). In *Prentiss*, the Tenth Circuit found that 18 U.S.C. § 1152 “makes

1 a crime occurring within Indian Country a federal crime only if the crime occurred between an  
2 Indian and a non-Indian; i.e., the crime must be what courts have termed ‘interracial.’” *Id* at 966.

3 This case is a corollary to the *U.S. v. Torres and Fish* and *Prentiss* cases. Instead of an  
4 Indian defendant and a non-Indian victim as in those cases, this case involves an alleged non-  
5 Indian defendant and an alleged Indian victim. The same basic constitutional principles  
6 addressed in the Seventh and Tenth circuit cases cited above should apply equally in this  
7 interracial crime case, because just as a defendant has a constitutional right in a federal case to  
8 require the prosecutor to prove Indian or non-Indian status of the defendant and victim, a non-  
9 Indian defendant in a tribal court should be guaranteed the same right to require a prosecutor to  
10 prove his non-Indian status as a jurisdictional element of the offense alleged.

11 By attempting to prosecute Mr. Jaimez without proving his status as a non-Indian, the  
12 Tribe seeks to deprive Mr. Jaimez of his due process rights, circumventing an element that would  
13 have to be proven if he were tried in federal court. This is expressly prohibited by 25 §  
14 1304(d)(4).

15  
16 **IV. THE FEDERAL GOVERNMENT CANNOT DELEGATE JURISDICTION TO**  
17 **THE TRIBE THAT THE TRIBE ALREADY POSSESSES UNDER ITS INHERENT**  
18 **AUTHORITY.**

19 The Petitioner argues that 25 U.S.C. § 1304 expands jurisdiction “to *all persons....*” *See*  
20 *Petition*, page 10, lines 20-22. (emphasis original). However, the Tribe has inherent authority to  
21 prosecute crimes committed by Indians against Indians within the external boundaries of the  
22 Pascua Yaqui Indian Reservation. *See, e.g., The Constitution of the Pascua Yaqui Tribe*, Article  
23 II, Jurisdiction; 3 PYTC §§ 1-1-10 and 1-1-20; *Oliphant*, 435 U.S. at 191. The United States  
24 Federal Government lacks the authority to delegate to the Tribe that authority which it already  
25 has. Therefore, 25 U.S.C. § 1304 cannot be said to expand jurisdiction to crimes committed by

1 Indians against Indians within the Pascua Yaqui Reservation, as the Tribe already has this  
2 authority. Therefore, 25 U.S.C. § 1304 can only expand the Tribe's authority to exercise  
3 jurisdiction to those over whom the Tribe cannot currently exercise that jurisdiction, as explicitly  
4 spelled out in § 1304(a)(6). When the Tribe seeks to exercise its inherent authority, the Tribe  
5 must prove beyond a reasonable doubt that a defendant is an Indian. It is therefore a reasonable  
6 conclusion that when the Tribe wishes to exercise its expanded authority, it must prove beyond a  
7 reasonable doubt that its inherent authority does not apply. The Tribe must prove beyond a  
8 reasonable doubt the defendant is a non-Indian.

9  
10 CONCLUSION

11  
12 The Petition, which inappropriately relies upon the Arizona Rules of Procedure for  
13 Special Actions rather than complying with the Tribe's own Rules of Appellate Procedure,  
14 should be struck, and the Court should therefore deny review.

15 Should the Court find that Arizona rules are applicable to Tribal Court proceedings, the  
16 Petition should still be denied. The Respondent Court did not abuse its discretion, but instead  
17 ordered a jury instruction that was intended to ensure the defendant's due process rights at trial.  
18 A federal statute cannot grant to a Tribe powers which it already possesses under its inherent  
19 authority, and therefore, 25 U.S.C. § 1304 must be interpreted as suggested by the Honorable  
20 Respondent as granting authority specifically over non-Indians. Therefore, the Tribe must prove  
21 beyond a reasonable doubt that Mr. Jaimez is a non-Indian, and the Respondent Court's order is  
22 appropriate. May the fourth be with you.

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Respectfully submitted this May the Fourth, 2017 by:

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William R. Soland,  
Deputy Public Defender

Original filed with the Pascua Yaqui Court of Appeals:

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On: May 4<sup>th</sup>, 2017

A copy of the foregoing was sent to:

Oscar J. Flores, Chief Prosecutor

Kendrick Wilson, Deputy Prosecutor

Hon. Judge Melvin Stoof, Pascua Yaqui Tribal Court

Ben Casey, Administrative Attorney, Pascua Yaqui Tribal Court

Amanda Lomayesva

Interim Attorney General, Pascua Yaqui Tribe