

No. CA-17-004

Pascua Yaqui Court of Appeals

Pascua Yaqui Tribe, Appellant,

vs.

Joshua Bustamante, Appellee,

Interlocutory appeal of a Pascua Yaqui Trial Court Arraignment Hearing and Order Setting Trial in Case No. CR-17-169, the Honorable Margaret Flores presiding.

Kendrick Wilson, Office of the Prosecutor of the Pascua Yaqui Tribe, 7777 Camino Huivisim, Building B, Tucson, AZ for the Appellant.

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

I. Summary

The main issue before this Court is whether the Tribal court abused its discretion in dismissing Count 1 (aggravated assault) without prejudice. This Court finds that it did not for the reasons set forth in this opinion.

II. Facts and Procedural History

Defendant was charged by criminal complaint with aggravated assault (Count 1), a violation of 4 PYTC § 1-130(B)(2); assault & battery on a Tribal Official (Count 2), a violation of 4 PYTC § 1-140(A)(2); possession or concealment of stolen property (Count 3), a violation of 4 PYTC § 1-480; and refusal to obey a lawful order (Count 4), a violation of 4 PYTC § 1-710. Defendant pled not guilty to Counts 2 and 3. At the arraignment, The Tribal Court dismissed Counts 1 and 4 without prejudice due to deficiencies in the complaint.

The Tribe appeals, requesting that this Court overturn the Tribal Court's dismissal of Count One, aggravated assault. The Tribe states the Criminal Complaint complied with the requirements outlined in 3 PYTC § 2-2-90 (B) and did not violate Defendant's Due Process rights. The Tribe does not appear to seek review of the Court's dismissal without prejudice of Count 4 as Count 4 is not mentioned in the initial

and the response briefs. The issue before this Court is whether the Tribal judge abused her discretion in dismissing Count 1 (aggravated assault) without prejudice.

III. Standard of Review

The dismissal of an indictment without prejudice is reviewed for an abuse of discretion. *United States v. Adrian*, 978 F.2d 486, 493 (9th Cir. 1992), *overruled on other grounds by United States v. Grace*, 526 F.3d 499 (9th Cir. 2008).

IV. Dismissal of Indictment

The Pascua Yaqui Code provides that criminal complaints shall contain “[a] written statement, describing in ordinary language the offense committed, including the time and place as nearly as may be determined, and the name or description of the person alleged to have committed the offense; and the section of the Tribal Code allegedly violated.” See 3 PYTC 2-2-90 (B)(1) & (2). During Defendant’s arraignment, the Tribal Court judge read criminal complaint CR-17-169 as follows:

The Pascua Yaqui Tribe hereby complains and alleges upon information and belief that the above named defendant, while on the Pascua Yaqui reservation, did commit the following offenses, count 1, 4 PYTC § 1-130(B)(2), aggravated assault, on or about May 17, 2017, at approximately 3:20 p.m. at or near 7642 Camino Vahcom, Defendant committed aggravated assault by committing assault and using a deadly weapon or injurious instrument, to-wit, drove his vehicle into Officer Wells. Count 2, 4 PYTC § 1-140(A)(2), assault & battery on a Tribal Official, on or about May 17, 2017, at approximately 3:20 p.m., at or near 7642 Camino Vahcom, defendant did willfully attempt to commit battery upon a Tribal police officer by force, violence or unlawful act, threat or menacing conduct, causing the Tribal Police Officer to reasonably believe he/she was in danger of receiving immediate battery, to wit, drove his vehicle into Officer Wells. Count 3, 4 PYTC § 1-480, possession or concealment of stolen property, on or about May 17, 2017, at approximately 3:20 p.m., at or near 7642 Camino Vahcom, Defendant knowingly possessed, concealed or converted for his own use, property which belongs to another and without the permission of the true owner or property which he/she knows is stolen, to wit, drove a stolen vehicle. Count 4, 4 PYTC § 1-710 refusal to obey a lawful order, on or about May 17, 2017, at approximately 3:20 p.m. at or near Camino Vahcom, to wit, refused to step out of the vehicle and place his hands on the vehicle and refused to turn off the car.

The Tribal judge noted there might be some language that might be missing on Count 4. She then asked if the Tribe had an explanation. The Tribe noted the deficiency and stated that based upon the affidavit, Defendant refused the officer's orders.

The Tribal Judge asked if the Tribe wanted to amend the complaint or leave Count 4 as written. The Tribal Judge stated that the Tribe could amend orally, or the Tribe could file an amended complaint in writing. If she were to amend orally, the judge asked if she had written language that she could submit. The prosecutor stated she did not have the statute before her.

Defense counsel moved to have Counts 1 and 4 dismissed, stating that in order to charge an individual with aggravated assault pursuant to Section B of 4 PYTC § 1-130(B)(2), the complaint should define the section under 1-130(A) (assault) that the Defendant is being charged with. However, there was no such designation in Count 1.

The Tribe noted there was no definition in Count 1 as well, and the Tribe agreed to defense counsel's request as well. The Tribal Judge stated that for Count 4, if the Tribe did not have that Code before her to make any necessary changes, the following counts were dismissed without prejudice --- Counts 1 and Count 4. Defendant then pled not guilty to counts 2 and 3.

In *Calderon v. Prunty*, 59 F.3d 1005 (9th Cir. 1995), the Court stated:

The Sixth Amendment, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, guarantees a criminal defendant a fundamental right to be clearly informed of the nature and cause of the charges against him. In order to determine whether a defendant has received constitutionally adequate notice, the court looks first to the information. The principal purpose of the information is to provide the defendant with a description of the charges against him in sufficient detail to enable him to prepare his defense.

Id. at 1009. *Calderon* provides that the information need not state the method of the crime, so long as it states the elements of an offense charged with sufficient clarity to give a defendant notice of what to defend against. *Id.* (citing *People v. Risenhoover*, 70 Cal.2d 39, 73 Cal.Rptr. 533, 540, 447 P.2d 925, 932 (1968), *cert. denied*, 396 U.S. 857, 90 S.Ct. 123, 24 L.Ed.2d 108 (1969)).

In the case at bar, the criminal complaint was read aloud at the arraignment as follows: "Count 1, 4 PYTC § 1-130(B)(2), aggravated assault, on or about May 17, 2017

at approximately 3:20 p.m. at or near 7642 Camino Vahcom, Defendant committed aggravated assault by committing assault and using a deadly weapon or injurious instrument, to-wit, drove his vehicle into Officer Wells.” When Defendant moved to have this Count dismissed, the Tribe noted there was no definition in Count 1 and agreed with the defense. The Tribal judge dismissed Count 1 (and Count 4, which is not the subject of this action). Nonetheless, the Tribe then filed an appeal seeking review of the judge’s dismissal without prejudice. In addition, the Tribe noted in its initial brief that the *affidavit* contains sufficient facts to make Defendant aware of the nature of the charges against him. That affidavit, however, is not included in the current appeal record.

In a prior Pascua Yaqui case, *PYT v. Gonzales*, CA-07-017 (2007), the Tribal Court dismissed several counts against the Appellee for lack of probable cause. The Tribe appealed the dismissal, and Defendant moved to dismiss the appeal alleging the Tribe could bring the charges again. The Tribe responded that the Probable Cause Affidavit contained enough facts to find probable cause on each of the dismissed counts. The Tribe, however, did not include the affidavit, which is also true in the instant case. There is no affidavit in the appellate record. In *Gonzales*, this Court stated that without the affidavit, it could not determine whether there was probable cause to support each count and prevent dismissal of the appeal.

According to 4 PYTC § 1-130 (B)(2), aggravated assault is committed when a person commits assault using a deadly weapon or dangerous instrument. Assault, according to 4 PYTC § 1-130(A) is intentionally, knowingly or recklessly causing any physical injury to another person, intentionally placing another person in reasonable apprehension of imminent physical injury, or knowingly touching another person with the intent to injure, insult or provoke such person.

In *Arizona v. Freaney*, 219 P.3d 1039 (2009), the Defendant was indicted on a charge of aggravated assault using a deadly weapon or dangerous instrument (aggravated assault as defined by A.R.S. § 13-1204(A)(2)), and having “intentionally placed [the victim] in reasonable apprehension of imminent physical injury” (assault as defined by A.R.S. 13-1203(A)(2)). *Freaney*, 219 P.3d at 1040. Although the indictment cited the assault statute and the aggravated assault statutes, the indictment

did not specify any subsections. Nonetheless, the Court noted that the indictment was not defective. *Id.* at 1041. However, prior to jury selection, the State moved to amend the indictment to change the theory of the underlying assault to “intentionally, knowingly, or recklessly causing any physical injury to another person” (A.R.S. § 13-1203(A)(1)), which the Supreme Court of Arizona ruled was an amendment that altered the elements of the charged offense; thus, it was a change in the nature of the offense. *Id.* at 1042.

Although the case at bar does not concern an amendment that has changed the nature of the offense, it is worth noting that the Court in *Freeney* stated that the elements required to prove a violation of A.R.S. § 13-1203(A)(2) differed from those required to prove a violation of A.R.S. § 13-1203(A)(1). Therefore, they were separate offenses. “When the elements of one offense materially differ from those of another -- even if the two are defined in subsections of the same statute --- they are distinct and separate crimes.” *Id.* at 1041 (citing *State v. Leenhouts*, 218 Ariz. 346, 349 (2008)).

In the case at bar, 4 PYTC § 1-130(A) (Assault) has three (3) subsections as follows:

- (1) Intentionally, knowingly or recklessly causing any physical injury to another person, or
- (2) Intentionally placing another person in reasonable apprehension of imminent physical injury; or
- (3) Knowingly touching another person with the intent to injure, insult or provoke such person.

The criminal complaint, on its face, specifies the section number for aggravated assault pursuant to Section 1-140 (B)(2), which the Tribe is relying on to prosecute Defendant. However, none of the abovementioned sections for assault in Section 1-140(A) are included in the complaint. Moreover, the Tribe also acknowledged that there was “no definition” in Count 1.

Accordingly, this Court finds that the Tribal Court did not abuse its discretion in dismissing Count 1 without prejudice.

V. Conclusion

For the foregoing reasons, the Tribal Judge’s order is affirmed.

So **ORDERED** this 3rd day of July 2017.

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

Chief Justice James Hopkins

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8 **IN THE PASCUA YAQUI COURT OF APPEALS**

9 **IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA**

10 PASCUA YAQUI TRIBE,
11 Plaintiff/Appellant

12 vs.

13 BUSTAMANTE, JOSHUA
14 Defendant/Respondent


15 **APPEALS CASE NO: CA-17-004**

16 **TRIBAL COURT NO: CR-17-169**

17 **APPELLANT'S REPLY TO APPELLEE'S
18 RESPONSE BRIEF**

19 COMES NOW, the Pascua Yaqui Tribe by and through the Pascua Yaqui Chief
20 Prosecutor, OSCAR J. FLORES, and the undersigned Deputy Prosecutor, KENDRICK
21 WILSON, and hereby respectfully submits the following Reply to Appellee's Response
22 Brief.

23 Respectfully submitted this 23rd day of June, 2017.

24 
25 Oscar J. Flores
Chief Prosecutor


Kendrick Wilson
Deputy Prosecutor

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

On:

1 Copy Mailed/Delivered to:

2

3 Honorable Judge Margaret Flores
4 Pascua Yaqui Tribal Court

5

6 Sara Dent
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1 **I. THE CRIMINAL COMPLAINT DID NOT VIOLATE APPELLEE’S DUE PROCESS**
2 **RIGHTS.**

3 Despite Appellee’s claim that the method by which the Tribe filed aggravated
4 assault charges against him violated his Due Process rights, “[A]n indictment need not
5 specify which overt act, among several named, was the means by which a crime was
6 committed.” *Schad v. Arizona*, 501 U.S. 624, 631 (1991). Moreover, “[a]lthough a jury
7 must find unanimously that the defendant committed a criminal act, a defendant is not
8 entitled to a unanimous verdict on the precise manner in which a crime was committed,”
9 *State v. Delgado*, 232 Ariz. 182, 188, 303 P.3d 76, 82 (Ariz. App. 2013); *PYT v.*
10 *Miranda*, CA-08-015, p.22 (Ct. App. 2009) (“[W]hile decisions of the Arizona . . . [c]ourts
11 are not controlling authority in this Court, they are highly persuasive”). Appellee also
12 provides no support for his conclusion that the election of the specific method of
13 committing assault must be elected in the charging document. Thus, any concerns
14 about proceeding under multiple theories is premature. Appellee also ignores the
15 holding in *United States v. Carrasco*, which specifically held that a supporting affidavit
16 may suffice to provide adequate notice when a criminal complaint does not meet the
17 requisite specificity. 257 F.3d 1045, 1051 (9th Cir. 2001).
18

19 **II. PREVIOUS CRIMINAL COMPLAINTS ARE NEITHER PERSUASIVE, NOR**
20 **PRECEDENT.**

21 Although Appellee notes that his Motion to Strike the Tribe’s Notice of Appeal
22 was not made part of the record, even if this Court were to consider that Motion, nothing
23 in the attached redacted Criminal Complaint from a prior case has any bearing on this
24 case. Defendant cites no authority for the premise that the Tribe is bound by previous
25

1 charging decisions in which more specificity than is required by law was provided.
2 Consequently, even if the Motion to Strike were part of the record, this Court should
3 give the attached criminal complaint no weight.

4 **REMEDY REQUESTED**


5 The Tribe respectfully requests that the Court of Appeals overturn the trial court's
6 dismissal of Count One, as the Criminal Complaint did not violate Defendant's Due
7 Process rights. Consequently, the Tribal Court had no basis for dismissal of Count
8 One.

9 **CONCLUSION**

10 For the foregoing reasons, the Tribe respectfully requests that the Tribal Court's
11 dismissal of Count One be reversed and remanded.
12

13
14 Respectfully submitted this 23rd day of June, 2017.

15 
16 _____
17 Oscar J. Flores
18 Chief Prosecutor

15 
16 _____
17 Kendrick Wilson
18 Deputy Prosecutor

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

PASCUA YAQUI TRIBE,

Appellant,

vs.

BUSTAMANTE, Joshua E.,

Appellee.

) APPELLATE CASE NO. CA-17-004

) PASCUA YAQUI TRIBAL COURT NO.:

) CR-17-169

RESPONSE BRIEF

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STATEMENT OF THE FACTS AND PROCEEDINGS

Mr. Bustamante objects to Appellant's Statement of Facts as they are not properly before this Court. The Pascua Yaqui Rules of Appellate Procedure ("Appellate Rules") clearly provides that a Statement of Facts should only include "facts relevant to the issues presented for review, with appropriate references to the record." 3 PYTC § 2-3-130(A)(4). Besides including alleged "facts" that have yet to be proven and are not relevant to the issue before this Court, Tribe fails to cite to any relevant portions of the recording of the original hearing. The Appellate Rules prohibit the inclusion of "evidentiary matters unless material to a proper consideration of the issues presented, in which instance reference shall be made to the record or page of the transcript where such evidence appears." 3 PYTC § 2-3-130(A)(4)(a). The Appellant's Statement of Facts fails to comport with the Rules of Appellate Procedure.

Appellee provides the following statement of the facts and proceedings.

On May 18, 2017, a Criminal Complaint was filed against Appellee Joshua Bustamante, for an incident alleged to have occurred on May 17, 2017. [*PYT v. Joshua E. Bustamante*, Pascua Yaqui Trial Court Record, document 11, hereinafter "Record at 55"].

At the Arraignment on May 24, 2017, trial court on its own, addressed the language missing in Count 4 of the complaint (Disobedience of a Lawful Order), and gave leave to Tribe to amend and include missing language. [Recording of the Proceedings; Arraignment Hearing 5.24.17, 10:17-11:54, hereinafter "RoP at xx:xx-xx:xx"] trial court gave Tribe the opportunity to amend the deficient count, but Tribe was not prepared to do so, based on not having a copy of the relevant tribal code to refer to in court. [RoP at 11:54-12:11] At that time Mr. Bustamante also noted the deficiency in the language in Count One, pointing out that the type of assault that allegedly occurred that was

then aggravated, had not been designated. [RoP at 12:10-12:39] Trial court provided Tribe the opportunity to respond to this deficiency as well, and Tribe stated it “has no response” and conceded that there was “no definition in Count 1” as to the type of assault alleged to have occurred. [RoP at 12:44-12:55] With Tribe being unprepared and unable to orally amend the defective portions of the complaint, trial court dismissed both Count 1 and Count 4 without prejudice, with the expectation that Tribe would quickly remedy the deficiencies by amending and refiling a corrected complaint. [RoP 13:15-14:07] Mr. Bustamante plead ‘not guilty’ to the remaining two counts, and the matter was set concurrent with Count One in TR-17-017, for a bench trial on July 19, 2017. [RoP at 14:07-14:50; RoP at 16:37-16:50; RoP at 19:44-19:48; Record at 5]

ARGUMENT

In its Opening Brief, the Tribe fails to clearly designate an articulated issue on appeal, and instead proceeds with two arguments as to why the criminal complaint is in compliance with Pascua Yaqui Tribal Criminal Procedure, and that Mr. Bustamante’s due process rights were not violated.

For the reasons set forth below, Mr. Bustamante argues that the trial court did not abuse its discretion when it dismissed Count Four without prejudice to refiling, for lack of notice to Mr. Bustamante as to the complete charge against him. This Court should not disturb the trial court’s order.

A. Due Process Guarantees Adequate Notice of the Charges Under Any Rubric.

Adequate notice of the charges is a right protected at the Tribal, State, and Federal level. (Art. 1, § 1(h), Const. Pascua Yaqui Tribe; Title Three, Part Two, Chapter 2-2, Pascua Yaqui

Criminal Procedure; Ariz. Const. art. II, §§ 4 & 24; U.S Const. amends. V, VI, XIV; Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301 *et seq.*)

Although tribal governments are not subject to the Bill of Rights or the 14th Amendment to the United States Constitution (*Talton v. Mayes*, 163 U.S. 376 (1896)), criminal prosecutions in tribal courts must comply with ICRA (25 U.S.C. §§ 1301 *et seq.*) Criminal prosecutions in the Pascua Yaqui Tribal Court must also comply with the provisions of the Constitution of the Pascua Yaqui Tribe.

The Constitution of the Pascua Yaqui Tribe and ICRA both provide that a person may not be deprived of liberty without due process of law, with ICRA specifically articulating one of those due process rights as being that a defendant “must be informed of the nature and cause of the accusation...” (Art. 1, § 1(h), Const. Pascua Yaqui Tribe; 25 U.S.C. § 1302(6)).

The Pascua Yaqui Rules of Criminal Procedure echo these federal and constitutional guarantees, with the language guaranteeing notice to the defendant in the complaint, of the crime alleged. 3 PYTC § 2-2-90.

The complaint filed in this matter lacked notice to Mr. Bustamante, as to which of the three possible theories of assault the Tribe was proceeding under, that was to be aggravated in the alleged manner. [See Record at 11] Contrary to Tribe’s assertion that they identified the applicable section of the code, the only specification made was to the theory of the aggravation. (*Id.*; *See also* Tribe’s Brief, page 6, lines 19-23). Under the Pascua Yaqui code, much like in Arizona law, it is possible to commit an assault in three separate and distinct ways. (4 PYTC § 1-130(A) *See also* A.R.S. § 13-1203(A)). Section ‘B’ of the Pascua Yaqui tribal assault code assumes that some defined or previously designated assault had occurred, that was then aggravated by one of the articulated methods. (4 PYTC § 1-130(B)).

Due process requires that a defendant be given “notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge.” (*State v Rivera*, 207 Ariz. 69, ¶ 12, 83 P.3d 69, 73 (App. 2004)(citations omitted.)) “A fair trial, as the United States Supreme Court has observed, is ‘one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.’” (*State v Sanders*, 205 Ariz. 208, ¶ 17, 68 P.3d 434, 440 (App. 2003), quoting *Strickland v Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984)). “With respect to charging an offense, this requirement, generally referred to as the ‘notice’ component of the [Sixth] Amendment, means that the indictment or information must describe the offense with sufficient specificity so as to enable the accused to prepare a defense and to permit him to avail himself of the protection against double jeopardy.” (*Sanders*, 205 Ariz. at ¶ 16, 68 P.3d at 439, citing *United States v Cruikshank*, 92 U.S. 542, 558 (1875)).

Mr. Bustamante was denied the basic due process guarantee of notice when Tribe failed to designate which theory of assault he was being accused of, that was being aggravated. The three subsections of assault under the Pascua Yaqui code are not simply variations of a single, unified offense, but are three separate and distinct crimes. Tribe is attempting to have three bites at the proverbial apple by declining to designate which theory of assault they are proceeding under, which by definition violates specific notice to Mr. Bustamante of what exactly he is charged with.

Trial court properly dismissed the complaint, after giving Tribe the opportunity to orally amend in court and they were unprepared to do so. There is no prejudice to refile the complaint with the correct language that satisfies due process protections, and the trial court order should stand.

B. Proceeding Under Multiple Theories For One Charge Violates Adequate Notice.

When the code is not clear, it is proper to look to Arizona law. (1 PYTC § 2-30(H)).

“Whether a charge is duplicitous is a legal question which this Court reviews *de novo*.” (*State v Ramsey*, 211 Ariz. 529, ¶ 5, 124 P.3d 756, 759 (App. 2005)). Adequate notice of the charges is a right protected by the state and federal constitutions. (See U.S. const. amends Five, Six and Fourteen; Ariz. const. article II, section Four and Twenty-four.) “Separate offenses must be charged in separate counts.” (*Ramsey*, 211 Ariz. 529 ¶ 6, 124 P.3d at 759, *citing* Ariz. R. Crim. P. 13.3(a); *Spencer v Coconino Superior Court*, 136 Ariz. 608, 610, 667 P.2d 1323, 1325 (1983); *State v Schroeder*, 167 Ariz. 47, 51, 804 P.2d 776, 780 (App. 1990)). “An indictment that charges separate or multiple crimes in the same count is duplicitous.” (*Ramsey*, 211 Ariz. 529, ¶ 6, 124 P.3d at 759, *citing Spencer*, 136 Ariz. at 610, 667 P.2d at 1325). “Duplicitous indictments are prohibited because they fail to give adequate notice of the charge to be defended, because they present the hazard of a non-unanimous jury verdict, and because they make a precise pleading of prior jeopardy impossible in the event of a later prosecution.” (*Id.*)

Both divisions of the Arizona appellate courts have agreed that the State may not charge assault under multiple theories, rather the State must be specific regarding which assault offense it is charging. (*Sanders*, 205 Ariz. 208, ¶ 44, 68 P.3d at 444-45; *In re Jeremiah T.*, 212 Ariz. 30, ¶ 12, 126 P.3d 177, 181 (App. 2006) (with the finding that the three subsections of A.R.S. § 13-1203(A) were three different crimes.))

Tribal courts do not have the same concerns as state courts do, with regards to unanimous verdicts or imprecise pleadings resulting in double jeopardy, as there are currently no felony level crimes that are prosecuted in tribal courts. The due process protections afforded to defendants

charged of all levels of crime however, are within the concern of tribal court, and there have been safeguards implemented at many levels to ensure that due process is guaranteed. ((Art. 1, § 1(h), Const. Pascua Yaqui Tribe; Title Three, Part Two, Chapter 2-2, Pascua Yaqui Criminal Procedure; Ariz. Const. art. II, §§ 4 & 24; U.S Const. amends. V, VI, XIV; Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301 *et seq.*))

By refusing to designate which theory of assault a defendant is charged with under section 'A' that is to be aggravated in the manner designated under section 'B', Tribe is violating a defendant's due process right of notice of the charges against him by effectively charging him with three separate possible crimes in one count. The trial court properly dismissed the defective count in the criminal complaint that lacked sufficient notice, giving Tribe ample opportunity to remedy the defect.

C. Protecting Mr. Bustamante's Due Process Rights Was Not Abuse of Discretion.

"Due process is a fundamental right protected by the Pascua Yaqui Tribal Constitution and the Indian Civil Rights Act (ICRA). 25 U.S.C. § 1302(8) (2006)" (*PYT v Alma Soto*, CA-06-010, at 10). "...when there is a violation of a defendant's due process rights, it will be difficult to find an abuse of discretion on the part of the trial judge." (*Id.*)

Special actions, like interlocutory appeals by the government, are extraordinary writs. In a criminal case, the prosecutor is prohibited from appealing a judgment of acquittal, and therefore has a limited ability to challenge rulings (3 PYTC § 2-3-90(G)). Special actions emerged in the common law as a specific remedial writ in the face of erroneous, excessive, arbitrary, and or capricious government actions; the remedies are directed specifically at the state's role in the context of a proceeding. (*See PYT v Christopher Montana*, CA-12-001 at 2). Arizona permits special actions when (1) the trial judge has failed to exercise discretion which she has a duty to exercise, or to perform a duty required by law as to which she has no discretion; and (2) the trial judge has proceeded or is

threatening to proceed without or in excess of jurisdiction or legal authority, and (3) the judge's determination was arbitrary or capricious or an abuse of discretion. (*Id.*)

In this matter, the trial court was acting in a manner to protect Mr. Bustamante's fundamental due process right to be on notice of the charge he was alleged to have committed. The trial court provided Tribe with the opportunity to remedy the defect at the time of the arraignment, but they were unprepared to go forward with any amendments. In order to prevent any due process violation from occurring, the trial court dismissed without prejudice, two deficient counts in the complaint, leaving Tribe the ability to amend in order to comply with the notice requirements of due process.

Mr. Bustamante notes that the record on appeal does not include his motion to strike the notice of appeal, filed on June 2, 2017. This motion included an example of another instance where Tribe properly designated the theory of assault, in addition to delineating the theory of aggravation. Tribe may not pick and choose when to observe due process rights. Mr. Bustamante is not clear if this can be taken into consideration or not, as it is not included in the record provided, but it was submitted to this Court and ruled upon on June 7, 2017.

Nevertheless, Tribe has not been prejudiced by the dismissal without prejudice to refile for deficient language that is easily remedied. Trial court did not abuse its discretion by protecting a defendant's rights, while providing ample opportunity for Tribe to comply with the rules.

CONCLUSION

The trial court properly dismissed this matter without prejudice, in order to preserve Mr. Bustamante's due process right of having notice of the specific charge against him. By failing to designate which of the three possible theories of assault that Mr. Bustamante is accused of, Tribe is improperly charging three separate crimes in one count. Trial court did not act in any manner that

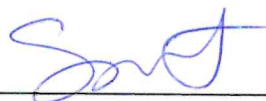
risers to the level of an arbitrary or capricious manner, and did not abuse its discretion by protecting the fundamental values of the Pascua Yaqui constitution and code.

Additionally, Appellant's brief fails to comport with the basic rules set forth in 3 PYTC § 2-3-130, in that it includes a recitation of some facts that are irrelevant to the Appeal.

For the reasons stated above, Appellee Mr. Bustamante requests this Court to leave the order of dismissal without prejudice by the trial court undisturbed.

DATED this 21st day of June, 2017

PASCUA YAQUI PUBLIC DEFENDER



Sara L. Dent
Senior Staff Attorney
Attorney for Appellee

Original delivered this date to:

Clerk of the Court of Appeals; Linda.Imonode@pascuayaqui-nsn.gov

Copy delivered electronically to:

Pascua Yaqui Tribal Court – Ben.Casey@pascuayaqui-nsn.gov

Pascua Yaqui Chief Prosecutor - Oscar.J.Flores@pascuayaqui-nsn.gov

Pascua Yaqui Prosecutor's office – Kendrick.Wilson@pascuayaqui-nsn.gov

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

.....

1 PASCUA YAQUI TRIBE
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2 7777 S. CAMINO HUIVISIM
TUCSON, ARIZONA 85757
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4 Kendrick Wilson
Deputy Prosecutor

5 **IN THE PASCUA YAQUI COURT OF APPEALS**

6 **IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA**

7 PASCUA YAQUI TRIBE,
8 Plaintiff/Appellant

9 vs.

10
11 BUSTAMANTE, JOSHUA
12 Defendant/Respondent

APPEALS CASE NO: CA-17-004

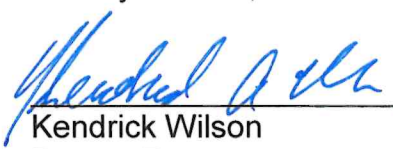
TRIBAL COURT NO: CR-17-169

APPELLANT'S OPENING BRIEF

13
14 COMES NOW, the Pascua Yaqui Tribe by and through the Pascua Yaqui Chief
15 Prosecutor, OSCAR J. FLORES, and the undersigned Deputy Prosecutor, KENDRICK
16 WILSON, and hereby respectfully submits the following Opening Brief.

17 Respectfully submitted this 14th day of June, 2017.

18
19 
20 Oscar J. Flores
Chief Prosecutor

21 
22 Kendrick Wilson
23 Deputy Prosecutor

PY 004-17/06/14 PM 11:22

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

3 On:

4 Copy Mailed/Delivered to:

5 Honorable Judge Margaret Flores
6 Pascua Yaqui Tribal Court

7 Sara Dent
8 Office of Public Defender
9 Attorney for Defendant/Respondent

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1 **FACTS:**

2 On May 18, 2017, the Tribe filed a Criminal Complaint and a four page probable
3 cause affidavit by Detective Jacob Garcia, alleging multiple charges against
4 Defendant/Respondent Joshua Bustamante under Pascua Yaqui Tribal Court in case
5 number CR-17-169. Among other charges, the Tribe charged Defendant with Count
6 One: Aggravated Assault, citing 4 PYTC § 1-130 (B) (2). The following language was
7 included for Count One: "On or about May 17, 2017 at approximately 3:20 p.m., at or
8 near 7642 Camino Vahcom, Defendant committed aggravated assault by committing
9 assault and using a deadly weapon or dangerous instrument, to wit: Drove his vehicle
10 into Officer Wells." See Criminal Complaint and Probable Cause Affidavit, attached as
11 Exhibit One. On page 2 of the Probable Cause Affidavit, Detective Garcia wrote that
12 "Joshua [Bustamante] asked Officer Wells why [he was being ordered to exit the
13 vehicle], and Officer Wells responded by telling him that the vehicle was reported stolen.
14 Joshua immediately got into the driver's seat and slammed the door and started the
15 vehicle. Officer Wells pulled out his gun and pointed it at Joshua and ordered Joshua
16 repeatedly to shut the vehicle off. Officer Wells was standing next to the front left fender
17 of the vehicle when the vehicle drove forward and hit Officer Wells' left leg." See *Id.*

18
19 On May 24, 2017, Defendant appeared for a scheduled arraignment hearing, at
20 which time his counsel moved the trial court to dismiss Count One because the
21 language in the Complaint did not specify the underlying theory of assault for the
22 aggravated assault charge. The trial court granted Defendant's motion. The Tribe now
23 appeals. For the following reasons, the trial court's dismissal of Count One was an
24 abuse of discretion.
25

1 **ARGUMENT:**

2 **I. THE CRIMINAL COMPLAINT COMPLIED WITH THE PASCUA YAQUI RULES**
3 **OF CRIMINAL PROCEDURE.**

4 The Pascua Yaqui Rules of Criminal Procedure spell out the requirements of a
5 Criminal Complaint, which must be filed before a case may be initiated. Specifically, a
6 Criminal Complaint must contain “(1) a written statement, describing in ordinary
7 language the offense committed, including the time and place as nearly as may be
8 determined, and the name or description of the person alleged to have committed the
9 offense; and (2) The section of the Tribal Code allegedly violated.” 3 PYTC § 2-2-90
10 (B). The Pascua Yaqui Criminal Code defines aggravated assault. In relevant part, “[a]
11 person commits aggravated assault if such person commits assault under any of the
12 following circumstances: (1) [i]f such person causes serious physical injury to another,
13 (2) [i]f such person uses a deadly weapon or dangerous instrument, (3) [i]f such person
14 is 18 years of age or more and commits the assault upon a child of 15 years or younger,
15 (4) [i]f such person commits the assault while the victim is bound or otherwise physically
16 restrained or while the victim’s capacity to resist is substantially impaired.” 4 PYTC § 1-
17 130 (B).
18

19 In the Criminal Complaint in this case, the Tribe identified 4 PYTC § 1-130 (B) (2)
20 as the section of the Criminal Code that the Defendant was alleged to have violated.
21 The Complaint specified that the theory of aggravated assault was that Defendant had
22 committed assault using a deadly weapon or dangerous instrument. The Complaint
23 went on to specify that Defendant was alleged to have driven his car into Officer Wells.
24 Consequently, the requirements of 3 PYTC § 2-2-90 (B) had been met and Defendant
25

1 had been given ample notice of the allegations against which he would have to mount a
2 defense.

3 **II. DEFENDANT’S DUE PROCESS RIGHTS WERE NOT VIOLATED**

4 At the arraignment hearing, Defense counsel’s basis for requesting dismissal of
5 Count One was specifically that Defendant’s due process rights had been violated by
6 not specifying the underlying theory of simple assault that was aggravated by the use of
7 a deadly weapon or dangerous instrument. Defendant is mistaken, however, as Due
8 Process does not require such an extreme level of specificity in the Criminal Complaint.
9

10 “[A]n indictment need not specify which overt act, among several named, was the
11 means by which a crime was committed.” *Schad v. Arizona*, 501 U.S. 624, 631 (1991).
12 Furthermore, “[A]n indictment is sufficient if it, first, contains the elements of the offense
13 charged and fairly informs the defendant of the charge against which he must defend,
14 and, second, enables him to plead an acquittal or conviction in bar of future
15 prosecutions for the same offense.” *United States v. Davis*, 336 F.3d 920, 922 (9th Cir.
16 2003) quoting *United States v. Bailey*, 444 U.S. 394, 414 (1980) (encl.). “[A]s long as
17 only one charge is alleged in a count of an indictment, jurors may ‘reach a verdict based
18 on a combination of alternative findings.” *State v. Payne*, 233 Ariz. 484, 508, 314 P.3d
19 1239, 1263 (Ariz. 2013) quoting *State v. Dann (Dann III)*, 220 Ariz. 351, 367, 207 P.3d
20 604, 620 (Ariz. 2009); *PYT v. Miranda*, CA-08-015, p.22 (Ct. App. 2009) (“[W]hile
21 decisions of the Arizona . . . [c]ourts are not controlling authority in this Court, they are
22 highly persuasive”). Additionally, a “jury need not be unanimous as to the theory of first
23 degree murder as long as all agree that the murder was committed.” *State v. Gomez*,
24 211 Ariz. 377, 390, 79 P.3d 64, 77 (Ariz. 2003).
25

1 Additionally, even assuming *arguendo* that the specific underlying theory of
2 assault must be listed on the criminal complaint, which appellant does not concede,
3 there is settled federal case law that when a complaint does not contain specificity that
4 is supplied by a probable cause affidavit, the language in the probable cause affidavit
5 can cure the defect in the complaint. *See United States v. Carrasco*, 257 F.3d 1045,
6 1051 (9th Cir. 2001) (Though complaint did not specify the items defendant was alleged
7 to have illegally possessed, but merely charged him with being a felon in possession of
8 a firearm or ammunition, where the supporting affidavit stated that the officers
9 discovered a revolver, bullets, and shotgun shells in defendant's car, the charge in the
10 criminal complaint fairly encompassed all those items). Certainly the level of specificity
11 in Detective Garcia's Probable Cause Affidavit gave Defendant ample notice as to the
12 conduct for which he would have to mount a defense.

14 **REMEDY REQUESTED**

15 The Tribe respectfully requests that the Court of Appeals overturn the trial court's
16 dismissal of Count One, as the Criminal Complaint complied with the requirements
17 outlined in 3 PYTC § 2-2-90 (B) and did not violate Defendant's Due Process rights.
18 Consequently, the Tribal Court had no basis for dismissal of Count One.


1 **CONCLUSION**

2 For the foregoing reasons, the Tribe respectfully requests that the Tribal Court's
3 dismissal of Count One be reversed and remanded.

4

5 Respectfully submitted this 14th day of June, 2017.

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7 
8 _____
9 Oscar J. Flores
10 Chief Prosecutor

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8 _____
9 Kendrick Wilson
10 Deputy Prosecutor

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4 Kendrick Wilson
5 Deputy Prosecutor

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

9 PASCUA YAQUI TRIBE,
10 Appellant,

11 Vs.
BUSTAMANTE, Joshua

12 Defendant/Respondent.

APPEALS CASE NO.: CA-17-004

(Tribal Court No. CR-17-169)

**RESPONSE TO MOTION TO STRIKE
NOTICE OF APPEAL**

13 The Pascua Yaqui Tribe, by an through undersigned counsel,
14 hereby responds to Defendant's Motion to Strike Notice of Appeal.
15 Defendant/Respondent's Motion is a premature attempt to argue the
16 merits of the appeal. Although argument will be more fully
17 developed in appropriate briefing, neither Due Process nor the
18 Tribe's Rules of Criminal Procedure require the Tribe to elect the
19 underlying method of assault in a Criminal Complaint. See *State v.*
20 *Delgado*, 232 Ariz. 182, 188, 303 P.3d 76, 82 (Ariz. App. 2013)
21 ("Although a jury must find unanimously that the defendant
22 committed a criminal act, a defendant is not entitled to a
23 unanimous verdict on the precise manner in which a crime was
24 committed"); 3 PYTC § 2-2-90 (B) ("Complaints shall contain: (1) A
25 written statement, describing in ordinary language the offense
26 committed, including the time and place as nearly as may be
27

1 determined, and the name or description of the person alleged to
2 have committed the offense; and (2) The section of the Tribal Code
3 allegedly violated").

4
5 Pascua Yaqui Rules of Appellate Procedure do not allow for
6 appeal of a judgment after trial by the prosecution. 3 PYTC § 2-3-
7 90(G). Thus, this form of pre-trial appeal is the only action
8 available to the Tribe for review of an issue that substantively
9 affects trial. If the trial court's ruling stands, the Tribe will
10 be subject to decisions by the Tribal Court that are contrary to
11 law. Defendant/Respondent's attachment indicating that at some,
12 unspecified, previous time the Tribe filed a criminal complaint
13 that specified the underlying method of assault on an aggravated
14 assault is neither precedent nor even persuasive that the Tribe is
15 required to make such specificity in a criminal complaint.

16 Because the issue raised has not previously been litigated in
17 the Pascua Yaqui Court of Appeals and because the Tribal Court
18 ruling is contrary to law, the Tribe respectfully requests that
19 this Court deny Defendant's premature Motion to Strike Notice of
20 Appeal.

21 **Respectfully submitted this 2nd day of June, 2017.**

22 OFFICE OF THE PROSECUTOR
23 PASCUA YAQUI TRIBE

24 
25 Oscar J. Flores
26 Chief Prosecutor

27 
28 Kendrick Wilson
Deputy Prosecutor

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Original delivered/mailed
This **date** to:
Clerk of the Court, Pascua Yaqui Tribe Court of Appeals
Copy delivered/mailed to:
Pascua Yaqui Tribal Court
Pascua Yaqui Appellate Court
Sara Dent
Public Defender's Office
Attorney for Defendant/Respondent

By:

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

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

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

PASCUA YAQUI TRIBE,
Plaintiff/Appellant,

vs.

BUSTAMANTE, JOSHUA,
Defendant/Respondent.

) Court of Appeals Case No:
) Trial Court Case No.: CR-17-169
) **MOTION TO STRIKE NOTICE OF APPEAL**

Pursuant to 3 PYTC Part II, Chapter 2-3, Section 80, Pascua Yaqui Tribe Rules of Appellate Procedure, counsel for Defendant/Respondent Joshua Bustamante respectfully files this Motion to Strike Tribe's a Notice of Interlocutory Appeal based on the following reasons:

1. Lack of Erroneous Government Action Needing Remedy

It is settled law that extraordinary writs are granted as remedial writs in the face of erroneous, excessive, arbitrary, and or capricious government actions. (Pascua Yaqui Court of Appeals, CA-12-001) In the Notice of Appeal dated May 24th, 2017, Tribe has failed to present any issue that rises to the level of erroneous, excessive, arbitrary, and or capriciousness, resulting in any request for relief unwarranted.

2. No Prejudice to Tribe to Remedy.

The alleged wrong Tribe seeks a remedy for was merely the trial court dismissing a charge **without prejudice**, based on the lack of notice to defendant as to definition of mens rea Tribe needs to prove at trial for that charge. There can be no abuse of discretion, as Tribe alleges, when 1) there is no prejudice to Tribe to refiling a correct complaint, especially when they have filed correctly defined complaints in the past (Please see attached); and 2) Trial Court is merely protecting a defendants due process right to have notice of the charges against him.

1
2 Respectfully submitted this 2nd day of June, 2017.
3

4 PASCUA YAQUI PUBLIC DEFENDER

5 

6 _____
7 Sara L. Dent
8 Senior Staff Attorney
9

10 Original delivered/mailed this date to:

11 Clerk of the Court, Pascua Yaqui Court of Appeals
12

13 Copy delivered/mailed to:

14 Honorable Judge M. Flores; Pascua Yaqui Tribal Court

15 O.J. Flores; Chief Prosecutor of the Pascua Yaqui Tribe

16 Kendrick Wilson, Deputy Prosecutor for Pascua Yaqui Tribe
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IN THE PASCUA YAQUI TRIBAL COURT
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME

2017 JAN -4 PM 1:58

DOCKET NO. CR-17-

CLERK *ml*

Pascua Yaqui Tribe,
Plaintiff,
vs.
Defendant.

Case No.

CRIMINAL COMPLAINT

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

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

On or about October 31, 2016 at approximately 8:30 p.m., at or near 5010 W. Calle Torim, committed aggravated assault by committing assault and using a deadly weapon or dangerous instrument, to wit: placed [redacted] co in reasonable apprehension of immediate physical injury by swinging a knife and attempting to stab [redacted]

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2 7777 S. Camino Huivisim
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3 Tucson, Arizona 85757
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4 Kendrick Wilson
5 Deputy Prosecutor

6 **IN THE PASCUA YAQUI COURT OF APPEALS**
7 **IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA**
8

9 PASCUA YAQUI TRIBE,
Appellant,

10 Vs.
11 BUSTAMANTE, Joshua

12 Defendant/Respondent.

APPEALS CASE NO.:

(Tribal Court No. CR-17-169)

NOTICE OF APPEAL
(Oral argument requested)

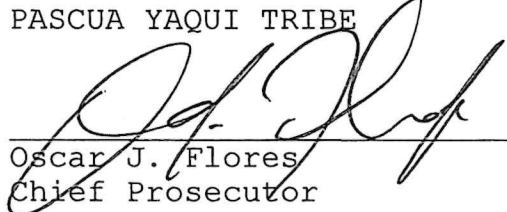
13
14 Notice is hereby given that the Pascua Yaqui Tribe appeals to
15 the Appellate Court of the Pascua Yaqui Tribe from the judgment
16 entered in this action by the Pascua Yaqui Tribal Court on May 24,
17 2017 by order of Presiding Judge Margaret Flores. [see attached]

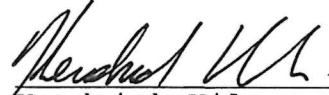
18 The Trial Court erred in ruling that the underlying theory of
19 assault in an aggravated assault must be identified in a Criminal
20 Complaint. Such a description is not necessary in a charging
21 document and dismissal of Count 1 constitutes an abuse of
22 discretion.

23 The Tribe appeals the Court's decision for the aforementioned
24 reasons. The Pascua Yaqui Tribe respectfully requests oral
25 argument and a three-Justice appellate proceeding. The Tribe
26 further requests an order for the Tribal Court to prepare and
27 submit the record to the Court of Appeals.

1 Respectfully submitted this 26th day of May, 2017.

2 OFFICE OF THE PROSECUTOR
3 PASCUA YAQUI TRIBE

4 
5 Oscar J. Flores
6 Chief Prosecutor

7 
8 Kendrick Wilson
9 Deputy Prosecutor

10 Original delivered/mailed
11 This date to:

12 Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

13 Copy delivered/mailed to:
14 Pascua Yaqui Tribal Court

15 Pascua Yaqui Appellate Court

16 Sara Dent
17 Public Defender's Office
18 Attorney for Defendant/Respondent

19 By:

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

PASCUA YAQUI TRIBE,)
Plaintiff,)
vs.)
BUSTAMANTE, JOSHUA,)
Defendant.)

Case No.: CR-17-169/TR-17-017
**ARRAIGNMENT HEARING AND ORDER
SETTING BENCH TRIAL**

This matter came before this Court on May 24, 2017 for a scheduled Arraignment hearing. The Defendant, Joshua Bustamante, was present and in custody. Charisse Arce appeared for the Tribe. Court-Appointed Counsel, Sara Dent, was present.

The Court finds that defense counsel waived the reading of the Defendant's rights and requested that the Court read the complaint. The Court read the complaint. Defense counsel moved the Court to dismiss Count 1 due to the lack of definition as to section A and moved the Court to dismiss Count 4 based upon the complaint not including the statute language. Upon hearing from the Tribe, the Court finds good cause to dismiss without prejudice Counts 1 and 4 based upon insufficient/incomplete language in the charges. The Defendant, through ocunsel entered a not guilty plea for Count 2 and Count 3.

Count 1:	<u>Aggravated Assault</u>	Plea: <u>Dismissed w/o prejudice</u>
Count 2:	<u>Assault & Battery on a Tribal Official</u>	Plea: <u>Not Guilty</u>
Count 3:	<u>Possession or Concealment of Stolen Property</u>	Plea: <u>Not Guilty</u>
Count 4:	<u>Refusal to Obey a Lawful Order</u>	Plea: <u>Dismissed w/o prejudice</u>

The Court will set the matter for Bench Trial hearing. The Court addressed conditions of release. The Tribe stated that the release conditions should remain as previously ordered. The Defendant, through counsel, requested that bond should be reduced in this matter due to two of the charges being dismissed. The Court finds good cause to grant the Tribe's recommendations.

THE COURT ORDERS that the Defendant's Motion to Dismiss Counts 1 and 4 is granted and the counts are dismissed without prejudice.

THE COURT FURTHER ORDERS that all parties shall appear before this Court for the **BENCH TRIAL hearing on JULY 19, 2017 AT 9:30 A.M..**

THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE

THE COURT FURTHER ORDERS THAT:


X The Defendant, Joshua Bustamante, shall be released only upon posting a concurrent cash

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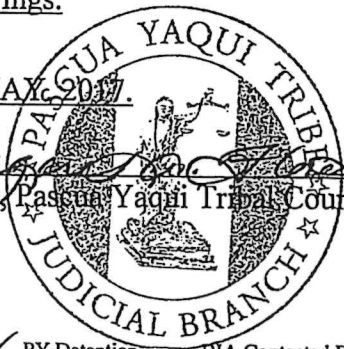
bond of \$5,000.00 for the matters of CR-17-169/TR-17-017 (to run consecutive to CR-09-300) prior to being released. If bond is not posted a transport order shall issue for the Defendant.

X Other: In the event that bond is posted the Defendant shall comply with the following: the Defendant shall comply with Pretrial supervision shall report to Pretrial within 24 hours after his release and thereafter at their discretion. The Defendant shall have not harm or harass Officer Kevin Wells. The Defendant shall not consume or possess any alcoholic beverages and any illegal drugs and shall be subject to random breath alcohol and drug testing by Pretrial Services. The Defendant shall obtain a substance abuse assessment by the Centered Spirit Program and comply with the recommendations. The Defendant shall obey all laws and appear for all future hearings.

SO ORDERED THIS 24TH DAY OF MAY, 2017.



Judge, Pascua Yaqui Tribal Court



Cc: Date May 26, 2017
 Tribe Defendant Defense Counsel Pretrial Services PY Detention BIA Contacted Detention Facility Other:
Monica Gomez
Clerk