No. CA-18-001

Pascua Yaqui Court of Appeals

Pascua Yaqui Tribe, Petitioner,
vs.
Hon. Melvin Stoof, Judge, Pascua Yaqui Tribal Court,
and
Antonio Julian Lopez, Real Party in Interest.

For Plaintiff: Oscar J. Flores, Chief Prosecutor; Kendrick Wilson and Coleen Thoene, Deputy Prosecutors, Pascua Yaqui Office of the Prosecutor

For Real Party in Interest: Annamarie L. Valdivia, Chief Public Defender for the Pascua Yaqui Tribe.

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Opinion & Order

I. Background

This case comes to the Appellate Court as a special action petition from the Pascua Yaqui's Office of the Prosecutor (hereinafter "Prosecutor") requesting review of a trial court order denying the Tribe's motion to preclude a prior felony conviction for impeachment.

II. Appellate Court Jurisdiction in Special Actions

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

The Pascua Yaqui Tribal Code (hereinafter "PYTC") is silent on the issue. While the PYTC specially prohibits interlocutory appeals in civil cases (3 PYTC §2-3-90(F)) and prohibits a governmental appeal of a judgment acquitting a defendant in a criminal matter (3 PYTC §2-3-90(D)), there is no PYTC reference to an interlocutory appeal or special action in a criminal proceeding. In reviewing prior Appellate Court opinions on the issue, it is clear that this Court has accepted various forms of interlocutory appeals, extraordinary writs, or special actions in criminal proceedings. *See Pascua Yaqui Tribe v. Coleman,* CA-15-0003 (PYT Ct. App. Nov. 17, 2015); *Pascua Yaqui Tribe v. Molina*, CA-14-003 (PYT Ct. App. June 6, 2014); *Pascua Yaqui Tribe v. Montana,* CA-12-001 (PYT Ct. App. July 23, 2013). The Appellate Court, however, has not articulated a clear rule regarding the circumstances under which special action jurisdiction is appropriate in a criminal proceeding.

In the absence of a clear rule, the PYTC does allow for this Court to adopt the laws of the State of Arizona. 1 PYTC §2-30(H); *Montana,* CA-14-003, at 2. The laws of the State of Arizona only permit special action review where no "equally plain, speedy, and adequate remedy is

available by appeal". Rule 1(a), Ariz. R. P. Spec. Act. Special action relief may only be granted where: 1) the trial judge has failed to exercise discretion which he/she has a duty to exercise, or to perform a duty required by law as to which he/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 trial judge's determination was arbitrary or capricious or an abuse of discretion. *See* Rule 3, Ariz. R. P. Spec. Act. This Court holds that in the absence of a clear rule in the PYTC, the Appellate Court formally adopts the Rules of the State of Arizona surrounding special action review.

We now turn to the merits and substance of the special action in this case. The Prosecutor seeks review of a pre-trial order in a criminal matter. It is clear that the Tribe has no plain, adequate, or speedy remedy available by appeal because 3 PYTC §2-3-90(D) prohibits governmental appeals after acquittal. Additionally, the special action petition alleges that the trial court abused its discretion when it ordered that a prosecution witness could be impeached with her 27 year old conviction. We therefore find that this is a matter within the Appellate Court's jurisdiction and warrants special action review by the Appellate Court.

III. The Tribe's Special Action Petition

Turning to the merits of the special action petition itself, the Tribe alleges that the trial court abused its discretion when it denied the Tribe's motion to preclude a prosecution witness' 27 years old conviction pursuant to 3 PYT R. Evid. 30(B). The trial court denied the Tribe's motion and instead ordered that the prosecution witness' prior conviction was excluded pursuant to PYT R. Evid. 30(B) but the prior conviction could be used pursuant to PYT R. 29(B) "as probative of the character for truthfulness of the witness, on cross examination. The Tribe's proposed witness' prior felony convictions may be used for impeachment purposes." Order Denying Tribe's Motion to Preclude Prior Felony Conviction as Impeachment." *Pascua Yaqui Tribe v. Lopez,* AC-17-020 (May 14, 2018).

In reviewing an alleged abuse of discretion by a trial court, most jurisdictions define an abuse of discretion as a "plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Rabkin v. Oregon Health Sciences Univ.,* 350 F.3d 967, 977 (9th Cir. 2003); *see also Coleman,* CA-15-003, at 2.

The PYTC contains formal rules of evidence that apply generally to both civil and criminal proceedings in the Pascua Yaqui Tribal Court. *See* PYTC Title 3, Part II, Chapters 2-4. The Rules of Evidence contain a specific provision regarding the issue at hand, impeachment of a witness by evidence of conviction of a crime. 3 PYT R. Evid. 30. This Court sees no reason to look any further than the PYT's Rules of Evidence on this issue and finds that Rule 30 specifically addresses the issue of whether a 27 year old conviction may be used to impeach a witness. Rule 30 reads as follows:

> (A) For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted, if it is elicited from the witness or established by public record, during cross examination, but only if the crime

(1) was punishable by death or imprisonment in excess of one year pursuant to the law under which he was convicted; or

(2) It involved dishonesty or false statement, regardless of the punishment.

(B) Evidence under this rule is not admissible if ten years have elapsed since the date of conviction or date of release from the confinement for that conviction whichever is the later; nor shall juvenile adjudications be admissible.

Rule 30(B) was clearly drafted with the intention to exclude convictions older than ten years for impeachment purposes. Therefore, a 27 year old conviction is well over the ten year limit imposed by the PYT Rules of Evidence.

We hold that the trial court abused its discretion in allowing the 27 year old conviction to be used pursuant to Rule 29(B) for impeachment purposes, when Rule 30 specifically prohibits its admittance for impeachment purposes. Additionally, this Court finds that in matters where the PYT Rules of Evidence specifically address an issue, like in this case, the Federal Rules of Evidence do not apply.

IV. Order

The Order Denying Tribe's Motion to Preclude Prior Felony Conviction as Impeachment is REVERSED. This case is REMANDED to the trial court to continue proceedings consistent with this Opinion.

Justice Kendra A. Martinez

We CONCUR:

Hon. Robert Miller

Hon. Rebecca Plevel

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

PASCUA YAQUI TRIBE, OFFICE OF THE PROSECUTOR Petitioner vs. Hon. Melvin Stoof, Judge, Pascua Yaqui Tribal Court, ANTONIO JULIAN LOPEZ, Real Party in Interest	APPELLATE CASE NO: CA-18-001 TRIBAL COURT CASE NO: AC-17-020

PETITIONER/APPELLANT'S REPLY BRIEF

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REQUEST FOR ORAL ARGUMENT

The parties agree that holding oral arguments in this case is in the interests of justice.[1] The Tribe, therefore, renews its request for oral argument based on 3 PYTC § 2-3-180, and 3 PYTC § 2-3-260(C)(6) & (D).

STATEMENT OF JURISDICTION

In his response, the Defendant/Real Party in Interest agreed that this Court has jurisdiction over this interlocutory appeal.[2] However, the Tribe notes that subject matter jurisdiction concerns a "court's power to hear a case." *United States v. Jacobo Castillo*, 496 F.3d 947, 952 (9th Cir. 2007) (*citations and quotations omitted*). It is not a power that can be "forfeited or waived." *Id.; see c.f. Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1095 (9th Cir. 1985) (noting, in context of a federal civil suit, that parties "cannot by stipulation or waiver grant or deny" subject matter jurisdiction). Thus, this Court must still determine whether it has jurisdiction over this matter. The Tribe further notes, as it did during its Opening Brief, that no detailed caselaw from the Pascua Yaqui Court of Appeals discusses when or who may file a criminal interlocutory appeal. Nor does local caselaw discuss what issues and circumstances would be appropriate for interlocutory review.[3] Because these are jurisdictional questions, they must be addressed by this Court even though both parties believe that jurisdiction exists. Accordingly, the Tribe urges the Court to accept jurisdiction based on the arguments raised in its Opening Brief.

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[1] *See* Real Party in Interest Response Brief, *PYT v. Lopez,* PYT CA-18-001, p.4.
[2] *Id.*
[3] The Court of Appeals only briefly analyzed special action jurisdiction in *Pascua Yaqui Tribe v. Montana*, CA-12-001 (PYT Ct. App. July 23, 2013), and did not provide a detailed discussion of the Arizona rules or related caselaw upon which it relied.

ISSUES PRESENTED FOR REVIEW

The Tribe presented a number of issues for this Court's review in its Opening Brief. In his response, the Defendant addressed some of those issues, but also raised three additional topics that were not included in the Tribe's brief. This Reply will respond to the following additional topics raised by the Defendant, in addition to addressing the Defendant's counterarguments to issues raised in the Opening Brief. [4]

5. Whether the trial court's written ruling that Ms. Montano's 1990 conviction is ripe for review when documentation of the facts underlying that conviction are unavailable due to the passage of nearly thirty years?
6. Whether the Indian Civil Rights Act, 25 U.S.C. § 1302, and due process grant a defendant a protected right to request that the admission of evidence against a defendant at trial be governed by a single, outdated federal evidentiary rule and associated caselaw in contravention of the rules of statutory construction, and when currently existing Tribal and federal rules more than adequately ensure due process?
7. Whether limiting a defendant's ability to cross examine Ms. Montano regarding her 1990 drug conviction will restrict his ability to adequately cross examine her as to the events she witnessed in 2017, and thereby deny him due process?

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[4] For the sake of clarity, these additional issues have been numbered sequentially following the four issues outlined in the Tribe's Opening Brief.

STATEMENT OF THE CASE

I. Facts and Proceedings Below:

The Tribe rests on the factual and procedural history summary included in its Opening Brief. The Tribe, however, notes that many of the records of Ms. Montano's 1990 drug conviction are so old that they have been purged. What limited records were available through Pima County Superior Court's online "Agave" system were provided to the trial court and defense counsel as an exhibit to the Tribe's motion to preclude use of the conviction at trial, and were included in the Tribe's materials submitted to this Court.

II. Summary of the Argument

The Defendant first argues that whether Ms. Montano's prior conviction may be admitted to impeach her at trial is not an issue that is ripe for review. Specifically, he claims that the issue is unripe because the parties lack knowledge of the exact facts that lead to Ms. Montano's conviction.[5] This argument is based on a mistaken interpretation of the "ripeness" doctrine. "Ripeness" in this context depends entirely on whether the trial court's ruling caused actual injury to a party, or whether injury is likely to occur. Because the trial court ruled that Ms. Montano's conviction is admissible at trial contrary to Tribal and Federal evidentiary rules, absent intervention by this Court, Ms. Montano will be cross examined at trial about her criminal history. Injury will, therefore, happen, and the issue is ripe for review.

The remainder of the Defendant's arguments focus on an overbroad interpretation of the due process rights afforded to Native criminal defendants by ICRA. The Defendant appears to argue, albeit indirectly, that ICRA allows a defendant to pick and choose not only what body of

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[5] *See* Real Party in Interest Response Brief, *PYT v. Lopez,* PYT CA-18-001, p.5.

law and rules should be applied to his case, but also which individual rules or cases should control the outcome of his case. As a result, he mistakenly argues that the admissibility of Ms. Montano's conviction is governed by an outdated version of Fed. R. Evid., Rule 608, and caselaw interpreting that version. What the Defendant forgets, however, is that the concepts of fairness and due process are not one-way streets that lead only in a defendant's direction. And nothing in tribal, federal, or state law allow a party to assume that outdated laws are controlling merely because they might be more beneficial to his case.

Based on the arguments and law presented in its Opening Brief, as well as the arguments presented below, the Tribe respectfully requests that this Court grant its requested relief.

LAW AND ARGUMENT

I. The issue of whether the trial court abused its discretion in ruling that Ms. Montano's 1990 conviction is admissible at trial is ripe for review because the trial court's order has already been entered.

The Defendant asserts that the Tribe's interlocutory appeal is not ripe for review because no information has been provided regarding the specific facts and circumstances that resulted in Ms. Montano being convicted for conspiracy to sell a narcotic drug in 1990. This argument fails for two reasons. First, "ripeness" is not an issue because the trial court has already issued a ruling regarding the conviction's admissibility. This is a ruling that is reviewable on interlocutory appeal. Second, the admissibility of prior convictions pursuant to Fed. R. Evid. 609 — which substantially mirrors PYT R. Evid., Rule 30 — does not depend in any way on the introduction of extrinsic evidence.

A. The trial court's ruling regarding the admissibility of Ms. Montano's conviction is ripe for review because the ruling is final, and means that injury caused by the court's ruling is "certainly likely."

It is well settled that courts lack jurisdiction to evaluate any claim unless it is ripe for review. *United States v. Streich*, 560 F.3d 926, 931 (9th Cir. 2009). Ripeness "is peculiarly a question of timing." *Id.* (*quoting Thomas v. Union Carbide Agr. Prods. Co.*, 472 US 568, 580 (1985). "A claim is not ripe if it involves contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* (*internal citations and quotations omitted*). A litigant does not need to await actual injury in order to obtain some sort of preventative relief. *Id.* So long as the injury is "certainly impending," the issue presented is fit for judicial decision, and the parties would suffer hardship if such decision is withheld until actual injury occurs, the issue will be considered ripe for judicial review. *Id.*

Here, the Defendant argues that the fact that he lacks information concerning the exact circumstances surrounding Ms. Montano's conviction renders review of the trial court's order regarding its admittance at trial unripe for appellate review. The Defendant is mistaken as this extrinsic evidence has no bearing on ripeness. The trial court has already ruled that the conviction can be admitted at trial. Although one can argue that actual injury has yet to happen because trial has yet to commence, the prejudice that will be caused to the prosecution by allowing the defense to impeach Ms. Montano with an ancient, irrelevant conviction is more than certainly impending *because of* the trial court's ruling. Thus, the issue is ripe for review.

B. "Ripeness" does not depend on the extrinsic details of Ms. Montano's conviction as Fed. R. Evid., Rule 608(b) prohibits the use of extrinsic information regarding a witness' prior at trial except under very limited circumstances.

The Defendant also argues that the Tribe's interlocutory appeal is not ripe because he does not have information concerning the extrinsic facts of Ms. Montano's conviction. Specifically, he claims that the trial court's ruling as to admissibility cannot be reviewed without

knowing whether Ms. Montano's conviction involved some element of dishonesty or moral turpitude. As discussed above, "ripeness" is an issue of timing, and not one of extrinsic facts. Furthermore, Fed. R. Evid., Rule 608(b) specifically states that "*extrinsic evidence is not admissible to prove specific instances of a witness's conduct* in order to attack or support the witness's character for truthfulness." (*emphasis added*); *see also United States v. Osazuwa*, 564 F.3d 1169, 1175 (9th Cir. 2009). The scope of inquiry is purposefully limited by the rule "because of the unfair prejudice and confusion that could result from eliciting details of the prior crime." *Id.* Accordingly, this argument has absolutely no bearing on ripeness.

II. Neither ICRA, Tribal or federal law allows the Defendant to require the use of a single, older federal rule of evidence and related caselaw to the exclusion of all current Tribal and federal law.

The Defendant asserts that the Indian Civil Rights Act, codified in 25 U.S.C. § 1301-1303, grants him a "protected right to apply the Federal Rules of Evidence in [his] case." *See Response, Lopez,* CA-18-001, at p.4. In doing so, he relies primarily upon 3 PYTC § 2-2-430(c) which states, "*Whenever due process or the court requires*, the Federal Rules of Evidence shall be adopted in any trial proceeding or evidentiary hearing, unless otherwise found by the court to have been voluntarily and intelligently waived by the defendant." (*emphasis added*).

The Tribe notes that the Defendant's desired application of this rule is problematic from a construction standpoint for two reasons. First, the text of the rule itself suggests that, rather than being applied as a matter of course in every criminal case, it should only be invoked when Tribal rules and procedures fail to adequately protect a defendant's due process rights, or when the trial court requires its application. Second, application of this rule in a particular case serves to render an entire chapter of the Pascua Yaqui Tribal Code superfluous. *See Corley v. United States*, 556 U.S. 303, 314 (2009) (laws within a statutory scheme are to be interpreted "so that effect is given to all its provisions" and "so that no part will be inoperative or superfluous, void or

insignificant.") However, whether 3 PYTC § 2-2-430(c) has been correctly invoked in the Defendant's particular case is not an issue that this Court needs to address in order to resolve the interlocutory appeal. This is because Ms. Montano's conviction is inadmissible under both Tribal and Federal law.

The Indian Civil Rights Act, codified in 25 U.S.C. § 1301-1303, grants Native defendants the same due process rights afforded to non-Native defendants under the Bill of Rights. 25 U.S.C. § 1302(a)(8) specifically prohibits tribal governments from "deny[ing] to any person within its jurisdiction the equal protection of its law or depriv[ing] any person of liberty or property without due process of law." The Pascua Yaqui Tribal Constitution includes the same protections outlined in ICRA. *See* Art. I, § 1 Pascua Yaqui Tribal Const.. The Defendant relies upon these guarantees to urge this Court to entertain a unique proposition: namely, that due process requires that a defendant be allowed to pick and choose not only which body of laws should apply to his case, but also which historic version should be used.

Other than citing to ICRA, the Defendant did not provide authority from any jurisdiction that supports his proposition. The Tribe has likewise been unable to find any authority suggesting that the Defendant's argument is correct, because there is none. Indeed, even the most generous reading of ICRA or the Tribal and Federal Constitutions does not support the proposition that a party may rely upon a historical version of a law simply because that particular version might be more beneficial to his case.

III. The Defendant's arguments regarding the admissibility of Ms. Montano's conviction are based on an old version of the Federal Rules of Evidence, and case law interpreting those older versions.

As the trial court did in its ruling, the Defendant relies heavily upon *United States v. Ortega*, 561 F.2d 803 (9th Cir. 1977) in support of his argument that Ms. Montano's conviction is admissible pursuant to Fed. R. Evid., Rule 608 — and, by extension, 3 PYT R. Evid., Rule 29.

Specifically, the Defendant relies upon *Ortega* for the proposition that evidence of a non-defense witness' prior conviction can be admitted without determining whether the prejudicial effect of the evidence greatly outweighs its probative value. He asserts that, because *Ortega* has not been specifically overruled, it is still considered good law. His argument carries the implication that, because *Ortega* has not been directly overruled by name, it carries more persuasive and precedential weight than current caselaw interpreting current versions of the Federal Evidentiary Rules.

In its Opening Brief, the Tribe extensively discussed the history of Fed. R. Evid., Rules 608 and 609 and when relevant amendments took effect. Those discussions will not be reiterated here. However, while *Ortega* has not been flagged by Westlaw as having been overturned,[6] *Ortega* was decided the same year as *United States v. Nevitt*, 563 F.2d 406, 408 (9th Cir. 1977). *Nevitt* addressed the same issue that *Ortega* did, and also concluded that the federal rules barred the use of any sort of balancing test when determining whether a witness' prior conviction was admissible under Rule 608. *Id. Nevitt* was addressed by name in the Ninth Circuit's ruling in *United States v. Rowe*, 92 F.3d. 928, 933 (9th Cir. 1996), a federal case which analyzed the same issue addressed by *Nevitt* and *Ortega.* The *Rowe* court, not surprisingly, concluded that courts must engage in Fed. R. Evid., Rule 403 balancing test even when admitting prior convictions under Rules 608 and 609 *because the law had changed.*

The Defendant's reliance upon *Ortega* is misplaced because it analyzed a version of the Federal Evidentiary Rules that is no longer in effect. Accordingly, the Tribe respectfully requests that relief be granted.

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[6] The Tribe notes that the Keycite and/or "Sheparding" flags included with cases and statutes on Westlaw are only as good as the individuals who put them there. Every day, hundreds of opinions are written in just as many cases across the United States. Sometimes, the research engine employees responsible for flagging cases make mistakes, and miss flagging cases that have been affected by a change in statutory law. This error does not mean that the incorrectly flagged case is still good or current law. Indeed, this Court is in no way bound by Westlaw's internal legal research.

IV. Precluding use of Ms. Montano's conviction at trial will not violate the Defendant's Confrontation rights because courts have the authority to limit a defendant's ability to cross-examine a witness.

All defendants have a right to confront the witnesses that the prosecution calls against them at trial. That being said, courts have "considerable discretion in restricting cross-examination." *United States v. Bensimon*, 172 F.3d 1121, 1128 (9th Cir. 1999). "A limitation on cross-examination does not violate the Confrontation Clause unless it limits *relevant* testimony and prejudices the defendant, and denies the jury *sufficient* information to appraise the biases and motivations of the witness." *Id.* (*emphasis added*). "A defendant's constitutional right to confront witnesses through cross-examination is limited to issues relevant to the trial." *United States v. Bonanno*, 852 F.2d 434, 439 (9th Cir. 1988). "Generally, once cross-examination reveals sufficient information with which to appraise a witness's possible bias and motives, confrontation demands are satisfied." *Id.*; *see also Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) ("The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*quoting Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985))); *United States v. Lo*, 231 F.3d 471, 482 (9th Cir. 2000), *holding modified by United States v. Larson,* 495 F.3d 1094 (9th Cir. 2007).

The Defendant argues that his due process right of confrontation will be violated if he is not allowed to cross-examine Ms. Montano as to either the existence or nature of her prior conviction. What the Defendant cannot demonstrate, however, is how Ms. Montano's prior conviction is at all relevant to his case. Ms. Montano was convicted in 1990 for conspiracy to sell a narcotic drug. The basic elements of that crime did not require the prosecution to prove anything relating to whether Ms. Montano was truthful. All state prosecutors needed to prove was that she conspired with at least one other individual to sell a narcotic drug. *See* Ariz. Rev.

Stat. §§ 13-1003(A), 13-3408.[7] Ms. Montano was ordered to serve a term of probation. She successfully completed that probation in 1997. She has not been convicted of any felonies — or any other crimes — since.

Ms. Montano's testimony in this case will consist of events she saw and heard in 2017, 27 years after she was convicted. The Defendant has not been able to suggest that Ms. Montano's conviction gives her a motive to lie about or misremember the events she witnessed in her neighborhood. Her conviction is irrelevant both to her credibility as a witness and to the Defendant's guilt or innocence. Any limited probative value it might have is substantially outweighed by the prejudice its introduction will cause. Forcing her to testify as to her conviction serves no purpose other than to embarrass and harass her, confuse the issues, and mislead the jury as to who and what crime are on trial.

On the other hand, preclusion of Ms. Montano's prior conviction or placing limitations on how the issue can be explored through cross-examination does not unduly limit the Defendant's ability to confront Ms. Montano. The Defendant may still cross-examine her on a variety of issues relevant to her credibility, including her relationship (if any) she had with the Defendant, whether she was distracted with other tasks when her daughter's dog was shot, whether lighting, environmental, or physical conditions might have affected her ability to see and hear what happened. As the United State Supreme Court has noted, due process and the "Confrontation Clause guarantee[] an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Van Arsdall*, 475 U.S. at 679 (*internal citations and quotations omitted*).

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[7] While preparing its Reply, the Tribe discovered that it had mistakenly indicated in its opening brief that Arizona's conspiracy statute was codified as Ariz. Rev. Stat. § 13-1001(A). That citation is incorrect and applies to "attempt" classifications, not conspiracy.

CONCLUSION AND REMEDY SOUGHT

The trial court's ruling as to the admissibility of Ms. Montano's prior conviction was both contrary to law and an abuse of discretion. Appellant respectfully requests that the trial court's ruling be reversed, and that this case be remanded for further proceedings.

RESPECTFULLY submitted this 19th day of September, 2018.

Oscar J. Flores
Chief Prosecutor

Kendrick Wilson
Deputy Prosecutor

Coleen Thoene
Deputy Prosecutor

CERTIFICATE OF SERVICE

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

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

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

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

Dated this 19 day of September, 2018.

PASCUA YAQUI PROSECUTOR

Kendrick Wilson
Deputy Prosecutor

Coleen Thoene
Deputy Prosecutor

Sworn before me this _____ day of _____, 2018

_____
Notary Signature

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Appellant, vs. LOPEZ, Antonio, Appellee.	APPELLATE CASE NO. CA-18-001 PASCUA YAQUI TRIBAL COURT NO. AC-17-202

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I. INTRODUCTION

Appellant, Mr. Lopez hereby submits the following response to the Tribe's Opening Brief of the Appellant. Jury trial in this case was set for May 22, 2018 and is currently stayed pending the outcome of this interlocutory appeal. Mr. Lopez is out of custody. Mr. Lopez does not dispute jurisdiction in this case and agrees that oral argument would be in the interests of justice. While some of the alleged facts are contested by Mr. Lopez and determination of guilt has yet to be made, the Tribe adequately addresses the relevant proceedings below. Mr. Lopez makes no admissions.

II. ARGUMENT

1. The Trial Court Properly Admitted Evidence of Prior Acts Committed By The Alleged Victim.

The Federal Rules of Evidence apply in this case. "Whenever due process or the court requires, the Federal Rules of Evidence ("FRE") shall be adopted in any trial proceeding or evidentiary hearing, unless otherwise found by the court to have been voluntarily and intelligently waived by the defendant." 3 PYTC 2-2-430. Mr. Lopez did not waive his protected right to apply the Federal Rules of Evidence in this case. In fact, Mr. Lopez specifically requested application of the Federal Rules of Evidence in this case. (Case Index #31, Case File pp. 103-106).

The Indian Civil Rights Act ("ICRA") requires that tribal courts afford defendants the same rights guaranteed under the U.S. Constitution's Bill of Rights. *See* 25 U.S.C. §1301-1303. Specifically, 25 U.S.C. § 1302 – 25 U.S.C. § 1302 (a)(8) prohibits tribal courts from "depriving any person of liberty or property without due process of law." Although the Pascua 3 PYT R. Evid., Rule 30 generally prohibits the use of impeachment material to other bad acts that are more than ten years old, the federal rules do not.

Because Mr. Lopez is protected by the ICRA and he demanded due process in this case, the time limits set forth in FRE 609 are controlling. Rule FRE 609 does not limit the admission of prior bad acts to those committed within 10 years from the date of an offense. Per FRE 609, felonies that are more than ten years old may be used if their "probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect."

Mr. Lopez knows that Mr. Montaño was convicted of a drug trafficking offense that involved a conspiracy. The Tribe has failed to indicate what role Ms. Montano played in her conspiracy conviction. Defense does not know what actions she took in furtherance of the conspiracy. Without additional information on Ms. Montaño's prior conviction, it is impossible to know whether the probative value of this offense outweighs its tendency to cause undue prejudice. Furthermore, FRE 608(b) does not prohibit use of extrinsic evidence to prove up the alleged victim's prior drug trafficking conviction. Therefore, this argument is not ripe.

2. **FRE 608 does not require sanitization of prior conviction being used to attack the credibility of a witness.**

FRE 608 permits "Rule 609(a) does not permit any [FRE 403] weighing process with respect to such impeaching evidence elicited by a defendant. The evidence produced in his defense cannot have a prejudicial effect 'to the defendant.'" *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977). *United States v. Ortega* remains good law and has not been overturned. Mr. Lopez has a fundamental right to due process and to confront his accusers under the Pascua Yaqui Constitution and the ICRA. 25 U.S.C. § 1302(a)(6). The rules of evidence were meant to protect these rights, and to protect the Defendant against undue prejudice. And to ensure that these rights were protected, tribal code provides for the use of the federal rules of evidence. Limiting Mr. Lopez's right to cross-

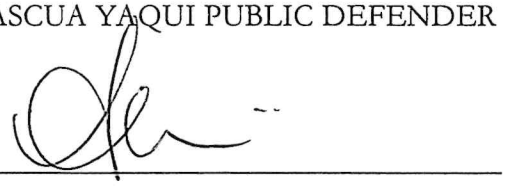
examine a witness would be a kin to limiting Mr. Lopez's liberty and access to due process. "Error in the restriction of a defendant's cross-examination of a government witness has constitutional implications and, therefore, we must be extremely hesitant in brushing aside such error as harmless." *Ortega*, 561 F.2d at 806 (citing, *Davis v. Alaska* (1974) 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347; *Smith v. Illinois* (1968) 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956; *Alford v. United States* (1931) 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624; *United States v. Alvarez-Lopez* (9th Cir. 1977) 559 F.2d 1155. See also *United States v. Dixon* (9th Cir. 1976) 547 F.2d 1079, 1083-84).

III. CONCLUSION

Based on the above, Mr. Lopez respectfully requests that this Court deny the Tribe's request for relief and find that the Pascua Yaqui Tribe Trial Court did not abuse its discretion by permitting use of the alleged victim's prior drug trafficking conviction for impeachment purposes at trial.

RESPECTFULLY SUBMITTED: September 4, 2018.

PASCUA YAQUI PUBLIC DEFENDER



Annamarie L. Valdivia
Senior Staff Attorney
Pascua Yaqui Public Defender
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

Attorney for Appellee Antonio Lopez

CERTIFICATE OF COMPLIANCE

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

PASCUA YAQUI PUBLIC DEFENDER

Annamarie L. Valdivia
Senior Staff Attorney
Pascua Yaqui Public Defender
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

Attorney for Appellee Antonio Lopez

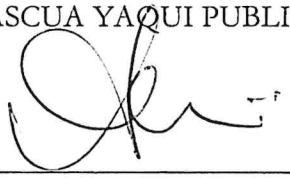
CERTIFICATE OF SERVICE

On September 4, 2018 the original and 5 copies of the *Supplemental Appellant Brief* were filed, and conforming copies were sent to the following:

Pascua Yaqui Office of the Prosecutor
Deputy Prosecutor
Kendrick Wilson
7777 S. Camino Huivisim, Bldg. A
Tucson, AZ 85757

Antonio Lopez, Appellant

PASCUA YAQUI PUBLIC DEFENDER



Annamarie L. Valdivia
Senior Staff Attorney
Pascua Yaqui Public Defender
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

Attorney for Appellee Antonio Lopez

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. Hon. Melvin Stoof, Judge, Pascua Yaqui Tribal Court, ANTONIO JULIAN LOPEZ, Real Party in Interest:[1]	APPELLATE CASE NO: CA-18-001 TRIBAL COURT CASE NO: AC-17-020

PETITIONER/APPELLANT'S SUPPLEMENTAL EXHIBITS

Oscar J. Flores,
Chief Prosecutor
Kendrick Wilson, Coleen Thoene,
Deputy Prosecutors
Pascua Yaqui Office of the Prosecutor
7777 S. Camino Huivisim
Bldg. A, 2nd Floor
Tucson, AZ 85757
Telephone: (520) 876-6251
Oscar.J.Flores@pascuayaqui-nsn.gov

Attorneys for the Pascua Yaqui Tribe

[1] In Special Actions, 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." Rule 2(a)(1), Ariz. R. P. Spec. Act. In such circumstances, the practice is to direct the writ in form to the court as a matter of courtesy, but in fact leave its handling to the Real Party in Interest. *See* Rule 2, Ariz. R. P. Spec. Act., State Bar Committee Notes, section (a).

On August 1, 2018, the Petitioner/Appellant filed its opening brief with the Pascua Yaqui Court of Appeals. As part of that brief, the Petitioner made reference to portions of the trial court's record, and indicated that there were attached exhibits. However, upon review, it was discovered that the exhibits were not attached as intended.

Accordingly, the Petitioner now submits the following supplemental exhibits for this Court's consideration pursuant to 3 PYTC § 2-3-110(c) and (e).

RESPECTFULLY submitted this 2nd day of August, 2018.

Kendrick Wilson
Deputy Prosecutor

Coleen Thoene
Deputy Prosecutor

CERTIFICATE OF SERVICE

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

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

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

Annamarie Valdivia
Annamarie.Valdivia@pascuayaqui-nsn.gov
Pascua Yaqui Office of the Public Defender
7474 S. Camino de Oeste
Tucson, AZ 85757

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

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

Dated this 2 day of August, 2018.

PASCUA YAQUI PROSECUTOR

Kendrick Wilson
Deputy Prosecutor

Coleen Thoene
Deputy Prosecutor

Sworn before me this 2nd day of August, 2018

Notary Signature

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

Exhibit #1

Copy of Animal Control Complaint in *Pascua Yaqui Tribe v. Lopez*, AC-17-020 (Sept. 5, 2017).

PASCUA YAQUI TRIBAL COURT
FILED
2017 AUG -8 PM 1:58
DOCKETED

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

Pascua Yaqui Tribe,
Plaintiff,
vs.
LOPEZ, ANTONIO JULIAN
Defendant.

Case No. **AC-17-** 020

ANIMAL CONTROL 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: 8 PYTC § 6-1-60 (A) (4) ~ Cruel Mistreatment of an Animal, a class three felony

On or about July 30, 2017 at approximately 4:10 p.m., at or near 7872 S. Maala Mecha Voo'd, Defendant did intentionally or knowingly subject any animal to cruel mistreatment, to wit: ***Shot a Chihuahua with a BB gun, causing serious physical injury.***

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

DATED this 8th day of August, 2017.

Complainant/Attorney

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

DEFENDANT: Antonio Julian Lopez
ADDRESS: 7871 S. Maala Mecha Voo'o, Tucson, AZ 85757
DOB: 09/22/1994 SSN: 600-45-4576 ORIGIN: Pascua Yaqui Tribe #2694U09187
SEX: Male HT: 5'09" WT: 230 EYES: Brown HAIR: Brown

Note: Accused persons may obtain disclosure information about their case ten days <u>after</u> arraignment by contacting the Prosecutor's Office at 7777 S. Camino Huivisim, Bldg. A, 2nd Floor, Tucson AZ 85757. [3 PYT R.Crim.P. Rule 38]

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBAL COURT
2017 AUG -8 PM 1:58

DOCKET # AC17-020

PASCUA YAQUI TRIBE, Plaintiff Vs. Antonio Lopez , **Defendant**	**COURT USE ONLY**
	CASE NUMBER P17073008

PROBABLE CAUSE STATEMENT

AFFIRMATION

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

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

2. **SUSPECTED PARTY (Defendant)**

Name: Antonio Lopez
Driver's License Number: D08091992
Tribal Enrollment Number: 2694U09187
Non-Tribal Member (VAWA) ☐
Date Of Birth: 09/22/1994

Antonio Lopez

☑ is an enrolled member of the Pascua Yaqui Tribe.

☐ is an Indian subject to the jurisdiction of the Pascua Yaqui Tribe.

☐ is subject to the Tribal Jurisdiction of the Pascua Yaqui Tribe under the Violence Against Women Reauthorization Act of 2013 (VAWA).

PASCUA YAQUI POLICE
RECEIVED
AUG 01 2017
RECORDS DIVISON

JUL 31 '17 SENT

2 AUG 2017 PM 2:00

3. The Defendant was Long Formed without a Warrant on 7/30/2017 at 9:00:00 PM

4. I have probable cause to believe that the defendant committed the following offense(s) at or near, 7871 S Maala Mecha Voo o which is within the exterior boundaries of the Pascua Yaqui Indian Reservation.

PYTC	4-1-550	Cruelty to Animals
Select...		

5. Statement Of Probable Cause:

On 07/30/17 at approximately 1610hrs I, Officer Romero responded to 7872 S Maala Mecha Vood reference a report of small black Chihuahua being killed with a possible BB gun.

I arrived and made contact with the owner of the Black Chihuahua, Dina Montano. Dina stated that her 1 year old Chihuahua's name was Pepe, and he lives with her at 7781 S Maala Mecha Vood. Dina stated that her mom, Josephina Montano was watching over Pepe at her house at 7872 S Maala Mecha Vood, when she arrived to find Pepe, dead in the street by 7871 S Maala Mecha Vood. Dina stated that she could see blood from Pepe's right shoulder neck area. Dina stated that when she informed Josephina about finding the dog dead in the roadway, Dina stated that Josephina told her that about 15 minutes prior to Dina's arrival, she had heard the sound of a BB gun being fired and then a screen door slamming. Dina stated that she has been told by Josephina that in the past, her neighbor Tony across the street at 7871 S Maala Mecha, has been seen and known to possess a BB gun that he uses to shoot at various other dogs or birds. Dina believes Tony is the best suspect in this case.

I then spoke to Josephina Montano. Josephina stated that about 15 minutes prior to Dina arriving, she had heard the sound of a BB gun being fired, and then hearing the screen door from across the street slamming. Josephina stated that she has witnessed several times her neighbor Tony shooting at various other dogs and birds with his BB gun. Josephina stated that she believes it was Tony who shot her dog. Josephine stated that she did not see Tony actually shoot Pepe, but heard his door slam after hearing the sound of a BB gun being fired.

I then examined Pepe with Dina and Officer Molina. I was able to locate a small hole in Pepe's neck/righ shoulder area approximately the same size as a BB.

I then responded to 7871 S Maala Mecha Vood to make contact with Tony. Tony then responded and identified himself as Antonio "Tony" Lopez. Antonio stated that he did just arrive home approximately 20 to 25 minutes ago from the movies. Tony stated that when he arrived home he did see the Black Chihuahua in the front yard about to "poop" in his property. Tony stated that he did clap is hands really loud and scared the Chihuahua back across the street. Tony stated that once he saw the dog across the street, he went back inside and did not see the dog again until he saw the neighbors standing over him laying on the ground by his house. Tony stated that he doesn't know what happened to the dog, but he did not shoot his BB gun to kill the dog.

I then asked Tony if he could show me his BB Gun. Tony then showed me his BB gun that he had placed right by the front door of his home, along with a bottle of copper BB's. Tony the handed me the BB gun and bottle of BB's. I was able to identify the bottle of BB's as a Copperhead 1500 Steel BB Cal 4.5. The BB Gun was identified as Silver/Black Marksman Repeater, BB Cal 4.5mm with serial number 04134261. Tony admitted to have shot at several other birds and dogs in his recent pass, but that he did not shoot and kill the black Chihuahua.

Tony stated that he just scared the dog away by yelling and clapping his hands at him. Tony stated that he never touched or fired his BB gun after he scared the Chihuahua away from his property. I informed Tony that he was the last person to see the Chihuahua alive, owns a BB gun, blood found on his front property, a hole the size of a BB in Pepe's neck, and his admitted history of shooting birds and dogs with his BB gun makes him the best suspect for having shot Pepe. Tony stated that he understood.

I informed Tony that I would be referring this case to PY Animal Control and Prosecutors office for a review of possible charges in this case.

NFI

Officer Frank Romero #3L60

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

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

Ofc. F. Romero #3L60
Signature of Officer

EXECUTED ON: 07/30/17
Date

Exhibit #2

Copy of Ms. Montano's Probation Discharge paperwork in Pima County Superior Court case number CR-27530

7-21-97

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

FILED
JAMES N. CORBETT
CLERK OF SUPERIOR COURT
97 JUL 21 PM 4:02
BY: M. MYHRE, DEPUTY

STATE OF ARIZONA,
Plaintiff,
vs.
MONTANO, Josephine Elenes
Defendant.

CR-27530

PETITION AND ORDER OF DISCHARGE FROM PROBATION

Assigned to DIV XX
Judge NANETTE M. WARNER

On March 30, 1990, the above-named defendant was adjudged guilty of Conspiracy to Commit Unlawful Sale of a Narcotic Drug, a Class 2 Felony, and was placed on probation for seven (7) years, to date from March 30, 1990.

The defendant has completed the period of probation as calculated pursuant to ARS 13-901, 13-902 and 13-903. All fines, fees, and assessments have been paid:

( ) in full.

(X) except as set forth on proposed order of Civil Judgment

Date: July 11, 1997

Kim C. Hatfield
Kim C. Hatfield, Probation Officer

THEREFORE, IT IS ORDERED that the defendant is hereby discharged from probation in this cause pursuant to ARS § 13-901, 13-902, 13-903, and Arizona Rules of Criminal Procedure 27.3 and 27.4.

DATED THIS 16th day of July, 1997

JUDGE OF THE SUPERIOR COURT

Distribution:
County Attorney
Clerk/Computer Collection Office
Recorder's Office
Adult Probation - Kim C. Hatfield
Defendant: MONTANO, Josephine Elenes
4941 W. Neokae
Tucson, AZ 85746

M-O

BOOK 5389 PAGE 051

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Exhibit #3

Copy of Tribe's "Motion to Preclude Witness Josephine Elenes Montano's Prior Conviction, or in the alternative to Sanitize Ms. Montano's Prior Conviction," *Pascua Yaqui Tribe v. Lopez*, AC-17-020 (Sept. 15, 2017).

PASCUA YAQUI TRIBE
Office of the Prosecutor
7777 S. Camino Huivisim
Bldg. A, 2nd Floor
Tucson, Arizona 85757
(520) 879-6251

Kendrick Wilson
Deputy Prosecutor

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

PASCUA YAQUI TRIBE, **Plaintiff,** **vs.** **LOPEZ, ANTONIO JULIAN** **Defendant.**	**NO. AC-17-020** **MOTION TO PRECLUDE WITNESS JOSEPHINE ELENES MONTANO'S PRIOR CONVICTION, OR IN THE ALTERNATIVE TO SANITIZE MS. MONTANO'S PRIOR CONVICTION** Assigned to: Hon. Melvin Stoof

The Pascua Yaqui Tribe, by and through counsel undersigned, hereby respectfully requests that this Court preclude use of witness Josephine Elenes Montano's prior conviction to impeach her testimony, or, in the alternative, to sanitize the nature of the prior conviction. For the following reasons, Ms. Montano's prior conviction should not be raised at trial.

FACTS:

On September 15, 2017, the Tribe disclosed one prior conviction for witness Josephine Elenes Montano with the Tribe's Notice of Witnesses and Disclosure. The conviction is for conspiracy to commit unlawful sale of a narcotic drug in Pima County Superior Court Case No. CR-27530. Ms. Montano was sentenced to a term of probation on March 30, 1990 and was discharged from probation on July 11, 1997, both of which took place more than ten years ago. *See* Sentencing

Minute Entry, attached as Tribe's Exhibit One. A thorough search of local and adjacent jurisdictions did not reveal any additional convictions for Ms. Montano since that time. Although the Tribe concedes that the existence of Ms. Montano's conviction may be discoverable, and the Tribe promptly disclosed the existence of her conviction, its use to impeach her testimony would be contrary to 3 PYTC R. Evid. 30 and Fed. R. Evid. 609. For the following reasons, the use of Ms. Montano's prior should be precluded.

LAW:

Ms. Montano's prior conviction falls outside the narrowly tailored circumstances enumerated in 3 PYTC R. Evid. 30 and Fed. R. Evid. 609 under which a prior conviction may be used to impeach a witness' testimony. The conviction alleged is more than ten years old and conspiracy to commit unlawful sale of a narcotic drug is not a crime involving dishonesty or false statement. 3 PYTC R. Evid. 30 (B) specifically states that "[e]vidence under this rule is not admissible if ten years have elapsed since the date of conviction or date or release from the confinement for that conviction whichever is the later." *Id.* Indeed, more than ten years have elapsed since Ms. Montano was terminated from probation. Fed. R. Evid. 609 is slightly broader, allowing use of a felony conviction that is more than ten years old only if "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." Fed. R. Evid. 609 (b)(1). In this case, Ms. Montano has had no subsequent criminal convictions and the conviction took place twenty-seven years ago. The prejudicial effect against Ms. Montano would strongly outweigh any probative value, particularly given the length of time that has elapsed since her conviction. Consequently, Ms. Montano's conviction should be precluded.

Should this Court find that evidence of Ms. Montano's prior conviction is admissible to impeach her testimony, which the Tribe does not concede, the Tribe respectfully requests, in the alternative that the nature and circumstances surrounding her conviction be precluded as outside the

scope of 3 PYTC R.Evid. 30 and Fed. R. Evid. 609, as any probative value of such evidence would be substantially outweighed by the danger of unfair prejudice, and should be excluded pursuant to 3 PYTC R. Evid. 7 and Fed. R. Evid. 403. Indeed, any conviction involving the sale of drugs carries a high danger of unfair prejudice. Exploring the nature of her conviction would serve to inflame the jury and insinuate that Ms. Montano is a person or poor moral character, rather than to determine her believability as a witness.

Arizona courts have "consistently approved of sanitization as a means of limiting prejudicial effect." *State v. Montano*, 204 Ariz. 413, ¶ 66, 65 P.3d 61, 75 (Ariz. 2003), *PYT v. Miranda*, CA-08-015 p. 22 (Ct. App. 2009). ("[W]hile decisions of the Arizona . . . [c]ourts are not controlling authority in this Court, they are *highly persuasive*.") (*Emphasis added*). The discretion in whether to sanitize a prior conviction lies with the trial court. *Id.* In *Montano*, the trial court sanitized the witness's prior convictions for child pornography and attempted child molestation to lessen their prejudicial effect. *Id.* at ¶ 64. The Arizona Supreme Court upheld such sanitization as proper. *Id.* at ¶ 66. Should this Court allow Ms. Montano's testimony to be impeached with her prior conviction, sanitization of the nature of her prior conviction is imperative to prevent the danger of unfair prejudice.

CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that this Court preclude use or mention of Ms. Montano's prior conviction as outside the scope of 3 PYTC R. Evid. 30 and Fed. R. Evid. 609, and as more prejudicial than probative pursuant to 3 PYTC R. Evid. 7 and Fed. R. Evid. 403

.

RESPECTFULLY submitted this 15th day of September, 2017.

PASQUA YAQUI OFFICE OF THE PROSECUTOR

Kendrick Wilson
Deputy Prosecutor

ORIGINAL delivered and filed this:
date to:

Clerk of the Court
Pascua Yaqui Tribal Court

A copy delivered to:
William Soland
Public Defender
Attorney for Defendant

Pascua Yaqui Public Defender's Office
By:

EXHIBIT ONE

7-21-97

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

FILED
JAMES N. CORBETT
CLERK OF SUPERIOR COURT

97 JUL 21 PM 4:02

BY: M. MYHRE, DEPUTY

STATE OF ARIZONA, Plaintiff, vs. MONTANO, Josephine Elenes Defendant.	CR-27530 PETITION AND ORDER OF DISCHARGE FROM PROBATION Assigned to DIV XX Judge **NANETTE M. WARNER**

On **March 30, 1990**, the above-named defendant was adjudged guilty of **Conspiracy to Commit Unlawful Sale of a Narcotic Drug, a Class 2 Felony**, and was placed on probation for **seven (7) years**, to date from **March 30, 1990.**

The defendant has completed the period of probation as calculated pursuant to ARS 13-901, 13-902 and 13-903. All fines, fees, and assessments have been paid:

( ) in full.

(X) except as set forth on proposed order of Civil Judgment

Date: July 11, 1997

Kim C. Hatfield
Kim C. Hatfield, Probation Officer

THEREFORE, IT IS ORDERED that the defendant is hereby discharged from probation in this cause pursuant to ARS § 13-901, 13-902, 13-903, and Arizona Rules of Criminal Procedure 27.3 and 27.4.

DATED THIS 18th day of July, 1997

JUDGE OF THE SUPERIOR COURT

Distribution:
County Attorney
Clerk/Computer Collection Office
Recorder's Office
Adult Probation - Kim C. Hatfield
Defendant: MONTANO, Josephine Elenes
4941 W. Neokae
Tucson, AZ 85746

M-O

BOOK 5389 PAGE 051

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Exhibit #4

Copy of Response to Tribe's Motion to Preclude [Alleged] Victim Josephine Montano's Prior Conviction, or, in the alternative, to Sanitize Victim's Prior Conviction," *Pascua Yaqui Tribe v. Lopez*, AC-17-020 (Sept. 28, 2017).

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 TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff, vs. LOPEZ, ANTONIO JULIAN, Defendant.	Case No.: AC-17-020 **RESPONSE TO TRIBE'S MOTION TO PRECLUDE [ALLEGED] VICTIM JOSEPHINE ELENES MONTANO'S PRIOR CONVICTION, OR, IN THE ALTERNATIVE, TO SANITIZE VICTIM'S PRIOR CONVICTION** **(Hon. Melvin Stoof)**

Defendant ANTONIO LOPEZ, through counsel hereby responds to the Tribe's Motion to Preclude or Sanitize [Alleged] Victim's Prior Conviction.

On September 15, 2017, Tribe filed a motion to preclude alleged victim Josephine Elenes Montano's 1990 conviction for Conspiracy to Commit Unlawful Sale of a Narcotic Drug, a Class 2 Felony. Alternatively, Tribe asks that this Court sanitize Ms. Montano's conviction.

Preclusion

Tribe states, as the basis for precluding the conviction, that it falls outside the scope of 3 PYTC R. Evid. 30 because it is more than 10 years old. While the age of the conviction may be relevant, it is by no means fatal to the use of this evidence at trial. "Whenever due process or the court requires, the Federal Rules of Evidence shall be adopted in any trial proceeding or

evidentiary hearing, unless otherwise found by the court to have been voluntarily and intelligently waived by the defendant." 3 PYTC 2-2-430. For this reason, and because Defendant has not waived the application of the Federal Rules of Evidence, Defendant asks the Court to look to Fed. R. Evid. 609, which is more broad. As Tribe notes, felonies more than ten years old may be used if their "probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." However, Tribe asks the Court to preclude this conviction without providing any of the relevant facts and circumstances. Defense is aware only of the charge, "Conspiracy to Commit Unlawful Sale of a Narcotic Drug." Defense, and the Court, do not know what role Ms. Montano played in this conspiracy, or what actions she took in furtherance of the conspiracy. Without this information, it is impossible to know whether the probative value of this offense outweighs its tendency to cause undue prejudice. For this reason, Tribe's motion to preclude should either be denied, or else Tribe should be ordered to produce documentation of the offense so that its probative value may be fairly debated.

Sanitization

The Tribe alternatively argues that, if the conviction is not precluded under Rule 30, the Court should use its discretion to "sanitize" the conviction, precluding the nature and circumstances surrounding her conviction. In *U.S. v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977) the 9th Circuit held that preventing the Defendant from impeaching a Government's witness with a prior felony conviction on the grounds that the prejudicial value outweighed the probative value was improper. The 9th Circuit based this ruling on the fact that Federal Rule of Evidence 609(a), which is analogous to Pascua Yaqui Rule of Evidence 30, does not permit such a weighing when the evidence is being elicited *by the Defendant. Id.* (emphasis added).

The 9th Circuit is well aware of Federal Rule of Evidence 403, which is analogous to Pascua Yaqui Rule of Evidence 7, both of which the Tribe cites. The 9th Circuit further

elaborated on this issue, stating "[e]rror in the restriction of a defendant's cross-examination of a government witness has constitutional implications and, therefore, we must be extremely hesitant in brushing aside such error as harmless." Id. citing, *Davis v. Alaska* (1974) 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347; *Smith v. Illinois* (1968) 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956; *Alford v. United States* (1931) 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624; *United States v. Alvarez-Lopez* (9th Cir. 1977) 559 F.2d 1155. *See also United States v. Dixon* (9th Cir. 1976) 547 F.2d 1079, 1083-84.) The Defendant has a fundamental right to due process and to confront his accusers under the Pascua Yaqui Constitution. The rules of evidence were meant to protect these rights, and to protect the Defendant against undue prejudice. Limiting Defendant's right to cross-examine a witness should not be undertaken lightly, as Mr. Lopez's liberty is at issue here. Ms. Montano's is not.

Tribe argues that "any conviction involving the sale of drugs carries a high danger of unfair prejudice." It is unclear why this should be true. Tribe cites *State v. Montano*, 204 Ariz. 413 as authority for sanitization as a means of limiting prejudicial effect. As Tribe points out, in *Montano* the trial court sanitized the witness's prior convictions for child pornography and attempted child molestation. These are examples of convictions that have a stigma associated with them. It is hard to believe that sale of drugs is somehow viewed by the community as similar to child pornography and child molestation.

It is not mere "prejudice" against which the law protects, but specifically *undue* prejudice. *See, for example United States v. Pinillos-Prieto,* 419 F.3d 61, 72 (1st Cir. 2005) ("Virtually all evidence is prejudicial -- if the truth be told, that is almost always why the proponent seeks to introduce it -- but it is only unfair prejudice against which the law protects.")

(internal quotation marks and citation omitted). For these reasons, the Defendant requests that Ms. Montano's records not be sanitized, and that the Tribe's motion be denied.

CONCLUSION

For these reasons, the Defense respectfully asks that the Court to deny Tribe's motion. In the alternative, Defense asks that the Court order Tribe to disclose the charging documents from the original case so that, pursuant to Fed. R. Evid. 609, the Court can determine whether this charge has any probative value that may outweigh its tendency to cause undue prejudice. Additionally, the Defense reserves the right to readdress this issue when and if the Tribe or the Alleged Victim opens the door for a more detailed cross examination.

DATED this 28 day of Sept, 2017.

PASCUA YAQUI PUBLIC DEFENDER

William R. Soland
Deputy Public Defender

ORIGINAL filed this date
In PYT Court by:

COPY delivered this day to PYT
Prosecutor by:

Exhibit #5

Copy of "Reply to Defendant's Respoinse to Motion to Preclude Witness Josephine Elenes Montano's Prior Conviction," *Pascua Yaqui Tribe v. Lopez*, AC-17-020 Oct. 3, 2017).

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Kendrick Wilson
Deputy Prosecutor

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

PASCUA YAQUI TRIBE,
Plaintiff,

Vs.

LOPEZ, ANTONIO JULIAN

Defendant

NO. AC-17-020

REPLY TO DEFENDANT'S RESPONSE TO MOTION TO PRECLUDE WITNESS JOSEPHINE ELENES MONTANO'S PRIOR CONVICTION

COMES NOW The Pascua Yaqui Tribe, by and through counsel undersigned, and hereby replies to Defendant's Response to Tribe's Motion to Preclude Witness Josephine Elenes Montano's Prior Conviction. For the following reasons, the Tribe's motion to preclude should be granted.

MEMORANDUM OF POINTS AND AUTHORITIES

The Tribe is obligated by 3 PYTC § 2-2-380 (A) (6) to disclose the prior felony convictions of witnesses it intends to call at trial. The Tribe has complied with this provision in its entirety. 3 PYTC § 2-2-380 (D) specifies the Prosecutor's duty to obtain information. Specifically, "[t]he prosecutor's obligation under this Section extends to material and information in the possession or control of members of his or her staff and of any other persons who have participated in the investigation or evaluation of the case and who are under the prosecutor's control." *Id.* The felony conviction, which is from 27 years ago, is from Pima County Superior Court. Neither the Tribe, nor the Pascua Yaqui Police Department had **any** involvement in the investigation or prosecution of this case. The Pima County Superior Court is a State of Arizona agency over which the Tribe has no

control whatsoever. The only procedure by which the Tribe could elicit further details other than the offense for which Ms. Montano was convicted would be to file a public records request. The Tribe is in no better position to file such a request than defense counsel.

In essence, Defendant is asking this Court to order the Tribe to act as a defense investigator, which lies far outside the disclosure requirements in 3 PYTC § 2-2-380. Furthermore, Defendant has provided no plausible explanation as to how conspiracy to commit unlawful sale of a narcotic drug would possibly constitute a crime of dishonesty or false statement. It is undisputed that Ms. Montano was convicted more than 27 years ago and discharged from probation more than 20 years ago. She has had no convictions since. The only conceivable purpose of introducing evidence of Ms. Montano's prior conviction would be to unfairly prejudice the jury against Ms. Montano.

CONCLUSION:

For the foregoing reasons, the Tribe respectfully requests this Court to preclude introduction of witness Josephine Elenes Montano's prior conviction at trial.

Respectfully submitted this 3rd day of October, 2017.

OFFICE OF THE PROSECUTOR
PASCUA YAQUI TRIBE

Kendrick Wilson
Deputy Prosecutor

Original of the foregoing delivered/mailed
This date to:

Clerk of the Court, Pascua Yaqui Tribal Court

A copy delivered to:

William Soland
Office of Public Defender
Attorney for Defendant

By:

Exhibit #6

Copy of "Order Denying Tribe's Motion to Preclude Prior Felony Conviction as Impeachment," *Pascua Yaqui Tribe v. Lopez*, AC-17-020 (May 14, 2018).

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, PLAINTIFF, vs. LOPEZ, ANTONIO DEFENDANT.	CASE NO. AC-17-020 ORDER DENYING TRIBE'S MOTION TO PRECLUDE PRIOR FELONY CONVICTION AS IMPEACHMENT

On May 14, 2018, the Tribe reviewed the parties request for ruling on the Tribe's motion to preclude prior felony conviction over ten years or to sanitize the conviction. The court should deny the Tribe's motion to exclude a prior felony conviction of the alleged victim for impeachment purposes, and it should allow the prior felony conviction, drug possession in for impeachment purposes. As to the drug conviction that is more than ten years old, although it may be inadmissible under PYT R. Evid. 30, as a conviction more than 10 year old, see also Fed. R. Evid. 609, it *may* be admissible, if allowed by the court on cross-examination, under PYT R. Evid. 29, see also F.R. Evid 609, as probative of the character for truthfulness or untruthfulness of the witness. PYT R. Evid 29(b), F.R.Evid. 608(b)(1). See also *U.S. V. Ortega*, 561 F.2d 803 (9th Cir. 1977).

IT IS ORDERED that the Tribe's motion to exclude the prior felony conviction, under PYT R. Evid. 30 shall be granted, but the prior drug felony conviction may be used under PYT R. 29(b) as probative of the character for truthfulness of the witness, on cross-examination. The Tribe's proposed witness' prior felony convictions may be used for impeachment purposes. The court denies the request to sanitize for lack of good cause shown.

SO ORDERED THIS 14th DAY OF MAY, 2018.

Melvin R. Thomas
Associate Judge, Pascua Yaqui Tribal Court

Date 05/14/18
cc: ___ Tribe ___ Defendant ___ Counsel
Clerk

PASCUA YAQUI TRIBE ☆ JUDICIAL BRANCH ☆

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. Hon. Melvin Stoof, Judge, Pascua Yaqui Tribal Court, ANTONIO JULIAN LOPEZ, Real Party in Interest:[1]	APPELLATE CASE NO: CA-18-001 TRIBAL COURT CASE NO: AC-17-020

PETITIONER/APPELLANT'S OPENING BRIEF

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[1] In Special Actions, 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." Rule 2(a)(1), Ariz. R. P. Spec. Act. In such circumstances, the practice is to direct the writ in form to the court as a matter of courtesy, but in fact leave its handling to the Real Party in Interest. *See* Rule 2, Ariz. R. P. Spec. Act., State Bar Committee Notes, section (a).

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REQUEST FOR ORAL ARGUMENT

This interlocutory appeal involves questions of first impression in this jurisdiction, specifically: 1) whether a prosecution witness may be impeached at trial with a nearly thirty-year-old prior narcotics conviction; 2) how the Pascua Yaqui Tribal Rules of Evidence should be interpreted; and, 3) whether the lower court abused its discretion in finding that the nature of the witness' conviction — and not just its existence — was admissible at trial. Additionally, although the Court of Appeals has accepted jurisdiction over interlocutory appeals in the past, there is no clear tribal caselaw regarding the circumstances under which special action jurisdiction is appropriate. Because resolution of these issues will rely heavily upon this Court's interpretation of Tribal, State, and Federal law, setting the matter for oral argument would be in the interests of justice.[2]

STATEMENT OF JURISDICTION

The Pascua Yaqui Tribal Rules of Appellate Procedure, *see generally* 3 PYTC § 2-3-30 *et seq*, grant parties the right to appeal in most, but not all, circumstances. For instance, the Tribe does not have the right to appeal a judgment acquitting a defendant in a criminal case. 3 PYTC § 2-3-90(G); Art. I, § 1(c), Pascua Yaqui Const.; *Pascua Yaqui Tribe v. Montana*, CA-12-001 (PYT Ct. App. July 23, 2013).[3] And parties in civil cases are prohibited from filing any sort of interlocutory appeal. 3 PYTC § 2-3-90 (F); *Global Cash Access, Inc. and Central Credit, LLC v. Gaming Enterprise Division of the Pascua Yaqui Tribe*, CA-14-0004 (PYT Ct. App. June

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[2] *See* 3 PYTC § 2-3-180; 3 PYTC § 2-3-260(C)(6) & (D).

[3] The Tribe may, however, appeal a dismissal, as evidenced by this Court's recent acceptance of jurisdiction and ruling in *In the Matter of Alvarez*, CA-17-008 (P.Y.T. Ct. App. June 19, 2018).

20, 2014). However, nothing in the Tribal code prohibits the Tribe from filing an interlocutory appeal in criminal cases.[4]

The Pascua Yaqui Tribal Code does not define what "interlocutory appeals," "special actions," or "extraordinary writs" are. *See generally* 3 PYTC § 2-3-40. Pursuant to 1 PYTC § 2-30 (H),[5] whenever the meaning of a term used in the code is unclear, either "on its face or in the context of the Code, such term shall have the meaning given to it by the laws of the State of Arizona, unless such meaning would undermine the underlying principles and purposes of this Code." *See also Pascua Yaqui Tribe v. Miranda*, CA-08-015 (PYT Ct. App. Mar. 29, 2009) at p.22. As a result, the Court of Appeals has turned to Arizona law for guidance as to how to proceed with interlocutory appeals and special actions. For example, in *Montana*, CA-12-001, at p. 1, the Court of Appeals was asked to determine whether the trial court erred by ordering that a minor victim be made available for an evidentiary hearing regarding allegations that she had been coached. The Court determined that, "[a]lthough the Pascua Yaqui Rules of Appellate Procedure are silent on special actions," the matter fell squarely "within the Appellate Court's jurisdiction." *Id.* at 2. Noting that prosecutors lack a right to appeal criminal convictions, the Court explained that "special actions emerged in the common law as specific remedial writs in the face of erroneous, excessive, arbitrary, and or capricious government actions." *Id.*

The Court then briefly analyzed state law. Arizona permits special action review only where no "equally plain, speedy, and adequate remedy is available by appeal." Rule 1(a), Ariz. R. P. Spec. Act.; *State ex rel. Romley v. Martin*, 203 Ariz. 46, 47, 49 P.3d 1142, 1143 (Ariz.

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

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

App. 2002); *Fragoso v. Fell*, 210 Ariz. 427, 429, 111 P.3d 1027, 1029 (Ariz. App. 2005). Moreover, relief may only be granted in situations where the trial court: 1) fails "to exercise discretion which [it] has a duty to exercise," or to perform a lawful duty "as to which [it] has no discretion"; 2) proceeds or threatens "to proceed without or in excess of jurisdiction or legal authority"; or, 3) makes a determination that is "arbitrary and capricious[6] or an abuse of discretion."[7] Rule 3, Ariz. R. P. Spec. Act.; *see also Montana*, CA-12-001, p. 2. Acceptance of special action jurisdiction is discretionary. *Snyder v. Donato*, 211 Ariz. 117, 119, 118 P.3d 632, 634 (Ariz. App. 2005); *Romley*, 203 Ariz. at 47, 49 P.3d at 1143; *c.f.* 3 PYTC § 2-3-210(D)(2) (suggesting that acceptance of special action jurisdiction in a particular case is discretionary, and not a decision that can serve as the basis of a motion to reconsider). "Special action jurisdiction is appropriate in matters of statewide importance, issues of first impression, cases involving purely legal questions, or issues that are likely to arise again." *Romley*, 203 Ariz. at 47, 49 P.3d at 1143 (special action was appropriate forum for reviewing whether State could impeach the defendant with certain prior convictions at trial); *Synder*, 211 Ariz. at 119, 118 P.3d at 634 (special action regarding whether complex case designation was appropriate); *McGuire*, 239 Ariz. at 386, 372 P.3d at 330 (special action regarding whether juvenile could be tried as an adult); *State ex rel. McDougall v Tvedt*, 163 Ariz. 281, 284, 787 P.2d 1077, 1080 (Ariz. App. 1989) (denied jurisdiction over State's special action because it was filed after the defendant's conviction became final).

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

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

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

The questions raised in this case are similarly appropriate for interlocutory review. The central issue involved concerns whether the trial court's ruling — holding that a witness' decades-old narcotics prior conviction could be used to impeach her testimony at trial — was an abuse of discretion. This is a purely legal issue that will require this Court to interpret the interplay between various Tribal Rules of Evidence, as well as the interplay between the various Federal evidentiary rules and related caselaw the trial court relied upon. It is an issue that is likely to arise again in one form or another in future criminal cases, especially when one considers the frequency with which cases are set for bench or jury trials in this jurisdiction. Moreover, based on the Tribe's research, it is an issue of first impression for this Court.[8] For these reasons, this Court should accept jurisdiction of the Tribe's petition for special action.

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[8] The Tribe was able to locate only one case where a somewhat similar issue was raised. In *Hickman v. Pascua Yaqui Tribe,* CA-96-04 (PYT Ct. App., June 25, 1996), the Appellant argued, among other things, that he should have been allowed to impeach a prosecution witness with evidence that the witness had entered into a cooperation plea. *See* Appellant's Brief, *Hickman v. Pascua Yaqui Tribe,* CA-96-04 (June 25, 1996). The Court did not reach this issue and, instead, reversed the Defendant's conviction based on a finding that "insufficient evidence of residency" had been presented at trial. *Hickman v. Pascua Yaqui Tribe*, CA-96-04 (Nov. 15. 1996).

ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion when it ruled that a prosecution witness could be impeached with her prior narcotics conviction committed 27 years before the Defendant was alleged to have shot the victim's Chihuahua?
2. Did the trial court abuse its discretion when it determined that Tribal and Federal rules of evidence prohibited him from balancing the limited probative impeachment value of the witness' prior conviction against its prejudicial effect simply because it would be offered by the defense?
3. Did the trial court abuse its discretion in finding that the Tribe failed to demonstrate that there was good cause to preclude the defense from eliciting the nature of the witness' ancient conviction, which was not a crime involving dishonesty or false statement?

STATEMENT OF THE CASE

I. Facts[9] and Proceedings Below:

The Defendant and Real Party in Interest, Antonio Julio Lopez, is an enrolled member of the Pascua Yaqui Tribe and resident of the Pascua Yaqui Reservation. On September 5, 2017, the Defendant was charged with intentionally or knowingly subjecting an animal to cruel mistreatment, specifically, by shooting "a Chihuahua with a BB gun" and causing him serious physical injury. *See* Animal Control Complaint, *Pascua Yaqui Tribe v. Lopez*, AC-17-020 (Sept. 5, 2017) (*see* Exhibit 1).[10]

On July 30, 2017, Tribal Police officers responded to the 7800 block of Maala Mecha Voo'd — a residential neighborhood located within the physical boundaries of the Pascua Yaqui Reservation — and saw a dead Chihuahua lying in the road. The Chihuahua's neck was matted with blood, and there was a trail of blood leading from his body to the Defendant's residence, which was located approximately fifteen feet away. There was a hole in the dog's neck that was approximately the size of a BB projectile. Officers interviewed Josephine Montano, who was the mother-in-law of the dog's owner, and who had been watching the dog that day. Ms. Montano told police that she had heard the sound of a BB pistol being fired followed by that of a door

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[9] The parties contest some of the facts and circumstances surrounding this case, and no final determination of guilt has been made; however, the trial court held evidentiary hearings and outlined factual summaries in written rulings. Unless otherwise stated, the following factual summary is taken from two of these rulings: "Order Granting Tribe's Motion to Introduce Specific Instances of Defendant's Conduct and Order Reserving Ruling as to Limiting Instructions under Rule 404(B)," filed Jan. 3, 2018; "Order Denying Defendant's Motion to Dismiss for Lack of Probable Cause, Nov. 30, 28, 2017.

[10] Although the tribal court forwards the record to the Court of Appeals for review, copies of this document and others have been attached for this Court's convenience. *See* 3 PYTC § 2-3-110(c) and (e).

slamming about fifteen minutes before officers arrived. Ms. Montano indicated that she saw the dog lying dead in the street when she looked outside.

Police also interviewed the Defendant, who admitted to owning a BB gun. The Defendant admitted that he had used the gun to shoot at birds and dogs in the past, but denied shooting the victim's Chihuahua. Instead, the Defendant claimed that he had clapped his hands to scare the dog out of his yard when he saw that it was about to defecate. During a later police interview, Ms. Montano discussed other incidents that occurred approximately six months earlier. She stated that, on one occasion, she went outside after hearing the sound of a gun and saw the Defendant hiding behind a tree. She indicated that there was another incident in which the Defendant was seen outside of his home shooting at dogs that were defecating in his yard.[11]

The case was ultimately set for a jury trial on May 22, 2018. On September 15, 2017, the Tribe disclosed that Ms. Montano had previously been convicted in Pima County Superior Court case number CR-27530 for conspiracy to unlawfully sell a narcotic drug. *See* Tribe's Notice of Witnesses and Disclosure, *Lopez,* AC-17-020. In a separate filing, the Tribe disclosed that she had been convicted on March 30, 1990, and ordered to complete seven years' of probation. Ms. Montano was discharged from probation on July 11, 1997. *See* Exhibit 2.[12]

The Tribe also filed a Motion to Preclude Prior Conviction on September 15, 2017, arguing that Ms. Montano's prior bore no probative value due to its nature and extreme age and, thus, should be precluded under 3 PYTC R. Evid. 30, and Fed. R. Evid. 609. The Tribe further argued that any minimal probative value the evidence may have was significantly outweighed by

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[11] Following an evidentiary hearing conducted on January 3, 2018, the trial court ruled that this evidence was admissible as "other act" evidence for the limited purpose of establishing identity, under 3 PYTC R. Evid., Rule 8 (b), and Fed. R. Evid. 404 (b).

[12] "Exhibit 2" is a copy of Ms. Montano's probation discharge paperwork. It was attached as an exhibit to the Tribe's "Motion to Preclude Witness Josephine Elenes Montano's Prior Conviction, or in the Alternative to Sanitize Ms. Montano's Prior Conviction," [*hereinafter* "Motion to Preclude Prior Conviction"].

the danger of its admission causing undue and unfair prejudice. The Tribe moved, in the alternative, to have the conviction "sanitized" at trial so that jurors would hear no evidence regarding its nature so as to somewhat limit its prejudice. On September 28, 2017, the Defendant filed a timely response opposing the motion, arguing that the Tribe needed to provide the court with more information concerning the facts surrounding the offense, specifically, regarding the role and actions leading to Ms. Montano's conviction.

The Court's written ruling was issued May 14, 2018.[13] It stated:

> "[T]he Tribe's motion to exclude the prior felony conviction, under PYT R. Evid. 30 shall be granted, but the prior drug felony conviction may be used under PYT R. 29(b) as probative of the character for truthfulness of the witness, on cross examination. The Tribe's proposed witness' prior felony convictions may be used for impeachment purposes." "Order Denying Tribe's Motion to Preclude Prior Felony Conviction as Impeachment," *Lopez*, AC-17-020 (May 14, 2018) [*hereinafter* "Order re: Preclusion"]

In addition to basing its ruling on PYT R. Evid., Rule 29(b) and Fed. R. Evid. 608(b)(1), the court also relied upon *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977). That case, which examined an older version of Fed. R. Evid. 609 and its commentary, held that the federal rules of evidence prohibited courts from engaging in a Fed. R. Evid. 403 balancing test if the prior conviction at issue belonged to a government witness because any resulting prejudice would not be to the defendant. *Id.* The trial court also denied the Tribe's motion to sanitize Ms. Montano's prior conviction "for lack of good cause shown." *Order re: Preclusion, Lopez,* AC-17-020. This special action followed, and the case is currently stayed.

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[13] In addition to the "other acts" litigation referenced *supra*, the parties also filed motions and received rulings regarding whether the crime for which the Defendant had been charged was a felony under Tribal law, and whether there was probable cause to support the complaint. *See* Order Denying Defendant's Motion to Dismiss for Lack of Probable Cause, *Lopez*, AC-17-020 (Nov. 28, 2017).

II. Summary of the Argument

According to well-established rules of statutory construction, as well as provisions in the Tribal Code, rules must be interpreted together, especially if doing otherwise would result in a rule or law being rendered superfluous. The Trial Court's ruling on the motion to preclude amounted to an abuse of discretion in multiple different ways. The trial court held that PYT R. 29 and Fed. R. Evid. 608 — the rules concerning the admissibility of specific instances of conduct — would allow Ms. Montano to be impeached with evidence of her 1990 narcotics conviction at trial. As discussed in detail below, this interpretation was an abuse of discretion because it ignored other rules requiring all evidence to undergo a "prejudicial versus probative" analysis prior to admission, and rules prohibiting the admission of convictions that are more than ten years old. Additionally, the trial court relied on a case that interpreted older, subsequently superseded versions of the federal rules and suggested that the "prejudicial vs. probative" balancing test applied only to evidence offered *against* a defendant. More recent caselaw interpreting the current version of the federal rule holds that the balancing test must be used regardless of who is seeking to admit evidence. Finally, in ruling that Ms. Montano could be impeached not only with the existence of her conviction, but also its nature is contrary to caselaw holding that such facts are rarely relevant as impeachment, especially when a prior conviction is more than ten years old.

For the reasons outlined below, the Tribe respectfully requests that this Court reverse the trial court's order on the admissibility of Ms. Montano's conviction due to the fact that it amounted to a clear abuse of discretion.

LAW AND ARGUMENT

I. The trial court abused its discretion in determining that a government witness could be impeached with a 1990's narcotics conviction because it was not evidence relating to a prior conviction of the Defendant and, thus, could not prejudice the defense.

In its May 14th ruling, the trial court relied primarily upon PYT R. Evid., Rule 29, Fed. R. Evid. 608 (b)(1), and *Ortega*, 561 F.2d at 807. In doing so, the trial court appeared to suggest that these rules were not only controlling, but that they should be considered in isolation from PYT R. Evid., Rule 30 and Fed. R. Evid 609, respectively. This amounted to an abuse of discretion. Under the Tribal Code, which is both clear and controlling, Ms. Montano's prior narcotics conviction is inadmissible at trial on the Defendant's animal cruelty-related charges. Her conviction occurred more than ten years ago and any potential probative value is substantially outweighed by its prejudicial effect. Moreover, the Tribal Code mandates that local rules of evidence be interpreted and applied as a collective whole, and not in the way that they were interpreted below, as such an approach renders individual rules superfluous.

A. Based on a plain reading of the Pascua Yaqui Tribal Code, Ms. Montano's prior drug conviction should have been precluded because it happened more than 27 years ago.

1) Canons of Statutory Construction:

The Tribal Code provides some direction regarding statutory construction and interpretation. 1 PYTC § 2-30. For instance, "[w]ords shall be given their plain meaning and technical words shall be given their usually understood meaning where no other meaning is specified." 1 PYTC § 2-30 (A); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989; *United States v. Flores*, 729 F.3d 910, 914 (9th Cir. 2013).[14] Moreover, the Tribal Code "*shall be construed as a whole* to give effect to all its parts in a logical, consistent manner."

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[14] *See Miranda*, CA-08-015 at p.22 ("[W]hile decisions of the Arizona and United States . . . [c]ourts are not controlling authority in this Court, they are highly persuasive").

1 PYTC § 2-30 (B) (*emphasis added*); *see also Boise Cascade Corp v. U.S. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991); *Corley v. United States*, 556 U.S. 303, 314 (2009). However, the Code is silent with regards to other well-established cannons of statutory interpretation.

Federal courts have long adhered to established cannons of construction. One such cannon dictates "that if the language of a statue is clear, [courts are to] look no further than that language in determining the statute's meaning." *United States v. Lewis*, 67 F.3d 225, 228 (9th Cir. 1995). Moreover, "[p]articular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme." *Id.* at 228-29. A court will look to the legislative history of a statute only if that statute's plain language is unclear. *Id.* at 229. Importantly, "one of the most basic interpretive canons" states that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley*, 556 U.S. at 314 (*citations and quotations omitted*).

In this case, and as will be discussed in more detail, *infra*, the trial court abused its discretion when it determined that admissibility of Ms. Montano's conviction was governed solely by PYT R. Evid. Rule 29 instead of the entirety of the Rules of Evidence.

2) The Pascua Yaqui Rules of Evidence

In the Pascua Yaqui Tribal Court, the admissibility of evidence in criminal cases is governed by the Tribal Code Rules of Evidence. 3 PYT R. Evid., Rule 1. These rules are designed to "secure *fairness* in [the] administration of justice, elimination of unjustifiable expense and delay, and promotion of growth and development of the law to the end that *the truth may be ascertained and proceedings justly determined.*" 3 PYT R. Evid., Rule 2 (*emphasis added*).[15] When Rule 2 is read in conjunction with 1 PYTC § 2-30 (B), discussed *supra*, it is clear that the Tribal Council intended for the rules of evidence to be read and interpreted together, and not in isolation.

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[15] Rule 2 mimics in many respects, Fed. R. Evid., Rule 102.

Evidence may only be admitted at trial if it is relevant. 3 PYT R. Evid., Rule 6 (c). Evidence is deemed relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action" more or less probable "than it would be without the evidence. 3 PYT R. Evid., Rule 6 (a). Nevertheless, even relevant evidence may be "excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, ...[of] misleading the jury," or when "it will unduly delay, waste time or be a needless presentation of cumulative evidence." 3 PYT R. Evid., Rule 7. The Tribal Code further requires that judges act as the gatekeepers of evidence and "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence." 3 PYT R. Evid., Rule 31(A). This is done to ensure that "the interrogation and presentation" of evidence is "effective for the ascertainment of the truth," that it "[a]void[s the] needless consumption of time," and that it protects "witnesses *from harassment and undue embarrassment.*" *Id.* (*emphasis added*).

The ascertainment of truth involves testing a witness' credibility via the crucible of cross-examination. *See* 3 PYT R. Evid., Rule 28. As such, the rules detail ways in which credibility may be tested. For example, Rule 29, the rule upon which the trial court relied, provides:

> (A) The witness' credibility may be attacked or supported by evidence of opinion or reputation, provided such evidence refers to truthfulness or unfaithfulness; and evidence of truthfulness is admissible only when it has been attacked by opinion or reputation evidence or otherwise.
>
> (B) Specific instances of conduct of a witness, for the purpose of attacking or supporting his credibility, may only be inquired into on cross examination, concerning the witness' truthfulness or untruthfulness. This rule does not operate as a waiver of the privilege against self-incrimination.

3 PYT R. Evid., Rule 29.

Rule 30, on the other hand, gives guidance as to when and how a witness may be impeached specifically by evidence of his criminal history. 3 PYT R. Evid., Rule 30. It states:

(A) For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted, if it is elicited from the witness or established by public record, during cross examination, but only if the crime[:]

1. was punishable by death or imprisonment in excess of one year pursuant to the law under which he was convicted; or
2. It involved dishonesty or false statement, regardless of the punishment.

(B) Evidence under this rule *is not admissible if ten years have elapsed* since the date of conviction or date of release from the confinement for that conviction whichever is the later; nor shall juvenile adjudications be admissible.

Id. (*emphasis added*).

An argument can certainly be made that evidence of a criminal conviction is evidence of a specific instance of conduct that would fall under the purview of Rule 29. However, Rule 30 specifically applies to criminal convictions, and, therefore, it is meant to apply to situations when a party seeks to impeach a witness with specific evidence of their criminal history. To hold otherwise would require an interpretation of Rule 29 that would render Rule 30 entirely superfluous.

Under a plain reading of the rules, Ms. Montano's prior conviction is inadmissible at trial, and the trial court abused its discretion by ruling to the contrary. Ms. Montano was convicted of conspiracy to sell a narcotic drug, which constituted a class 2 felony under Ariz. Rev. Stat. § 13-3408(A) at the time of her conviction. As such, Ms. Montano faced a potential sentence of between 4 and 10 years imprisonment, Ariz. Rev. Stat. §13-702 (1987), or could have been ordered to serve up to seven years of probation. She was ultimately given probation, and was successfully discharged from supervision in 1997.

Drug offenses — even those involving sales — are not considered crimes of moral turpitude, and a person who sells narcotics may very well have a reputation for being honest and truthful. Although perhaps an undesirable character trait, even an individual with a *propensity*

for selling drugs is no more likely than any other individual to testify untruthfully.[16] But, setting questions of moral turpitude aside, the fact remains that Ms. Montano's conviction occurred *9,984* days prior to the date when the Defendant was alleged to have shot her daughter-in-law's Chihuahua. That amounts to a period of twenty seven years and four months; in many respects, a lifetime and certainly far older than the ten year period contemplated by 3 PYT R. Evid., Rule 30. Therefore, under the plain language of the relevant rule, Ms. Montano's conviction is not admissible at trial.

While the plain language of Rule 30 is clear, *see generally* 1 PYTC § 2-30, it cannot be interpreted in isolation. As was discussed *supra*, 1 PYTC § 2-30(B) requires that Rule 30 be read and interpreted in accordance with its fellow rules. This requirement, when followed, prevents individual provisions and rules from being rendered superfluous. The first question, then, is whether evidence of Ms. Montano's 1990 drug conviction is relevant and, thus, has "any tendency to make the existence of any fact that is of consequence" more or less probable. 3 PYT R. Evid., Rule 6 (a). The existence of prior convictions can be relevant to determining a witness' overall credibility. Arguably, the fact that Ms. Montano has a prior felony conviction could have passing relevance to the issue of her credibility.

Certain types of crimes can, however, be more relevant to the issue of credibility than others. For instance, evidence Rule 30(a) allows for a witness to be impeached with a misdemeanor conviction so long as it involved a crime of "dishonesty or false statement," but typically disallows other misdemeanors from being used as impeachment.[17] 3 PYT R. Evid., Rule 30 (a). It puts misdemeanor crimes of moral turpitude at the same level as felony convictions that do not involve false acts or statements. The fact that Rule 30 draws this

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[16] In this case, there is no evidence whatsoever that Ms. Montano has any such propensity. Indeed, since her discharge from probation, she has not accumulated *any* additional criminal convictions, felony or misdemeanor.

[17] The Tribe acknowledges that, in certain, very specific circumstances, a witness can be impeached with evidence of a prior conviction involving something other than a crime of moral turpitude so long as the conviction fell within the scope of 3 PYT R. Evid., Rule 8 as "other acts" evidence. However, that situation does not apply to this case.

distinction demonstrates that certain types of conviction are less relevant to a witness' credibility than others and should not be used as impeachment.

Even though a crime may be probative as to the issue of witness credibility, a court's gatekeeping responsibility does not end with Rules 29 nor 30. Instead, the trial court is required to weigh all proposed evidence according to the balancing test mandated by 3 PYT R. Evid., Rule 7. This requires the trial court to exclude any evidence if its probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." *Id.*

Here, Ms. Montano's prior conviction carries very little probative value. Ms. Montano is expected to testify about events that she personally experienced. Her testimony would relate specifically to what she heard and saw on the day her daughter-in-law's dog was shot, and about the Defendant's "other acts." Ms. Montano's prior conviction did not involve a crime of dishonesty,[18] and, in addition to being ancient, was her only conviction. Simply put, this conviction has no bearing on whether her testimony concerning an incident that happened in 2017 is credible.

On the other hand, allowing Ms. Montano to be impeached with her conviction would subject her and the Tribe to significant undue prejudice. When a person hears that a witness has a prior felony conviction, it generally causes them to believe that said person is a reprobate, untrustworthy, and someone who should not be believed. When a person hears that the prior conviction was for conspiracy to sell narcotics — and thanks in many ways to news and entertainment programming — it conjures subconscious images of cartels, poisoned communities and children, broken families, and violence. Ms. Montano has spent decades

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[18] Ariz. Rev. Stat. § 13-3408(A) requires prosecutors to prove that a suspect knowingly sold a narcotic drug. In order to be convicted of conspiracy to sell a narcotic drug, prosecutors would be required to also prove that the suspect performed an overt act "with the intent to promote or aid the commission of an offense" with another person. Ariz. Rev. Stat. § 13-1001(A). Unlike crimes like fraud, false reporting or perjury, it does not require the prosecution to prove anything about a suspect's honesty.

moving past a mistake made during younger days. Forcing her to answer questions about a prior conviction from twenty seven years ago serves no purpose other than to embarrass and harass her, confuse the issues, and mislead the jury as to who and what crime is on trial. The trial court failed to engage in a balancing test as required by the Tribal Rules of Evidence. Accordingly, its decision to admit the prior as impeachment constituted an abuse of discretion, and should be overturned.

B. The trial court abused its discretion in ruling that *United States v. Ortega* — which interpreted an older, superseded version of Rule 609 and its commentary — mandated that Ms. Montano's conviction to be used as impeachment.

Although the Tribal Code clearly requires that Ms. Montano's conviction be precluded from use at trial, even as impeachment, further analysis is required because the trial court also based its decision on *Ortega*, 561 F.2d at 807, which discussed Fed. R. Evid. 609. As with the Tribal Code, the Federal Rules of Evidence include directives as to relevancy. *See* Fed. R. Evid., Rule 401 & 402. Furthermore, the Federal rules also mandate the exclusion of evidence when its probative value is substantially outweighed by the danger of prejudice. Fed. R. Evid., Rule 403. The Federal rules also establish trial courts' duty to "protect witnesses from harassment or undue embarrassment" while ensuring that trials promote effective and efficient truth seeking. Fed. R. Evid., Rule 611(a). These rules are nearly identical in terms of substance and scope to the Tribal Rules discussed above.

Since their enactment in 1975, there have been several substantive changes to the Federal rules and their corresponding advisory committee notes. Fed. R. Evid. 609, for instance, has gone through significant changes, which are directly relevant to this case. The Rule provides, in pertinent part:

(a) **In General**. The following rules apply to attacking a witness's character for truthfulness *by evidence of a criminal conviction*:[19]
(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, *subject to Rule 403*, in a civil case or in a criminal case *in which the witness is not a defendant*; and
(B) must be admitted in a criminal case in which the witness is a defendant, *if the probative value of the evidence outweighs its prejudicial effect* to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving— or the witness's admitting— *a dishonest act or false statement*.

(b) **Limit on Using the Evidence After 10 Years**. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if... (1) *its probative value*, supported by specific facts and circumstances, *substantially outweighs its prejudicial effect*.

Fed. Rule Evid. 609.

Originally, courts, including those in the Ninth Circuit, interpreted Rules 609 and 403 differently. Cases like *Ortega*, 561 F.2d at 805-06, and *United States v. Nevitt*, 563 F.2d 406, 408 (9th Cir.1977) held that a defendant could impeach government witnesses with all of their prior felony convictions without the court weighing the probative value of those convictions against their prejudicial effect. These cases reasoned that no such balancing test was required because a defendant could not be prejudiced by evidence he introduced in his own defense. *Id.*

The rules and their commentary were later amended in 1990, and, in 1996, the Ninth Circuit was asked to revisit the issues discussed in cases like *Nevitt*. In *United States v. Rowe*, 92 F.3d 928, 933 (9th Cir. 1996), the defendant—who had been charged with carjacking—sought to impeach a victim with, among other things, her twelve-year-old auto theft conviction. *Id.* He

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[19] As will be discussed, *infra*, the inclusion of this clause provides a critical distinction between this rule, and Fed. R. Evid. 608.

relied primarily on *Nevitt.* The Ninth Circuit acknowledged that the rule that *Nevitt* relied upon was "expressly abrogated by the 1990 amendments to the Federal Rules of Evidence." *Id.* The new amendments *required* courts to "apply 'the general balancing test of Rule 403 to protect all litigants against [the] unfair impeachment of witnesses. The balancing test protects ... the government in criminal cases ....'" *Id.* (*quoting* Fed. R. Evid. 609, Advisory Committee's Note (1990)). The Ninth Circuit ultimately held that the trial court did not abuse its discretion when it relied on the current rule and found that the victim's auto theft conviction bore little probative value compared the prejudice its admission would cause to the prosecution. *Id.*

In this case, the trial court relied on case law interpreting outdated and subsequently superseded versions of the federal rule. Accordingly, its ruling amounted to an abuse of discretion.

C. The trial court abused its discretion by ruling that evidence of Ms. Montano's conviction was admissible through the "back door" of Rule 608 even though Rule 609 prohibited admission of this evidence at trial. .

In its ruling, the trial court appeared to acknowledge, even without engaging in a Rule 7 or Rule 403 balancing test, that PYT R. Evid., Rule 30 and Fed. R. Evid., Rule 609 would preclude Ms. Montano from being impeached with her prior conviction at trial. The trial court then ruled, however, that evidence relating to Ms. Montano's conviction could be introduced as extrinsic act evidence pursuant to PYT R. Evid., Rule 29, and Fed. R. Evid., Rule 608. There is no Pascua Yaqui appellate caselaw regarding this issue. However, the Ninth Circuit has examined the interplay between Fed. R. Evid., Rules 608 and 609 and reached the opposite conclusion. Thus, the trial court's ruling amounted to an abuse of discretion and was contrary to law.

Rule 608(b) states that, "[e]xcept for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances or a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness." The defendant in *United States v. Osazuwa*, 564 F.3d 1169 (9th Cir. 2009), was charged with assaulting a prison guard. He had a prior conviction for bank fraud, and the prosecution elicited facts regarding the nature of that conviction at trial to impeach the defendant's credibility. *Id.* The trial court in that case had ruled that the evidence was admissible under Rule 608.[20]

The Ninth Circuit first looked at the plain language of Rules 608 and 609. Noting "that the interplay between Rules 608 and 609 is complex," and that the language of Rule 608 was ambiguous about whether it governed the admissibility of prior convictions. Thus, the Court turned its attention to relevant advisory committee notes. Those notes indicated "that '[p]articular instances of conduct, *though not the subject of criminal conviction*, may be inquired into on cross-examination' and '*[c]onviction of crime as a technique of impeachment is treated in detail in Rule 609*, and here is merely recognized as an exception to the general rule excluding evidence of specific incidents for impeachment purposes.'" *Id.* at 1174 (*quoting* Fed. R. Evid. 608 advisory committee's notes (1972) (emphases and alterations in original). The Ninth Circuit ultimately held "that Rule 608(b) permits impeachment only by specific acts that have not resulted in a criminal conviction. Evidence relating to impeachment by way of criminal conviction is treated exclusively under Rule 609." *Id* at 1175. In doing so, it recognized "the unfairness that would result if evidence relating to a conviction is prohibited by Rule 609 but admitted through the 'back door' of Rule 608." *Id.* at 1174.

The precise situation that was disallowed by the *Osazuwa* court would be created by allowing Ms. Montano to be impeached by evidence of her prior conviction under Rule 608 even

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[20] *Osazuwa* dealt with an older version of Rule 608(b), which was amended in 2011. However, the 2011 amendments merely reorganized the rule's language, and did not change any of its substantive terms.

though it would be precluded under Rule 609. Although *Osazuwa* is not binding precedent in this jurisdiction, it is directly on point and highly persuasive authority. Moreover, it directly interprets the federal rules upon which the trial court, in part, relied. The trial court's ruling as to the motion to preclude Ms. Montano's conviction, thus, amounted to an abuse of discretion, and should be reversed.

II. The trial court abused its discretion when it ruled that Ms. Montano's prior conviction should not be sanitized at trial, thus allowing the jury to hear that it was for a narcotics offense.

The Tribe has never conceded that Ms. Montano's conviction could be used to impeach her testimony under either the Tribal or Federal Rules of Evidence. However, while moving to preclude her conviction under the rules, the Tribe moved, in the alternative, to "sanitize" Ms. Montano's conviction in the event that the trial court found it to be admissible. When a conviction has been sanitized, jurors are informed that a witness has a prior felony conviction and the date on which he or she was convicted, but are not informed as to the nature of the conviction or the circumstances surrounding it. The trial court found that the Tribe had failed to demonstrate that there was good cause to sanitize Ms. Montano's conviction. This amounted to a further abuse of discretion.

Because there are no Pascua Yaqui appellate decisions on this issue, it is appropriate to turn to federal law for persuasive guidance. The Ninth Circuit has held that "the scope of inquiry into prior convictions is limited." *Osazuwa*, 564 F.3d at 1175. "[A]bsent exceptional circumstances, evidence of a prior conviction admitted for impeachment purposes may not include collateral details and circumstances attendant upon the conviction." *Id.* (*alterations in original, internal citations omitted*). "The scope of the inquiry is limited because of the unfair prejudice and confusion that could result from eliciting details of the prior crime." *Id.* (*quoting United States v. Robinson,* 8 F.3d 398, 410 (7th Cir.1993) (holding that the impeaching party is

not "entitled to harp on the witness's crime, parade it lovingly before the jury in all its gruesome details, and thereby shift the focus of attention from the events at issue in the present case to the witness's conviction in a previous case") *(internal quotations marks omitted); United States v. Roenigk,* 810 F.2d 809, 815 (8th Cir.1987) ("The problem with excessive references to the details of prior criminal conduct is that the jury is likely to infer that the defendant is more likely to have committed the offense for which he is being tried than if he had previously led a blameless life.")). In *Osazuwa*, the Ninth Circuit found that it was improper for the prosecution to elicit details about the nature of the defendant's bank fraud conviction at trial.

Although there is no tribal precedent regarding this issue, PYT R. Evid., Rule 31 requires trial courts to ensure that evidence introduced at trial serves certain goals. Those goals include ensuring that the trial is an effective forum in the pursuit of truth, and that the parties do not introduce evidence of a type or in such a manner that it serves simply to embarrass or harass a witness unnecessarily.

Unlike the bank fraud conviction at issue in *Osazuwa*, Ms. Montano's prior conviction was for a felony narcotics crime, *not* a crime of dishonesty. Moreover, it happened nearly thirty years ago. The only reason to admit evidence regarding the nature of her conviction at trial would be to embarrass her with a mistake made many years before. It would constitute an impermissible attempt to shift the jury's attention and focus from who and what issue is before them, namely, whether the Defendant shot and killed a dog. Introduction of the details of her conviction, thus, would serve only to harass and embarrass her unnecessarily, and in violation of PYT R. Evid., Rule 31. Accordingly, the trial court abused its discretion in ruling that this evidence was admissible.

CONCLUSION AND REMEDY SOUGHT

The trial court's ruling as to the admissibility of Ms. Montano's prior conviction was an abuse of discretion and contrary to law. Appellant respectfully requests this Court to reverse the trial court's ruling and remand for further proceedings.

RESPECTFULLY submitted this 1st day of August, 2018.

Oscar J. Flores
Chief Prosecutor

Kendrick Wilson
Deputy Prosecutor

Coleen Thoene
Deputy Prosecutor

CERTIFICATE OF SERVICE

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

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

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

Annamarie Valdivia
Annamarie.Valdivia@pascuayaqui-nsn.gov
Pascua Yaqui Office of the Public Defender
7474 S. Camino de Oeste
Tucson, AZ 85757

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

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

Dated this 1 day of August, 2018.

PASCUA YAQUI PROSECUTOR

Kendrick Wilson
Deputy Prosecutor

Coleen Thoene
Deputy Prosecutor

Sworn before me this 1st day of August, 2018

Notary Signature

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

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Kendrick Wilson
Deputy Prosecutor

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

PASCUA YAQUI TRIBE,
Appellant,

Vs.
LOPEZ, ANTONIO

Defendant.

APPEALS CASE NO.: CA-18-001

(Tribal Court No. AC-17-020)

NOTICE OF APPEAL
(Oral argument requested)

Notice is hereby given that the Pascua Yaqui Tribe appeals to the Appellate Court of the Pascua Yaqui Tribe from the judgment entered in this action by the Pascua Yaqui Tribal Court on May 15, 2018 by order of Associate Judge Melvin Stoof. [see attached].

The Trial Court erred in denying the Tribe's Motion to Preclude Witness Josephine Montano's Prior Conviction. Because Ms. Montano's conviction is more than ten years old and did not involve dishonesty or false statement, the Trial Court's ruling is an abuse of discretion and is contrary to 3 PYT R. Evid. Rule 30 and Fed. R. Evid. 609.

Pursuant to the Pascua Yaqui Rules of Criminal Procedure the Tribe does not have a right of appeal upon completion of a criminal case. *See* 3 PYTC § 2-3-90(G). In cases where the Tribe requires reconsideration of a decision made by the trial court, the Tribe

should seek remedy pretrial or prior to the termination of trial. Such extraordinary writs are permitted under the Pascua Yaqui Rules of Appellate Procedure. *See* 3 PYTC § 2-3-260(D).

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

Respectfully submitted this 15th day of May, 2018.

OFFICE OF THE PROSECUTOR
PASCUA YAQUI TRIBE

Oscar J. Flores
Chief Prosecutor

Kendrick Wilson
Deputy Prosecutor

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

Annamarie Valdivia
Public Defender's Ofc.
Attorney for Defendant

By:

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, PLAINTIFF, vs. LOPEZ, ANTONIO DEFENDANT.	CASE NO. AC-17-020 ORDER DENYING TRIBE'S MOTION TO PRECLUDE PRIOR FELONY CONVICTION AS IMPEACHMENT

On May 14, 2018, the Tribe reviewed the parties request for ruling on the Tribe's motion to preclude prior felony conviction over ten years or to sanitize the conviction. The court should deny the Tribe's motion to exclude a prior felony conviction of the alleged victim for impeachment purposes, and it should allow the prior felony conviction, drug possession in for impeachment purposes. As to the drug conviction that is more than ten years old, although it may be inadmissible under PYT R. Evid. 30, as a conviction more than 10 year old, see also Fed. R. Evid. 609, it *may* be admissible, if allowed by the court on cross-examination, under PYT R. Evid. 29, see also F.R. Evid 609, as probative of the character for truthfulness or untruthfulness of the witness. PYT R. Evid 29(b), F.R.Evid. 608(b)(1). See also *U.S. V. Ortega*, 561 F.2d 803 (9th Cir. 1977).

IT IS ORDERED that the Tribe's motion to exclude the prior felony conviction, under PYT R. Evid. 30 shall be granted, but the prior drug felony conviction may be used under PYT R. 29(b) as probative of the character for truthfulness of the witness, on cross-examination. The Tribe's proposed witness' prior felony convictions may be used for impeachment purposes. The court denies the request to sanitize for lack of good cause shown.

SO ORDERED THIS 14th DAY OF MAY, 2018.

Associate Judge, Pascua Yaqui Tribal Court

Date 05/14/18

cc: ___ Tribe ___ Defendant ___ Counsel

Clerk

PASCUA YAQUI TRIBE ☆ JUDICIAL BRANCH ☆

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