

No. CA-18-002

Pascua Yaqui Court of Appeals

Pascua Yaqui Tribe, Petitioner,
vs.
Hon. Margaret A. Flores, Pascua Yaqui Tribal Court,
and
Alvarez Aquiles, Real Party in Interest.

For Plaintiff: Oscar J. Flores, Chief Prosecutor; Alicia Renee Robertson, Deputy Prosecutor,
Pascua Yaqui Office of the Prosecutor

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

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 dismissing Count 4 of the Amended Complaint on grounds of multiplicity.

II. Appellate Court Jurisdiction

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. As this Court decided in *PYT v. Stooft, ex. rel. Lopez*, CA-18-001, special actions are permitted.

The Prosecutor seeks review of a pre-trial order in this criminal matter. The Trial Court's order dismissed Count 4 with prejudice before trial, which has the same effect as an acquittal after trial. 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, and thus an interlocutory appeal is the only option herein. The defendant argues that this appeal is prohibited given that the prosecutor did not file a Motion to Reconsider pursuant to 3 PYT §2-2-300. However that argument ignores the plain language of that section, that "either party **may**, by filing a written motion, or by making an oral motion in open court in the presence of all other parties, request that the court issue a particular order." (Emphasis added) This provision is permissive and not mandatory. There is no provision in that section or any other law of the Pascua Yaqui Tribe that requires a motion to reconsider be filed prior to an appeal.

The special action petition alleges that the trial court abused its discretion when it ordered that Count 4 be dismissed on the grounds of multiplicity, however, this is a question of law, which we review de novo. *Pascua Yaqui Tribe v. Soto*, CA-06-010, at 8 (PYT Ct. App., 3/9/07). *see also, Pascua Yaqui Tribe v. Molina*, CA-14-003, at 9 (PYT Ct App., 5/16/14)

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

The Tribe alleges that the trial court erred when it dismissed Count 4 of the Amended Complaint, granting the defendant's Motion to Dismiss on grounds of multiplicity. "We review questions of law using the de novo standard of review..." and are not bound by the trial court's interpretation of the law. *Pascua Yaqui Tribe v. Soto*, CA-06-010, at 8 (PYT Ct. App., 3/9/07). *see also, Pascua Yaqui Tribe v. Molina*, CA-14-003, at 9 (PYT Ct App., 5/16/14)

The Pascua Yaqui Tribe charged the defendant on September 9, 2017 with multiple offenses arising from a confrontation between the defendant and a victim, including Count 1 – Assault 4 PYTC §1-130(A)(3), Count 2 – Aggravated Assault, 4 PYTC §1-130(A)(2)(B)(2), Count 3 Threatening and Intimidating 4 PYTC §1-225(A), Count 4 Tampering with Communications 4 PYTC §1-430, Count 5 Malicious Mischief, 4 PYTC §1-400, and Count 6 Disorderly Conduct 4 PYTC §1-300. That complaint was accompanied with a probable cause statement. *Record on Appeal*, pgs 62-63 & 64-67 On October 19, 2017 the defendant filed a Motion to Dismiss (Multiplicity). *Record on Appeal*, pg 41-45 Also, on October 19, 2017 the Tribe filed an Amended Criminal Complaint, which corrected typographical errors in the victim's name, but did not alter the charges. *Record on Appeal*, pgs 35-40

The trial court heard argument on the defendant's Motion to Dismiss on May 2, 2018, after the Tribe responded in writing and the defendant submitted a reply on the motion. The trial court issued its decision on that same date, dismissing with prejudice Count 4 of the Amended Complaint. *Record on Appeal*, pg 3

The counts in question in this interlocutory appeal are 4 and 5, which state¹:

COUNT 4: 4 PYTC § 1-430- Tampering with Communications

On or about September 08, 2017 at approximately 3:27 p.m., at or near 5040 Wichalakas, Defendant interfered with communications by displacing, removing, injuring, or destroying any radio station, TV tower, antenna, cable, telephone, line, wire, pole, or conduit or shall cut, break, tap, or did use any other means in destroying, interfering with or preventing the operation of communications or did assist in any of the foregoing conditions, to wit: defendant slapped Matthew Izzo's phone out of his hand.

¹ Amended Complaint filed on October 19, 2017

COUNT 5: 4 PYTC § 1-400- Malicious Mischief

On or about September 08, 2017 at approximately 3:27 p.m., at or near 5040 Wichalakas, Defendant maliciously disturbed, injured, or destroyed any livestock or other domestic animal or other property, to wit: Defendant slapped Matthew Izzo's phone out of his hand, causing it to fall to the ground and be damaged.

The probable cause statement which was filed with and in support of the complaint states in pertinent part:

ON OR ABOUT 090817 AT APPROXIMATELY 1527 HOURS, NEAR
OR APPROXIMATELY NEAR 5040 WICHALAKAS ...

MR. IZZO STATES HE WAS CALLING THE POLICE WHILE FOLLOWING MR. ALVAREZ. ... HE CONTINUED FOLLOWING MR. ALVAREZ AND SPEAKING WITH POLICE DISPATCH AND NEAR 5040 WICHALAKAS MR. ALVAREZ STOPPED EXITED HIS VEHICLE AND APPROACHED MR. IZZO WHILE HE WAS IN HIS TRUCK SPEAKING ON THE PHONE.

ACCORDING TO MR. IZZO MR. ALVAREZ SLAPPED HIS PHONE OUT OF HIS HAND CAUSING IT TO FALL TO THE GROUND CAUSING DAMAGE TO IT, ...

4 PYTC § 1-400 Malicious Mischief, provides: "Any person who shall maliciously disturb, injure or destroy any livestock or other domestic animal or other property shall be deemed guilty of malicious mischief." Thus the elements are,

- 1) maliciously,
- 2) disturbs, injuries, or destroys,
- 3) property.

This offense requires a specific intent on the part of the defendant, in addition to damage or injury to property. The intent required, "malice" is defined as "a conscious, intentional wrongdoing... with the intention of doing harm to the victim." <https://dictionary.law.com>

4 PYTC § 1-430 Tampering with Communication, provides: "Any person who shall interfere with communications by displacing, removing, injuring or destroying any radio station, TV tower, antenna, cable, telephone, line, wire, pole, or conduit or shall cut, break, tap, or shall use cut, break, tap, in destroying, interfering with, or preventing the operation of communications or shall assist in any of the foregoing conditions shall be deemed guilty of an of an offense." The elements of that offense are,

- 1) displacing, removing, injuring or destroying; or
- 2) cut, break, tap, or by any other means destroy, interfere with, or prevent the operation of,
- 3) a means of communication, *i.e.* any radio station, TV tower, antenna, cable, telephone, line, wire, pole, or conduit.

This offense does not require the same specific intent on the part of the defendant, and does not require any injury or damage, but must include interference with a communication device or means.

The specific elements of these two offenses are fundamentally different; a defendant can cause Malicious Mischief by intentionally damaging or destroying someone's cell phone by slapping it out of the victim's hand, without ever interfering with any communications. And, a defendant can interfere with communications by slapping a phone out of someone's hand, without causing any damage, and without having any specific intent to cause damage. The differences are seen in the probable cause statement. As to the facts necessary to prove Count 4, "Mr. Alvarez approached Mr. Izzo while he was in his truck speaking on the phone. According to Mr. Izzo Mr. Alvarez slapped his phone out of his hand." And the facts necessary to prove Count 5, "according to Mr. Izzo Mr. Alvarez slapped his phone out of his hand causing it to fall to the ground causing damage to it."

While the trial court appears to have tried to apply the legal standard in *Blockburger, infra*, the court failed to take into account the differing elements or facts proved by the same conduct in the present matter.

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is **whether each provision requires proof of an additional fact which the other does not**. *Gavieres v. United States*, 220 U. S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489, and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey v. Commonwealth*, 108 Mass. 433: 'A single act may be an offense against two statutes; and **if each statute requires proof of an additional fact which the other does not**, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' Compare *Albrecht v. United States*, 273 U. S. 1, 11, 12, 47 S. Ct. 250, 71 L. Ed. 505, and cases there cited. Applying the test, we must conclude that here, although both sections were violated by the one [act], two offenses were committed.

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, ___ (1932) (Emphasis added)

The *Blockburger* test was not properly applied, as these two offenses each have an element or fact which must be proven that the other does not have, and thus they are not multiplicitous, nor is double jeopardy implicated.

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IV. Order

The Order Granting the Defendant's Motion to Dismiss on grounds of Multiplicity is REVERSED. This case is REMANDED to the trial court to continue proceedings consistent with the Pascua Yaqui Tribal Code and this Opinion and Order.




Hon. Rebecca Plevel

We CONCUR:



Hon. Robert Miller



Justice Kendra A. Martinez

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IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR,

Appellant.

Vs.

HONORABLE MARGARET FLORES
JUDGE, PASCUA YAQUI TRIBAL COURT
Appellee,

AQUILES ALVAREZ¹
Real Party in Interest

APPEALS CASE NO: CA-18-002
TRIBAL COURT NO: CR-17-268


APPELLANT’S REPLY BRIEF

COMES NOW, the Pascua Yaqui Tribe by and through the Pascua Yaqui Chief Prosecutor, OSCAR J. FLORES, and his Deputy, ALICIA RENEE ROBERTSON, and hereby respectfully submits the Appellant’s Reply Brief. The Tribe respectfully requests this Court take

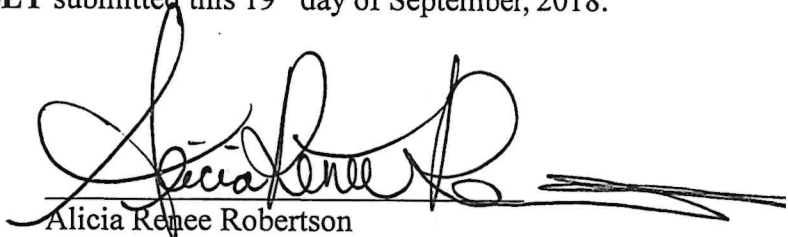
¹ In Special Action pleadings the complaint names the body, officer, or person against whom relief is sought. However, “[i]f any public body, tribunal, or officer is named as a defendant, the real party or parties in interest shall be joined as defendants.” Ariz.R.Spec.Act., Rule 2(a)(1). In such circumstances,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

jurisdiction of this issue and to grant relief to Appellant by reversing the ruling of the Defendant Tribal Court Judge and remand for further proceedings.

RESPECTFULLY submitted this 19th day of September, 2018.



Oscar J. Flores
Chief Prosecutor



Alicia Renee Robertson
Deputy Prosecutor

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

On: _____

Copy of the foregoing provided to:

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STATEMENT OF THE ISSUES:

- 1. CAN A DEFENDANT BE CHARGED WITH BOTH TAMPERING WITH COMMUNICATIONS AND MALICIOUS MISCHIEF WITHOUT BEING MULTIPLICITOUS?**

LAW AND ARGUMENT

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

In his response, the Defendant/Real Party in Interest disagreed that this Court has jurisdiction over this interlocutory appeal. 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. 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.

**II.
DEFENDANT INCORRECTLY CITES TO CASELAW THAT IS NOT APPLICABLE.**

Defendant disagrees that the Pascua Yaqui Tribal Code allows for interlocutory appeals in criminal cases and he mistakenly asserts that this Court should decline jurisdiction over this

particular appeal because the Tribe had another avenue of relief available to it at the trial court level. Specifically, the Defendant argues that the Tribe should have filed a motion for reconsideration with the trial court. In doing so, the Defendant relies on a number of older Arizona cases. Those cases dealt with various forms of special writs that were later incorporated into Arizona's rules regarding special actions. *See generally* Rule 1(b), Ariz. R. P. Spec. Act. However, as will be discussed below, the cases the Defendant relies upon are not analogous to the jurisdictional issues presented by this particular case.

For instance, *Hazard v. Superior Court*, 82 Ariz. 211, 310 P.2d 830 (1957) involved a civil zoning dispute. The Arizona Supreme Court was asked to determine whether it could accept review over a writ of certiorari to determine whether the trial court had exceeded its jurisdiction. On review, the Court determined that it could accept jurisdiction over the writ of certiorari because, at the time, zoning issues were not appealable. Similarly, in *Welker v. Stevens*, 82 Ariz. 233, 311 P.2d 832 (1957), the Arizona Supreme Court was asked to review of a writ of certiorari challenging the lower tribunal's ruling regarding the issuance of liquor licenses. The Court stated, "Certiorari will lie when an inferior tribunal, board or officer exercises judicial functions and has exceeded its jurisdiction and there is no appeal nor, in the judgment of the court, a plain, speedy and adequate remedy."

In *Dean v Superior Court*, 84 Ariz. 104, 324 P.2d 764 (1958), another case relied upon by the Defendant, the Arizona Supreme Court discussed whether a party could seek a writ of prohibition regarding the disclosure of certain documents in a civil case. The Court ultimately ruled that the trial court exceeded its jurisdiction when it granted a plaintiff's non-specific motion for disclosure. *Id.* The Court's opinion did not address whether a motion to reconsider filed with the trial court was a form of appellate remedy. In *Caruso v. Superior Court in and for*

Pima County, 100 Ariz. 167, 172, 412 P.2d 463, 466 (1966) the Court was tasked with determining whether a party in a civil dependency matter could file a request for a writ of prohibition with the Court of Appeals. In that case, the party requesting the writ argued that the juvenile court had exceeded its jurisdiction when it ruled that a minor was dependent. The Court in *Caruso* never addressed the issue of whether a motion for reconsideration was an equally plain, speedy, and effective avenue of remedy that the parties should have pursued prior to requesting a writ of prohibition with the appellate court.

Finally, in *State ex rel. Hyder v. Superior Court of Maricopa County*, 114 Ariz. 337, 339, 560 P.2d 1244, 1246 (1977), another case relied upon by the Defendant, the Arizona Supreme Court was asked to review a special action filed by state prosecutors in a criminal case. The defendant in that case had filed a motion to suppress evidence obtained as a result of a vehicle stop, and searches of that vehicle and a “stash house.” The trial court did not hear the motion until after the jury had been sworn. The Court noted that, under Arizona law, the granting of a motion to suppress “is an appealable order.” *Id.*; see also Ariz. Rev. Stat. § 13-1712. However, because the motion was not heard until commencement of trial, special action was appropriate. Timing rendered normal appellate avenues unavailable. As with the other cases cited to by the Defendant, *Hyder* did not hold that the prosecution should have filed a motion to reconsider with the trial court before pursuing a special action.

A review of more recent caselaw that discusses the application of the Arizona Rules of Special Actions does not reveal any case in which the appellate court’s acceptance of special action jurisdiction hinged upon whether the appellant had first filed a motion to reconsider at the trial court level. Rule 1(a), Ariz. R. Spec. Act. States that special actions are not “available where there is an equally plain, speedy, and adequate remedy by *appeal*” available to the

complaining party. (*emphasis added*). The Arizona rules do not indicate that a motion to reconsider is an alternative appellate remedy. This is likely because a motion to reconsider is not an appellate remedy. It does not get heard by a different judge nor by a reviewing court. In practice, it is something that can often be granted or denied by the court without the other side being provided an opportunity to submit additional briefing or argument. Appeals and interlocutory appeals are different. They involve a separate court, with separate judges whose sole task is to provide lower courts and litigants with guidance as to how the criminal laws are to be interpreted.

In criminal cases in the Pascua Yaqui Tribal Court, the prosecution does not have a right to appeal a judgment of acquittal. 3 PYTC § 2-3-90(G); Art. I, § 1(c), Pascua Yaqui Const. However, the Pascua Yaqui Tribal Code does not prohibit the Tribe from filing interlocutory appeals in criminal cases in order to ensure that the law is being applied correctly, consistently, and without confusion. Indeed, the Pascua Yaqui Court of Appeals has a long history of reviewing and accepting jurisdiction over interlocutory appeals filed by the Tribe. *See Pascua Yaqui Tribe v. Montana*, CA-12-001, p.1 (PYT Ct. App. July 23, 2013); *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); *In re Pascua Yaqui Tribe*, CA-13-005 (PYT Ct. App. Jan. 28, 2014). Of note, none of this Court's previous opinions have held that jurisdiction over a special action depended on whether the complainant had first filed a motion to reconsider with the trial court.

Nothing in the Tribal Code, Tribal caselaw, or Arizona law suggests that a motion to reconsider is an appellate remedy. Nor do any of these bodies of law require a party to first file a

motion to reconsider before they may seek interlocutory review. The Tribe, therefore, respectfully asks that this Court accept jurisdiction.

III.

APPLYING *BLOCKBURGER*, THE COMPLAINT IS NOT MULTICPLICITOUS.

As indicated in the Tribe's Opening Brief, whether or not a complaint is multiplicitous: "[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that the other does not." *Id. citing Gavieres v. United States* 220 U.S. 338, 342 (1911). Under this "same-elements" test, unless the two offenses each contain an element not found in the other, they are considered the same offense, and double jeopardy bars additional punishment. *Id.*; *See also Grimes*, 702 F.3d at 467. Defendant, in his response, mistakenly equates the facts of the case as somehow failing the *Blockburger* test. Nothing within in the test suggests that there must be two separate sets of facts for the Tribe to charge multiple offenses. In fact, in *Blockburger*, the defendant was specifically charged with two different crimes for one sale of drugs. *Id.* In that case, the Supreme Court looked to a Massachusetts court ruling which indicated as follows:

A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932), *citing Morey v. Commonwealth*, 108 Mass. 433, 434 (Mass. 1871). Applying this test, the Court concluded that while both crimes were violated by *only one sale*, both offenses were in fact committed. *Id.*

Similarly in the case before this Court, the two offenses Defendant committed are not mutually exclusive and may be committed entirely separate of one another. Defendant committed the first offense — tampering — by interrupting the victim’s call to dispatch when he slapped the victim’s phone from his hand while he was using it to call 911.² The Defendant committed the second crime — malicious mischief — by causing the phone to fall to the ground, which damaged it. The phone did not have to be in use for Defendant to commit this second crime; it only had to be damaged or injured. Conversely, had the phone not been damaged, the Defendant would only have committed the offense of tampering with communications. These crimes are separate and distinct and require proof of separate elements, therefore satisfying the *Blockburger* test. Further—Defendant can both interfere with a phone call and damage a phone. Because the Tribal Court misinterpreted *Blockburger*, its ruling should be reviewed *de novo*.³

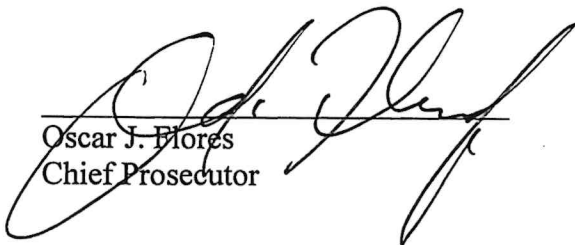
CONCLUSION

The plain language of the Tribal Code demonstrates that the Tribal Council intended that an act may be charged as Tampering with Communications and additionally as Malicious Mischief and therefore should be subject to separate prosecution. In this case, the Defendant was appropriately charged with these two crimes based on the fact that each crime involved an element that the other did not, and, thus, involved two distinct criminal offenses. Therefore, the Tribe requests that this Court reverse the Tribal Court’s ruling and remand to the Tribal Court for further proceedings.

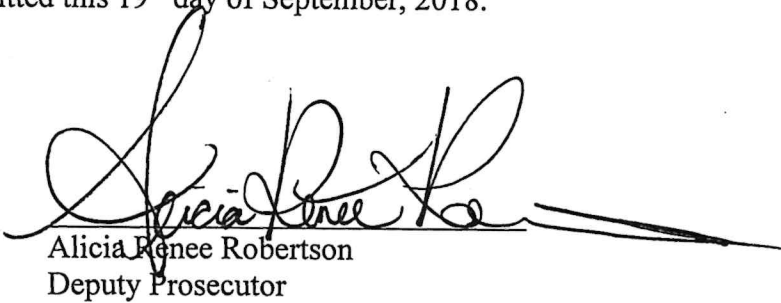
² Defendant indicates that the Tribe inappropriately attached the 911 call to its Opening Brief. The call was referenced in Tribe’s originally filed motion with the trial court and was argued in court. Therefore, it would not constitute new evidence. The call was only attached to supplement Tribe’s argument and give this Court additional guidance. This Court may choose to disregard it or listen to it.

³ See *United States v. D.M.*, 869 F.3d 1133, 1138 (9th Cir. 2017) (Questions of law are reviewed *de novo*).

RESPECTFULLY submitted this 19th day of September, 2018.



Oscar J. Flores
Chief Prosecutor



Alicia Renee Robertson
Deputy Prosecutor

CERTIFICATE OF SERVICE

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

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

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

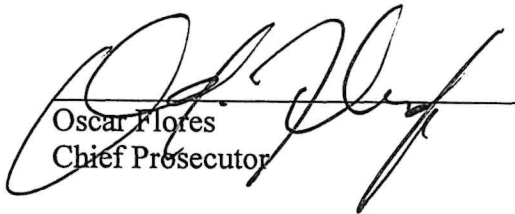
Annamarie Valdivia
Annamarie.Valdivia@pascuayaqui-nsn.gov
7474 S. Camino de Oeste
Tucson, AZ 85757

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

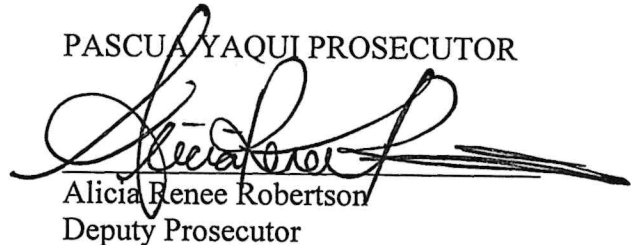
Chief Judge Margaret Flores
Pascua Yaqui Tribal Court
7777 S. Camino Huivisim
Tucson, AZ 85757

Dated this 19th day of September, 2018.

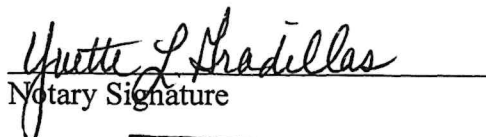
PASCUA YAQUI PROSECUTOR

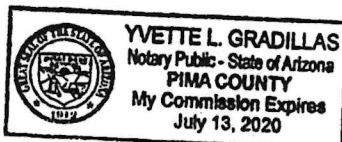

Oscar Flores
Chief Prosecutor

PASCUA YAQUI PROSECUTOR


Alicia Renee Robertson
Deputy Prosecutor

Sworn before me this 19th day of September, 2018


Notary Signature



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

PASCUA YAQUI TRIBE,)	APPELLATE CASE NO. CA-18-002
Appellant,)	
v.)	PASCUA YAQUI TRIBAL COURT NO.
ALVAREZ, AQUILES)	CR-17-268
Appellee.)	
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APPELLEE'S RESPONSE BRIEF

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I. STATEMENT OF THE CASE

Appellant is the Pascua Yaqui Tribe Office of the Prosecutor and Appellee is Mr. Aquiles Alvarez (Mr. Alvarez). This case was set for a jury trial on June 19, 2018. (Case Index #14, Case File pp. 46-47). The trial case is now stayed pending the resolution of one issue now in front of the Pascua Yaqui Tribe Court of Appeals on Interlocutory Appeal.

On May 2, 2018, the Pascua Yaqui Tribe Court granted Mr. Alvarez motion to dismiss count four of the criminal complaint against him on the ground of multiplicity. The Tribe had elected the same factual basis to prove the alleged offenses charged in count four and five — Malicious Mischief and Tampering with Communications. The trial court reached its decision after analyzing the current legal standard held in *Blockburger v. United States*, 284 U.S. 299 (1932).

The Tribe filed a notice of appeal to the Pascua Yaqui Tribe Court of Appeals, appealing the trial court's dismissal of count four of the criminal complaint alleging that the trial court had abused its discretion in its May 2, 2018 ruling (Case Index #1, Case File pp. 1-2; Appellant Brief Filed August 2, 2018).

II. JURISDICTIONAL STATEMENT

A. Tribe's Jurisdiction

The Pascua Yaqui Tribe Court had jurisdiction under 3 PYTC § 1-1-10 because the Tribe charged Mr. Alvarez, an enrolled Indian, with multiple offenses enumerated in the Tribal Code. The charges allegedly occur within the exterior boundaries of the Pascua Yaqui Reservation. (*See* 3 PYTC § 1-1-10 (B); Case Index #12 and 22, Case File pp. 35-40 and 62-71).

B. Court of Appeal Jurisdiction

Pursuant to the Rules of Appellate Procedure, 3 PYTC § 2-3-90 (F), “[i]nterlocutory appeals shall not be permitted in civil cases.” The plain language of the statute indicates that interlocutory appeals in criminal matters is permitted. The Appellate Court has the sole discretion to accept an interlocutory appeal. *See* 3 PYTC § 2-3-170.

Because the Pascua Yaqui Tribal Code (PYTC) does not provide a definition of Interlocutory Appeals or further detail on when such appeal is permitted, the PYTC Rules of Construction directs the parties to refer to the definition provided by the State of Arizona “unless such meaning would undermine the underlying principles and purposes of this Code.” 1 PYTC § 2-30.

Interlocutory Appeals in the State of Arizona are also called “Special Actions.” Ariz. R. Spec. Act., Rule 4. Such actions are only permitted where no “equally, plain, speedy, and adequate remedy is available by appeal.” Ariz. R. Spec. Act., Rule 1. The statute authorizes Special Actions to address only three issues:

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

Ariz. R. Spec. Act., Rule 3.

In this case, the Tribe argues the Appellate Court should take jurisdiction because the order dismissing count four of the criminal complaint was an error as a matter of law. In support of its argument, the Tribe has elected to pursue a claim under Rule 3 (c) of the

Arizona Rules for Special Action — “whether a determination was arbitrary and capricious or an abuse of discretion.” Ariz. R. Spec. Act., Rule 3 (c).

A trial court abuses its discretion when it commits an error of law in the process of reaching a discretionary decision. *Grant v. Arizona Pub. Serv. Co.*, 133 Ariz. 434, 455-56, 625 P.2d 507, 528-29 (1982). However, the general rule for the filing of a Special Action “is that there is no review simply because a lower body was in error as a matter of law.” Ariz. R. Spec. Act., Rule 3, *comment*; *See also Hazard v. Superior Court*, 82 Ariz. 211, 310 P.2d 830 (1957); *Welker v. Stevens*, 82 Ariz. 233, 311 P.2d 832 (1957). Under Rule 3(c), the Arizona supreme court has permitted Special Actions to be used for example in respect to discovery errors and to review whether essential justice has been done — not when an equally, plain, speedy, and adequate remedy is available at a trial level. *See generally Dean v. Superior Court*, 84 Ariz. 104, 324 P.2d 764 (1958); *Caruso v. Superior Court In & For Pima Cty.*, 100 Ariz. 167, 172, 412 P.2d 463, 466 (1966) (citation omitted).

Moreover, absent an express legislative authority authorizing a prosecutorial appeal, it is presumed that the prosecutor lacks the ability to appeal in criminal matters. *State v. Dawson*, 164 Ariz. 278, 280, 792 P.2d 741, 743 (1990). Appeals by the government in criminal matters have been historically disfavored, and it is well established — under federal and state law — that in the absence of a constitutional provision or statute clearly conferring that right, an appeal by the government cannot be taken. *Id.*; *State v. Lelevier*, 116 Ariz. 37, 38, 567 P.2d 783, 784 (1977); *United States v. Chaudhry*, 630 F.3d 875, 878 (9th Cir. 2011) (Court of appeals have jurisdiction over the government’s appeal in a criminal case when there is a statutory permission and when the decision is a final judgment); *United States v. Russell*, 804 F.2d 571, 573 (9th Cir. 1986) (“To prosecute its

appeal, the government ‘must show that it has the right to appeal and that the order appealed from comes within the terms of a statutory grant of appellate jurisdiction.’”) (quoting *United States v. Dior*, 671 F.2d 351, 354 (9th Cir.1982)).

Under state law, the Tribe’s Appellate Court lacks jurisdiction to entertain this interlocutory appeal because the Tribe has an adequate remedy by filing a Motion for Reconsideration with the trial court. *See* 3 PYTC § 2-2-300. Pursuant to 3 PYTC § 2-2-300, “[a]t any time after the arraignment, either party may, by filing a written motion, ... request that the court issue a particular order.” Pursuant to 3 PYTC § 2-3-210, a Motion for Reconsideration is appropriate when a party alleges the court erred in addressing a specific point or as a matter of law. Accordingly, in cases such as this, the Tribe’s Appellate Court should not entertain an interlocutory appeal where there is an adequate remedy by filing a Motion for Reconsideration with the trial court.¹ *See generally State ex rel. Hyder v. Superior Court of Maricopa Cty.*, 114 Ariz. 337, 339, 560 P.2d 1244, 1246 (1977).

Because the adequate remedy — if assumed the trial court erred — is a Motion for Reconsideration and not an Interlocutory Appeal, the Court of Appeals should not accept jurisdiction over this matter.

III. ISSUE PRESENTED FOR REVIEW

Did the Pascua Yaqui Tribe Court abuse its discretion in dismissing count four of the criminal complaint on the ground of multiplicity requiring a reversal?

¹ However, Mr. Alvarez believes the time to file a motion for reconsideration has expired. *See* 3 PYTC § 2-3-210

IV. RELEVANT FACTS

On September 9, 2017, the Pascua Yaqui Tribe Office of the Prosecutor charged Mr. Alvarez with multiple offenses, including one count of Tampering with Communications and one count of Malicious Mischief. On October 19, 2017, Mr. Alvarez filed a motion to dismiss one of the above counts on the ground of multiplicity. (Case Index #13, Case File pp. 41-45). The Tribe filed a response, and Mr. Alvarez filed a reply. (Case Index #9 and 7; Case File pp. 22-28 and 14-17).

On May 2, 2018, the parties participated in an evidentiary hearing where the trial court heard oral arguments on the issue. Neither party submitted evidence during the hearing. At the conclusion of the proceedings, the trial court found that the factual basis required to prove count four involved the same facts alleged in count five. Prior to dismissing count four, the trial court gave the Tribe the option to elect which count should be dismissed. The Tribe elected the dismissal of count four.

The Tribe alleges the Pascua Yaqui Tribe Court of Appeals should accept jurisdiction of this Interlocutory Appeal because the trial court abused its discretion in dismissing count four of the criminal complaint as a matter of law. Mr. Alvarez disagrees.

V. SUMMARY OF ARGUMENT

The Pascua Yaqui Tribe Trial Court did not abuse its discretion when it granted Mr. Alvarez's motion to dismiss count four of the criminal complaint on the ground of multiplicity. The trial court correctly applied the current legal standard decided in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932) ("where the same act or transaction constitutes a violation of two distinct statutory provision, the test to be applied to determine whether there are two offenses or only one is whether each

provision requires proof of a fact which the other does not”). The Court considered all the evidence submitted on the record and found count four and five to be multiplicitous “because the proof required in count four involve[d] the same alleged facts alleged in count five of the complaint. Both charges would require the Tribe to prove the same factual basis.” (Case Index #2, Case File p. 4).

Therefore, there was no error as a matter of law and the Court of Appeals should deny the Tribe’s requested relief.

VI. ARGUMENT

A. **The Pascua Yaqui Tribe Court Did Not Abuse Its Discretion in Its May 2, 2018 Ruling Because The Record Unmistakably Confirms That The Tribe Elected the Same Factual Basis to Charge Mr. Alvarez With Count Four and Five of The Criminal Complaint.**

If assumed that this Court has jurisdiction to hear this Interlocutory Appeal, the trial court’s order was not arbitrary or capricious, nor was it an abuse of discretion. “Generally, a court abuses its discretion where the record fails to provide substantial support for its decision or the court commits an error of law in reaching the decision.” *Files v. Bernal*, 200 Ariz. 64, 65, 22 P.3d 57, 58 (Ct. App. 2001) (*See also Grant v. Arizona Pub. Serv. Co.*, 133 Ariz. 434, 455-56, 625 P.2d 507, 528-29 (1982); *Torres v. North Am. Van Lines, Inc.*, 135 Ariz. 35, 40, 658 P.2d 835, 840 (App. 1982) (discretion abused if “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons”).

In this case, the record supports the trial court’s decision. The evidence on the record provided substantial support for the trial court’s order dismissing count four of the criminal complaint. The probable cause affidavit states: “According to Mr. Izzo[,] Mr. Alvarez slapped his phone out of his hand causing it to fall on the ground causing

damage to it.” (Case Index #12, Case File 35-40). The recitation of the facts in the probable cause affidavit and in the Amended Criminal Complaint clearly indicate that the two charges arose from the same, singular and continuous act. There was no evidence admitted in the record suggesting that two separated actions occurred in this case with two separated intents that would warrant the two separated charges of Tampering with Communications and Malicious Mischief.

B. The Tribe is Precluded From Introducing New Evidence That Was Known and Was in The Tribe’s Possession at The Time of The May 2, 2018 Evidentiary Hearing in This Special Action.

The Tribe now, in its opening brief, attempts to introduce a copy of the alleged victim’s 911 call to the police in support of its claim that the actions were not continuous. However, an appellate court’s review is limited to the record before the trial court. *See GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 4, 795 P.2d 827. 830 (App. 1990). And, because the appellate court shall not substitute its determination of witness credibility and weight of the evidence for those of the fact-finder, the 911 call made by the alleged victim cannot be admitted through this interlocutory appeal. *See Zavala v. Arizona State Pers. Bd.*, 159 Ariz. 256, 260, 766 P.2d 608, 612 (Ct. App. 1987) (The Court of Appeals in turn, “decline to substitute a reviewer’s judgment for that of the fact-finder tribunal”); *See also United California Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 286, 681 P.2d 390, 438 (App. 1983). Therefore, if the Pascua Yaqui Court of Appeals takes jurisdiction over this matter, the alleged victim’s 911 call and the Tribe’s argument based on it must not be considered.

C. The Trial Court Did Not Commit an Error As a Matter of Law Because It Applied The Current Legal Standard Held in *Blockburger*.

The trial court did not commit an error as a matter of law in dismissing count four of the criminal complaint. The Tribe argued during the May 2, 2018 evidentiary hearing, as the basis for its multiplicitous charges, that both charges require different intents and that the alleged defendant's action did not constitute only one act. The Tribe specifically argued that the plain meaning of each charge requires proof of distinct elements, and because of this, there is no multiplicity. Although Malicious Mischief may be committed in multiple ways, and that such a charge is not mutually exclusive to the charge of Tampering with Communications, the Tribe elected a singular action to prove both charges — “to wit: defendant slapped Matthew Izzo’s phone out of his hand.”

“Multiplicity” is commonly defined as the charging of a single offense in more than one count. *United States v. Anderson*, 872 F.2d 1508, 1520 (11th Cir. 1989); *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976). The fundamental due process rights of defendants prohibit multiplicitous indictments. *UCO Oil Co.* at 835. The Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act guarantee Mr. Alvarez’s right to due process under the law. Constitution of the Pascua Yaqui Tribe, § 1(h); 25 U.S.C. § 1302 (8). The U.S. Supreme Court has established, where an additional element must be proven, separate offenses lie. *Gavieres v. United States*, 220 U.S. 338, 342, 31 S. Ct. 421, 422 (1911). “The test to be applied to determine whether there are two offenses or only one is whether *each* provision requires proof of an additional fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (emphasis added).

The additional element concept for the establishment of separate charges has been reaffirmed more recently in *Texas v. Cobb*, 532 U.S. 162 (2001). In *Cobb*, the court noted, “[p]ursuant to the Supreme Court’s *Blockburger* decision, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether *each* provision requires *proof of a fact which the other does not.*” *Id.* at 173 (emphasis added). Accordingly, the Tribe cannot divide a single action into multiple parts to create new offenses.

Mr. Alvarez was accused of slapping a phone out of Mr. Izzo’s hand, causing it to fall to the ground and be damaged. The two charges alleged the same date, time, and reference the same conduct on Mr. Alvarez’s part. Although the prosecutor “may carve as large an offense out of a single transaction as he can, ... he must cut only once, and the prosecutor can carve but one conviction for the same offense.” *Fleming v. State*, 168 Tex. Crim. 595, 598, 330 S.W.2d 457, 459 (1959). The proper remedy for a multiplicitous indictment is an election or consolidation of offending counts, and the dismissal of surplus counts. *United States v. Universal Corp.*, 344 U.S. 218, 225 (1952). Counts four and five were clearly multiplicitous as the Tribe utilized the same alleged factual basis in the affidavit and in the criminal complaint. Therefore, the trial court did not abuse its discretion.

VII. CONCLUSION

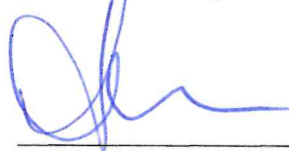
The trial court, as the fact-finder in this case, adopted Mr. Alvarez’s argument over the Tribe’s. In doing so, the trial court noted in its ruling that after applying the *Blockburger* test, it agreed the alleged act was a continuous one. The trial court applied current and valid legal standards in reaching its decision, and its reasoning was not a mistake of law. There

was no mistake as a matter of law, there was no abuse of discretion, and the trial court's ruling was not arbitrary or capricious. The trial court correctly considered all the available evidence, which it did not include the 911 call from the alleged victim to the police. Thus, if the Court of Appeals takes jurisdiction over this matter, review should be denied and the 911 call should not be considered.

Wherefore, Mr. Alvarez respectfully requests this Court find that it lacks jurisdiction to hear the Interlocutory Appeal in this criminal prosecution of the ruling by the trial court dismissing count four of the criminal complaint on the ground of multiplicity. Alternatively, Mr. Alvarez respectfully asks this Court to deny the Tribe's appeal because the trial court did not abuse its discretion and because there was no mistake as a matter of law in the trial court's order.

RESPECTFULLY SUBMITTED: September 4, 2018.

PASCUA YAQUI PUBLIC DEFENDER



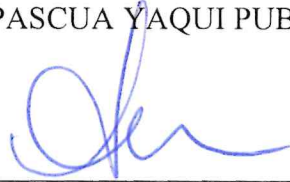
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CERTIFICATE OF COMPLIANCE

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

PASCUA YAQUI PUBLIC DEFENDER

A handwritten signature in blue ink, appearing to be 'A. Valdivia', is written over a horizontal line.

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CERTIFICATE OF SERVICE

On September 4, 2018, the original and five copies of the *Appellees Response Brief* were filed and conforming copies were sent to the following:

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

8
9 PASCUA YAQUI TRIBE
10 OFFICE OF THE PROSECUTOR,

11 Appellant.

12 Vs.

13 HONORABLE MARGARET FLORES
14 JUDGE, PASCUA YAQUI TRIBAL COURT
Appellee,

15 AQUILES ALVAREZ¹
16 Real Party in Interest

APPEALS CASE NO: CA-18-002
TRIBAL COURT NO: CR-17-268

APPELLANT’S OPENING BRIEF

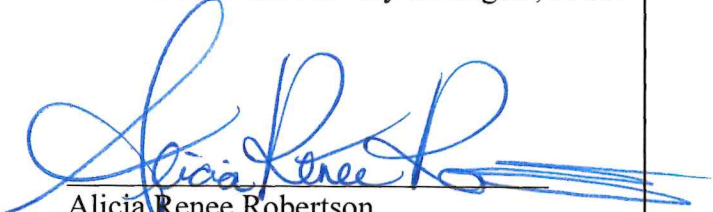
17
18
19 COMES NOW, the Pascua Yaqui Tribe by and through the Pascua Yaqui Chief
20 Prosecutor, OSCAR J. FLORES, and his Deputy, ALICIA RENEE ROBERTSON, and hereby
21 respectfully submits the Appellant’s Opening Brief. The Tribe respectfully requests this Court

22
23
24 ¹ In Special Action pleadings the complaint names the body, officer, or person against whom relief is sought.
25 However, “[i]f any public body, tribunal, or officer is named as a defendant, the real party or parties in interest shall
be joined as defendants.” Ariz.R.Spec.Act., Rule 2(a)(1). In such circumstances, the practice is to direct the writ in
form to the court, but in fact leave its handling to the parties. See Ariz.R.Spec.Act., Rule 2, State Bar Committee
Notes, section (a).

1 take jurisdiction of this issue and to grant relief to Appellant by reversing the ruling of the
2 Defendant Tribal Court Judge.

3
4 **RESPECTFULLY** submitted this 2nd day of August, 2018.

5
6
7 
8 _____
9 Oscar J. Flores
10 Chief Prosecutor

11 
12 _____
13 Alicia Renee Robertson
14 Deputy Prosecutor

15
16 Original filed with the
17 Clerk of the Pascua Yaqui Court of Appeals

18 On: _____

19 Copy of the foregoing provided to:

20 Hon. Margaret Flores
21 Pascua Yaqui Tribal Court

22 Annamarie Valdivia
23 Pascua Yaqui Office of the Public Defender
24 Attorney for Real Party in Interest Aquiles Alvarez
25

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1 **PROCEDURAL POSTURE AND RELEVANT FACTS:**

2 On September 9, 2017 Defendant was charged with multiple offenses including one
3 count of Tampering with Communications and one count of Malicious Mischief. Counts Four
4 and Five of the Criminal Complaint read as follows:

5 **COUNT 4: 4 PYTC § 1-430 ~ Tampering with Communications**

6 On or about September 08, 2017 at approximately 3:27 p.m., at or near 5040
7 Wichalakas, Defendant interfered with communications by displacing, removing,
8 injuring, or destroying any radio station, TV tower, antenna, cable, telephone, line,
9 wire, pole, or conduit or shall cut, break, tap, or did use any other means in
10 destroying, interfering with, or preventing the operation of communications or did
11 assist in any of the foregoing conditions, to wit: defendant slapped . . . Matthew Izzo's
12 phone out of his hand.

13 **COUNT 5: 4 PYTC § 1-400 ~ Malicious Mischief**

14 On or about September 08, 2017 at approximately 3:27 p.m., at or near 5040
15 Wichalakas, Defendant maliciously disturbed, injured, or destroyed any livestock or
16 other domestic animal or other property, to wit: Defendant slapped . . .Matthew Izzo's
17 phone out of his hand, causing it to fall to the ground and be damaged.

18 *See Tribe's Exhibit 1*, Probable Cause Statement and Affidavit by Officer Gonzales filed
19 September 9, 2017 and *Tribe's Exhibit 3*, 911 Recording.

20 The charges were based upon the probable cause affidavit provided by Officer Gonzales.
21 In relevant part, the affidavit indicates:

22 Mr. Izzo states he was calling the police while following Mr. Alvarez. Mr. Izzo stated
23 that Mr. Alvarez stopped and threatened him with a tree branch. Mr. Aquiles said he
24 continued following Mr. Alvarez and speaking with police dispatch and near 5040
25 Wichalakas Mr. Alvarez stopped[,] exited his vehicle[,] and approached Mr. Izzo while
he as in his truck speaking on the phone.

According to Mr. Izzo[,] Mr. Alvarez slapped his phone out of his hand causing it to
fall to the ground causing damage to it, Mr. Alvarez threatened him with a metal pipe
making motions as if he was going to strike him with it.

See Tribe's Exhibit 1.

On October 19, 2017, Defendant filed a Motion to Dismiss (Multiplicity). On October
30, 2018, the Tribe filed its response. Subsequently, Defendant filed his reply on November 7,

1 2018. Oral arguments on Defendant’s motion were heard on May 2, 2018. At that hearing, the
2 Court granted Defendant’s motion, indicating that the same facts were used to prove both counts
3 4 and 5. *See Tribe’s Exhibit 2, Court’s Order Granting Defendant’s Motion to Dismiss*
4 *(Multiplicity)*.

5
6 **JURISDICTION**

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

10 The Pascua Yaqui Tribal Rules of Appellate Procedure, *see generally* 3 PYTC § 2-3-30
11 *et seq.*, grant parties the right to appeal in most, but not all, circumstances. For instance, the
12 Tribe does not have the right to appeal a judgment acquitting a defendant in a criminal case. 3
13 PYTC § 2-3-90(G); Art. I, § 1(c), Pascua Yaqui Const.; *Pascua Yaqui Tribe v. Montana*, CA-12-
14 001 (PYT Ct. App. July 23, 2013).² And parties in civil cases are prohibited from filing any sort
15 of interlocutory appeal. 3 PYTC § 2-3-90(F); *Global Cash Access, Inc. and Central Credit, LLC*
16 *v. Gaming Enterprise Division of the Pascua Yaqui Tribe*, CA-14-0004 (PYT Ct. App. June 20,
17 2014). Thus, nothing in the Tribal code prohibits the Tribe from filing an interlocutory appeal or
18 “extraordinary writ” in criminal cases.³

19 The Pascua Yaqui Tribal Code does not define what “interlocutory appeals,” “special
20 actions,” or “extraordinary writs” are. *See generally* 3 PYTC § 2-3-40. However, pursuant to 1

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23 ² The Tribe may, however, appeal a dismissal, as evidenced by this Court’s recent ruling in *In the Matter of Alvarez*,
24 CA-17-008 (P.Y.T. Ct. App. June 19, 2018).

25 ³ Indeed, the Pascua Yaqui Court of Appeals has accepted jurisdiction over 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).

1 PYTC § 2-30(H),⁴ whenever the meaning of a term used in the code is unclear, either “on its face
2 or in the context of the Code, such term shall have the meaning given to it by the laws of the
3 State of Arizona, unless such meaning would undermine the underlying principles and purposes
4 of this Code.” *See also Pascua Yaqui Tribe v. Miranda*, CA-08-015 (PYT Ct. App. Mar. 29,
5 2009), at p.22. As a result, the Court of Appeals has turned to Arizona law for guidance as to
6 how to proceed with interlocutory appeals and special actions. In *Montana*, CA-12-001, p. 1, the
7 Court of Appeals was asked to determine whether the trial court erred by ordering that a minor
8 victim be made available for an evidentiary hearing so that she could be questioned regarding
9 allegations that she had been coached. The Court determined that “[a]lthough the Pascua Yaqui
10 Rules of Appellate Procedure are silent on special actions,” the matter fell squarely “within the
11 Appellate Court’s jurisdiction.” *Id.* at 2.

13 Noting that prosecutors lack a right to appeal criminal acquittals, this Court explained
14 that “special actions emerged in the common law as specific remedial writs in the face of
15 erroneous, excessive, arbitrary, and or capricious government actions.” *Id.* The Court then
16 turned to state law. Arizona permits special action review only where no “equally plain, speedy,
17 and adequate remedy is available by appeal.” Rule 1(a), Ariz. R. P. Spec. Act.; *State ex rel.*
18 *Romley v. Martin*, 203 Ariz. 46, 47, 49 P.3d 1142, 1143 (Ct. App. 2002); *Fragoso v. Fell*, 210
19 Ariz. 427, 429, 111 P.3d 1027, 1029 (App. 2005). Moreover, relief may only be granted in
20 situations where the trial court: 1) fails “to exercise discretion which [it] has a duty to exercise,”
21 or to perform a lawful duty “as to which [it] has no discretion”; 2) proceeds or threatens “to
22 proceed without or in excess of jurisdiction or legal authority”; or, 3) makes a determination that
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⁴ 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.”

1 is “arbitrary and capricious⁵ or an abuse of discretion.”⁶ Rule 3, Ariz. R. P. Spec. Act.; *see also*
2 *Montana*, CA-12-001, p. 2. Acceptance of special action jurisdiction is discretionary. *Snyder v.*
3 *Donato*, 211 Ariz. 117, 119, 118 P.3d 632, 634 (Ct. App. 2005); *Romley*, 203 Ariz. at 47, 49 P.3d
4 at 1143 ; *c.f.* 3 PYTC § 2-3-210(D)(2) (suggesting that acceptance of special action jurisdiction
5 in a particular case is discretionary, and not a decision that can serve as the basis of a motion to
6 reconsider). “Special action jurisdiction is appropriate in matters of statewide importance, issues
7 of first impression, cases involving purely legal questions, or issues that are likely to arise
8 again.” *Romley*, 203 Ariz. at 47, 49 P.3d at 1143 (appropriate forum for reviewing whether State
9 could impeach the defendant with certain prior convictions at trial was via special action);
10 *Snyder*, 211 Ariz. at 119, 118 P.3d at 634 (special action regarding whether complex case
11 designation was appropriate); *McGuire v. Lee*, 239 Ariz. 384, 386, 372 P.3d 328, 330 (App.
12 2016), (special action regarding whether juvenile could be tried as an adult); *State ex rel.*
13 *McDougall v Tvedt*, 163 Ariz. 281, 284, 787 P.2d 1077, 1080 (App. 1989) (jurisdiction over
14 State’s special action denied because it was filed after the defendant’s conviction became final).

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16 In *Montana*, although the Pascua Yaqui Court of Appeals made no detailed references to
17 Rule 1(a), Ariz. R. P. Spec. Act, or related state case law, the issue that the Court was tasked to
18 review met all of the requirements of the rule and related precedent. The Tribe had no plain,
19 adequate or speedy remedy by way of appeal because it had no right to appeal an acquittal. The
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22 ⁵ A court’s decision is considered capricious and arbitrary when the decision has no “reasonable basis in relevant
23 facts.” *Carlson v. Landon*, 187 F.2d 991, 1003 (9th Cir 1951).

24 ⁶ “An ‘abuse of discretion’ is discretion manifestly unreasonable, or exercised on untenable grounds, or for
25 untenable reasons. A trial court abuses its discretion if it makes an error of law in reaching its decision or makes a
discretionary finding of fact that is not justified by reason.” *State v. Fell*, 242 Ariz. 134, 136, 393 P.3d 475, 477 (Ct.
App. 2017), review denied (Nov. 16, 2017) (*internal citations and quotations omitted*); *see also McGuire v. Lee*, 239
Ariz. 384, 386, 372 P.3d 328, 330 (App. 2016), *rev. denied Dec. 13, 2016* “An abuse of discretion includes an error
in interpreting or applying the law.”)

1 question involved was a purely legal one, and involved an issue that — at the time — was a
2 question of first impression.⁷ Finally, it was a question that was likely to arise again unless the
3 Court of Appeals had the opportunity to provide future litigants with guidance. It was for these
4 reasons that the Court accepted jurisdiction.

5 The issue raised in this case is similarly appropriate for interlocutory review. It is also an
6 issue that is one of first impression for the Pascua Yaqui Court of Appeals. The central issue
7 involved here is whether the trial court’s ruling — dismissing Count Five of the Criminal
8 Complaint because proving it at trial would involve evidence similar to the evidence that would
9 be required to prove Count Four even though both counts require proof of different elements —
10 was arbitrary, capricious, or an abuse of discretion. This is a purely legal issue regarding when a
11 defendant may be charged with multiple different crimes that arise from the same incident. It is
12 an issue that has been repeatedly raised at the trial court level, and one which is likely to arise
13 again in one form or another in future criminal cases. For these reasons, this Court should accept
14 jurisdiction of the Tribe’s petition for special action.
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25 ⁷ There is one case that deals with *Blockburger*, discussed *infra*; however, the Court determined it did not apply as Defendant had already conceded that he was being prosecuted for different offenses. See *PYT V. Baltazar*, CA-08-014, p. 3 (P.Y.T. Ct. App. Nov. 28, 2011).

1 **STATEMENT OF THE ISSUES:**

2 **1. CAN A DEFENDANT BE CHARGED WITH BOTH TAMPERING WITH**
3 **COMMUNICATIONS AND MALICIOUS MISCHIEF WITHOUT BEING**
4 **MULTIPLICITOUS?**

4 **LAW AND ARGUMENT**

5 **I. TAMPERING WITH COMMUNICATIONS AND MALICIOUS MISCHIEF**
6 **REQUIRE SEPARATE ELEMENTS; THEREFORE COUNTS FOUR AND**
7 **FIVE ARE NOT MULTIPLICITOUS.**

8 In relevant part, the Pascua Yaqui Tribal Code defines the offense of Tampering with
9 Communications as:

10 **Tampering with Communications**

11 Any person who shall interfere with communications by displacing, removing,
12 injuring or destroying any radio station, TV tower, antenna, cable, telephone, line,
13 wire, pole, or conduit or shall cut, break, tap, or shall use any other means in
destroying, interfering with, or preventing the operation of communications or shall
assist in any of the foregoing conditions shall be deemed guilty of an offense.

14 4 PYTC § 1-430.

15 In relevant part, the Pascua Yaqui Tribal Code defines the offense of Malicious Mischief
16 as:

17 **COUNT 5: ~ Malicious Mischief: On or about September 08, 2017 at approximately**
18 **3:27 p.m., at or near 5040 Wichalakas, Defendant maliciously disturbed, injured, or**
19 **destroyed any livestock or other domestic animal or other property.**

20 4 PYTC § 1-400.

21 The plain language of the tampering charge indicates that a person is guilty of this
22 offense when he interferes with one of the listed forms of communication, in this case the
23 telephone, by destroying the phone, interfering with it or preventing its operation. As indicated
24 by the affidavit, the victim told the officer he was talking on the phone with dispatch when he
25 was approached by Defendant, who subsequently slapped the phone out of his hand. The
victim's account is supported by the recording of his call to 911, which was disclosed to defense

1 on September 25, 2017. The recording demonstrates that the victim’s 911 call with dispatch was
2 interrupted. When he returned to the call, the victim indicated that Defendant ripped his phone
3 out of his hand. See Tribe’s Attached Exhibit 3, CD of 911 with Victim caller.

4 The Double Jeopardy Clause of the United States Constitution and the Indian Civil
5 Rights Act, 25 U.S.C. § 1302(a)(3), protects persons from being subjected to the hazards of trial
6 and possible conviction more than once for an alleged offense. See *Missouri v. Hunter*, 459 U.S.
7 359, 365 (1983). The Clause also protects against multiple punishments for the same offense.
8 *Id.*, 459 U.S. at 366. However, Double Jeopardy does no more than prevent the sentencing court
9 from prescribing greater punishment than the legislature intended. *Id.* at 366.

10 Multiplicity involves charging a single offense in multiple counts. *Blockburger v. United*
11 *States*, 284 U.S. 299 (1931); See *Merlina v. Jejna*, 90 P.3d 202, 205 (Ariz. App. 2004) (citing
12 *State v. Barber*, 653 P.2d 29, 33 (Ariz. App. 1982); *United States v. Grimes*, 702 F.3d 460, 467
13 (8th Cir. 2012).⁸ Multiplicity can emerge in two distinct charging scenarios. One scenario
14 involves charging several different criminal offenses based on one act by the individual. See
15 *Blockburger v. United States*, 284 U.S. 299 (1931); *Albernaz v. United States*, 450 U.S. 333
16 (1981); See *United States v. Grimes*, 702 F.3d 460, 467 (8th Cir. 2012). The other scenario
17 involves charging more than one count of the same criminal offense. See *Grimes*, 702 F.3d at
18 468; *United States v. Universal C.I.T. Credit Corp.*, 344 US 218, 219 (1952). Multiplicity raises
19 the potential for multiple punishments, thus implicating a risk of Double Jeopardy violations.
20 *Blockburger*, 2884 U.S. at 301; *Brown*, 357 P.3d at 881. “[T]he vice would be that the
21 punishment provided for a single offense may be pyramided by a multi-count indictment.”
22 *United States v. UCO Oil Company*, 546 F.2d 833, 835 (9th Cir. 1976).

25 ⁸ *PYT v. Miranda*, CA-08-015, p.22 (Ct. App. 2009) (“[W]hile decisions of the Arizona and United States . . .
[c]ourts are not controlling authority in this Court, they are highly persuasive”).

1 *Blockburger* directly addressed situations where a defendant is charged with several
2 different criminal offenses involving different statutes arising from one act, and its test is
3 controlling.. 284 U.S. at 304. *Blockburger* held that “[w]here the same act or transaction
4 constitutes a violation of two distinct statutory provisions, the test to be applied to determine
5 whether there are two offenses or only one, is whether each provision requires proof of a fact that
6 the other does not.” *Id. citing Gavieres v. United States* 220 U.S. 338, 342 (1911). Under this
7 “same-elements” test, unless the two offenses each contain an element not found in the other,
8 they are considered the same offense, and double jeopardy bars additional punishment. *Id.*; *See*
9 *also Grimes*, 702 F.3d at 467. However, if the legislature specifically authorizes cumulative
10 punishment under two statutes, regardless of whether those two statutes proscribe the same
11 conduct under the *Blockburger* test, a court’s task of statutory construction is ended. *Missouri v.*
12 *Hunter*, 459 U.S. at 368-69. The limitations imposed under *Blockburger* only apply where the
13 plain language of a statute is unclear. *Id.*

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15 In *PYT V. Baltazar*, CA-08-014, p. 3 (P.Y.T. Ct. App. Nov. 28, 2011), the Pascua Yaqui
16 Tribe Court of Appeals indicates that “[t]he double jeopardy clause protects against (1) a second
17 prosecution for the same offense after acquittal, (2) a second prosecution for the same offense
18 after conviction, and (3) against multiple punishments for the same offense.” *Id., citing to US. v.*
19 *Brooklier* 637 F.2d 620 (9th Cir. 1980). While that case implicated protection against second
20 prosecution, the Appellant had already acknowledged that his second prosecution was for
21 different offenses than those involved in his first prosecution. Therefore, the appellate court
22 concluded that *Blockburger* did not apply.

23
24 In this case, the language of each section of the Code under which the Defendant was
25 charged is clear. Specifically, the plain meaning and common-sense understanding of

1 “interfered with communications” as described in 4 PYTC § 1-430 clearly demonstrates a
2 separate element as opposed to “maliciously disturbing injuring or destroying[. . .] property.” 4
3 PYTC § 1-400. The intent of each crime is different. One requires an intentional act while the
4 other requires a malicious act. In addition, the crime of tampering with communications requires
5 proof that the defendant interfered with or prevented the operation of a means of communication.
6 This is an entirely separate element from those required to prove the offense of malicious
7 mischief. Malicious mischief requires proof that a piece of property—regardless of whether that
8 property happens to be usable for communication — was destroyed or injured by the defendant.
9 One can commit malicious mischief without committing tampering with communications, and
10 vice versa.
11

12 Here, the two offenses Defendant committed are not mutually exclusive and may be
13 committed entirely separate of one another. Defendant committed the first offense — tampering
14 — by interrupting the victim’s call to dispatch when he slapped the victim’s phone from his hand
15 while he was using it to call 911. The Defendant committed the second crime — malicious
16 mischief — by causing the phone to fall to the ground, which damaged it. The phone did not
17 have to be in use for Defendant to commit this second crime; it only had to be damaged or
18 injured. Conversely, had the phone not been damaged, the Defendant would only have
19 committed the offense of tampering with communications. These crimes are separate and
20 distinct and require proof of separate elements, therefore satisfying the *Blockburger* test.
21 Further—Defendant can both interfere with a phone call and damage a phone. Defendant was
22 appropriately charged with one count of Tampering with Communications and one count of
23 Malicious Mischief, and the trial court abused its discretion in ruling otherwise. Therefore, the
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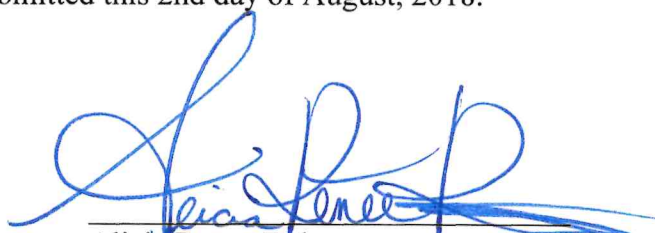
1 Tribe respectfully requests this Court overturn the trial court's ruling and deny Defendant's
2 motion.

3
4 **CONCLUSION**

5 The plain language of the Tribal Code demonstrates that the Tribal Council intended that
6 an act may be charged as Tampering with Communications and additionally as Malicious
7 Mischief and therefore should be subject to separate prosecution. In this case, the Defendant was
8 appropriately charged with these two crimes based on the fact that each crime involved an
9 element that the other did not, and, thus, involved two distinct criminal offenses. Thus, the
10 complaint was not multiplicitous. For the foregoing reasons, the Tribe requests that this Court
11 reverse the Tribal Court's ruling and remand to the Tribal Court for further proceedings.
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15 **RESPECTFULLY** submitted this 2nd day of August, 2018.

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19 Oscar J. Flores
Chief Prosecutor

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21 Alicia Renee Robertson
22 Deputy Prosecutor
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TRIBE'S EXHIBIT 1

IN THE PASCUA YAQUI TRIBAL COURT IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION	
<p>PASCUA YAQUI TRIBE, Plaintiff</p> <p>Vs.</p> <p>AQUILES ALVAREZ, Defendant</p>	<p style="text-align: center;">CLERK</p> <p style="text-align: center;">COURT USE ONLY</p> <p style="text-align: center;">Case Number P17090820</p>
PROBABLE CAUSE STATEMENT	

PASCUA YAQUI TRIBAL COURT
9:11

AFFIRMATION

1. I 3L04-Alex Gonzalez 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 3L04-Alex Gonzalez.

2. SUSPECTED PARTY (Defendant)

Name: **AQUILES ALVAREZ**

Driver's license number: _____

Tribal enrollment number: **2694U06593**

Date of birth: **11/15/1989**

AQUILES ALVAREZ: is an enrolled member of the **Pascua Yaqui** Tribe.

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

3. The defendant was Arrested on 9/8/2017 at 3:27:00 PM

I have probable cause to believe that the defendant committed the following offense(s) at or near

IN THE AREA APPROXIMATELY NEAR 5040 WICHALAKAS which is within the exterior boundaries of the Pascua Yaqui Indian Reservation.

<u>PYTC</u>	1-130 B	AGGAVATED ASSULT
<u>PYTC</u>	1-300	DISORDERLY CONDUCT
<u>PYTC</u>	1-255	THREATENING AND INTIMIDATING
<u>PYTC</u>	1-630	INJURY TO PUBLIC PROPERTY

5. Statement of Probable Cause:

ON OR ABOUT 090817 AT APPROXIMATELY 1527 HOURS, NEAR OR APPROXIMATELY NEAR 5040 WICHALAKAS WHICH IS WITHIN THE BOURDARIES OF THE PASCUA YAQUI RESERVATION. AQUILES ALVAREZ WHO IS AN ENROLLED MEMBER OF THE PASCUA TRIBE COMITTED THE OFFENSES OF AGGARAVATED ASSAULT, DISORDERLY CONDUCT, THREATENING AND INTIMIDATING, INJURY TO PUBLIC PROPERTY.

THE VICTIM MR. MATTEW IZZO WHO IS NOT A TRIBAL MEMBER STATES THAT WHILE HE WAS DRIVING ON SORRELL AND TURNING ON TO TETAKUSIM MR. ALVAREZ PASSED HIM IN AN AGRRESSIVE MANNER BECAUSE HE WAS DRIVING SLOW. MR. IZZO SAID HE FOLLOWED MR. ALVAREZ INTO THE RESERVATION WITH THE INTENTION OF OBTAINING HIS LICENSE PLATE NUMBER AND REPORING THE INCIDENT.

MR. IZZO STATES HE WAS CALLING THE POLICE WHILE FOLLOWING MR. ALVAREZ. MR. IZZO STATED THAT MR. ALVAREZ STOPPED AND THREATENED HIM WITH A TREE BRANCH. MR AQUILES SAID HE CONTINUED FOLLOWING MR. ALVAREZ AND SPEAKING WITH POLICE DISPATCH AND NEAR 5040 WICHALAKAS MR. ALVAREZ STOPPED EXITED HIS VEHICLE AND APPROACHED MR. IZZO WHILE HE WAS IN HIS TRUCK SPEAKING ON THE PHONE.

ACCORDING TO MR. IZZO MR. ALVAREZ SLAPPED HIS PHONE OUT OF HIS HAND CAUSING IT TO FALL TO THE GROUND CAUSING DAMAGE TO IT, MR. ALVAREZ THREATENED HIM WITH A METAL PIPE MAKING MOTIONS AS IF HE WAS GOING TO STRIKE HIM WITH IT. MR. ALVAREZ GRABBED MR. IZZO BY THE NECK AND ADDRESSED HIM AS MOTHER FUCKER HOMMIE WHAT YOU DOING?

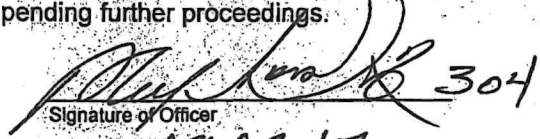
CECILIA BRUCE A WITNES TO THE INCIDENT MADE A STATEMENT REAFIRMING THE EVENTS AS THEY WERE TOLD BY MR. IZZO AND CONFIRMED THE APPROXIMATE LOCATION AS NEAR 5040 WICHALAKAS. THE VEHICLE THAT MR. IZZO WAS DRIVING WAS A SMALL DARK BLUE TRUCK WITH ARIZONA PLATE NUMBER BXD2846 MR. ALVARTEZ WAS DRIVING A WHITE VEHICLE WITH ARIZONA PLATE NUMBER CAE0844



The information contained herein is true and 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 be continued in custody, pending further proceedings.

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Signature of Officer

EXECUTED ON:

090817

Date

TRIBE'S EXHIBIT 2

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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,)
Plaintiff,)
vs.)
ALVAREZ, AQUILES,)
Defendant.)

Case No.:CR-17-268

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS (MULTIPLICITY)

The defendant, Aquiles Alvarez, was present for his Motion to Dismiss (Multiplicity) hearing on May 2, 2018. Court-Appointed Counsel and Deputy Public Defender, Annamarie Valdivia was present. Deputy Prosecutor, Alicia Renee Robertson appeared for the Tribe.

The Court finds that the defendant, through counsel, presented his motion and the Tribe presented the Tribe's response. The Court finds that the U. S. Supreme Court explained in *Blockburger v. United States*, that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offense or only one is whether each provision requires proof of a fact which the other does not," 284 U.S. 299, 304 (1932). In applying the *Blockburger* test in the case at hand, the Court should grant the defendant's Motion to Dismiss on multiplicity grounds, because the proof required in Count 4 involve the same facts alleged in Count 5 of the complaint. Both charges would require the Tribe to prove the factual basis for Count 4. The Tribe requested that the Court dismiss Count 4 since Count 5 includes an alleged victim. The Court will grant the Tribe's request.

The Court will order that the jury trial and pretrial conference currently set in this matter will remain on the court calendar. The Tribe recommended that the defendant's conditions of release should remain as previously ordered. The defendant, through counsel, had no objections. Good cause appears to grant the Tribe's release recommendations.

THE COURT ORDERS that the defendant's Motion to Dismiss (Multiplicity) is granted. and Count 4 is dismissed with prejudice. All remaining counts shall remain in the amended complaint.

THE COURT FURTHER ORDERS that the Jury Trial and Pretrial Conference currently scheduled in this matter shall remain on the court calendar.

THE COURT FURTHER ORDERS that the Defendant shall continue to be released under the previously ordered release conditions.

SO ORDERED THIS 2ND DAY OF MAY



Chief Judge, Pascua Yaqui Tribal Court

JUDICIAL BRANCH

Cc: Date 5-15-18
 Tribe Defendant Defense Counsel Pretrial Services PY Detention B.I.A. Contracted Detention Facility
Clerk: [Signature]

TRIBE'S EXHIBIT 3

Tribe's Exhibit #3 is a CD-R disk that is contained in the file

CERTIFICATE OF SERVICE

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

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

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

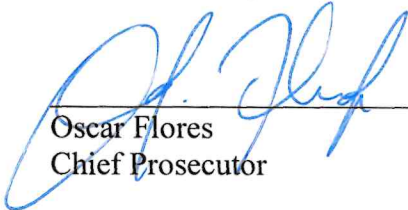
Annamarie Valdivia
Annamarie.Valdivia@pascuayaqui-nsn.gov
7474 S. Camino de Oeste
Tucson, AZ 85757

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

Chief Judge Margaret Flores
Pascua Yaqui Tribal Court
7777 S. Camino Huivisim
Tucson, AZ 85757

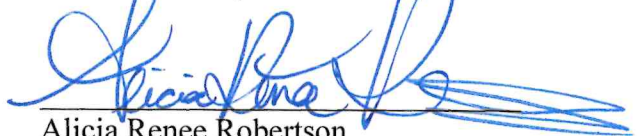
Dated this 2nd day of August, 2018.

PASCUA YAQUI PROSECUTOR



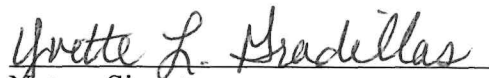
Oscar Flores
Chief Prosecutor

PASCUA YAQUI PROSECUTOR

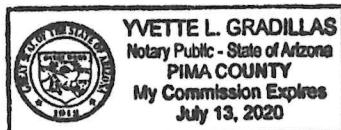


Alicia Renee Robertson
Deputy Prosecutor

Sworn before me this 2nd day of August, 2018



Notary Signature



1 PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR
2 7777 S. Camino Huivisim
Bldg. A, 2nd Floor
3 Tucson, Arizona 85757
(520) 879-6251

4 Alicia Renee Robertson
5 Deputy Prosecutor

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

9 PASCUA YAQUI TRIBE,
10 Appellant,
11 Vs.
ALVAREZ, AQUILES
12 Defendant.

APPEALS CASE NO.:
(Tribal Court No. CR-17-268)
NOTICE OF APPEAL
(Oral argument requested)

13
14 Notice is hereby given that the Pascua Yaqui Tribe appeals to the Appellate Court of the
15 Pascua Yaqui Tribe from the judgment entered in this action by the Pascua Yaqui Tribal Court
16 on May 2, 2018 by order of Chief Judge Margaret Flores. [see attached]

17 The Trial Court erred in finding that the Tribe was precluded from charging both
18 Tampering with Communications and Malicious Mischief. In situations where several different
19 criminal offenses (different statutes) are charged from one act by the defendant, the
20 controlling test emerged from the *Blockburger* case. *Blockburger v. United States*, 284 U.S. 299,
21 304 (1931). "Where the same act or transaction constitutes a violation of two distinct
22 statutory provisions, the test to be applied to determine whether there are two offenses or
23 only one, is whether each provision requires proof of a fact that the other does not." *Id. citing*
24 *Gavieres v. United States* 220 U.S. 338, 342 (1911).

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

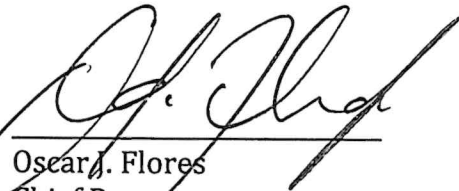
1 remedy pretrial or prior to the termination of trial. Such extraordinary writs are permitted
2 under the Pascua Yaqui Rules of Appellate Procedure. See 3 PYTC § 2-3-260(D).

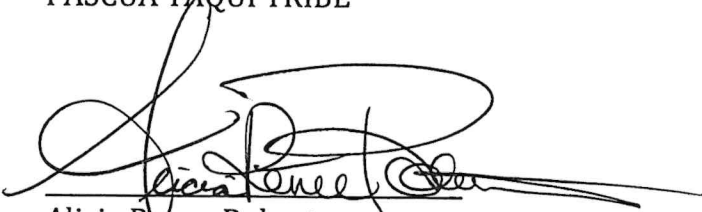
3 The Tribe appeals the Court's decision for the aforementioned reasons. The Pascua
4 Yaqui Tribe respectfully requests oral argument and a three-Justice appellate proceeding. The
5 Tribe further requests an order for the Tribal Court to prepare and submit the record to the
6 Court of Appeals.

7
8 **Respectfully submitted this 16th day of May, 2018.**

9
10 OFFICE OF THE PROSECUTOR
11 PASCUA YAQUI TRIBE

OFFICE OF THE PROSECUTOR
PASCUA YAQUI TRIBE

12 
13
14 _____
15 Oscar J. Flores
Chief Prosecutor


16 _____
17 Alicia Renee Robertson
18 Deputy Prosecutor

19
20 Original delivered/mailed
21 This **date** to:

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

23 Copy delivered/mailed to:
24 Pascua Yaqui Tribal Court

25 Pascua Yaqui Appellate Court

26 Annamarie Valdivia
27 Public Defender's Ofc.
28 Attorney for Defendant

By:

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,
Plaintiff,

Case No.:CR-17-268

vs.

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS (MULTIPLICITY)

ALVAREZ, AQUILES,
Defendant.

The defendant, Aquiles Alvarez, was present for his Motion to Dismiss (Multiplicity) hearing on May 2, 2018. Court-Appointed Counsel and Deputy Public Defender, Annamarie Valdivia was present. Deputy Prosecutor, Alicia Renee Robertson appeared for the Tribe.

The Court finds that the defendant, through counsel, presented his motion and the Tribe presented the Tribe's response. The Court finds that the U. S. Supreme Court explained in *Blockburger v. United States*, that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offense or only one is whether each provision requires proof of a fact which the other does not," 284 U.S. 299, 304 (1932). In applying the *Blockburger* test in the case at hand, the Court should grant the defendant's Motion to Dismiss on multiplicity grounds, because the proof required in Count 4 involve the same facts alleged in Count 5 of the complaint. Both charges would require the Tribe to prove the factual basis for Count 4. The Tribe requested that the Court dismiss Count 4 since Count 5 includes an alleged victim. The Court will grant the Tribe's request.

The Court will order that the jury trial and pretrial conference currently set in this matter will remain on the court calendar. The Tribe recommended that the defendant's conditions of release should remain as previously ordered. The defendant, through counsel, had no objections. Good cause appears to grant the Tribe's release recommendations.

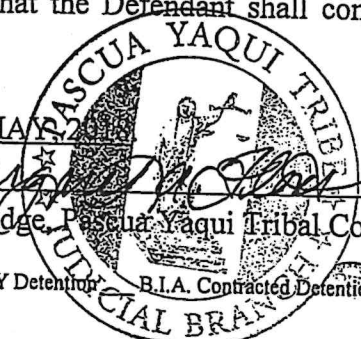
THE COURT ORDERS that the defendant's Motion to Dismiss (Multiplicity) is granted. and Count 4 is dismissed with prejudice. All remaining counts shall remain in the amended complaint.

THE COURT FURTHER ORDERS that the Jury Trial and Pretrial Conference currently scheduled in this matter shall remain on the court calendar.

THE COURT FURTHER ORDERS that the Defendant shall continue to be released under the previously ordered release conditions.

SO ORDERED THIS 2ND DAY OF MAY, 2018

[Signature]
Chief Judge, Pascua Yaqui Tribal Court



Cc: Date 5-15-18

Tribe Defendant Defense Counsel Pretrial Services PY Detention B.I.A. Contracted Detention Facility

Clerk: *[Signature]*