

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 Kendrick Wilson
5 Deputy Prosecutor

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

9 PASCUA YAQUI TRIBE,
Appellant,
10
Vs.
11 GARCIA, ALBERT MARGARITO
12 Defendant.

APPEALS CASE NO.: CA-18-003
(Tribal Court No. TR-18-007)
MOTION TO DISMISS APPEAL

13
14 The Pascua Yaqui Tribe, by and through undersigned counsel,
15 hereby respectfully moves this Court to dismiss the appeal in this
16 matter for the following reason:

17 Prosecutorial discretion.

18 **Respectfully submitted this 25th day of July, 2018.**

19
20 OFFICE OF THE PROSECUTOR
PASCUA YAQUI TRIBE

21 

22 Kendrick Wilson
23 Deputy Prosecutor

1 Original delivered/mailed
This **date** to:

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

3 Copy delivered/mailed to:
Pascua Yaqui Tribal Court

4 Hollie Holguin
Public Defender's Ofc.
Attorney for Defendant

5 By:

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **PASCUA YAQUI TRIBE**
2 **OFFICE OF THE PROSECUTOR**
3 7777 S. CAMINO HUIVISIM
4 TUCSON, ARIZONA 85757
5 TEL: (520) 879-6251
6 FAX: (520) 879-6260

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

8 **IN AND FOR THE PASCUA YAQUI RESERVATION, ARIZONA**

9 PASCUA YAQUI TRIBE

10 Appellant,

11 vs.

12 GARCIA III, ALBERT

13 Appellee.

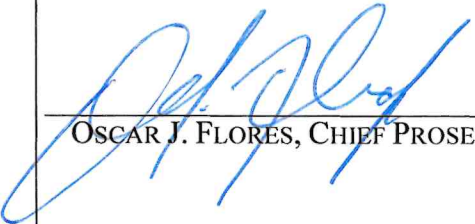
COURT OF APPEALS CASE NO.: CA-18-05

TRIBAL COURT CASE NO.: TR-18-007

NOTICE OF APPEAL

14 Notice is hereby given that the Pascua Yaqui Tribe, appellant in the above named case,
15 appeals to the Pascua Yaqui Court of Appeals from the order of Pascua Yaqui Tribal Court, entered
16 on May 28, 2018 by Associate Judge Melvin Stoof (attached hereto).
17

18 RESPECTFULLY SUBMITTED this 8 day of June, 2018.

19
20 
21 _____
OSCAR J. FLORES, CHIEF PROSECUTOR

20 
21 _____
JOSEPH AUSTIN, DEPUTY PROSECUTOR

22 **ORIGINAL of the forgoing filed**
23 **this 8 day of June, 2018.**

24 Clerk of the Court
25 Pascua Yaqui Tribal Court

26 **Copy of the foregoing**
27 **delivered/mailed/provided to:**

28 Office of the Public Defender
29 *Attorney for Defendant*

30 By: _____

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Officer (Signature)

Date/Time

Emphasis Added.

In this case, the officer administered a PBT to the defendant resulting in a reading of .154. Under Pascua Yaqui Law, a breath or blood alcohol reading of .08 is considered as legal intoxication. According to the Pascua Yaqui Police Department's own form, the defendant was to be given an opportunity to have an independent test for alcohol, as stated in the form "[a]fter completing the tests of your breath. . ."

Although the Tribe argues that the U.S. Constitution does not apply to Tribes, See *Talton v. Mayes* (citation omitted), and that the tribal court is not bound by Arizona law or the Arizona Constitution, the court may look no further than Pascua Yaqui law and apply the Pascua Yaqui Constitutional provisions that guarantee due process that provide, in pertinent part, as follows:

ARTICLE I – BILL OF RIGHTS

Section 1. Consistent with the provisions of this Constitution, the Pascua Yaqui Tribe in exercising its powers of self-government shall not:

- h. Deny to any person within its jurisdiction the equal protection of its laws or deprive any person or property without due process of law.

PYTCONST. Art. 1, SEC. 1(h).

Even though the U.S. Constitution does not apply to Indian Tribes, the Pascua Yaqui Tribe has adopted the Indian Civil Rights Act, 25 U.S.C. 1302, et seq., and it has incorporated those guaranteed rights in its own Constitution.

Defendants have a due process right to collect independent scientific evidence of their blood alcohol concentration (BAC). e.g. *McNutt*, 133 Ariz. 7 (1982) (dismissal of DWI case with prejudice appropriate where state prevented defendant from obtaining independent blood test). Independent chemical tests are exculpatory evidence, and the Tribe may not unreasonably interfere with a defendant's reasonable efforts to gain such evidence. *Montano*, 149 Ariz. 385, (1986). If this occurs the DUI charge or suppression of the blood or breath test may result.

Just as the Arizona Supreme court had found that depriving an accused DWI defendant of his right to due process under the 5th and 14th Amendments of the U.S. Constitution and Art. 2, section 4 of the Arizona Constitution to an independent blood or breath alcohol test, so too,

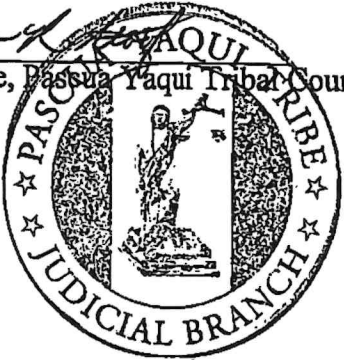
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

this court finds that under the Pascua Yaqui Constitution Art. I, Section (h), and based on the Pascua Yaqui's own police forms, the failure to advise Mr. Garcia, III, of his right to independent testing after he took his PBT is a violation of his due process rights under the Pascua Yaqui Constitution.

IT IS ORDERED that defendant's motion for dismissal based on a due process violation shall be granted.

IT IS FURTHER ORDERED that the dismissal shall be with prejudice to re-filing.
SO ORDERED THIS 28th DAY OF MAY, 2018.

Melvin A. Lopez
Associate Judge, Pascua Yaqui Tribal Court



cc: Date: May 29, 2018
 Tribe Defendant Counsel

[Signature]
Clerk