No. CA-19-001

Pascua Yaqui Tribe Court of Appeals

Rosendo Valenzuela, Appellant,

v.

Pascua Yaqui Tribe, Appellee.

For the Appellant: Glaucia Batista Brannock Deputy Public Defender

For the Appellee: Oscar J. Flores Chief Prosecutor & Coleen Thoene Deputy Prosecutor

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Opinion

Miller, Interim Chief Justice

Appellant Rosendo Valenzuela appeals trial court decisions denying his motions for continuance of his bench trial held on October 1, 2018.

Facts

The Pascua Yaqui Tribe charged Appellant with two criminal counts[1]. Appellant's Opening Brief, at 2. The Appellant had requested, as allowed by 3 PYTC §§ 2-2-350 & 360, that the trial court issue and serve a subpoena to compel the appearance at trial of a witness for the Appellant. Appellant's Opening Brief, at 2. Tribal process servers made three attempts to serve the prospective witness at his home, first on September 10, 2018 and then two different process servers attempted to serve the witness at his home at two different times on September 11, 2018. *Id.*; Appellee's Opening Brief, Exhibit A, Copy of Court Process Log. The process servers left their contact cards at the potential witness' home on two of their three attempts to serve the subpoena. Appellee's Exhibit A, Copy of Court Process Log; Appellant's Opening Brief, at 2. Appellant's attorney learned from the subpoena service logs "about a week prior to trial" that the potential witness had not been served with the subpoena. Appellant's Reply Brief, at 2 & n.1; *id.* at Exhibit D.

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[1] Appellant was charged with one count of Assault (4 PYTC § 1-130(A)(3)) and one count of Disorderly Conduct (4 PYTC § 1-300(A)). The Tribe alleged that both charges were domestic violence offenses pursuant to 4 PYTC § 3-10(A). Appellee's Opening Brief, at 6.

On the day of trial, October 1, 2018, Appellant's defense attorney unsuccessfully attempted to contact the potential witness by telephone and text. Appellant's Opening Brief, at 3; Appellee's Opening Brief, at 7. Appellant then requested the trial court grant a brief continuance of the trial. Appellant's Opening Brief, at 3. During a colloquy with the court on this motion, the defense attorney disclosed that the potential witness worked on the reservation for the Tribe's Education Department but that she had not requested that the witness be served at that location. Appellant's defense attorney never indicated on the record that the potential witness was an exculpatory witness and never made a proffer as to what the potential witness might testify about. Appellee's Opening Brief, at 7; *cf.* Appellant's Reply Brief, at 9 ("Although defense counsel did not indicate during her first motion to continue the bench trial that Witness was a rebuttal/exculpatory witness, defense attorney renewed her motion to continue after Appellant and alleged victim testified, indicating Witness was present during the incident."). Appellant made a second motion for continuance after the victim and Appellant testified. Appellant's Reply Brief, at 9. The trial court denied both motions and found the Appellant guilty of one of the two counts.

Standard of Review

We agree with numerous courts that an appellate court's standard of review of decisions granting or denying motions to continue a trial are for an abuse of discretion. *E.g.*, *United States v. Wilcox*, 487 F.3d 1163, 1172 (8th Cir. 2007); *United States v. Rivera-Guerrero*, 426 F.3d 1130, 1138 (9th Cir. 2005). *Cf. Pascua Yaqui Tribe v. Coleman*, No. CA-15-003, at 2 (PYT Ct App, Nov. 17, 2015) (holding the standard of review for a trial court decision disqualifying a prosecutor to be abuse of discretion; "The court abuses its discretion when it makes an error of law in reaching a discretionary conclusion or 'when the record, viewed in the light most favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision.'" Citation omitted).

Discussion

There is ample case law regarding denials of motions for continuances. Various courts have stated that continuances "are generally disfavored and should be granted only if the moving party has shown a compelling reason." *Wilcox*, 487 F.3d at 1172; *accord United States v. Nguyen*, 526 F.3d 1129, 1134 (8th Cir. 2008).

Courts have set out a four factor test to determine if a court abused its discretion in denying a motion for continuance. The Ninth Circuit states the test thusly:

> "[1] the extent of appellant's diligence in his efforts to ready his defense prior to the date set for hearing . . . [2] how likely it is that the need for a continuance could have been met if the continuance had been granted . . . [3] the extent to which granting the continuance would have inconvenienced the court and the opposing party, including its witnesses . . . [4] the extent to which the appellant might have suffered harm as a result of the district court's denial."

Rivera-Guerrero, 426 F.3d at 1138-39 (quoting *United States v. Flynt*, 756 F.2d 1352, 1359 (9th Cir. 1985)).

The Tenth Circuit states the test somewhat differently:

> "To determine whether a denial of a continuance is arbitrary or unreasonable, we look to several factors, including: the diligence of the party requesting the continuance; the likelihood that the continuance, if granted, would accomplish the purpose underlying the party's expressed need for the continuance; the inconvenience to the opposing party, its witnesses, and the court resulting from the continuance; the need asserted for the continuance and the harm that appellant might suffer as a result of the district court's denial of the continuance."

United States v. West, 828 F.2d 1468, 1470 (10th Cir. 1987).

We adopt these iterations of the test for the Pascua Yaqui Tribe's court system to apply in analyzing motions for continuances.

The first factor of this test requires us to examine the diligence of the Appellant and his attorney to prepare their defense prior to the day of trial. The tribal code requires the tribal court to subpoena defense witnesses. 3 PYTC § 2-2-360. Tribal process servers attempted to serve Appellant's witness three times at his home, at the address defense counsel provided for the witness. Appellant's defense counsel received a copy of the service log, showing that the prospective witness had not been served with the subpoena, approximately one week before trial. Apparently, defense counsel undertook no further efforts to ensure that this witness was actually served and instead called and texted the potential witness only on the day of trial, to no avail. In our view, this level of "diligence in his efforts to ready his defense prior to the date set for hearing," *Rivera-Guerrero*, 426 F.3d at 1138, does not satisfy the first factor of the test we have adopted for reviewing denials of motions for continuances.

Second, the test asks "how likely it is that the need for a continuance could have been met if the continuance had been granted." *Id.* This factor weighs in Appellant's favor. Granting the motions to continue would have obviously allowed time for further attempts at service, and once the defense attorney notified the court of the work address of the prospective witness, on the reservation, service of the subpoena could no doubt have been accomplished.

Third, we must address "the extent to which granting the continuance would have inconvenienced the court and the opposing party, including its witnesses." *Id.* at 1138. This factor weighs in favor of the Tribe. Delaying the trial would have inconvenienced the court, the Tribe and prosecutor, and the victim who were all prepared for trial on the scheduled date and were present in court at the appointed time.

Finally, the fourth factor requires us to consider "the extent to which the appellant might have suffered harm as a result of the [trial] court's denial." *Id.* at 1139. The Tenth

Circuit states this factor somewhat differently as "the need asserted for the continuance." *West*, 828 F.2d at 1470. This factor also weighs in favor of the Tribe and supports the trial court's decision to deny the motions for continuance. Since defense counsel never informed the court what testimony the prospective witness would allegedly offer, and no proffer was ever made to the court, the moving party obviously failed its duty to establish "the need asserted for the continuance," *id.*, failed to "show[ ] a compelling reason" for a continuance, *Wilcox*, 487 F.3d at 1172, and did not disclose to the court the circumstances surrounding the requests for a continuance. *West*, 828 F.2d at 1469-70; *Flynt*, 756 F.2d at 1359. In the cases we reviewed, the trial courts were informed of the reasons and the needs for motions to continue. Here, in contrast, the trial court was not offered any information with which to assess the need for these continuances or how to assess any potential harm that might ensue to the Appellant.

The United States Supreme Court has emphasized the need for parties to inform trial courts of the circumstances and reasons for motions to continue: "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer is found in the *circumstances present* in every case, *particularly in the reasons presented to the trial judge at the time the request is denied.*" *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (emphasis added). Since Appellant did not inform the trial court of what the prospective witness might have testified to and did not inform the court via a proffer or in any other fashion as to what this witness might say, the trial judge was given no reason to grant the continuances.

Consequently, the facts and circumstances surrounding the trial court's denial of Appellant's motions for a continuance, and our analysis of the factors of the test we have adopted, lead us to conclude that the trial court did not abuse its discretion in denying Appellant's motions for continuance of his trial.

Conclusion

We hold that the trial court did not abuse its discretion in denying Appellant's motions for continuance, and thus we affirm that court's decisions.

So ORDERED this18th day of March, 2019.

Hon. Robert Miller

WE CONCUR:

Justice Kendra A. Martinez

Hon. Jeremy Brave-Heart

No. CA-19-001

Pascua Yaqui Tribe Court of Appeals

Rosendo Valenzuela

v.

Pascua Yaqui Tribe

For the Appellant: Glaucia Batista Brannock

For the Office of the Prosecutor: Oscar J. Flores, Jr. and Coleen Thoene

Order Regarding Oral Argument

The Court will conduct a telephonic oral argument in this appeal on Wednesday, February 27, 2019 from 1:00 – 2:00 PM MST. Counsel may attend the argument in person at the tribal court or attend via telephone. The attorneys will address these questions:

1. Is our standard of review of the trial court's decision "abuse of discretion?"
2. What does "abuse of discretion" mean under Pascua Yaqui tribal laws, culture, and customs?
3. Did the trial court below abuse its discretion in denying a continuance of the bench trial due to the absence of defendant/appellant's one potentially exculpatory witness?
4. What duties do criminal defense attorneys have to ensure that the Pascua Yaqui Tribe serves subpoenas and that defense witnesses are compelled to attend and testify at trials?

No further briefing is required at this time.

So **ORDERED** this 15th day of February, 2019.

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

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

ROSENDO VALENZUELA, Appellant, v. PASCUA YAQUI TRIBE Appellee.	APPELLATE CASE NO. CA-19-001 PASCUA YAQUI TRIBAL COURT NO. CR-18-171

APPELLANT REPLY BRIEF

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TABLE OF AUTHORITIES

A. Table of Cases

B. Statues

Pascua Yaqui

3 PYTC § 2-2-309

United States

U.S. Const. amend. VI

I. Argument

The Pascua Yaqui Tribal Court Violated Mr. Valenzuela's Right to a Fair Trial when it Abused Its Discretion in Denying Mr. Valenzuela's Motion to Continue The Bench Trial Because Due to No Fault of Mr. Valenzuela, Service of Subpoena Was Deemed Incomplete, and Denial of Mr. Valenzuela's Motion to Continue Substantially Prejudiced His Defense, as The Witness Was Present During the Alleged Incident and Had Knowledge of Direct Exculpatory Evidence

II. The Correct Standard Of Review Is For An Abuse Of Discretion.

The Tribe claims the standard of review in this case is for fundamental error. In support of its claim, the Tribe cites to a non-binding Arizona case, *State v. Escalante*, 245 Ariz. 135, 425 P.3d 1078 (2018). In *Escalante*, the defendant was convicted on a variety of crimes and he appealed certain convictions and sentences. *Id.* at 1083. In his appeal, the defendant asked the Arizona court of appeals to review "whether the trial court incorrectly admitted drug-courier profile *evidence and hearsay statements.*" *Id.* (emphasis added). The court affirmed the defendant's convictions and sentences and the Arizona Supreme Court granted review only to clarify what a defendant must show to establish fundamental error. *Id.*

The issue in *Escalante* was related to the trial court's admission of evidence — an issue unrelated to the issue in the present case. In truth, Appellant found no jurisdiction where the denial of a motion for continuance is reviewed for fundamental error. It is undisputable that in Federal courts and in Arizona, a denial of a motion for continuance is reviewed for an abuse of discretion standard. *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321 (1940); *United States v. Gidley*, 527 F.2d 1345 (5 Cir. 1976); *United States v. Sahley*, 526 F.2d 913 (5 Cir. 1976); *United States v. Moriarty*, 497 F.2d 486 (5 Cir. 1974); *State v. Benge*, 110 Ariz. 473, 520 P.2d 843 (1974). As such, the case is reviewed on a case-by-case analysis. *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841 (1974).

Here, Appellant did not forfeit his claim on appeal, as he moved the trial court to continue trial, so service could be effected, and he also renewed his motion during his case in chief. Accordingly, there is no issue warranting fundamental error review.

III. The Pascua Yaqui Tribal Code Does Not Specify a Minimum or a Maximum Amount of Times Process Servers Must Attempt Service, as Servers Have Attempted Service on Individuals Numerous Times.

The Tribe claims Appellant's argument is "whether the Pascua Yaqui Tribal Code requires that more than three attempts be made to serve a defense witness," and "whether the law required that any service attempts be made on separate days." *See* Appellee's Response Brief, p. 9-10. The Tribe is mistaken. Appellant argues his fundamental rights were violated because the Tribe failed to serve Mr. Sergio Valenzuela (Witness) when it attempted to serve him three times, being two attempts on the same day, and then ceasing service three weeks prior to the trial. The trial court disclosed the service logs to defense counsel, but it never informed defense counsel that no further attempts were going to be made.[1]

Appellant is not asking this Court to establish a minimum or a maximum amount of attempts to be made. The Tribe is correct; the Tribal Code does not specify a number of attempted services to be made. However, Appellant asks this Court to look at the circumstances in this case because the Tribal Court has attempted service on other individuals numerous times. (*See e.g.* Appellant's Exhibit B and C).[2] Appellant secured a subpoena almost a month prior to trial on September 7, 2018. Once the subpoena was issued, it was up to process servers

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[1] It is unclear when the Tribal Court disclosed the service logs to defense counsel. However, an email between defense counsel and chief prosecutor, suggested that the information was disclosed about a week prior to trial. *See* Appellant's Exhibit D.

[2] The names of individuals being served on the attached service logs were covered up to protect the individual's privacy.

to serve Witness. Process servers failed to effect service through no fault of Appellant. There was a valid address for service on file and still plenty of time to serve Witness.

Further, there is nothing in PYT Code, nor has Appellant found any other authority where Appellant must request the trial court a second time to serve an individual once process servers decide on his or her own not to serve a witness.

Here, Appellant's rights were violated because the Tribal Court ceased to attempt to serve Appellant's witness almost three weeks prior to trial, when it served the Tribe's witnesses later. Process servers arbitrarily ceased service simply because on two days, they did not find Witness at home. Had process servers informed defense counsel that Witness was not found at home, defense counsel could have provided the servers with Witness' place of employment, so service could have been effected. *See Singlenton v. Lefkowitz*, 583 F.2d 618, 623 (2d Cir. 1978) ("This right is violated when the [s]tate arbitrarily denies a defendant the opportunity to put on the stand a witness whose testimony would be relevant and material to his defense").

IV. The Trial Court Abused Its Discretion When It Denied Appellant's First Motion to Continue to Secure the Attendance of Exculpatory Witness, Violating Appellant's Fundamental Rights.

Pursuant to Title Three of the Pascua Yaqui Tribe Code (PYTC), "[i]n all criminal proceedings, the defendant *shall* have the following rights: (5) to compel by subpoena; (a) the attendance of any witnesses necessary to defend against the charges[.]" 3 PYTC § 2-2-309 (emphasis added). This right is also present in the Sixth Amendment of the United States Constitution. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense").

The Supreme Court of the United States "has been unanimous in its conclusion that the right to a fair trial encompasses the right of a criminal defendant to present the testimony

of witnesses in his own behalf." *Johnson v. Johnson*, 375 F. Supp. 872, 875 (W.D. Mich. 1974) (citing *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) ("the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the [s]tate arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense"). In *Washington v. Texas*, the court reasoned:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, *he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.*

388 U.S. 14 at 19 (emphasis added).

The Tribe in its Response Brief cited to the same case law Appellant cited in his Opening Brief and is asking this Court to adopt — *United States v. Miller*, 513 F.2d 791, 793 (5th Cir. 1975) and *Johnson v. Johnson*, 375 F. Supp. 872, 875 (W.D. Mich. 1974). However, it appears as though the Tribe incorrectly argues the findings and circumstances of the cases. As such, as discussed below, the arguments the Tribe erroneously introduce in its response brief are not analogous to the particular issue in this case.

In *Miller*, the Tribe quoted a very limited part of the opinion where it says the granting of continuances "are not a matter of right." *See* Appellee's Response Brief, p. 15. In *Miller*, the court argued that granting of continuances are not a matter of right because the witness the defendant was trying to secure lived in Jamaica, which was outside the subpoena powers of that court's jurisdiction. *Miller* at 793. Therefore, the court in *Miller* affirmed the trial court's denial

of continuance "because the witness, a Jamaican residing in Jamaica, was outside the subpoena power of the court." *Id.*

In *Johnson*, the trial court denied the defendants' request for a continuance to secure the presence of their only alibi-subpoenaed witness. The defendants filed a Writ of Habeas Corpus. The Michigan district court granted the Federal Writ and *found*, "[the defendants] were effectively denied the right to present their defense. There is no showing that the petitioners in any way contributed to the absence of their witnesses." The court then concluded, "under the special circumstances of this case, the defendants were denied a fair trial within the meaning of the relevant constitutional provisions. This is not to say that the defendants had a right to an outright dismissal because some of their witnesses could not be obtained. Nor did the defendants have a right to a prolonged delay. But the crucial right to present a defense as comprehended by the Sixth Amendment required something more than what was done here." *Id.* at 876.

The Tribe erroneously argued that the court in *Johnson* found "the defendant's Sixth Amendment right to a speedy trial and the prosecution's similar interest must be taken into account." *See* Appellee's Response Brief, p. 16, *citing Johnson* at 875. The tribe's argument is misleading. Under *Johnson*, the prosecutor is responsible for producing witnesses at trial, even if the witness will provide exculpatory testimony. *Id.* at 875 ("...the modern statutory codification of the rule, ... has been held to require the prosecution to endorse the name of a *res gestae* witness on the information and produce him even though he may give testimony favorable to the accused"). The balancing between a defendant's speedy trial rights and prosecution similar interest argued in *Johnson* lies on the ability to locate the witness. As that court noted, "[w]hen a witness sought by a defendant is in a foreign country, totally beyond the reach of the court's process, or cannot be found, the defendant cannot successfully claim a

Sixth Amendment right not to be tried at all." *Id.*; *See also United States v. Murphy*, 413 F.2d 1129, 1139 (6th Cir. 1969).[3] Nevertheless, the court in *Johnson*, specifically noted, "[t]here is simply nothing in the record which suggests that the interests of the prosecution outweighed the right of the defendants to have a reasonable opportunity to present their only defense." *Johnson* at 876.

The Tribe also cited to *United States v. Hoyos*, 573, F.2d 1111, 1114 (9th Cir. 1978). However, the Tribe misstated the argument when it omitted the fact that the witness had absconded from that court's jurisdiction. *Id.* at 1114 ("In view of the fact that [the witness] was a fugitive at the time of Hoyos' trial, *we conclude* that the trial court justifiably entertained grave doubt whether [the witness] could be produced as a witness." (emphasis added)). *Hoyos* differs from Appellant's case because the witness in *Hoyos* was a co-defendant who could not be located and that court had already continued the case once to secure the presence of that witness. Here, Witness was an eyewitness, whose whereabouts were known and that was Appellant's first request for a continuance.

Moreover, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Hicks v. Wainwright*, 633 F.2d 1146, 1148–49 (5th Cir. 1981); Nilva v. United States, 352 U.S. 385, 77 S.Ct. 431, 1

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[3] Appellant in his opening brief mentioned, "Unlike in *Johnson*, where the witness was living beyond the jurisdictions of that court, Witness in this case lives in the reservation and works in the reservation where he is subjected to the Tribe's jurisdiction." *See* Appellant Opening Brief, p. 6. This was a mistake. Appellant referred to the wrong case. The correct case is *State v. Miller*, 513 F.2d 791, 793 (5th Cir. 1975), which was also cited in Appellant's Opening Brief and Reply.

L.Ed.2d 415; Torres v. United States, 270 F.2d 252 (C.A.9th Cir.); United States v. Arlen, 252 F.2d 491 (C.A.2d Cir.); *Ungar v. Sarafite*, 376 U.S. 575, 589–90, 84 S. Ct. 841, 849–50, 11 L. Ed. 2d 921 (1964).

In the present case, Appellant's crucial right to present a defense as understood by the Sixth Amendment required something more than what was done here. The reason for continuance was compelling — Appellant requested the issuance of subpoena almost a month prior to trial, and despite knowing Witness' address, process servers ceased attempting to serve Witness three weeks prior to trial. Process servers failed to inform Defense counsel that there would not be any further attempts to serve Witness.

The PYT Code does not require a defendant to request a second subpoena so service can be effected simply because process servers ceased attempting service with plenty of time to still do so. Notably, to simply leave a card at an individual's residence with no explanation does not satisfy the power of a subpoena.

V. Appellant Demonstrated A Continuance Was Warranted In This Case.

In regards to claims that a continuance is necessary to subpoena potential witnesses, the Tribe has recognized it in its response brief that federal courts have considered whether "due diligence has been exercised to obtain the attendance of the witness, that substantial favorable testimony would be tendered by the witness, that the witness is available and willing to testify, and that the denial of a continuance would materially prejudice the defendant." *United States v. Miller*, 513 F.2d 791, 793 (5th Cir. 1975); *See also United States v. Cawley*, 481 F.2d 702, 705 (5th Cir. 1973); *See* Appellee's Response Brief, p. 16. As discussed in his Opening Brief and below, Appellant met the burden set in *Miller*.

a. Appellant Was Diligent To Obtain The Attendance Of The Witness.

The Tribe argues that to locate a witness the Tribe had initially disclosed, hear his side of the story, secure a subpoena with the court with a good address for service, and call and text Witness on the day of trial is not due diligence to secure a witness attendance at trial. In support of its argument, the Tribe suggests Appellant should have hired an investigator to locate Witness to effect service. *See* Appellee's Response, p. 17. This argument is not realistic under the present circumstances.

To satisfy such burden, Appellant would have to petition the trial court to approve funds to hire an investigator, which in turn would decide whether to approve the funds for the Office of the Public Defender (the Office), then the Office would have to find an investigator to hire, so he/she could locate a Witness whom the whereabouts were known to the trial court. All of this would have to happen assuming the Tribal Court would have approved the funds for the Office to hire an investigator, which is highly speculative.

The PYT Code does not require a defendant to secure an investigator solemnly to locate a witness whose whereabouts are known in order to protect a defendant's fundamental right to present his defense at trial. The Tribe's argument squarely contradicts its judicial economy argument. Importantly, had process servers served Witness, there would not be a need to continue the hearing because Witness would have been compelled to attend the trial.

b. The Tribe As Well As The Court Were Aware Appellant's Witness Was An Exculpatory Witness

The Tribe mistakenly alleges, "Appellant did not present the trial court with sufficient facts to warrant the granting of a continuance." *See* Appellee Response, p. 13. The Tribe claims, without citing to any authority, the right to compulsory service was not violated because Appellant did not present any proffer as to what Appellant's witness would have testified, and

that deprived the trial court from debating whether Witness was a material witness. *Id.* This claim is inaccurate.

The standard in *Miller* requires the court to *consider* whether the witness would tender substantial favorable testimony for defense. *Miller* at 793. This is not the same as detailing a witness' testimony to the party prior to trial. Simply put, the Tribe and the trial court had enough information that Witness was present during the incident in question, and that he was the only Witness Appellant was presenting. Appellant requested the issuance of the subpoena and it was granted, which indicates the trial courts intention to permit Witness to testify.

Witness testimony was not highly speculative. The Tribe and the trial court had sufficient notice that Witness was a rebuttal/exculpatory witness who was present during the incident in question. First, Witness' name appears on the probable cause affidavit presented to the trial court by the Tribe. *See* Case Index #20, Probable Cause Affidavit.[4] Second, Appellant disclosed to the Tribe that Witness was going to be called as rebuttal witness. *See* Appellant's Exhibit D.[5] Next, The trial court was also aware of Witness because Appellant and Victim testified that Witness was present.

Although defense counsel did not indicate during her first motion to continue the bench trial that Witness was a rebuttal/exculpatory witness, defense counsel renewed her motion to continue after Appellant and alleged victim testified, indicating Witness was present during the incident. The renewed motion was made before Appellant rested his case in chief. *See* Case Index #2, Judgment and Order Setting Sentencing Hearing. The trial court also made

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[4] "I arrived and made contact with Norma Valencia … and Sergio Valenzuela"

[5] "I am not clear on the rules here regarding disclosure of *rebuttal witnesses*, but out of an abundance of caution and to follow up with the call earlier, I have been trying to subpoena Sergio Valenzuela.... He was the only witness to the incident aside from the alleged victim and the defendant...."

factual findings that Witness was present during the incident in question. [6] [7] Therefore, it is undisputable that the trial court as well as the Tribe had notice that Witness was a material witness present during the incident and his testimony was not simply cumulative.

Moreover, even assuming the court was unaware Witness was called to testify because he was present during the incident in question, "it is important to note that where the [g]overnment has contributed to the unavailability of the witness, the showing of favorable testimony that is required of the defendant is relaxed." *Singleton v. Lefkowitz*, 583 F.2d 618, 623 (2d Cir. 1978). Even though defense counsel was unable to argue whether the witness' testimony was going to favor the defendant, the court held that "the petitioner was deprived of his Sixth Amendment right to compulsory process when the state trial court refused to grant a short adjournment to secure the presence of an important defense witness who was unavailable due to the state's error." *Id. See also United States v. Alonzo-Miranda*, 427 F.Supp. 924, 925-26 (E.D.Cal. 1977). Analogously here, Appellant's witness was not subpoena but through no fault of Appellant, as he had requested the trial court to issue the subpoena and serve Witness weeks before the trial.

c. Witness Is Available And Willing To Testify.

Witness is available and willing to testify. Defense counsel, in her first motion to continue, indicated she provided Witness' address to the trial court, to have his phone number, and that she knew where Witness worked. The fact defense counsel had good contact

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[6] "The court finds credible the testimony of Ms. Valencia who stated that shortly after [Appellant] pulled up to the house, in the car drive by his cousin [Witness], the defendant appeared to be intoxicated, as she approached his vehicle."

[7] "The court finds as follows: ... After making 18 unanswered phone calls to the defendant, Ms. Valencia went to see the defendant who was seated in his pick up truck and who had been driven home by his cousin, Sergio Valenzuela, and both were sitting parked in front of the residence."

information for witness validates his availability and willingness to testify. A person who is unwilling to testify on behalf of another would not provide personal contact information to facilitate service. Witness was at all times under the Pascua Yaqui Tribe jurisdiction, and the lack of service was through no fault of Appellant.

Whether Witness was avoiding services, which was clarified on Appellant's opening brief that he was not, is not relevant because process servers ceased attempting to serve him three weeks prior to trial.[8] Two business cards were left at Witness' residence. There is nothing on the record indicating what was written on the cards. There cannot be inferred Witness actually saw the card.

Furthermore, it is not Witness' responsibility to contact the court to ask to be served. However, even assuming individuals being served have a duty to contact process servers to effect service, failure to do so cannot be imputed on Appellant, because Appellant did what he was supposed to do — requested the issuance of subpoena, which was granted, to secure the presence of Witness, who was present during the alleged incident. *See e.g. Hicks v. Wainwright*, 633 F.2d 1146, 1149 (5th Cir. 1981) ("Petitioner's counsel was in telephone contact with [the witness] during the trial. The witness's unwillingness to appear when the court was ready to hear his testimony cannot be attributed to the petitioner").

d. The Denial of Continuance Materially Prejudiced Appellant.

The Tribe, in its response, made inflammatory arguments and assumed facts not supported by the record. First, the Tribe stated, "that the victim suffered a minor injury when

[8] The Tribe indicates that Appellant inappropriately attached Sergio Valenzuela's affidavit to his Opening Brief. The affidavit explaining his availability was attached to correct defense counsel's assertion at trial. The communication with Mr. Sergio Valenzuela, although the date is missing, clearly occurred after trial, but before this appeal. This Court may choose to disregard it or to consider it.

she was struck by the beer carton." *See* Appellee's Response, p. 20. This accusation is incorrect. The victim testified that Appellant got mad and threw the box at her. She never testified that she sustained a minor injury nor was there any evidence presented that she was injured.

Next, the Tribe alleged it would be able to impeach Witness had he testified because of his "alcohol consumption, his position in the car, and any biases he had in favor the Appellant, his cousin." Appellee Response, p. 23. These allegations are highly speculative and not supported by the record. Nobody testified that Witness was intoxicated. The police officer made contact with Witness and nowhere in his report stated he smelled alcohol on Witness or that he appeared to be impaired, nor did the officer charged him with any alcohol related offense. Appellant stated he and Witness were drinking. Appellant said he had two cans of beers for each, but he never testified how much Witness actually drank. It is evident, however, that Witness drank less than two cans of beer because the alleged victim testified that she took some beer and started to pour it on the floor.

Finally, the Tribe argued Defendant cannot demonstrate that the outcome of his trial would have been different if his motion to continue had been denied. The issue here is not whether there would be a different outcome had Witness testified. Rather, the issue is whether there was a prejudice once Appellant was precluded from presenting his own defense at trial.

The denial of a continuance materially prejudiced Appellant. Witness was present during the alleged incident and had important exculpatory evidence to present to the court. At trial, the alleged victim, Norma Valencia, and Appellant testified to the best of their recollection. Neither Appellant nor did Ms. Valencia fully recalled the events on the day in question. Witness was present and could have testified as to his impressions of the alleged event. Appellant was found guilty without having the opportunity to fully present his defense. Therefore, the trial court's denial of a continuance materially prejudiced Appellant and the outcome of this case.

The Tribe cannot speculate what would the outcome of trial be had Witness testified to merely justify the trial court's denial of Appellant's fundamental rights to present his defense. Specially, when the Tribe claimed in its own brief that the trial court was "deprived of the ability to consider" what Witness was going to testify. *See* Appellee's Response, p. 20.

VI. Conclusion

Appellant met the standard set up in *Miller*. Appellant exercised due diligence to obtain the attendance of Witness, the trial court and the Tribe were aware that Witness was being called to challenge the Tribe's case, the Witness is available and willing to testify, and the denial of a continuance materially prejudiced Appellant. The Tribe disregarded every effort, every information presented in the record, as it attempted to raise a high bar not supported by any case law it cited. Therefore, Appellant respectfully asks this Court to reverse the Tribal Court's ruling and grant a trial *de novo*, where Appellant is afforded the opportunity to present his defense.

RESPECTFULLY SUBMITTED: January 14, 2019.

PASCUA YAQUI PUBLIC DEFENDER

Glaucia Batista Brannock
Deputy Public Defender
Pascua Yaqui Public Defender
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

Attorney for Appellant Rosendo Valenzuela

CERTIFICATE OF COMPLIANCE

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

PASCUA YAQUI PUBLIC DEFENDER

Glaucia Batista Brannock
Deputy Public Defender
Pascua Yaqui Public Defender
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

Attorney for Appellant Rosendo Valenzuela

CERTIFICATE OF SERVICE

On January 19, 2019, the original and three copies of the *Appellant's Reply Brief* were filed and conforming copes were sent to the following:

Pascua Yaqui Office of the Prosecutor
Chief Prosecutor
Oscar J. Flores
7777 S. Camino Huivisim, Building A
Tucson, AZ 85757

Rosendo Valenzuela, Appellant

PASCUA YAQUI PUBLIC DEFENDER

Glaucia Batista Brannock
Deputy Public Defender
Pascua Yaqui Public Defender
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

Attorney for Appellant Rosendo Valenzuela

APPELLANT'S EXHIBIT B

PASCUA YAQUI TRIBAL COURT

7474 S. CAMINO DE C STE TUCSON, ARIZONA 85757 (520) 879-6276

(NOTE TO PROCESS SERVER: Tribal Court Rules require that this log be filled out completely. Please make sure that you include the date, time and location of each service attempt as well as any notes regarding the reason(s) why an attempt was unsuccessful. Illegible handwriting is unacceptable.)

COURT PROCESS LOG

PROCESS TO:
ADDRESS: **4080 W CALLE TETAKUSIM TUCSON AZ 85746**
ALTERNATE ADDRESS:
CASE & DOCKET NO. **CR-18-248 PYT V CARINA N DOMINGUEZ**
TYPE OF PROCESS: ☒ Criminal ☐ Civil ☐ Traffic ☐ Child Welfare ☐ Juvenile Status ☐ Juvenile Offender ☐ Animal Control
DESCRIPTION: ORDER WITH BENCH TRIAL
DATE AND TIME OF COURT: **DECEMBER 10, 2018 AT 10 AM**
DATE PROCESSED ISSUED: **09/19/18**
ISSUING CLERK: **RENE GARCIA**

Pascua Yaqui Judicial Branch SEP 28 2018 JUDICIAL SECURITY

TO BE RETURNED TO CLERK NO LATER THAN: 10/20/18

FIRST ATTEMPT (location): outgoing Call (520) 282-8625
DATE: 9/20/18 TIME: 9:10 ☑ A.M. ☐ P.M.

☑ SERVICE INCOMPLETE (Reason): Spoke with Carina Dominguez and advise her that she has paperwork

☐ SERVICE COMPLETE Served By: F. Martinez
Name (Print)
Signature T.S.O
Title

****

SECOND ATTEMPT (location): 4080 W. Calle Tetakusim
DATE: 9/20/18 TIME: 9:13 ☑ A.M. ☐ P.M.

☐ SERVICE INCOMPLETE (Reason): NO Contact, NO Answer

☐ SERVICE COMPLETE Served By: F. Martinez
Name (Print)
Signature T.S.O
Title

****

THIRD ATTEMPT (location): 4080 W. CALLE TETAKUSIM
DATE: 9/20/2018 TIME: 2:40 ☐ A.M. ☒ P.M.

☒ SERVICE INCOMPLETE (Reason): NO CONTACT, NO ANSWER

☐ SERVICE COMPLETE Served By: Rudy Cordova
Name (Print)
Signature T.S.O
Title

FOURTH ATTEMPT (locati 4880 W. TETAKUSIM

DATE: 9/21/2018 TIME: 9:38 ☒ A.M. ☐ P.M.

☒ SERVICE INCOMPLETE (Reason): NO CONTACT, NO ANSWER LEFT CARD ON FRONT DOOR.

☐ SERVICE COMPLETE Served By: Rudy Cordova
Name (Print)

Signature Title J.S.O

****

FIFTH ATTEMPT (location): 4080 W. TETAKUSIM

DATE: 9/24/2018 TIME: 8:29 ☒ A.M. ☐ P.M.

☒ SERVICE INCOMPLETE (Reason): NO CONTACT, NO ANSWER LEFT CARD ON FRONT DOOR

☐ SERVICE COMPLETE Served By: Rudy Cordova
Name (Print)

Signature Title J.S.O

****

SIXTH ATTEMPT (location): 4080 Tetakusim

DATE: 9/24/18 TIME: 1450 ☐ A.M. ☒ P.M.

☒ SERVICE INCOMPLETE (Reason): NO Contact/no answer - Card still on door from last attempt

☐ SERVICE COMPLETE Served By: Tripoh
Name (Print)

Signature Title JSO

****

SEVENTH ATTEMPT (location): 4080 W. TETAKUSIM

DATE: 9/25/2018 TIME: 11:49 ☒ A.M. ☐ P.M.

☒ SERVICE INCOMPLETE (Reason): NO CONTACT, NO ANSWER CARD NO LONGER ON FRONT DOOR.

☐ SERVICE COMPLETE Served By: Rudy Cordova
Name (Print)

Signature Title J.S.O

****

EIGHTH ATTEMPT (location): 4080 W Tetakusim

DATE: 9/28/18 TIME: 2:35 ☐ A.M. ☒ P.M.

☐ SERVICE INCOMPLETE (Reason):

☒ SERVICE COMPLETE Served By: Andre Lucero
Name (Print)

Signature Title J.S.O.

(NOTE: RETURN TO ISSUING CLERK AFTER ATTEMPTS MADE)

APPELLANT'S EXHIBIT C

PASC A YAQUI TRIBAL COURT #213

7474 S. CAMINO DE C STE TUCSON, ARIZONA 8575(520) 879-6276

(NOTE TO PROCESS SERVER: Tribal Court Rules require that this log be filled out completely. Please make sure that you include the date, time and location of each service attempt as well as any notes regarding the reason(s) why an attempt was unsuccessful. Illegible handwriting is unacceptable.)

Pascua Yaqui Judicial Branch

JUL 03 2018

JUDICIAL SECURITY

COURT PROCESS LOG

PROCESS TO:
ADDRESS: 7850 S CAMINO COCOIM TUCSON AZ 85757
ALTERNATE ADDRESS:
CASE & DOCKET NO. CR-18-094 PYT V CHRISTINA GALLARDO
TYPE OF PROCESS: ☒ Criminal ☐ Civil ☐ Traffic ☐ Child Welfare ☐ Juvenile Status ☐ Juvenile Offender ☐ Animal Control
DESCRIPTION: ORDER W/MOTION TO MODIFY RELEASE CONDITIONS
DATE AND TIME OF COURT: **JULY 10, 2018 AT 11 AM**
DATE PROCESSED ISSUED: 06/28/18
ISSUING CLERK: RENE GARCIA

TO BE RETURNED TO CLERK NO LATER THAN: 07/07/18

FIRST ATTEMPT (location): 7850 Cocoim
DATE: 6-28-18 TIME: 1616 ☐ A.M. ☑ P.M.

☑ SERVICE INCOMPLETE (Reason): no Contact, no answer - left card front door.

☐ SERVICE COMPLETE Served By: Tippet
Name (Print)

Signature JSO
Title

****

SECOND ATTEMPT (location): 7850 Cocoim
DATE: 6-29-18 TIME: 0901 ☑ A.M. ☐ P.M.

☑ SERVICE INCOMPLETE (Reason): no Contact, no answer - left card front door.

☐ SERVICE COMPLETE Served By: Tippet
Name (Print)

Signature JSO
Title

****

THIRD ATTEMPT (location): 7850 Cocoim
DATE: 6/29/18 TIME: 1:02 ☐ A.M. ☒ P.M.

☑ SERVICE INCOMPLETE (Reason): Card still on door ~~for~~ no contact. No answer

☐ SERVICE COMPLETE Served By: Andre Lucero
Name (Print)

Signature J.S.O.
Title

FOURTH ATTEMPT (location): 7850 S. COCOIM

DATE: 06.29.2018 TIME: 3:30 ☐ A.M. ☒ P.M.

☒ SERVICE INCOMPLETE (Reason): NO CONTACT / NO ANSWER
CARD STILL ON DOOR

☐ SERVICE COMPLETE Served By: BUENAMEA JR
Name (Print)

Signature J.S.O
Title

****

FIFTH ATTEMPT (location): 7850 S. COCOIM
DATE: 07.02.2018 TIME: 8:35 ☒ A.M. ☐ P.M.

☒ SERVICE INCOMPLETE (Reason): NO CONTACT / NO ANSWER
CARD STILL ON DOOR / LEFT CARD ON DOOR

☐ SERVICE COMPLETE Served By: BUENAMEA JR
Name (Print)

Signature J.S.O
Title

****

SIXTH ATTEMPT (location): 7850 Cocim
DATE: 7/2/18 TIME: 3:37 ☐ A.M. ☑ P.M.

☑ SERVICE INCOMPLETE (Reason): NO Contact, NO Answer
Left Card at door

☐ SERVICE COMPLETE Served By: F. Martinez
Name (Print)

X
Signature J.S.O
Title

****

SEVENTH ATTEMPT (location): 7850 S. COCOIM
DATE: 07.03.2018 TIME: 8:29 ☒ A.M. ☐ P.M.

☒ SERVICE INCOMPLETE (Reason): NO CONTACT / NO ANSWER
LEFT CARD ON DOOR

☐ SERVICE COMPLETE Served By: BUENAMEA JR
Name (Print)

Signature J.S.O
Title

****

EIGHTH ATTEMPT (location):
DATE: TIME: ☐ A.M. ☐ P.M.

☐ SERVICE INCOMPLETE (Reason):

☐ SERVICE COMPLETE Served By:
Name (Print)

Signature
Title

(NOTE: RETURN TO ISSUING CLERK AFTER ATTEMPTS MADE)

APPELLANT'S EXHIBIT D

Annamarie Valdivia

From: Annamarie Valdivia
Sent: Monday, September 24, 2018 4:49 PM
To: Oscar J. Flores (Oscar.J.Flores@pascuayaqui-nsn.gov)
Subject: Rosendo Valenzuela (CR-18-171)

Good afternoon OJ.

I am not clear on the rules here regarding disclosure of rebuttal witnesses, but out of an abundance of caution and to follow up with the call earlier, I have been trying to subpoena Sergio Valenzuela who resides at 7902 Maala Mecha Voo'd, Tucson, AZ 85757. He was the only witness to the incident aside from the alleged victim and the defendant. He is avoiding service so I am not sure if he will come.

Thank you in advance for your attention to this matter.

Kind regards,

Annamarie L. Valdivia

Annamarie L. Valdivia
Senior Staff Attorney
Pascua Yaqui Tribe
Office of the Public Defender
4725 W. Calle Tetakusim, Bldg. B
Tucson, AZ 85757
(520) 883-5012

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

ROSENDO VALENZUELA Appellant vs. PASCUA YAQUI TRIBE, Appellee	APPELLATE CASE NO: CA-19-001 TRIBAL COURT CASE NO: CR-18-171

APPELLEE/RESPONDENT'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

In its Response to the Appellant's Opening Brief, also filed this date, the Appellee made reference to several exhibits. Those exhibits are attached to this pleading for this Court's consideration pursuant to 3 PYTC § 2-3-110(c) and (e).

RESPECTFULLY submitted this 28th day of December, 2018.

Oscar J. Flores
Chief 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 28 day of December, 2018.

PASCUA YAQUI PROSECUTOR

Oscar J. Flores
Deputy Prosecutor

Coleen Thoene
Deputy Prosecutor

Sworn before me this 28th day of December, 2018

Notary Signature

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

Appellee's Exhibit A
(*Copy of Court Process Log as to Sergio Valenzuela*)

PASCUA YAQUI TRIBAL COURT #49

7474 S. CAMINO DE OESTE TUCSON, ARIZONA 85757 (520) 879-6276

(NOTE TO PROCESS SERVER: Tribal Court Rules require that this log be filled out completely. Please make sure that you include the date, time and location of each service attempt as well as any notes regarding the reason(s) why an attempt was unsuccessful. Illegible handwriting is unacceptable.)

COURT PROCESS LOG

PROCESS TO: **SERGIO VALENZUELA**
ADDRESS: **7902 NAALA MECHA VOO'D TUCSON AZ 85757**
ALTERNATE ADDRESS:
CASE & DOCKET NO. **CR-18-171 PYT V ROSENDO VALENZUELA**
TYPE OF PROCESS: ☒ Criminal ☐ Civil ☐ Traffic ☐ Child Welfare ☐ Juvenile Status ☐ Juvenile Offender ☐ Animal Control
DESCRIPTION: SUBPOENA
DATE AND TIME OF COURT: **OCTOBER 1, 2018 AT 10 AM**
DATE PROCESSED ISSUED: **09/07/18**
ISSUING CLERK: **RENE GARCIA**

Pascua Yaqui Judicial Branch
SEP 12 2018
JUDICIAL SECURITY

TO BE RETURNED TO CLERK NO LATER THAN:

FIRST ATTEMPT (location): 7902 Naala mecha voo'd
DATE: 9/10/18 TIME: 10:15 ☒ A.M. ☐ P.M.

☐ SERVICE INCOMPLETE (Reason): NO Contact, NO Answer
Left Card on door

☐ SERVICE COMPLETE Served By: F. Martinez
Name (Print)
J.S.O
Signature Title

****

SECOND ATTEMPT (location): 7902 Naala Mecha
DATE: 9/11/18 TIME: 9:19 ☒ A.M. ☐ P.M.

☒ SERVICE INCOMPLETE (Reason): No contact
No answer, dogs in yard
left card on gate

☐ SERVICE COMPLETE Served By: Andre Lucero
Name (Print)
J.S.O.
Signature Title

****

THIRD ATTEMPT (location): 7902 S. NAALA MECHA VOO'D
DATE: 09.11.2018 TIME: 3:13 ☐ A.M. ☒ P.M.

☒ SERVICE INCOMPLETE (Reason): NO CONTACT / NO ANSWER
CARD STILL ON GATE

☐ SERVICE COMPLETE Served By: BUENAMEA JR
Name (Print)
J.S.O
Signature Title

Appellee's Exhibit B
(*Copy of Court Process Log as to N.V., Officer Mark Machado, and Rosendo Valenzuela*)

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PASCUA YAQUI TRIBAL COURT

7474 S. CAMINO DE OESTE TUCSON, ARIZONA 85746 (52) 879-6276

(NOTE TO PROCESS SERVER: Tribal Court Rules require that this log be filled out completely. Please make sure that you include the date, time and location of each service attempt as well as any notes regarding the reason(s) why an attempt was unsuccessful. Illegible handwriting is unacceptable.)

COURT PROCESS LOG

Pascua Yaqui Judicial Branch
SEP 13 2018
JUDICIAL SECURITY

PROCESS TO: Valencia, Norma
ADDRESS: 5140 W. Wichalakas, Tucson, AZ 85757
ALTERNATE ADDRESS:
CASE & DOCKET NO. Valenzuela, Rosendo CR-18-171
TYPE OF PROCESS: Criminal Misdemeanor
DESCRIPTION: Subpoena for Bench Trial
DATE AND TIME OF COURT: BT - October 01, 2018 10:00 AM
DATE PROCESSED ISSUED: 9/12/18
ISSUING CLERK:
TO BE RETURNED TO CLERK NO LATER THAN:

FIRST ATTEMPT (location): 5140 WICHALAKAS
DATE: 09.13.2018 TIME: 10:05 ☒ A.M. ☐ P.M.

☐ SERVICE INCOMPLETE (Reason): _____

☒ SERVICE COMPLETE Served By: BILENAMEA JR
Name (Print)

X _____ Title: J.S.O
Signature

****

SECOND ATTEMPT (location): _____
DATE: _____ TIME: _____ ☐ A.M. ☐ P.M.

☐ SERVICE INCOMPLETE (Reason): _____

☐ SERVICE COMPLETE Served By: _____
Name (Print)

_____ Title
Signature

****

THIRD ATTEMPT (location): _____
DATE: _____ TIME: _____ ☐ A.M. ☐ P.M.

☐ SERVICE INCOMPLETE (Reason): _____

☐ SERVICE COMPLETE Served By: _____
Name (Print)

_____ Title
Signature

(NOTE: IF SERVICE IS NOT COMPLETED AFTER THE THIRD ATTEMPT, PLEASE RETURN THIS LOG TO THE ISSUING CLERK).

93

PASCUA YAQUI TRIBAL COURT

7474 S. CAMINO DE OESTE TUCSON, ARIZONA 85757 (520) 879-6276

(NOTE TO PROCESS SERVER: Tribal Court Rules require that this log be filled out completely. Please make sure that you include the date, time and location of each service attempt as well as any notes regarding the reason(s) why an attempt was unsuccessful. Illegible handwriting is unacceptable.)

COURT PROCESS LOG
FOR PASCUA YAQUI LAW ENFORCEMENT

PROCESS TO: **Machado, Ofc. Mark - MMachado**
ADDRESS: **7777 S. Camino Huivisim, Bldg. A, Tucson, AZ 85757**
CASE & DOCKET NO. **Valenzuela, Rosendo CR-18-171**
TYPE OF PROCESS: **Criminal Misdemeanor**
X Other: **Subpoena for Bench Trial**
DATE AND TIME OF COURT: **October 01, 2018 10:00 AM**
DATE PROCESSED ISSUED:
ISSUING CLERK:
TO BE RETURNED TO CLERK NO LATER THAN:

FIRST ATTEMPT (location): PASCUA YAQUI LAW ENFORCEMENT

DATE: 9/13/18 TIME: 1034 ☑ A.M. ☐ P.M.

Pascua Yaqui
Judicial Branch
SEP 13 2018
JUDICIAL SECURITY

☐ SERVICE INCOMPLETE (Reason): _____

☑ SERVICE COMPLETE Served By: Tribal Court Security Officer:

☐ Jason Gastelum ☐ Hernan Martinez
☐ Emilia Gonzalez ☐ Felipe Martinez
☐ Rudy Cordova ☐ Andre Lucero

Signature of Server

Signature of Person Accepting Service

9/13/18
Date

LAW ENFORCEMENT
INTERNAL PROCESS LOG

ATTEMPT (location): _____
DATE: _____ TIME: _____ ☐ A.M. ☐ P.M.

☐ SERVICE INCOMPLETE (Reason): _____

☐ SERVICE COMPLETE Served By: _____
Name (Print)

Signature

Title

Signature of Person Accepting Service

Date

PASCUA YAQUI TRIBAL COURT #73

7474 S. CAMINO DE OESTE TUCSON, ARIZONA 85757 (520) 879-6276

(NOTE TO PROCESS SERVER: Tribal Court Rules require that this log be filled out completely. Please make sure that you include the date, time and location of each service attempt as well as any notes regarding the reason(s) why an attempt was unsuccessful. Illegible handwriting is unacceptable.)

COURT PROCESS LOG

PROCESS TO: **ROSENDO VALENZUELA**
ADDRESS: **5140 WICHALAKAS TUCSON AZ 85757**
ALTERNATE ADDRESS:
CASE & DOCKET NO. **CR-18-171 PYT V ROSENDO VALENZUELA**
TYPE OF PROCESS: ☒ Criminal ☐ Civil ☒ Traffic ☐ Child Welfare ☐ Juvenile Status ☐ Juvenile Offender ☐ Animal Control
DESCRIPTION: ORDER WITH TRIAL
DATE AND TIME OF COURT: **OCTOBER 1, 2018 AT 10 AM**
DATE PROCESSED ISSUED: **07/11/18**
ISSUING CLERK: **RENE GARCIA**

TO BE RETURNED TO CLERK NO LATER THAN: 07/31/18

FIRST ATTEMPT (location): 5140 Wichalakas
DATE: 7/12/18 TIME: 0841 ☒ A.M. ☐ P.M.

☐ SERVICE INCOMPLETE (Reason): _____

Pascua Yaqui Judicial Branch
JUL 11 2018
JUDICIAL SECURITY

☒ SERVICE COMPLETE Served By: Tirpak
Name (Print)
Signature Title

****

SECOND ATTEMPT (location): _____
DATE: _____ TIME: _____ ☐ A.M. ☐ P.M.

☐ SERVICE INCOMPLETE (Reason): _____

☐ SERVICE COMPLETE Served By: _____
Name (Print)
Signature Title

****

THIRD ATTEMPT (location): _____
DATE: _____ TIME: _____ ☐ A.M. ☐ P.M.

☐ SERVICE INCOMPLETE (Reason): _____

☐ SERVICE COMPLETE Served By: _____
Name (Print)
Signature Title

Appellee's Exhibit C
(*Recorded Record from Trial, "Hearing, Part One"*)

Appellee's Exhibit C is a DVD-R disk and is in the file.

Appellee's Exhibit D
(*Recorded Record from Trial, "Hearing, Part Two"*)

Appellee's Exhibit D is a DVD-R disk and is in the file.

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

ROSENDO VALENZUELA, Appellant vs. PASCUA YAQUI TRIBE, Appellee	APPELLATE CASE NO: CA-19-001 TRIBAL COURT CASE NO: CR-18-171

APPELLEE'S OPENING BRIEF

Oscar J. Flores,
Chief Prosecutor
Coleen Thoene,
Deputy Prosecutor
Pascua Yaqui Office of the Prosecutor
7777 S. Camino Huivisim
Bldg. A, 2nd Floor
Tucson, AZ 85757
Telephone: (520) 879-6251
Oscar.J.Flores@pascuayaqui-nsn.gov
Coleen.Thoene@pascuayaqui-nsn.gov

Attorneys for the Pascua Yaqui Tribe

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REQUEST FOR ORAL ARGUMENT

The issues raised by the Appellant — specifically, whether the trial court denied him his due process rights to a fair trial by attempting to serve a subpoena upon a defense witness only three times, and by denying the defense's oral motion to continue made on the day of trial — are issues of first impression before this Court. 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. *See* 3 PYTC § 2-3-180; 3 PYTC § 2-3-260(C)(6) and (D). Therefore, the Tribe respectfully requests that this Court set the matter for oral argument.[1]

STATEMENT OF JURISDICTION

A criminal defendant has a constitutional right to appeal his conviction following trial. *PYT v. Stoof, ex. rel. Madrid*, CA 17-002, p.1 (PYT Ct. App. Dec. 2018); *see also generally* 3 PYTC § 2-3-30, *et. seq.* The Appellant, who is enrolled as a member of the Pascua Yaqui Tribe, was convicted following a bench trial of one count of domestic violence assault, committed on the reservation in violation of 4 PYTC § 1-300(A)(3) and 4 PYTC § 3-10(A). Accordingly, this Court has jurisdiction over this Appeal.

---

[1] The Tribe notes that the Appellant's opening brief did not include a request for oral argument. However, the Tribe has conferred with Appellant's counsel, who indicated that a request for oral argument will be included in the reply brief.

ISSUES PRESENTED FOR REVIEW

1. Whether the Appellant was denied a substantial due process right when court process servers attempted to serve a subpoena upon a potential defense witness three times — with two of the attempts being made on the same day — when the last attempt was made far enough in advance of trial for defense counsel to request additional service attempts, or to arrange for a different method of service, and the Appellant failed to exercise due diligence in attempting to secure the witness' appearance?
2. Did the trial court abuse its discretion in denying the Appellant's eleventh hour, oral motion to continue when the Appellant failed to make a record that his potential witness possessed relevant, exculpatory information that would have resulted in his acquittal at trial, that a continuance would have allowed the Appellant to secure his presence given that multiple service attempts had already been made, or that a denial of the motion to continue would materially diminish his ability to defend himself at trial?

STATEMENT OF THE CASE

I. Facts and Procedural History:

The Appellant, Rosendo Valenzuela, and the victim, N.V., were married and living together on the Pascua Yaqui Reservation on May 22, 2018. *See* Judgment and Order Setting Sentencing Hearing, *PYT v Valenzuela*, CR-18-171 (Oct. 1, 2018), p.1. At approximately 10:22 p.m. that evening, N.V. attempted to call the Appellant eighteen times, but none of the calls were answered. She went outside and saw the Appellant sitting inside his pickup truck along with an individual named Sergio Valenzuela. *Id.* N.V. testified that the Appellant appeared to be intoxicated, and there was a case containing both opened and unopened beers in the truck. *Id.*

The victim picked up some of the beer from the case and began emptying the contents. This upset the Appellant, who picked up the case and threw it at N.V., hitting her and splashing beer on her. *Id.* The Appellant then sped away in his truck, and N.V. called police.

The Appellant was subsequently charged on June 8, 2018, with one count of Assault, committed in violation of 4 PYTC § 1-130(A)(3), and one count of Disorderly Conduct, committed in violation of 4 PYTC § 1-300(A). The Tribe alleged that both charges were domestic violence offenses pursuant to 4 PYTC § 3-10(A). *See* Criminal Complaint, *Valenzuela*, CR-18-171 (June 8, 2018). An initial hearing was held on July 11, 2018, and a bench trial was scheduled for October 1, 2018. *See* Initial Hearing Order, Valenzuela, CR-18-171 (July 11, 2018).

Both the Tribe and Appellant's trial counsel disclosed and subpoenaed witnesses for trial. In particular, the Appellant disclosed Sergio Valenzuela as a witness. According to court records, process was issued on September 7, 2018, which was a Friday. *See* Appellee's Exhibit A, Copy of Court Process Log as to Sergio Valenzuela, filed Sept. 12, 2018; *also* Appellee's Exhibit C, Recorded Record from Trial, "Hearing Part One," at 00:42. Court process servers then attempted to serve Mr. Valenzuela at his home on September 10, 2018, at 10:15 a.m. At that time, no one answered the door, and the process server left a contact card at the residence. *See* Appellee's Exhibit A. Two different process servers also attempted to serve Mr. Valenzuela on September 11, 2018, at 9:19 a.m. and at 3:13 p.m. *Id.* An additional contact card was left at the residence during the second attempt when no one answered. *Id.* The process server who made the third attempt noted on service logs that no one was answering the door, and that the card from that morning's attempt was still located "on [the] gate." *Id.* No additional service attempts were made as to this witness. The Tribe's witnesses, specifically, N.V. and the case

officer, were both served on September 13, 2018. *See* Appellee's Exhibit B, Copies of Court Process Logs as to N.V., Officer Mark Machado, and Rosendo Valenzuela.[2]

On the morning of trial, Appellant's trial counsel orally moved for a continuance to allow her additional time to attempt to serve Sergio Valenzuela. Appellee's Exhibit C at 00:35. Counsel indicated that she had attempted to call and text the witness but had received no response. *Id.* When the court noted that multiple attempts had been made to serve the witness at his last known address, *Id.* at 02:03, counsel further indicated that she had spoken to the witness at his last known address on September 5th, 2018. She also indicated that she knew that the witness worked on the Reservation for the Pascua Yaqui Education Department, but that she had not attempted to have him served there, noting that she "tr[ies] not to do that." *Id.* at 02:09. Counsel for the Tribe objected to the motion to continue and indicated that the Tribe and the victim were both prepared to proceed with trial. At no point did Appellant's trial counsel indicate on the record that Sergio Valenzuela was an exculpatory or crucial defense witness. Nor did counsel offer any sort of proffer as to what she expected Sergio Valenzuela to testify to, other than to make a sweeping assertion that he was needed for the defense case.

At the close of the Tribe's case, the Appellant moved for a directed verdict as to both counts, but which was granted solely as to the disorderly conduct charge. *See* Judgment and Order Setting Sentencing Hearing, *Valenzuela*, CR-18-171 (Oct. 1, 2018), p.1. The Appellant then testified on his own behalf. Appellee's Exhibit D, "Hearing part 2," at 00:20. After the Appellant testified, trial counsel renewed her request to continue the trial in order to afford her an additional opportunity to serve Sergio Valenzuela.[3] *Id.* at 13:33. Trial counsel again failed to

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[2] Pursuant to tribal court practice, the Appellant was also served with a subpoena for the trial date by the court.
[3] Although trial counsel referred to her request as a continuance, because trial had already commenced and jeopardy attached, presumably she was actually requesting an extended recess.

make any proffers as to what the witness would have testified to, and did not inform the trial court how or why the witness was crucial to the Appellant's defense at trial.

The court denied Appellant's request and found the Appellant guilty of domestic violence assault, and set a sentencing hearing for October 30, 2018.[4] The Appellant filed a timely notice of appeal and opening brief.

II. Summary of the Argument

The Appellant asserts that he was denied his due process right to compel the testimony of beneficial witnesses because court process servers made only three attempts to serve Sergio Valenzuela, and because the trial court denied his oral motion to continue made on the day of trial. The Appellant is mistaken in both regards. Because the Appellant failed to raise these specific issues with the trial court, they should be reviewed solely for fundamental error. However, regardless of whether this Court reviews the Appellant's claims under a "fundamental error" or "abuse of discretion" standard, it is clear that the trial court committed no error for myriad reasons.

First, neither the Tribal Code nor case law, nor federal equivalents set a "magic number" with regards to the number of attempts a court must make when attempting to serve a witness. Appellant fails to cite any statutory or case law requiring that only one attempt be made per day, because there is no such authority to support this contention. Second, the trial court did not abuse its discretion when it denied the Appellant's eleventh hour motion to continue. The motion to continue was made orally, just prior to the commencement of trial, and when the

[4] The Appellant initially filed a motion to stay the case prior to sentencing in order to file an appeal. That motion was denied; however, once the trial court imposed sentence, it granted the Appellant's subsequent motion to stay the execution of sentence for the purposes of appeal pursuant to 3 PYTC § 2-2-490(A). *See* Sentencing Order for Supervised Probation and Order Granting Stay and Setting Appeals Bond, *Valenzuela*, CR-18-171 (Oct. 30, 2018). The Appellant did not file any motions to reopen the case, or for a new trial on the grounds that serve as the basis for his current appeal.

Tribe, victim, and other witnesses were present and prepared to testify. The reason for the motion to continue was one that the Appellant was or should have been aware of as early as September 12, 2018.[5] There was ample time for the Appellant to file a written motion to continue. At the very least, it afforded the Appellant ample time to request that additional attempts to serve the witness be made by court process servers, to arrange for such attempts to be made by alternative means, or to otherwise attempt to secure the witness' presence at trial.[6]

Finally, the Appellant never informed the trial court that Sergio Valenzuela was an exculpatory witness who was crucial to his ability to present a vigorous defense. The Appellant, likewise, failed to offer a proffer as to what the witness might have testified to, as is required under Federal law. For the reasons discussed below, the Tribe respectfully requests that the appeal be denied, and that the Appellant's conviction and sentence be affirmed.

LAW AND ARGUMENT

I. The Claims Raised by the Appellant are Subject to Review Only for Fundamental Error Because the Appellant Failed to Raise Those Specific Issues at Trial.

It is undisputed that the Appellant made an oral motion to continue his case on the morning of trial, and a renewed motion to continue prior to resting his case. The basis of this motion was that, although attempts were made, Sergio Valenzuela had not been served with a subpoena. However, the arguments that the Appellant now raises on appeal, as they relate to the motion to continue, are not arguments that were ever specifically presented to the trial court. As such, the trial court was never asked to rule on the issue of whether the Pascua Yaqui Tribal

[5] The Tribe notes that the service log for Sergio Valenzuela was filed with the trial court on September 12, 2018. The record does not contain a date stamp for when Appellant received a copy of the service log. Although undersigned counsel is not aware of precisely when the Appellant received a copy of the log, counsel notes that the Pascua Yaqui Tribal Court clerk's office is generally prompt in sending copies of service logs to the parties.

[6] Although not raised in Appellant's Opening Brief, Appellant made no effort before or during trial to request funds for an indigent defendant to investigate his case pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985).

Code requires that more than three attempts be made to serve a defense witness, nor was the trial court asked to consider whether the law required that any service attempts be made on separate days. Because he failed to raise these issues with the trial court, the Appellant has forfeited appellate relief absent a showing of fundamental error. *State v. Escalante*, 245 Ariz. 135, ¶1, 425 P.3d 1078, 1081 (Ariz. 2018).[7]

In order to prevail under a fundamental error analysis, a defendant most show that the trial court committed an error that falls into one of three categories: 1) the error went to the "foundation of a case" and "relieve[d] the prosecution of its burden to prove a crime's elements, directly impact[ed] a key factual dispute, or deprive[d] the defendant of constitutionally guaranteed procedures;" 2) the error committed deprived "the defendant of a constitutional or statutory right necessary to establish a viable defense or rebut the prosecution's case;" or, 3) the error was "so profoundly distort[ed] the trial that injustice is obvious without the need to further consider prejudice." *Escalante,* 245 Ariz. at ¶¶ 18-20, 425 P.3d at 1084. In the case of the first two categories, a defendant must make an additional showing that the error prejudiced him. *Id.* at ¶ 21, 425 P.3d at 1085. In analyzing whether fundamental error occurred, the reviewing court must look at the totality of the circumstances. *Id.* At all points of this analysis, the defendant bears the burden of persuasion. *Id.*

As will be discussed in the sections below, the trial court's denial of the Appellant's motion to continue was neither an abuse of discretion, nor fundamental error. The Appellant was not deprived of constitutionally guaranteed procedures, nor was he limited in his ability to present a full and viable defense. The Appellant failed to inform the trial court of any facts or circumstances that would have caused the court to grant his motion to continue. And, on appeal, he cannot demonstrate that he was prejudiced by the lack of a continuance other than broadly

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[7] *PYT v. Miranda*, CA-08-015, p.22 (PYT Ct. App. 2009) ("[W]hile decisions of the Arizona . . . [c]ourts are not controlling authority in this Court, they are *highly persuasive*") (Emphasis added).

asserting that he would not have been convicted based on the unspecified testimony of Sergio Valenzuela. Given the state of the record before this Court, concluding that Sergio Valenzuela's testimony would have altered the outcome of Appellant's case would be highly speculative at best. Accordingly, the Appellant's conviction should be affirmed.

II. While Federal and Pascua Yaqui Tribal Law Grant Defendants the Right to Compulsory Service, the Law Does Not Require the Trial Court to Attempt to Serve a Subpoena a Specific Number of Times, nor Prohibit the Court from Attempting Service Twice in the Same Day.

The Appellant argues that the trial court abused its discretion when it denied his motion to continue because he had a Constitutional, due process right to compel witnesses to testify on his behalf at trial. Implicit in that argument is the Appellant's belief that the trial court should have made additional attempts to serve Sergio Valenzuela. *See* Appellant's Opening Brief, p. 3-4. For the reasons discussed below, the Appellant is mistaken because the trial court made multiple attempts to serve Sergio Valenzuela, and the Tribal Code does not specify the number of attempts that must be made.

Article 1, Section 1 of the Pascua Yaqui Constitution affords criminal defendants several due process rights, including the right to subpoena witnesses for trial by way of subpoena. Art. I, § 1(f), Pascua Yaqui Tribe Const. This right is further enumerated in the Pascua Yaqui Tribal Code, which governs the issuance and service of subpoenas. *See* 3 PYTC § 2-2-309(B)(5).

When analyzing the relevant code provisions, it is important to start with their plain text. *See* 1 PYTC § 2-30(A) ("Words shall be given their plain meaning and technical words shall be given their usually understood meaning where no other meaning is specified"); *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); 1 PYTC § 2-30(B) (dictating that the Tribal Code "*shall be construed as a whole* to give effect to all its parts in a logical, consistent manner") (*emphasis added*); *United*

States v. Lewis, 67 F.3d 225, 228 (9th Cir. 1995) (holding that if "the language of a statue is clear, [courts are to] look no further than that language in determining the statute's meaning").[8]

3 PYTC § 2-2-350 governs the issuance of subpoenas. It states:

A) Upon the request of any party to a case or upon the Tribal Court's own initiative, the court shall issue subpoenas to compel the testimony of witnesses, or the production of books, records, documents or any other physical evidence which is relevant, necessary to the determination of the case and not an undue burden on the person possessing the evidence.
B) A subpoena shall bear the signature of a tribal judge, and it shall state the name of the court, the name of the person or description of the physical evidence to be subpoenaed, the title of the proceeding, and the time and place where the witness is to appear or the evidence is to be produced.

The *service* of subpoenas, on the other hand, is controlled by 3 PYTC § 2-2-360, which provides:

A) A subpoena may be served at any place within or without the confines of the reservation, but any subpoena served outside the reservation shall be served by a person authorized to serve subpoenas according to the law of the jurisdiction in which the subpoena is served.
B) Except as provided in Subsection (A) above for the service of subpoenas outside of the reservation, a subpoena may be served by any tribal law enforcement officer or other person appointed by the court for such purpose. Service of a subpoena shall be made by delivering a copy of it to the person named or by leaving a copy at his or her place of residence with any competent person 16 years of age or older who also resides there.
C) Proof of service of the subpoena shall be filed with the clerk of the court by noting on a copy of the subpoena the date, time, and place that it was served and noting the name of the person to whom it was delivered. Proof of service shall be signed by the person who actually served the subpoena.

Nothing in the language of either of these provisions — nor any part of the Pascua Yaqui Tribal Code — requires court process servers attempt to serve a witness a minimum number of times, or that attempts be made on different days. The Tribe has been unable to locate any federal or Arizona caselaw that imposes such a requirement, nor has Appellant cited any. The

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[8] *Miranda*, CA-08-015 at p.22 ("[W]hile decisions of Arizona and the United States… are not controlling authority in this Court, they are highly persuasive."); *c.f. Pascua Yaqui Tribe v. Stoof ex. rel. Lopez*, CA-18-001, p.2 (PYT Ct. App. Oct. 2018).

Appellant, likewise, has failed to cite to any authority indicating that a defendant has a constitutional right to a specific number of service attempts made on different days.

The Appellant was not denied a substantial procedural right by virtue of the fact that court process servers did not attempt to serve the Appellant's witness, Sergio Valenzuela, in the exact manner that he now, in hindsight, desires. The trial court did not err by attempting to serve the witness in the manner it did. Because the court's service attempts were sufficient, the trial court did not commit error — fundamental nor otherwise — when it denied the Appellant's eleventh hour motion to continue. Therefore, the Appellant's conviction and sentence should be affirmed.

III. The Trial Court Did not Abuse its Discretion when it Denied the Defendant's Oral Motion to Continue Made on the Day of Trial, when the Appellant Failed to Make an Adequate Record Regarding his Motion, and when the Tribe, Victim, and Another Witness were Prepared to Proceed.

The Appellant argues that the trial court abused its discretion when it denied his motion to continue made on the day of trial. However, the Appellant is mistaken because the decision to grant or deny a continuance — even one made under circumstances such as this — is one that rests soundly within the trial court's discretion, and the Appellant did not present the trial court with sufficient facts to warrant the granting of a continuance. Indeed, Appellant's request for a continuance, absent any proffer as to what his witness would have testified to and that more time would have resulted in a fruitful service, would have constituted nothing but unnecessary delay.

There is no Pascua Yaqui Tribal Court case law concerning a court's power to continue a hearing or trial to allow a defendant to secure potential witnesses.[9] However, it is an issue that

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[9] The Court of Appeals has, however, issued a very limited ruling regarding whether a trial court must grant a request for a continuance. *See PYT v. Lopez*, CA-16-005 (PYT Ct. App. Feb. 6, 2017). While the Court of Appeals

has been examined extensively in other jurisdictions. *Miranda*, CA-08-015 at p.22 (holding that this Court may look to Arizona or Federal authority in the absence of controlling Tribal law). Federal courts have held that "[t]he decision to grant or deny a requested continuance lies within the broad discretion of the district court, and will not be disturbed on appeal absent clear abuse of that discretion." *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir.), amended, 764 F.2d 675 (9th Cir. 1985). Courts will "not find a clear abuse of discretion unless, after carefully evaluating all the relevant factors, we conclude that the denial was arbitrary or unreasonable." *Id.* This analysis depends heavily on the facts and circumstances of a particular case, and the weight the reviewing court gives to "any single factor may vary with the extent of the showings on the other factors." *Id.*; *see also PYT v. Coleman,* CA 15-003 (Nov. 2015) (A court "abuses its discretion when it makes an error of law in reaching a discretionary conclusion or when the record, viewed in the light most favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision."); *see also Stoof ex. rel. Lopez*, CA-18-001, p.2.

Any time a party requests a continuance in a criminal case, regardless of the reason, the trial court must also consider whether a victim is involved, because under the Pascua Yaqui Tribal Code, a victim has the right "[t]o a speedy trial or disposition and [a] prompt and final conclusion of the case." 4 PYTC § 5-20(11). The court may continue a case, even if doing so would result in a trial occurring beyond speedy trial limits, "where good cause has been established." 3 PYTC § 2-2-330. Additionally, courts should look to whether a continuance would contravene the interests of judicial economy.

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determined that the trial court erred in denying the prosecution's request for a one-hour continuance, the opinion did not discuss the court's discretionary power to grant continuances whatsoever. Nor did it deal with the issue specifically involved with this case: namely, whether the trial court has the discretion to deny a defendant's requested continuance when it is based solely on a desire to secure a potential defense witness. Additionally, the hearing in question in *Lopez* was an initial hearing, not a trial, and a one-hour continuance would not have pushed the initial hearing beyond the twenty-four hour timeframe mandated by 3 PYTC § 2-2-170(A).

When a defendant requests a continuance in order to secure witnesses for trial, he "must show who they are, what their testimony will be, that the testimony will be competent and relevant, that the witnesses can probably be obtained if the continuance is granted and that due diligence has been used to obtain their attendance on the day set for trial." *United States v. Sterling*, 742 F.2d 521, 527 (9th Cir. 1984). Simply requesting a continuance in order to secure a defense witness who *might* provide relevant, exculpatory evidence at trial is not enough. For instance, in *United States v. Hoyos*, 573 F.2d 1111, 1114 (9th Cir. 1978), a defendant requested a continuance to secure the testimony of a severed co-defendant. The defendant's first request for a continuance was granted to allow the co-defendant to be sentenced, and largely because the co-defendant refused to testify until his own criminal charges were resolved. *Id.* However, the co-defendant failed to appear for the reset trial even though he had been subpoenaed. The defendant moved for an additional ten day continuance on the morning of trial. *Id.* That request was denied. On appeal, the Ninth Circuit determined that the trial court did not abuse its discretion when it denied the motion to continue. The defendant had failed to "establish with any precision what [the co-defendant's] testimony would be or whether, in fact, [he] had unconditionally agreed to testify" on the defendant's behalf. *Id.* Additionally, the defendant had failed to "demonstrate that he could produce…[the] witness if the continuance had been granted."

The Fifth Circuit employs a similar test to determine whether a court's denial of a defendant's motion to continue for the purpose of securing a witness constitutes an abuse of discretion. That Circuit has noted that continuances can be granted "in the discretion of the trial court" and that they "are not a matter of right." *United States v. Miller*, 513 F.2d 791, 793 (5th Cir. 1975); *see also Johnson v. Johnson*, 375 F. Supp. 872, 875 (W.D. Mich. 1974) (finding that when witnesses are difficult to obtain, "the defendant's Sixth Amendment right to a speedy trial

and the prosecution's similar interest must be taken into account.") (*emphasis added*). In order to obtain a continuance under Fifth Circuit case law, "[a] movant must show that due diligence has been exercised to obtain the attendance of the witness, that substantial favorable evidence would be tendered by the witness, that the witness is available and willing to testify, and that the denial of the continuance would materially prejudice the defendant." *Miller*, 513 F.2d at 793.

Although Fifth Circuit and Ninth Circuit case law use different language, their standards on this issue are fundamentally the same. In this particular case, the trial court did not abuse its discretion when it denied the Appellant's motion to continue because the Appellant failed to demonstrate that he had exercised due diligence in attempting to secure Sergio Valenzuela's appearance at trial. The Appellant also failed to demonstrate that the witness would have provided substantially favorable evidence and, thus, did not show that failure to grant the continuance materially prejudiced him. Finally, the Appellant failed to provide the trial court with evidence suggesting that a continuance would have actually allowed him to secure the witnesses' presence. Accordingly, the trial court did not abuse its discretion when it denied the Appellant's eleventh hour motion to continue.

A. The Appellant failed to demonstrate that he exercised due diligence to secure Sergio Valenzuela's presence at trial.

The Appellant argues that he acted with due diligence in attempting to secure Sergio Valenzuela's presence at trial because he requested that he be subpoenaed by the tribal court. The Appellant appears to also suggest that, if there was a lack of due diligence in this case, it was on the part of court process servers and the fact that they only attempted to serve the witness three times. As was discussed earlier, neither due process nor Pascua Yaqui Tribal law requires

that the court attempt to serve a defense witness a specific number of times. Furthermore, the Appellant failed to exercise due diligence in this case.

When counsel requested a continuance on the morning of trial, she noted that she had spoken to Sergio Valenzuela on September 5th, which was two days before the court issued a formal subpoena. Court process servers then made three attempts to serve the witness, all of which were unsuccessful and completed weeks before trial. The fact that he had not been served was known to all parties. Trial counsel informed the court that she had not attempted to have the witness served at his place of employment because she "tr[ies] not to do that." Appellee's Exhibit C, , at 02:09. She also indicated that she had a good address and phone number for the witness. Given these circumstances, the Appellant had ample opportunity to request that additional service attempts be made, or to attempt to use different process servers or defense investigators to effect service. Based on the record before this Court, it is apparent that the Appellant also had the means to contact the witness at his home, at work, or via phone, and sooner than the day of trial.

Additionally, an indigent defendant has the ability to request funds for an investigator pursuant to *Ake v. Oklahoma,* 470 U.S. 68 (1985). Indeed, if after reasonable efforts the trial court's process servers are unable to locate and serve a defense witness at the address provided, the next prudent step would have been to file an expedited motion requesting funds to hire a professional defense investigator to locate and serve the witness, rather than cause needless delay by continuing trial without any reasonable basis to believe that further attempts to serve the witness would be fruitful. That was not done in this case.[10]

Simply requesting a subpoena does not, by itself, constitute due diligence. There were numerous steps the Appellant could have taken to attempt to secure Sergio Valenzuela's

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[10] Indeed, Appellant cites no authority establishing that a criminal defendant's right to have subpoenas issued and served extends to having court staff act as professional defense investigators to root out recalcitrant or missing witnesses.

appearance. He failed to make any of those attempts and, therefore, failed to exercise due diligence.

B. The Appellant failed to demonstrate that Sergio Valenzuela would have provided substantially favorable evidence on his behalf at trial.

In his Opening Brief, the Appellant argues that Sergio Valenzuela's testimony would have been exculpatory. Appellant's Opening Brief, pp. 3, 6. However, the Appellant failed to inform the trial court during his motion to continue exactly how the witness' testimony would have tended to exculpate him. Nor did he even provide a preview of the areas of inquiry Appellant intended to explore with this witness. Simply asserting that a witness would have been exculpatory is not sufficient to meet the requirements of *Hoyos*, 573 F.2d at 1114, or *Miller*, 513 F.2d at 793. It is, likewise, insufficient to simply assert, without more, that a witness possesses exculpatory evidence merely because they were present at the scene of a crime.

The Tribe further notes that the Appellant's opening brief also failed to detail what Sergio Valenzuela would have testified to, or how his testimony would have resulted in the Appellant's acquittal at trial. In his brief, the Appellant submitted an undated and unsworn[11] "declaration" purportedly authored by Sergio Valenzuela. Appellant's Opening Brief, p.10. The declaration, which was signed, indicated that Sergio Valenzuela was available and willing to testify on behalf of the Appellant at trial, but that he had been unable to testify at the Appellant's trial because he was unable to take time off from work unless he was subpoenaed. *Id.* The declaration fails to provide any information concerning what testimony Sergio Valenzuela would have provided. The Tribe objects to this document being considered by this Court because it was never presented to the trial court and, as such, was not preserved for the purpose of appeal.

[11] Although the declaration includes a statement that the author "solemnly swear[s] or affirm[s] under the penalties of perjury" that the information contained in the document is correct, the declaration was neither notarized nor witnessed as is typical for sworn affidavits.

Consideration of this document impermissibly expands the record on appeal beyond what was made available to the trial court. *See GM Dev. Corp. v. Cmty. Am. Mortgage Corp.,* 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) (noting an appellate court's review is limited to the record that was created at the trial court level). However, to the extent that this Court is willing to consider the document, which the Tribe does not concede, it fails to show that Sergio Valenzuela would have provided substantially favorable evidence to the defense. Indeed, it fails to even touch on issues relevant to the charges for which Appellant was on trial.

Based on the totality of the circumstances, the Appellant failed to demonstrate to the trial court that Sergio Valenzuela's testimony would have substantially favored him at trial. Because he failed to meet his burden, he cannot now claim that the trial court abused its discretion in denying his motion to continue.

C. The Appellant failed to demonstrate to the trial court that a continuance would have allowed him to secure Sergio Valenzuela's presence at trial.

When the Appellant moved to continue the trial, he failed to provide the court with any evidence suggesting that a continuance would have allowed him to secure the presence of Sergio Valenzuela at trial. At trial, counsel and the court both noted that attempts had been made to serve the witness at his last known address. Counsel also indicated that she had met the witness at his residence, and had a working phone number for him. The trial court's service logs indicated that process servers had left their contact information at the witness' house. There is no evidence in the record to support any reasonable belief that additional attempts to subpoena the witness for trial would have been successful.[12]

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[12] The Tribe acknowledges that Appellant has submitted an unsworn declaration from Sergio Martinez indicating that he would have been willing to testify. The Tribe maintains its position that consideration of this document is improper because it was never presented to the trial court. However, should this Court wish to consider it, which the

D. The Appellant has not shown that the trial court's failure to grant his motion to continue materially prejudiced him.

Although the Appellant claims that he suffered prejudice as a result of the trial court's denial of his motion to continue because he was convicted of domestic violence assault, the record does not support that assertion. The Appellant, in his Opening Brief, improperly vouches that defense counsel knew what Sergio Valenzuela would have testified to, and knows it to have been exculpatory. Opening Brief, at p.6. However, specific information was never provided to the trial court. The trial court was, thus, deprived of the ability to consider such information as part of the motion to continue. This Court's review is limited to the trial court record. *See* 3 PYTC § 2-3-110(A)(1) ("[t]he papers making up the record on appeal shall be the original papers, exhibits and other objects filed with the trial court clerk, a reporter's transcript, transcription of an electronic recording or narrative or agreed statement, and copies of all entries"). The fact that the Appellant may now wish to expand the record to include facts and evidence that were never presented to the trial court is disingenuous.

In this particular case, the victim and the Appellant both testified that Sergio Valenzuela was present at the time of the assault. Both also testified that there was beer inside the Appellant's vehicle, and that the Appellant had consumed some amount of alcohol. The Appellant further testified that Sergio Valenzuela had also been consuming alcohol. The victim and Appellant each testified that the victim had attempted to take beer out of the vehicle, and that the victim suffered a minor injury when she was struck by the beer carton. While the victim testified that the Appellant had thrown the box at her, the Appellant testified that the box hit the victim while they were both in the process of struggling over it. Assuming, *arguendo*, that

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Tribe does not concede, it should give great weight to the fact that it was presented after trial, and that, at the time of trial, such information was not available to counsel for either side.

Sergio Valenzuela had testified to what he observed, his credibility would still have been impeached based on his own alcohol consumption, his position in the car, and any biases he had in favor of the Appellant, his cousin. The Appellant cannot, therefore, claim that he was convicted solely because this witness did not testify. Accordingly, he cannot demonstrate that the outcome of his trial would have been different if his motion to continue had been granted.

The Appellant has failed to meet any of the requirements of *Hoyos* and *Miller*. The Appellant failed to act diligently in attempting to serve his witness, and then provided the trial court with no information regarding why a continuance was required in the interests of justice. Under these circumstances, the denial of the Appellant's motion to continue did not constitute an abuse of discretion.

CONCLUSION AND REMEDY SOUGHT

Based on the unique circumstances of this case, the trial court did not abuse its discretion when it denied the Appellant's motion to continue trial, nor did it commit fundamental error. A defendant has the constitutional right to subpoena witnesses and to present a defense. However, there is no constitutional or statutory right to a continuance, and the Appellant failed to present the trial court with evidence or arguments demonstrating that a continuance in this case was required by the interests of justice. Given these circumstances, the Tribe respectfully requests that this Court deny the appeal, and affirm the Appellant's conviction and sentence.

RESPECTFULLY submitted this 28st day of December, 2018.

Oscar J. Flores
Chief 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
Glaucia Brannock, Glaucia.Brannock@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 28th day of December, 2018.

PASCUA YAQUI PROSECUTOR

Oscar J. Flores
Chief Prosecutor

Coleen Thoene
Deputy Prosecutor

Sworn before me this 28th day of December, 2018

Notary Signature

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

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

ROSENDO VALENZUELA, Appellant, v. PASCUA YAQUI TRIBE Appellee.	APPELLATE CASE NO. CA-19-001 PASCUA YAQUI TRIBAL COURT NO. CR-18-171

APPELLANT OPENING BRIEF

PASCUA YAQUI PUBLIC DEFENDER
Glaucia Batista Brannock
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Attorney for Appellant Rosendo Valenzuela

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Pascua Yaqui

United States

I. STATEMENT OF THE CASE

Appellant is Rosendo Valenzuela (Mr. Valenzuela) and Appellee is the Pascua Yaqui Tribe Office of the Prosecutor (Tribe). The Pascua Yaqui Tribe Court scheduled a bench trial on this matter for October 1, 2018. (Case Index #14, Case File p. 20). The case is stayed pending resolution of the issue now in front of the Pascua Yaqui Tribe Court of Appeals.

On October 1, 2018, before the start of the bench trial, Mr. Valenzuela moved for a brief continuance to secure the presence of exculpatory witness, Mr. Sergio Valenzuela (Witness). Defense counsel requested the trial court to issue a subpoena to secure the presence of Witness, in which the court granted. After three attempts, being two on the same day, service was deemed incomplete. At trial, defense counsel moved for a brief continuance, the Tribe opposed the motion to continue, and the trial court denied continuance and proceeded with the trial. At the end of the Tribe's case in chief, Mr. Valenzuela moved for a direct verdict and the trial court granted the motion as to count two, Disorderly Conduct/Domestic Violence but it denied the motion as to count one, Assault/Domestic Violence.

Mr. Valenzuela filed a notice of appeal to the PYT Court of Appeals, appealing the trial court's denial of continuance to secure the presence of an exculpatory witness, alleging the trial court abused its discretion on its October 1, 2018 ruling, and thus violating Mr. Valenzuela's rights to a fair trial. (Case Index #1, Case File pp. 1-2).

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. Valenzuela, an enrolled Indian, with two offenses enumerated in the Tribe's Code. The charges allegedly occurred within the exterior boundaries of the Pascua Yaqui Reservation. (*See* 3 PYTC § 1-1-10 (B); Case Index #19, Case File pp. 25-29).

B. Court of Appeals Jurisdiction

Pursuant to the Rules of Appellate Procedure, "[t]he Pascua Yaqui Tribe or prosecutor shall not appeal a judgment acquitting a defendant in a criminal case." 3 PYTC § 2-3-90(F). The plain language of the statute indicates that appeals in criminal matters by defendants is permitted.

III. ISSUES PRESENTED FOR REVIEW

Did the Pascua Yaqui Tribe Court abuse its discretion in denying Mr. Valenzuela's Motion to Continue the Bench Trial to allow service of subpoena to secure the presence of exculpatory witness?

Did the trial court violate Mr. Valenzuela's fair trial rights when it denied his motion for a brief continuance to secure the presence of exculpatory witness?

IV. RELEVANT FACTS

On May 22, 2018, the Tribe charged Mr. Valenzuela with count one Assault/Domestic Violence and count two Disorderly Conduct /Domestic Violence. (Case Index #19, Case File pp. 25-26). Mr. Valenzuela waived his right to a jury trial and made no requests for a continuance until the day of his bench trial on October 1, 2018, when exculpatory witness failed to appear for trial. The trial court issued a subpoena to compel Witness' appearance at trial, but efforts to complete services were unsuccessful. The trial court had made three attempts to serve Witness — one on September 10, 2018, and two attempts on September 11, 2018. In the first attempt the officer of the court left a card at Witness' door, in the second attempt the card was left at the gate, and in the third attempt, the officer of the court indicated that the card left at the gate in the second attempt was still there, so no additional information was left to Witness. (Case Index #6, Case File p. 8).

On September 13, 2018, officers of the court served the Tribe's witnesses, and no attempt was made to serve Mr. Valenzuela's witness.

The trial court denied Mr. Valenzuela's Motion to Continue and the bench trial proceeded. After listening to testimony of alleged victim, Norma Valencia, the trial court granted Mr. Valenzuela's motion for direct verdict on count two, Disorderly Conduct/Domestic Violence, but it denied as to count one, Assault/Domestic Violence. This appeal followed.

Mr. Valenzuela argues the trial court abused its discretion in denying a brief continuance to secure the presence of an exculpatory witness, thus violating Mr. Valenzuela's right to a fair trial. This caused prejudice to Mr. Valenzuela, as he was found guilty of a crime he vehemently denies to have committed.

V. SUMMARY OF ARGUMENT

The trial court abused its discretion when it denied Mr. Valenzuela's motion to continue the bench trial to secure the presence of exculpatory witness. Mr. Valenzuela was diligent in requesting the trial court to issue a subpoena to secure Witness' appearance and by calling and texting him on the day of trial to request his attendance. Witness' testimony was exculpatory and intended to prove Mr. Valenzuela's innocence. Witness was/is available and willing to testify and his whereabouts is known to the court. The denial of the continuance materially prejudiced Mr. Valenzuela, as the trial court found him guilty of count one, Assault/Domestic Violence.

The trial court issued a subpoena to secure Witness' attendance to the October 1, 2018 bench trial, but after three unsuccessful attempts to serve Witness, service was deemed incomplete. Although there were three attempts made, the second and third attempts were made on the same day on September 11, 2018, and no additional information was left at

Witness' residence on the third attempt. On September 13, 2018, two days after the second and third attempted service on Witness, officers of the court served two of the Tribe's witnesses in this case while failing to attempt service on Witness one more time. Therefore, because lack of service was through no fault of Mr. Valenzuela, the trial court violated Mr. Valenzuela's rights to a fair trial when it abused its discretion in denying his Motion to Continue to secure the presence of exculpatory witness.

VI. ARGUMENT

A. The Pascua Yaqui Tribe Court Violated Mr. Valenzuela's Right to a Fair Trial when it Abused Its Discretion in Denying Mr. Valenzuela's Motion to Continue The Bench Trial Because Due to No Fault of Mr. Valenzuela, Service of Subpoena Was Deemed Incomplete, and Denial of Mr. Valenzuela's Motion to Continue Substantially Prejudiced His Defense, as The Witness Was Present During the Alleged Incident and Had Knowledge of Exculpatory Evidence

A motion for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion. *See e.g. Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321 (1940); *United States v. Gidley*, 527 F.2d 1345 (5 Cir. 1976); *United States v. Sahley*, 526 F.2d 913 (5 Cir. 1976); *United States v. Moriarty*, 497 F.2d 486 (5 Cir. 1974); *State v. Benge*, 110 Ariz. 473, 520 P.2d 843 (1974). This issue must be decided on a case-by-case basis in light of the circumstances presented. *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841 (1974).

"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").

Pursuant to Title Three of the Pascua Yaqui Tribe Code (PYTC), "[i]n all criminal proceedings, the defendant *shall* have the following rights: (5) to compel by subpoena; (a) the attendance of any witnesses necessary to defend against the charges[.]" 3 PYTC § 2-2-309 (emphasis added). This right is also present in the Sixth Amendment of the United States Constitution. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense").

The Supreme Court of the United States "has been unanimous in its conclusion that the right to a fair trial encompasses the right of a criminal defendant to present the testimony of witnesses in his own behalf." *Johnson v. Johnson*, 375 F. Supp. 872, 875 (W.D. Mich. 1974) (citing *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). In *Washington v. Texas*, the court said:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

388 U.S. 14 at 19.

In balancing a defendant's Sixth Amendment right to present his own witness to establish a defense and interests of justice, the difficulty in obtaining a witness must be taken into account. *Johnson* at 875. For example, "[w]hen a witness sought by a defendant is in a foreign country, totally beyond the reach of the court's process, or cannot be found, the defendant cannot successfully claim a Sixth Amendment right not to be tried at all." *Id.*; *See also United States v. Murphy*, 413 F.2d 1129, 1139 (6th Cir. 1969). Unlike in *Johnson*, where the witness

was living beyond the jurisdictions of that court, Witness in this case lives on the reservation and works for the reservation where he is subjected to the Tribe's jurisdiction. Therefore, Mr. Valenzuela can successfully claim his right to a fair trial.

In regards to claims that a continuance is necessary to subpoena potential witnesses, federal courts have considered whether "due diligence has been exercised to obtain the attendance of the witness, that substantial favorable testimony would be tendered by the witness, that the witness is available and willing to testify, and that the denial of a continuance would materially prejudice the defendant." *United States v. Miller*, 513 F.2d 791, 793 (5th Cir. 1975); *See also United States v. Cawley*, 481 F.2d 702, 705 (5th Cir. 1973). In this case, it is clear Mr. Valenzuela met the burden.

Here, the trial court abused its discretion in denying Mr. Valenzuela's Motion to Continue the bench trial.[1] Prior to the trial, Defense counsel made diligent efforts to secure Witness' testimony. Defense counsel had conversations with Witness, knew what Witness was going to testify on the stand, and had disclosed to the court a good address for Witness to be located. Defense counsel also requested the trial court to subpoena Witness for the bench trial, and on the day of trial, Defense counsel attempted to call and text Witness to secure his attendance. Therefore, Mr. Valenzuela exercised due diligence to obtain the attendance of Witness.

Next, Witness was expected to present exculpatory evidence and he was/is willing to testify. (Appellant's Exhibit A). Witness' testimony was/is of great importance to a just determination of the cause, as he was present during the alleged incident and was expected to testify as to his own impressions. The parties were aware of Witness and that he would present exculpatory evidence at trial. Witness responded to defense counsel attempted contact once the

[1] This was the first requested continuance in this case.

bench trial was over and indicated he was willing and available to testify on behalf of Mr. Valenzuela, but was unable to leave work on the day of the trial.

Lastly, the denial of a continuance materially prejudiced Mr. Valenzuela, as Witness was present during the alleged incident and had important exculpatory evidence to present to the court. At trial, Norma Valencia and Mr. Valenzuela testified to the best of their recollection. Neither Mr. Valenzuela nor Ms. Valencia fully recalled the events on the evening in question. Witness was present and could have testified as to his impressions of the alleged event. Mr. Valenzuela was found guilty of count one, Assault/Family Violence, without having the opportunity to fully present his defense. A Scheduled trial date should never become such an overarching end that it results in the erosion of the defendant's right to a fair trial. Therefore, the trial court's denial of a continuance materially prejudiced Mr. Valenzuela and the outcome of this case.

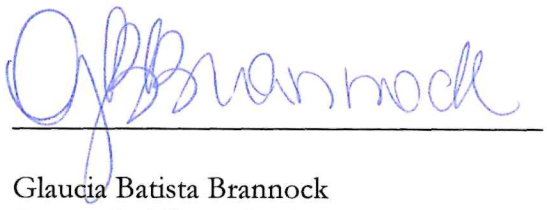
VII. CONCLUSION

The trial court abused its discretion in denying Defendant's motion for a brief continuance to secure the attendance of an exculpatory witness to the bench trial held on October 1, 2018. The trial court denied Mr. Valenzuela's right to have compulsory process for obtaining witnesses in his favor. The trial court arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. Mr. Valenzuela acted diligently in securing Witness' appearance at trial, Witness was expected to provide substantial favorable testimony to Mr. Valenzuela and was/is available and willing to testify. The denial of a continuance materially prejudiced Mr. Valenzuela, as he was found guilty of count one, Assault/Family Violence.

Wherefore, Mr. Valenzuela respectfully requests a new trial where he is given the opportunity to present a complete defense and the attendance of exculpatory witness, Mr. Sergio Valenzuela, is secured.

RESPECTFULLY SUBMITTED: November 28, 2018.

PASCUA YAQUI PUBLIC DEFENDER



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Attorney for Appellant Rosendo Valenzuela

APPELLANT'S EXHIBIT A

DECLARATION OF SERGIO VALENZUELA

I, Sergio Valenzuela, hereby state that I am over eighteen (18) years of age, am competent to testify, and declare the following:

1. I was called to be a witness for Mr. Rosendo Valenzuela for an incident that occurred on May 22, 2018 as I was present at the time of the incident;
2. I was available and willing to testify on behalf of Rosendo Valenzuela's at trial;
3. Mr. Rosendo Valenzuela's defense attorney indicated I was going to be subpoenaed to testify at trial, but I was never served, and due to the lack of service, I was unable to leave work to testify for Mr. Rosendo Valenzuela.

I solemnly swear or affirm under the penalties of perjury that the matters set forth in this Declaration are true and correct to the best of my personal knowledge, information, and belief.

Sergio Valenzuela
Witness for Rosendo Valenzuela

CERTIFICATE OF COMPLIANCE

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

PASCUA YAQUI PUBLIC DEFENDER

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Attorney for Appellant Rosendo Valenzuela

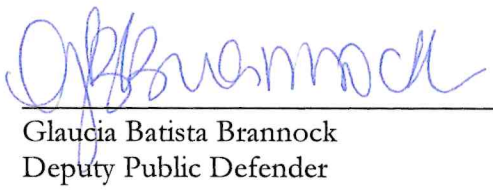
CERTIFICATE OF SERVICE

On November 28, 2018, the original and three copies of the *Appellee's Response Brief* were filed and conforming copes were sent to the following:

Pascua Yaqui Office of the Prosecutor
Chief Prosecutor
Oscar J. Flores
7777 S. Camino Huivisim, Building A
Tucson, AZ 85757

Rosendo Valenzuela, Appellant

PASCUA YAQUI PUBLIC DEFENDER



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Attorney for Appellant Rosendo Valenzuela

No. CA-19-001

Pascua Yaqui Court of Appeals

Rosendo Valenzuela, Appellant
vs.
Pascua Yaqui Tribe, Appellee,

For Appellant: Annamarie L. Valdivia, Chief Public Defender for the Pascua Yaqui Tribe.

For Appellee: Oscar Flores, Esq., Pascua Yaqui Office of the Prosecutor.

****

Order Granting Appellant's
Motion to Extend Time To File Appellant's Brief

On October 25, 2018, Appellant filed an unopposed motion requesting an extension of time to file his opening brief pursuant to 3 PYTC § 2-3-70(B).

The Court finds that Appellant has shown good cause to extend the original deadline. Appellant's motion is GRANTED. Appellant has until November 28, 2018 to file his opening brief.

Justice Kendra A. Martinez

We CONCUR:

Hon. Robert Miller

Hon. Rebecca Plevel

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

VALENZUELA, ROSENDO Appellant, vs. PASCUA YAQUI TRIBE, Defendant.	Case No.: CA-19-001 **MOTION TO EXTEND TIME TO FILE APPELLANT'S BRIEF** **UNOPPOSED**

Appellant, Rosendo Valenzuela, through undersigned counsel, Glaucia Brannock, respectfully requests for an extension of time to file appellant's opening brief in this matter pursuant to 3 PYTC § 2-3-70 (B). ("The time for doing any act provided by these rules, … may be shortened or extended upon … written motion for good cause shown….). This motion is based on the following:

Following a bench trial, Defendant/Appellant was convicted of Assault, Domestic Violence. The sentencing hearing on this matter was scheduled for October 30, 2018. After a notice of appeal was filed, undersigned counsel filed a motion to stay the trial court proceedings and vacate the sentencing hearing pending resolution of appeal. The trial court denied Defendant's/Appellant's motion to stay. Because Defendant/Appellant may wish to appeal his sentence and sentencing is not set until October 30, 2018, undersigned counsel believes additional time is needed to complete the necessary work.

Out of an abundance of caution, Appellant respectfully requests for an extension of time to file the appellant's brief. Undersigned counsel needs no more than two weeks extension from Appellant's original deadline to file opening brief. This motion is being made in good faith and not for the purpose of delay.

Undersigned counsel contacted Chief Prosecutor Oscar Flores and he does not oppose this motion.

RESPECTFULLY SUBMITTED this 25th day of October 2018.

Glaucia Batista Brannock
Deputy Public Defender
Attorney for Mr. Valenzuela

CERTIFICATE OF SERVICE

I hereby certify that the original and five copies of the Motion to Extend Time to File Appellant Brief were delivered this date to:

Ben Casey
Pascua Yaqui Court of Appeals

Oscar Flores
Chief Prosecutor
Pascua Yaqui Office of the Prosecutor
7777 S. Camino Huivisim, Bldg. A
Tucson, AZ 85757

Conforming copy to Rosendo Valenzuela, Appellant

DATED this 25th day of October, 2018

Glaucia Batista Brannock
Deputy Public Defender
Attorney for Mr. Valenzuela

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THE PASCUA YAQUI TRIBAL COURT

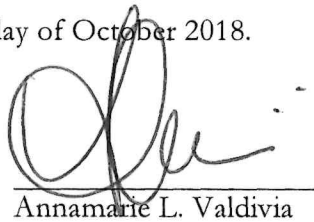
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff, vs. VALENZUELA, ROSENDO, Defendant.	Appellate Case No.: Case No.: CR-18-171 **NOTICE OF APPEAL**

Appellant, Rosendo Valenzuela, by and through counsel, pursuant to 3 PYTC § 2-3-90(A), 3 PYTC § 2-3-90(B), 3 PYTC § 2-3-100(B)(1) and 3 PYTC § 2-3-100(B) of the Pascua Yaqui Tribe Rules of Appellate Procedure, respectfully files a Notice of Appeal in the Pascua Yaqui Tribal Appellate Court from the Order entered in this action by the Pascua Yaqui Tribal Court on October 1, 2018. The Appellant is appealing the Trial Court's Judgment denial of his motion to continue the bench trial as well and the denial of the renewed motion to continue the bench trial to allow additional time to summons a witness who defense counsel argued appeared to be avoiding service.

The Appellant is requesting remand for a new trial as he was denied the right to present evidence in support of his innocence in this case.

RESPECTFULLY SUBMITTED this 2nd day of October 2018.



Annamarie L. Valdivia
Senior Staff Attorney
Attorney for Rosendo Valenzuela

The original of foregoing was filed in Pascua Yaqui Tribal Court on October 2, 2018, and copy of was delivered this same date to:

Pascua Yaqui Office of the Prosecutor
Oscar Flores
Chief Prosecutor
7777 S. Camino Huivisim, Bldg. A
Tucson, AZ 85757

Ben Casey
Pascua Yaqui Tribe Court of Appeals

Conforming copy to Rosendo Valenzuela, Defendant