

Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribe, Plaintiff/Appellant)	
)	
)	ORDER ON PETITION FOR
)	SPECIAL ACTION
v.)	
)	Tribal Court Case No. CR-19-072
)	TR 19-007
Justin Paul Thomas, Defendant/Appellee.)	
)	

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

For the Defendant: Glauca Batista Brannock, Deputy Public Defender

Order

1. We VACATE the Trial Court’s January 3, 2019 Order that dismissed the Tribe’s criminal complaint, without prejudice. We also REMAND this case to the Trial Court to conduct further proceedings pursuant to this Order.
2. We have stated that an “appellate court’s standard of review of decisions dismissing a criminal case without prejudice is for an abuse of discretion.” *Pascua Yaqui Tribe v. Rodriguez*, CA-19-004, at 2 (PYT Ct. App. Oct. 8, 2019). In 2015, we held that 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.” *Pascua Yaqui Tribe v. Coleman*, CA-15-003, at 2 (PYT Ct. App. Nov. 17, 2015). In this appeal, we are unable to review the Trial Court’s decision to dismiss the complaint at the initial hearing because we have no record to review. The Trial Court rendered its decision to dismiss the complaint, and reached a legal decision regarding the Tribe’s sovereignty and authority and actions, without allowing the parties to brief or argue the evidentiary and legal issues. In doing so, we find that the Trial Court abused its discretion.

3. The Trial Court can conduct whatever further proceedings it finds necessary, but at a minimum, we expect the Trial Court to hold a hearing. At the hearing, the Trial Court will consider all evidence and legal arguments regarding the contested Arizona Department of Safety blood alcohol testing procedure and the Arizona state court's issuance of a search warrant in the Tribe's criminal case. If possible, the Trial Court will review the Tribe's agreements with the Arizona Department of Safety regarding forensic testing, *in camera* if necessary. The Trial Court will then issue a final judgment on the sufficiency of the Tribe's criminal complaint. The Trial Court will also make a legal determination regarding any delegation of authority the Tribe has made to authorize the state and county agencies to assist the Tribe in criminal investigations, pursuant to the aforementioned agreements. This will create a full record and a final judgment for this Court to review if either party appeals.
4. On REMAND, the Trial Court will also consider the issue of whether it should have dismissed, without prejudice, the charges in the complaint against Defendant/Appellee Thomas that did not involve the contested Arizona Department of Safety blood alcohol testing procedure.

So ORDERED this 22nd day of October, 2019.




Hon. Robert Miller

WE CONCUR:



Justice Kendra A. Martinez



Hon. Jeremy Brave-Heart

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,

Appellee,

vs.

JUSTIN THOMAS,

Appellant.

) APPELLATE CASE NO. CA-19-002
)
) PASCUA YAQUI TRIBAL COURT NO. CR-
) 19-072/TR-19-007
)
)
)
)
)

APPELLEE'S SUPPLEMENTAL RESPONSE BRIEF

PASCUA YAQUI PUBLIC DEFENDER
Glauca Batista Brannock
Deputy Public Defender
PYT Bar #10348
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

I. Procedural Posture..... 1

ARGUMENT 1

I. There is an intergovernmental agreement between the Pascua Yaqui Tribe and the Arizona Department of Public Safety for the limited purpose of processing evidence. 1

II. An Arizona judge may review a Tribal law enforcement officer affidavit of probable cause for the issuance of a warrant for offenses occurring outside the reservation. 2

III. There is no Intergovernmental Agreement between Arizona courts and the Pascua Yaqui Tribal Court...... 3

A) PYT Code expressly authorizes the issuance of search warrant signed by a Tribal Judge only. 3

CONCLUSION 4

CERTIFICATE OF COMPLIANCE 5

CERTIFICATE OF SERVICE 6

TABLE OF AUTHORITIES

Cases

State v. Nelson, 208 Ariz. 5, 90 P.3d 206 (App. 2004)..... 6

PYT Statutes

1 PYTC § 2-30 (A) 7

1 PYTC § 2-30 (I)..... 7

2 PYTC § 2-8-10..... 7

2 PYTC § 2-8-90..... 5

3 PYTC § 2-2-40..... 6, 7

PYT Const. Art. VI, § 1..... 6

Arizona Statutes

A.R.S. § 13-3874 5, 6

STATEMENT OF THE CASE

I. Procedural Posture

On June 5, 2019, the Pascua Yaqui Court of Appeals requested supplemental briefing from the parties on the “limited authority of the Tribe to use Arizona Department of Public Safety Resources, and any other State or County resources for the Purposes of law enforcement investigation and/or issuance of search warrants including but not limited to Intergovernmental Agreements, Cross-Deputization Agreements, and/or contracts for services with the State, County or City.” Pascua Yaqui Court of Appeals, Order, June 5, 2019.

The Tribe submitted its supplemental brief on July 5, 2019. Mr. Thomas submits his supplemental brief in response.

ARGUMENT

I. There is an intergovernmental agreement between the Pascua Yaqui Tribe and the Arizona Department of Public Safety for the limited purpose of processing evidence.

The intergovernmental agreement between the Pascua Yaqui Tribe and the Department of Public Safety (DPS) only authorizes DPS to provide laboratory services for purposes of processing evidence. According to the Resolution No. C04-93-18, the Intergovernmental Agreement was approved by Tribal Council specifically “for the provision of forensic science services through the Arizona DPS Crime Lab.” *See* Appellant’s Exhibit 2, *Pascua Yaqui Resolution C04-93-18*.

The Arizona DPS provides numerous services for the state that are not authorized to provide inside the reservation, including but not limited to: “missing children search, sex offender compliance, licensing, fingerprint clearance card,” and so on. *See* Appellee’s Exhibit A, *Arizona DPS webpage services*. Arizona courts are not a branch or an extension of DPS. Arizona courts does not provide laboratory

services for purposes of processing evidence. Therefore, the intergovernmental agreement is exclusive between DPS and the Pascua Yaqui Tribe for the limited purpose of forensic evidence related services.

Since there is a bilateral agreement between DPS and Pascua Yaqui Tribe, it proves DPS will honor a search warrant signed by a tribal judge. Thus, there is no need to seek a search warrant by a state court judge who is not licensed under this jurisdiction or authorized to preside over Tribal matters.

II. An Arizona judge may review a Tribal law enforcement officer affidavit of probable cause for the issuance of a warrant for offenses occurring outside the reservation.

The Tribe mistakenly claims that 2 PYTC § 2-8-90(A)(1) and A.R.S. § 13-3874 consider PYPD officers *de facto* law enforcement officers for the State of Arizona while engaged in their official duties and that a State judge may accept a PYPD officer's affidavit of probable cause supporting the issuance of a warrant. *See* Tribe's Supplemental Brief, p. 8. This argument is misleading. 2 PYTC § 2-8-90(A)(1) does not consider PYPD officers law enforcement officers for the State of Arizona. Rather, the statute highlights authorized programs PYPD officers are allowed to participate. ("The Police Department will have the following authorized programs...")

Pursuant to A.R.S. § 13-3874, a Tribal police officer who is certified by the Arizona Peace Officer Standards and Training Board (AZ POST) is authorized to possess and exercise some law enforcement powers of peace officers in *Arizona*. It is clear that Arizona law authorizes qualified PYPD officers to act as law enforcement officers in Arizona for offenses occurring **outside** the reservation. *See State v. Nelson*, 208 Ariz. 5, 90 P.3d 206 (App. 2004) (holding that law enforcement officer who was employed by governing body of Indian tribe *and* certified by Arizona Peace Officer Standards and Training Board (AZ POST) was expressly authorized *by statute* to conduct brief stop and detention of vehicle *off* the reservation.") (emphasis added). This is an Arizona statute, not an

intergovernmental agreement. There is no equivalent statute under the PYT Code. A state court judge may accept a probable cause affidavit drafted by a PYPD officer for offenses outside the reservation, but a state court judge is not authorized to exercise authority over matters occurring inside the reservation.

III. There is no Intergovernmental Agreement between Arizona courts and the Pascua Yaqui Tribal Court.

It is the Tribe's burden, as the Appellant in this matter, to show there is an intergovernmental agreement authorizing a state court judge to issue search warrants in tribal matters. The Tribe has failed to attach any intergovernmental agreement or resolution related to services between Arizona courts and the Tribal Court because there is no intergovernmental agreement or resolution authorizing a state court judge to interfere or issue search warrants for tribal related matters.

A) PYT Code expressly authorizes the issuance of search warrant signed by a Tribal Judge only.

According to the Pascua Yaqui Tribe Constitution, only Tribal Council can negotiate and execute agreements with federal, state and local governments and to make laws. *See* PYT Const. Art. VI, § 1 (a) & (o). Tribal Council is the legislative branch. *See* PYT Const. Art. V, § 1 (“The legislative powers of the Pascua Yaqui Tribe shall rest in the Pascua Yaqui Tribal Council...”)

In regards to search and seizures warrant, the Tribal Council, in its inherent powers, has elected that only a Tribal Judge can issue a search warrant for offenses allegedly occurring in the reservation.

According to the Pascua Yaqui Criminal Code, 3 PYTC § 2-2-40,

A search warrant is a written order, **signed by a Tribal Court judge**, and directed to a tribal law enforcement officer ordering him or her to conduct a search and to seize items of property specified in the warrant, or to search for a person for whom an arrest warrant is outstanding.

(emphasis added). *See also* 1 PYTC § 2-30 (I) (“When there is a conflict between one provision of this Code which treats a subject in a general way and another provision which treats subject in a specific manner, the specific provision will prevail.”); 1 PYTC § 2-30 (A) (“Words shall be given their plain meaning...”). 3 PYTC § 2-2-40, titled “Search Warrants” is the specific provision in this matter and its plain language is clear and unambiguous.

Pascua Yaqui Police Officers are members of the executive branch. *See* 2 PYTC § 2-8-10 (“The organizational Department to be known as the Pascua Yaqui Police Department is hereby created as a Department of the Executive Branch of the Pascua Yaqui Tribe Government.”). Therefore, PYPD officers are not allowed to make laws in this reservation. Additionally, there is no intergovernmental agreement authorizing a state court judge to interfere in tribal matters, and because PYT rules in this subject is clear and unambiguous, the search warrant signed by a state court judge in this matter was invalid and a violation of Tribal laws.

CONCLUSION

For the reasons stated above, as well as the oral and written arguments previously submitted to this Court, Mr. Thomas respectfully requests this Court to dismiss this appeal, as the trial court did not err in dismissing the complaint without prejudice granting leave for refilling. Alternatively, Mr. Thomas respectfully requests this Court to affirm the trial court’s decision, as it correctly ruled on the issue.

CERTIFICATE OF COMPLIANCE

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

PASCUA YAQUI PUBLIC DEFENDER

/s/Glaucia B. Brannock

GLAUCIA BATISTA BRANNOCK

Pascua Yaqui Tribe Public Defender

4725 W. Calle Tetakusim, Building B

Tucson, AZ 85757

(520) 883-5013

Attorney for Defendant-Appellee

CERTIFICATE OF SERVICE

On August 5, 2019, the original and three copies of the *Appellee's Response Brief* were filed and conforming copies 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

Thomas Justin, Appellee

PASCUA YAQUI PUBLIC DEFENDER

/s/Glaucia B. Brannock
GLAUCIA BATISTA BRANNOCK
Pascua Yaqui Tribe Public Defender
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

Attorney for Defendant-Appellee

Appellee's Exhibit A



ARIZONA DEPARTMENT OF PUBLIC SAFETY (/)

ARIZONA STATE TROOPERS

(/)

Search

[Home \(/\)](#) » [Services \(/services\)](#)

SERVICES

The Arizona Department of Public Safety (DPS) provides a wide array of critical services to the public and the DPS website that allows some of those services to be carried out in a manner that is more convenient and efficient for users. Below are just some of the services DPS provides, including those that may be expedited if conducted online.

Public Services Sections (/services/public)

- [Missing Children Search \(/missingchildren\)](#)
- [Sex Offender Compliance \(/services/public/offender\)](#)
- [Concealed Weapons \(/services/public/cwp\)](#)
- [Fingerprint Clearance Card \(/services/public/fingerprint\)](#)
- [File a Commendation \(content/file-commendation\)](#)
- [Licensing \(/services/public/licensing\)](#)
- [Courts & Tickets Information \(/services/public/courts\)](#)
- [Claiming Personal Property \(/services/public/property\)](#)
- [Records Requests \(/services/public/records\)](#)
- [Report a Crime \(/services/public/crime-form\)](#)
- [Submit a Tip \(Silent Witness\) \(/services/public/silent_witness\)](#)
- [Tow Truck Application \(/services/public/tow-truck\)](#)
- [Household Goods Enforcement \(/services/public/hhg\)](#)

Enforcement Service Sections (/services/enforcement)

- [Chaplaincy Program Services \(/services/enforcement/chaplain\)](#)
- [Commercial Vehicle Enforcement \(/organization/HPD/cve\)](#)
- [DUI Enforcement \(/organization/HPD/dui\)](#)
- [Gang & Illegal Immigration Enforcement \(GIITEM\) \(/about/programs/giitem\)](#)
- [Impaired Driving \(/safety/impaired-driving\)](#)
- [Move Over Law \(/safety/move-over\)](#)
- [Scrap Metal Theft Database \(/services/enforcement/scrap\)](#)
- [Student Transportation \(/services/enforcement/student\)](#)
- [WANTED Fugitive Tips \(https://www.tipsubmit.com/webtipforms/webform.aspx?id=25&AgencyID=807\)](#)

Governmental Services (/services/government)

- [Arizona Disposition Reporting System \(ADRS\) \(/services/government/adrs\)](#)
- [Arizona Department of Transportation \(ADOT\) \(http://azdot.gov\)](#)
- [Automated Fingerprint Identification System \(AZAFIS\) \(/services/government/AFIS\)](#)
- [Crime Lab Services \(/organization/TSD/scientific-analysis\)](#)
- [Crime Victims Services \(/services/enforcement/crime-victims\)](#)
- [Noncriminal Justice Agency Fingerprint Compliance \(NCJA\) \(/services/government/ncja\)](#)
- [Tow Program \(/services/government/tow\)](#)

SERVICES

[All Services \(/services\)](#)

➤ [Public Services \(/services/public\)](/services/public)

➤ [Enforcement Services \(/services/enforcement\)](/services/enforcement)

➤ [Government Services \(/services/government\)](/services/government) (https://twitter.com/arizona_dps) (<https://www.linkedin.com/company/arizona-department-of-public-safety>)

Location Information

Arizona Department of Public Safety

2222 W. Encanto Blvd.
Phoenix, AZ 85009

Phone: 602.223.2000



[Find in Google Maps](#)

(<https://www.google.com/maps/place/2222+W+Encanto+Blvd,+Phoenix,+AZ+85009/@33.4739143,-112.1092278,17z/data=!3m1!4b1!4m5!3m4!1s0x>)

Copyright © Arizona Department of Public Safety – All rights reserved.

[CONTACT US \(/NODE/20985\)](/NODE/20985)

[STATEWIDE POLICIES \(HTTP://AZ.GOV/POLICIES\)](http://AZ.GOV/POLICIES)

[GOVERNOR'S REGULATORY REVIEW COUNCIL \(HTTP://GRRC.AZ.GOV\)](http://GRRC.AZ.GOV)

[WEBSITE ACCESSIBILITY \(/ACCESSIBILITY\)](/ACCESSIBILITY)

[WEBSITE SUPPORTED BY CSU \(/CSU\)](#)

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

PASCUA YAQUI TRIBE,
OFFICE OF THE PROSECUTOR

Petitioner

vs.

Hon. Melvin Stoof, Judge, Pascua Yaqui Tribal
Court,

JUSTIN PAUL THOMAS,

APPELLATE CASE NO: CA-19-002

TRIBAL COURT CASE NO:

CR-19-072/ TR-19-007

PETITIONER/APPELLANT'S SUPPLEMENTAL 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) 876-6251
Oscar.J.Flores@pascuayaqui-nsn.gov
Coleen.Thoene@pascuayaqui-nsn.gov
Attorneys for the Pascua Yaqui Tribe

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3
PROCEDURAL UPDATE/SUMMARY OF SUPPLEMENTAL ARGUMENT3
LAW AND ARGUMENT5
CONCLUSION.....9
CERTIFICATE OF SERVICEA

TABLE OF AUTHORITIES

Authority	Page Number
Pascua Yaqui Tribal Code	
2 PYTC §2-8-90(A)(1).....	8
Art VI, §1a, d, & o, Pascua Yaqui Const.	6
Art VIII, § 2, Pascua Yaqui Const.	6
Art. IV, Pascua Yaqui Const.	6
Art. V, §§ 1-2, Pascua Yaqui Const.	6
Art. XV, 2, Pascua Yaqui Const.....	6
Preamble, Pascua Yaqui Const.....	6
Federal Cases	
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963)	5
Federal Statutes	
Public Law 93-638	7
Arizona Statutes	
A.R.S. § 13-3874.....	8
A.R.S. § 13-3915(A)	8
A.R.S. § 13-3916(D)	8

PROCEDURAL UPDATE/SUMMARY OF SUPPLEMENTAL ARGUMENT

The Tribe hereby incorporates the procedural and factual summaries, and arguments included in its Opening Brief, which was filed on April 5, 2019, and Reply brief, which was filed on May 21, 2019. The Tribe also incorporates its arguments made at the Oral Argument proceeding that was held on June 4, 2019.

In an order dated June 5, 2019, this Court requested the parties to submit supplemental briefing on the “authority of the Tribe to use Arizona Department of Public Safety Resources, and any other State of County resources for the purposes of law enforcement investigation and/or issuance of search warrants.” Order, *PYT v. Thomas*, CA-19-002 (June 5, 2019). The Pascua Yaqui Constitution specifically provides the Pascua Yaqui Tribal Council—which serves as the local government’s legislative branch—with the power and authority to enter into agreements with sister sovereigns and their agencies. This includes the ability to enter into agreements that are designed for the purposes of ensuring public safety, and furthering law enforcement and criminal investigative goals. In short, these powers granted by the Constitution allow the Pascua Yaqui Nation to exercise its authority as a sovereign nation, to make rules and regulations that protect and guides its members. To this end, the Pascua Yaqui Nation has specifically entered into agreements with the Arizona Department of Public Safety regarding the collection and testing of blood alcohol content (BAC) and other forensic laboratory evidence. While these contracts assist the Pascua Yaqui Nation’s pursuit of public safety, they also benefit defendants who are charged with crimes occurring within the Tribe’s jurisdiction because the contracts aid in the search for both inculpatory and potentially exculpatory evidence.

Additionally, as noted in previous briefing and at oral argument, the Tribe’s position is simple, but twofold. First, the BAC evidence that formed the basis of the trial court’s dismissal decision was not a critical element of the charges filed against the Appellee. Because the court’s dismissal of those BAC-unrelated charges was the result of a misinterpretation of the scope of

Wong Sun v. United States, 371 U.S. 471 (1963), this Court need not based its ruling on questions of sovereignty or the separation of powers. Second, should this Court elect to expand its ruling to the sovereignty issue, Pascua Yaqui Law and sovereignty allowed the Tribe to establish contracts with outside law enforcement agencies that allowed the officers involved in this case to seek a warrant, collection, and testing services from its sister sovereign. Because the Pascua Yaqui Nation, as a sovereign, may enlist the aid of other sovereigns in order to expand its resources and public safety capabilities, the search warrant issued in this case was lawful and the BAC evidence, therefore, admissible.

LAW AND ARGUMENT

The Tribe maintains that the decision in this case was incorrect because the trial court misinterpreted the scope of *Wong Sun v United States*, 371 U.S. 471 (1963). Simply put, the BAC evidence at issue was neither relevant nor necessary to proof of the charges levied against the Appellee at the initial hearing/probable cause stage of the proceedings. . Nevertheless, the trial court's decision was also incorrect because the Pascua Yaqui Constitution clearly allows the legislative branch to establish contracts with sister sovereigns and their law enforcement agencies that are designed to allow the Tribe to fully exercise its sovereign powers to promote public safety and criminal investigations.¹

The preamble to the Pascua Yaqui Constitution states as follows:

We, the Pascua Yaqui Tribe of Arizona, *in order to exercise more fully our privileges and duties* as American citizens and *promote the general welfare of our people*, to cooperate more fully with the Government of the United States for our benefit, to establish a self-supporting economy offering education and opportunity for all, and to preserve and promote the spiritual, cultural and social values of the Yaqui people, do hereby adopt this constitution, under Divine Guidance and

¹ To the extent that the Court's order requested authority regarding either Pascua Yaqui Tribal or Arizona State statutes regarding the cross-deputization of law enforcement agents, the Tribe respectfully directs the Court to the arguments contained on pages 29-30 of its opening brief.

pursuant to the Indian Reorganization Act of June 18, 2934 (48 Stat. 984) as amended.” Preamble, Pascua Yaqui Const. (*emphasis added*).

The Pascua Yaqui Constitution establishes a tripartite government, in which powers and checks on said powers are divided amongst a legislative, executive, and judicial branches. Art. IV, Pascua Yaqui Const. The Constitution further states that “*no person or group of persons charged with the exercise of powers properly belonging to one of these branches, shall exercise any powers properly belonging to the others, except as this constitution may otherwise expressly direct or permit.*” *Id.* (*emphasis added*).

The legislative branch, which consists of the duly elected Tribal Council, Art. V, §§ 1-2, Pascua Yaqui Const., possesses a number of powers. These include, but are not limited to, the ability:

“[t]o negotiate and execute contracts and agreements with federal, state and local governments as well as any person, association, partnership, corporation or other private entity,” to “appropriate available tribal funds for public, governmental and business purposes serving the general welfare of the Pascua Yaqui Tribe,” and to “*develop and adopt ordinances, resolutions, rules and regulations to protect and promote the peace, health, safety and general welfare of the Pascua Yaqui people and to facilitate the conduct and operation of the tribal government.*” Art VI, §1a, d, & o, Pascua Yaqui Const. (*emphasis added*).

The duties and powers of the judicial branch are outlined by Art. VIII, Pascua Yaqui Const. Said powers include the ability to preside over “all cases in law and equity arising under[] this constitution and the laws, traditions, customs or enactments of the Pascua Yaqui Tribe.” Art VIII, § 2, Pascua Yaqui Const. The Executive branch is governed by Art VII, Pascua Yaqui Const., and consists of the “chairman, vice-chairman, ... secretary and treasurer and such other officers as the tribal council may find necessary for the proper administration of the tribal business.” *Id.* Neither the judiciary nor the executive have the ability to contract with outside sovereigns, as that is a power that the Pascua Yaqui Constitution delegates exclusively to the legislative branch. *See also* Art. XV, 2, Pascua Yaqui Const. (noting that the Executive branch will “carry out, or cause to be

carried out, the provisions of any resolution which has been duly adopted by the Pascua Yaqui Tribal Council....”)

The provisions of the Pascua Yaqui Constitution further reflect the precepts of the Indian Self-Determination Act (Public Law 93-638) [*hereinafter P.L. 638*]. P.L. 638 contains what has come to be known as the Indian Self-Determination Act, and allows tribes, as a natural part of their sovereignty, to enter into contracts with outside agencies in a variety of areas. This contracting ability is a vital component of Indian Sovereignty because many Indian Nations—including the Pascua Yaqui Tribe—lack the resources and financial means to be able to have an accredited lab, or to have specially trained and certified law enforcement officers — specifically in the areas of phlebotomists, drug recognition experts, child forensic interviewers and the like — on staff. Such resources and personnel are vital to the promotion of public safety and welfare, to criminal investigations designed to promote said safety and welfare, and to the due process rights of the accused.

To that end, the Pascua Yaqui Tribal Council has passed resolutions approving intergovernmental agreements with the Arizona Department of Public Safety. *See* Attachment A (Copy of Resolution No. C08-305-06); *also* Attachment B (Copy of Resolution No. C04-93-18). In 2006, and again in 2018, the Tribal Council entered into an intergovernmental agreement with Arizona DPS that governs the processing of DNA evidence. These are not the only intergovernmental agreements that the Tribe has entered into.² And these agreements are specifically designed to help the Tribe exercise its sovereign duties of preserving the health, safety, and welfare of its citizens.³ They further allow the Tribe to base prosecutions, and the collection

² *See e.g.* <http://intranet/council/pages/Tribal%20Resolutions.aspx>. This link contains the citations for resolutions passed by the Pascua Yaqui Tribal Council, including the numbers associated with said resolutions. Copies of said resolutions are available through the Attorney General’s Office.

³ In conversations with the Pascua Yaqui Attorney General’s Office, which acts as council for the Pascua Yaqui Tribal Government, the prosecution was informed that copies of the actual contracts between the Tribe and outside agencies are not a matter of public record, or items that can be obtained without a court-issued subpoena. The Tribe has found no local law or appellate court rule that allows the Tribal Court of Appeals to grant a request for a subpoena duces

and testing of evidence on their own timelines, instead of requiring them to let cases languish while waiting for Federal agencies or laboratories to find the time and resources to collect evidence on crimes that occur within Indian Country.⁴

The decisions to enter into these interagency agreements is not one that has been foisted upon Tribal Nations. Instead, they are agreements that the Tribe has chosen, of its own free will and as a proper exercise of sovereignty, to enter into. Such agreements are allowed under both Federal law and the Tribal Constitution, and represent inherent aspects of tribal sovereignty. *See e.g. Talton v. Mayes*, 163 U.S. 376 (1896); *see also* 2 PYTC §2-8-90(A)(1) (indicating that Pascua Yaqui law enforcement officers are considered *de facto* law enforcement officer in Arizona); A.R.S. § 13-3874 (same); *c.f.* A.R.S. § 13-3915(A) (regarding acceptance of a tribal officers affidavit in support of a state issued warrant); A.R.S. § 13-3916(D) (allowing tribal officers to execute state-issued warrants). Indeed, given the Pascua Yaqui Tribe and Arizona statutory

tecum. As a result, the Tribe did not submit a subpoena for this court to review. The Tribe further notes that, while a trial court has the power to issue a subpoena duces tecum to make or expand a trial court record, the trial court is unable to do so once jurisdiction over a case has been vested in – and, thus, jurisdiction transferred to— the court of appeals. However, while the Tribe has been unable to obtain copies of actual agreements and contracts due to the unique procedural posture of this case, it has been able to obtain copies of the publically available copies of resolutions adopted by Tribal Council relating to those contracts. Those resolutions are discussed here. Additionally, the Attorney General has indicated that it agrees that the Tribal Council has the power, under the Constitutional provisions outlined above, to enter into intergovernmental agreements designed to promote the safety of the citizens of the Pascua Yaqui Tribe.

The Tribe further notes that its inability to secure copies of contracts upon request of this Court—a direct consequence of the case’s procedural posture—is further evidence that the Trial court should not have dismissed this case at the initial/probable cause hearing. Had a full evidentiary hearing been held pursuant to standard motions practice, counsel for both parties would have had an opportunity to subpoena the requested documents, to give the Attorney General an opportunity to intervene regarding any request for subpoena, and for the documents to be obtained and presented at a full evidentiary hearing—along with testimony from the officers involved—as to whether the search warrant granted in this case was issued properly. Additionally, the issues that would be covered by the protected contracts pertain, in this particular case, solely to any uncharged acts involving the Appellee’s BAC. As discussed extensively in its Opening Brief, evidence regarding the Appellee’s BAC had no bearing on whether there was probable cause for the charges for which he was indicted. Thus, dismissal of these BAC-unrelated charges was not appropriate.

⁴ It is important to note that, were the Pascua Yaqui Tribe to be forced to rely solely on federal BIA agencies, there is absolutely no guarantee that federal resources would be given in a particular case. Additionally, if the Tribe were to rely on the FBI for assistance, the FBI crime lab is located in Virginia, and processes a significant number of cases yearly from across the country. In the event that the FBI laboratory was able to process evidence in somewhat of a timely fashion, the Tribe would then be required to cover the costs of travel for laboratory technicians to Arizona for trial. Both the delay and the cost are another reason that PL. 93-638 was implemented, so that Tribal sovereignty in the criminal area would not be entirely dependent and beholden to the federal system.

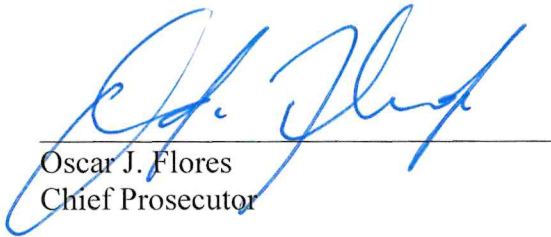
schemes outlined in the Tribe's Opening Brief, *see Opening Brief* at p. 29-30, such agreements are a necessary byproduct of the cross-deputization framework that exists between the Tribe and Arizona.

Because the agreement itself was proper, the search warrant issued in this case was also proper. Because the search warrant was properly issued, the blood draw obtained in this case should not have been suppressed, as any resulting BAC evidence would be admissible. And, as mentioned above, the Appellee's other charges—which exist independently from any BAC evidence and related search warrant—should not have been dismissed.

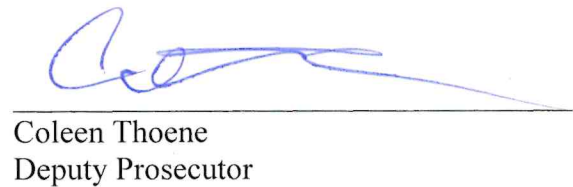
CONCLUSION

For the reasons discussed above, as well as the oral and written arguments previously supplied to this Court, the Tribe respectfully requests that the dismissal order issued by the trial court be reversed, and that the case be remanded to the lower court for further proceedings.

RESPECTFULLY submitted this 5th day of July, 2019



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:

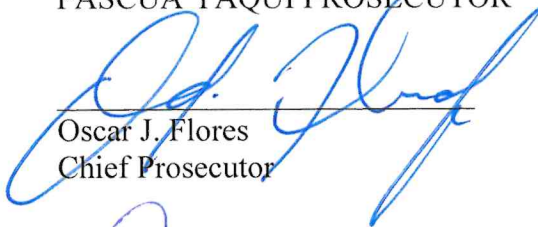
Glaucia Brannock
Glaucia.Brannock@pascuayaqui-nsn.gov
Pascua Yaqui Office of the Public Defender
7474 S. Camino de Oeste
Tucson, AZ 85757

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 5 day of July, 2019.

PASCUA YAQUI PROSECUTOR

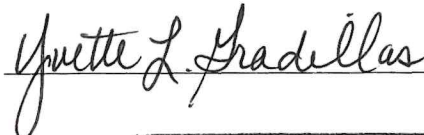


Oscar J. Flores
Chief Prosecutor



Coleen Thoene
Deputy Prosecutor

Sworn before me this 5th day of July, 2019



Notary Signature

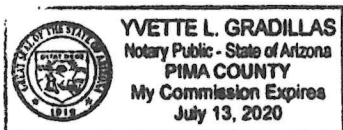


Exhibit 1
(Pascua Yaqui Tribal Resolution C08-305-06)

PASCUA YAQUI TRIBE

RESOLUTION NO. C08-305-06

RESOLUTION OF THE PASCUA YAQUI TRIBE APPROVING AN INTERGOVERNMENTAL AGREEMENT WITH THE STATE OF ARIZONA DEPARTMENT OF PUBLIC SAFETY FOR CRIME LABORATORY SERVICES FOR PURPOSES OF PROCESSING EVIDENCE.



WHEREAS, the Tribal Council of the Pascua Yaqui Tribe is vested with the authority to enter into agreements with federal, state and local governmental agencies, and other entities, and is also charged with providing for the general welfare of the members of the Pascua Yaqui Tribe (Article VI, Sections 1(a) and (o) of the Constitution of the Pascua Yaqui Tribe); and

WHEREAS, the State of Arizona Department of Public Safety ("DPS") Crime Laboratory has proposed an Intergovernmental Agreement ("IGA") with the Tribe to provide evidence processing and analysis services through the DPS Crime Laboratory; and

WHEREAS, the services to be performed by DPS under the terms of the IGA will enhance the ability of the PYT Police Department and Prosecutor's Office to apprehend and prosecute criminal perpetrators on the Reservation, and are therefore essential to the provision of law enforcement and the Tribe's ability to provide for the public safety and welfare on the Reservation; and

WHEREAS, based on a recommendation from the Director of the Public Safety Division, and having been reviewed by the Office of the Attorney General, the Tribal Council has determined that it is in the best interest of the Tribe to approve the IGA with DPS for Crime Lab services.

NOW THEREFORE BE IT RESOLVED BY THE TRIBAL COUNCIL OF THE PASCUA YAQUI TRIBE that the DPS IGA for Crime Lab Services is hereby approved, and that the Chairwoman of the Tribe is hereby authorized to take any necessary and proper action to execute, implement, and enforce this Resolution and Agreement.

BE IT FINALLY RESOLVED that the Chairwoman is hereby delegated the authority to execute any future renewal amendments to the DPS IGA for Crime Lab services, provided that such amendments are solely for the purpose of renewing the agreement, do not alter the substantive provisions of the original agreement, or contain a waiver of sovereign immunity.

CERTIFICATION

THE FOREGOING was on **August 9, 2006** duly adopted by a vote of **TEN** in favor, **ZERO** opposed, and **ZERO** abstained, by the Tribal Council of the Pascua Yaqui Tribe pursuant to authority vested in it by Article VI, Section 1(a), (d), and (o), and Article VI, Section 2 of the Constitution of the Pascua Yaqui Tribe as adopted on January 26, 1988 and approved by the Secretary of the Interior on February 8, 1988 pursuant to Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984).



CHAIRWOMAN OF THE PASCUA YAQUI TRIBE



SECRETARY OF THE PASCUA YAQUI TRIBE



Exhibit 2
(Pascua Yaqui Resolution C04-93-18)

PASCUA YAQUI TRIBE

RESOLUTION NO. C04-93-18



RESOLUTION OF THE PASCUA YAQUI TRIBE APPROVING AN INTERGOVERNMENTAL AGREEMENT BETWEEN THE TRIBE AND THE ARIZONA STATE DEPARTMENT OF PUBLIC SAFETY.

WHEREAS, the Tribal Council of the Pascua Yaqui Tribe is vested with the authority to enter into agreements with federal, state and local governmental agencies, and other entities (Article VI, Section 1(a) of the Constitution of the Pascua Yaqui Tribe); and

WHEREAS, the Pascua Yaqui Police Department desires to use the Arizona State Department of Public Safety Crime Lab for scientific examination of evidence, technical assistance, and expert testimony pertaining to laboratory findings; and

WHEREAS, the Pascua Yaqui Police Department recommends that the Tribe enter into an intergovernmental agreement (“IGA”) with the Arizona State Department of Public Safety (“Arizona DPS”) for purposes of provision of forensic science services through the Arizona DPS Crime Lab; and

WHEREAS, the Office of Attorney General has approved to form an IGA (incorporated herein by this reference) to govern the Tribe’s relationship with Arizona DPS and the Arizona DPS Crime Lab, which shall be for the period of January 1, 2018 through December 31, 2018, and which shall automatically renew for four (4) additional one (1) year periods; and

WHEREAS, the Tribal Council has determined that it is in the best interests of the Tribe to enter into an IGA with Arizona DPS for the provision of forensic science services through the Arizona DPS Crime Lab.


NOW THEREFORE BE IT RESOLVED BY THE TRIBAL COUNCIL OF THE PASCUA YAQUI TRIBE that the Tribal Council hereby (1) approves the IGA with the Arizona State Department of Public Safety, substantially in the form attached hereto, for the provision of forensic science services through the Arizona DPS Crime Lab, effective January 1, 2018 through December 31, 2018; (2) authorizes the Chairman to execute the IGA and any extensions or amendments thereto that extend funding or make non-substantive changes to the IGA on behalf of the Tribe; and (3) authorizes the Chairman to take necessary and proper action to execute, implement, and enforce this Resolution and the IGA.

CERTIFICATION

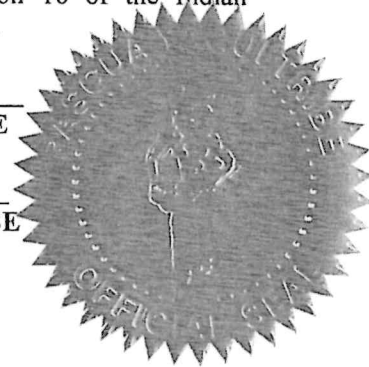
THE FOREGOING was on **April 25, 2018** duly adopted by a vote of **TEN** in favor, **ZERO** opposed, and **ZERO** abstaining, by the Tribal Council of the Pascua Yaqui pursuant to authority vested in it by Article VI, Section 1(a) of the Constitution of the Pascua Yaqui Tribe, as adopted on January 26, 1988 and approved by the Secretary of the Interior of February 8, 1988 pursuant to Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984).



CHAIRMAN OF THE PASCUA YAQUI TRIBE



SECRETARY OF THE PASCUA YAQUI TRIBE



OFFICE OF THE PROSECUTOR

PASCUA YAQUI TRIBE

7777 S. CMO. HUIVISIM

TUCSON, ARIZONA 85757

(520) 879-6251

1

2 **ORIGINAL of the forgoing filed**

3 **this 9 day of April, 2019.**

4 Clerk of the Court

5 Pascua Yaqui Tribal Court of Appeals

6 **Copy of the foregoing**

7 **delivered/mailed/provided to:**

8 Glaucia Brannock,

9 Public Defender

10 *Attorney for Appellee Defendant*

11

12 Clerk of the Court (x1)

13 Pascua Yaqui Tribal Court

14

15 Clerk of the Court (x4)

16 Pascua Yaqui Tribal Court of Appeals

17 By: _____

18

OFFICE OF THE PROSECUTOR
PASCUA YAQUI TRIBE
7777 S. CMO. HUIVISIM
TUCSON, ARIZONA 85757
(520) 879-6251

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17

Attachment A

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

PASCUA YAQUI TRIBE,
OFFICE OF THE PROSECUTOR

Appellant

vs.

JUSTIN PAUL THOMAS,

APPELLATE CASE NO: CA-19-002

TRIBAL COURT CASE NO:

CR-19-072/ TR-19-007

APPELLANT'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) 876-6251
Oscar.J.Flores@pascuayaqui-nsn.gov
Coleen.Thoene@pascuayaqui-nsn.gov
Attorneys for the Pascua Yaqui Tribe

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

PASCUA YAQUI TRIBE,
OFFICE OF THE PROSECUTOR

Petitioner

vs.

JUSTIN PAUL THOMAS,

APPELLATE CASE NO: CA-19-002

TRIBAL COURT CASE NO:

CR-19-072/ TR-19-007

APPELLANT'S REPLY 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) 876-6251
Oscar.J.Flores@pascuayaqui-nsn.gov
Coleen.Thoene@pascuayaqui-nsn.gov
Attorneys for the Pascua Yaqui Tribe

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

REQUEST FOR ORAL ARGUMENT..... 4

STATEMENT OF JURISDICTION..... 4

STANDARD OF REVIEW 4

ISSUES PRESENTED FOR REVIEW..... 8

STATEMENT OF THE CASE..... 8

SUMMARY OF THE ARGUMENT, POST APPELEE’S RESPONSE..... 9

LAW AND ARGUMENT 10

I.The Trial Court Erred When it Determined that it Lacked Jurisdiction over Offenses That Were Derived Entirely from Evidence Discovered by Tribal Law Enforcement, on the Pascua Yaqui Reservation..... 10

II. There Was Ample Evidence of Probable Cause Supporting Appellee’s Charges Levied Against the Appellee..... 11

A.The Life of a criminal case under the Pascua Yaqui Tribal Code. 11

1.Probable Cause for Driving Under the Influence Charge 15

2.Probable Cause for Leaving the Scene of an Accident Charge 16

3.Probable Cause for Injury to Public Property Charge..... 17

III.The Appellee’s Arguments Constitute a Dangerous Attempt to Diminish Tribal Sovereignty by Implying that a Tribe Does Not Have the Power to Enter Into Inter-Governmental Agreements, and by Implying that the Tribe is Not Entitled to Rely Upon the Principle of Comity. 17

IV.Appellee Ignores the Tribe’s Argument that the Proper Remedy in this Case — Assuming *Arguendo* that a Violation Occurred Requiring Remedy — Would Have Been Preclusion After an Evidentiary Hearing. 18

CONCLUSION AND REMEDY SOUGHT 19

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Authority	Page Number
Pascua Yaqui Cases	
<i>In the Matter of Alvarez</i> , CA-17-008 (PYT Ct. App., Jun. 19, 2018).....	5
<i>PYT v. Baltazar</i> , CA-01-003 (PYT Ct. App., Sept. 12, 2001),.....	5
<i>PYT v. Bustamante</i> , CA-17-004 (PYT Ct. App., Jul. 3, 2017).....	5
Pascua Yaqui Tribal Code	
4 PYTC § 1-630	17
8 PYTC § 6-4-10	15
Pascua Yaqui Rules	
3 PYTC § 2-2-10	11
3 PYTC § 2-2-170	12
3 PYTC § 2-2-180	12
3 PYTC § 2-2-190	12
3 PYTC § 2-2-20	11
3 PYTC § 2-2-200	12
3 PYTC § 2-2-230	12
3 PYTC § 2-2-300	19
3 PYTC § 2-2-90	11
3 PYTC § 2-3-110	8
Federal Cases	
<i>Brinegar v. United States</i> , 338 U.S. 160 (1949)	14
<i>Hamling v. United States</i> , 418 U.S. 87, 94 S.Ct 2887 (1974).....	13
<i>Illinois v. Gates</i> , 462 U.S. 213, 236 (1983),.....	6
<i>United States v. Alfonso</i> , 143 F.3d 772 (2d Cir. 1998)	7, 13, 14
<i>United States v. Gonzalez-Roque</i> , 301 F.3d 39 (2d Cir. 2002)	7
<i>United States v. James</i> , 980 F.2d 1314 (9 th Cir. 1992).....	13
<i>United States v. Linick</i> , 195 F.3d 538 (9 th Cir. 1999).....	7
<i>United States v. Neill</i> , 166 F.3d 943 (9 th Cir. 1999).....	13
<i>United States v. Orbitz</i> , 358 F. Supp. 200 (D.Ct. Puerto Rico, 1973).....	14
<i>United States v. Shetler</i> , 665 F.3d 1150, 1157 (9th Cir. 2011)	19
<i>United States v. Spillone</i> , 879 F.2d 514 (9 th Cir. 1989)	7
<i>United States v. Stravroulakis</i> , 952 F.2d 686 (2 nd Cir. 1992)).....	14
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963).....	18
Arizona Cases	
<i>State ex rel. Mahoney v Stevens</i> , 79 Ariz. 298, 300-01, 288 P.2d 1077, 1078, 79 (1955)...	13
<i>State v. Hoskins</i> , 199 Ariz. 127, 14 P.3d 997 (Ariz. 2000)	14
<i>State v. Rumsey</i> , 225 Ariz. 374, 238 P.3d 642 (Ct. App. 2010).....	19
Arizona Statutes	
A.R.S. § 28-1381(A)(1).....	15
A.R.S. § 28-665(A)(1).....	16
A.R.S. 28-664(A)(1).....	16

REQUEST FOR ORAL ARGUMENT

In its Response, the Appellee has not included either a request for oral argument, or motion to deny the Tribe's request. The Tribe renews its request for oral argument for the reasons set forth in its Opening Brief. *See* Opening Brief, at 6.

STATEMENT OF JURISDICTION

The parties agree that the Court of Appeals has jurisdiction over this matter. *See* Appellant's Opening Brief, at 6; Appellee's Response Brief, at 7.

STANDARD OF REVIEW

The parties disagree as to what standard of review is appropriate for this appeal. This disagreement is based upon a conflicting interpretation of earlier Pascua Yaqui Appellate cases, and whether those cases adequately address the specific issue raised in this appeal. The Appellee correctly notes that, previously, this Court had reviewed general dismissals of complaints under an "abuse of discretion" standard. Appellee then suggests that — because this court previously used an "abuse of discretion" standard in distinguishable cases — this Court should only look to Pascua Yaqui case law for guidance. *See* Appellee's Response Brief, at 9, fn1 (indicating that *PYT v. Miranda*, CA-08-015, p.22 (PYT Ct. App. Mar. 29, 2009) "is irrelevant" to the issues raised in this appeal). Appellee, likewise, mistakenly suggests that some of the issues involved in this case — specifically, whether preclusion is the proper remedy for search warrant violations or whether the issues involved in this case demand *de novo* review — are issues that have been addressed by this Court.

Appellee has cited to no local case law indicating that the issues involved in this appeal are *not* matters of first impression. Indeed, the local cases cited by the parties, even though they

reviewed dismissals, simply did not address the issue of dismissals based on whether sufficient evidence exists to support a finding of probable cause, or whether the grant of an extra-jurisdictional warrant — which is unrelated to a defendant’s charges — warrants outright dismissal. To say otherwise misinterprets this jurisdiction’s case law.

For instance, in *PYT v. Bustamante*, CA-17-004 (PYT Ct. App., Jul. 3, 2017), this Court was asked to review whether the trial court abused its discretion by dismissing a complaint that failed to include proper statutory language and citations relating the defendant’s charges. Ultimately, the Court found that there had been no abuse of discretion. However, the Court did not address the issue of probable cause,¹ or the issue of whether a court may dismiss charges based upon perceived — yet ultimately unrelated — search warrant issue. In *In the Matter of Alvarez*, CA-17-008 (PYT Ct. App., Jun. 19, 2018), this Court reviewed whether the trial court abused its discretion in dismissing a juvenile complaint. The specific issue before the Court at that time did not concern probable cause or its sufficiency. Instead, it involved determining whether statutory time limits for filing a complaint as to an arrested juvenile barred the prosecution from refileing it as a non-arrest matter when the first complaint was dismissed for an identification-related error. Again, these are simply not the issues involved in this unique case. Even *PYT v. Baltazar*, CA-01-003 (PYT Ct. App., Sept. 12, 2001), which determined whether location or date issues are fatal to the form of a complaint, did not address that issue in the context of probable cause, or whether

¹ This case relied upon *PYT v. Gonzalez*, CA-07-017 (PYT Ct. App., Oct. 9, 2007). This case was not cited in the Tribe’s Opening Brief. The Appellee correctly points out that *Gonzalez* ruling was designated as an “Order,” and not as an Opinion, thereby making it akin to a memorandum decision that may carry persuasive authority in certain contexts, without being of precedential value. However, it is also important to note that the Court in that opinion did not address any of the unique issues involved in this appeal. This Court dismissed the *Gonzalez* appeal because the appellant had failed to submit a crucial part of the trial court record. Thus, to intimate, as Appellee has, that *Gonzalez* has addressed the standard of review issue, even as persuasive authority, is incorrect.

perceived temporal-locative issues for an un-charged offense necessitate dismissal of the entire case.

Because there is no local case law that specifically addresses the unique issue presented in this appeal, looking to extra-jurisdictional law is relevant, persuasive, and allowable under *Miranda*, CA-18-015, at 22. For instance, Appellee, although claiming that *Miranda* is irrelevant, cites to *Illinois v. Gates*, 462 U.S. 213, 236 (1983), for the proposition that *de novo* review of a magistrate's probable cause determination is inappropriate. That case, however, like the cases discussed above, fails to address the unique issue involved here.² *Gates*' discussion and review of probable cause was done primarily in the context of search warrant affidavits. In it, the United States Supreme Court indicated that “[f]inely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision” to issue a warrant. *Id.* at 235. “While an effort to fix some general, numerically precise degree of certainty corresponding to probable cause may not be helpful, it is clear that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.” *Id.* (citations and quotations omitted). The Supreme Court ultimately indicated that, when issuing a warrant, a court need only to have a “substantial basis ... for conclud[ing] that a search would uncover evidence of wrongdoing.” *Id.* at 236-237 (internal quotations omitted, alterations in original). *Gates* never touched upon probable cause in the context of charging documents, or the standard of review that should be used when reviewing a court's charging determination, or even whether a court may properly dismiss counts that have

² The Tribe further notes that, throughout his Response and with regard to a variety of topics, Appellee has cited to both federal and Arizona case law. Should this Court rule that *Miranda* does not apply to this particular case, then consideration of that case law would be improper. By citing to extra-jurisdictional law, Appellee concedes that *Miranda* applies.

nothing to do with evidence seized during an incorrectly perceived illegal search warrant. Although the Appellee argues that each of these cases “challenged the sufficiency [of] information in the complaints to establish probable cause to proceed,” the cases themselves show this argument is incorrect.³

At least two federal circuits have, however, indicated that appellate review of dismissals, when they involve mixed questions of law and fact, or pure questions of law, warrant *de novo* review. See Opening Brief, at 8-9. See *United States v. Linick*, 195 F.3d 538, 541 (9th Cir. 1999); *United States v. Alfonso*, 143 F.3d 772, 776 (2d Cir. 1998); *United States v. Spillone*, 879 F.2d 514, 520 (9th Cir. 1989); *United States v. Gonzalez-Roque*, 301 F.3d 39, 44 (2d Cir. 2002). Although those cases, also, did not review charging decisions based on a sufficiency of probable cause argument, the cases, as detailed more fully in the Tribe’s Opening Brief, clearly demonstrate that review of a charging document can — and often does — involve a nuanced interplay between factual and legal interpretation.

The issue presented by this appeal involves a mixed question of law and fact, and this nuanced interplay demands *de novo* review. Probable cause in the context of charging documents, much like warrant decisions, involves very specific factual determinations. However, whether probable cause for criminal charges depends upon the validity of an extra-jurisdictional warrant is a purely legal question. Furthermore, probable cause to support a charge requires an understanding not only of the legal definition of probable cause, but what elements are required by the statutory language of offense, and how those legal considerations interact with rules regarding forms of complaint. Likewise, the question of whether dismissal-level sanctions are warranted when a trial

³ The Tribe further notes that, while Appellee indicated that the appellants in the cases discussed below “challenged the sufficiency [of] information in the complaints to establish probable cause to proceed,” Appellee Response Brief at 9, a review of these cases shows that this is an incorrect assertion.

court — incorrectly or not — determines that a search warrant resulting in evidence unrelated to said charges warrants dismissal, is not an issue that this Court has addressed. This issue also involves, at the very least, mixed questions of law and fact, if not pure questions of law.

The factual and legal interpretive issues involved in this case are intimately intertwined and virtually inseparable from each other from an analytical standpoint. Because the issues presented in this case involve a mixed question of law and fact, *de novo* review is appropriate. However, in the event that this Court determines, instead, that an “abuse of discretion” standard of review should be used, the trial court’s dismissal decision still resulted in error.

ISSUES PRESENTED FOR REVIEW

The Appellee’s Response Brief presents an additional issue for review that, although alluded to in the Tribe’s Opening Brief, was not fully addressed. Specifically, that issue involves:

1. Whether the complaint levied against the Appellee contained sufficient probable cause to charge him with the offenses of DUI, damage to property, and leaving the scene of an accident when there was ample circumstantial evidence supporting the charges.

STATEMENT OF THE CASE

Based on the arguments and facts outlined in the Appellee’s Response Brief, no additions need to be made to the factual or procedural recitation outlined in the Tribe’s Opening Brief, or in the record that is properly before this Court pursuant to 3 PYTC § 2-3-110(A). However, the Tribe corrects the statement included on page 14 of its Opening Brief where it mistakenly indicated that the judge who issued the warrant in this case was a Superior Court judge, instead of a Justice Court judge. While the Tribe rests on the factual and procedural summary contained in its Opening Brief, there are certain facts alluded to by Appellee that are not contained in the trial court record. Appellee has, for instance, indicated that the clothing worn by the Appellee is of a style “commonly

seen in [*sic*] the reservation.” Appellee Response Brief at 11. This observation was neither supplied in the complaint or affidavit, testimony or argument during the Initial hearing. Additionally, Appellee seeks to interpret the trial court’s ruling as one being based solely upon a lack of probable cause, *see* Appellee Response Brief at 12-13. This interpretation is incorrect. A reading of the plain language of the transcript of the initial hearing, and the text of the trial court’s order clearly demonstrate that the crux of the court’s ruling involved jurisdictional and sovereignty issues related to the Arizona issued search warrant.

As will be discussed below, the facts that Appellee now seeks to belatedly introduce into the record further demonstrates that the decisions reached in this case were made too quickly, without legal authority, and in such a manner as to deprived the parties an opportunity to make a full record.

SUMMARY OF THE ARGUMENT, POST APPELEE’S RESPONSE

Although the Appellee advances a number of arguments, they are ultimately based upon a misreading of the trial court record, misinterpretation of existing Pascua Yaqui law, and a misunderstanding of both the nature of probable cause. Additionally, while Appellee correctly notes that a party may file a motion to suppress *after* arraignment — which would result in an evidentiary hearing and arguments from both sides — he fails to acknowledge two important facts. First, he ignores that an arraignment did not happen in this case, because the case was dismissed at the initial hearing stage. Second, he ignores that an initial hearing, under the Pascua Yaqui Tribal Code, is designed to serve a specific and particular purpose — namely, determining whether probable cause exists. It is not the venue for parties to visit the evidentiary intricacies involved in a motion to suppress, especially when those issues require testimony and a detailed examination of facts that do not go to the question of probable cause. Third, and finally, Appellee’s arguments

evinced a misunderstanding of the nature of probable cause, and of local DUI law. For all of these reasons, Appellee's arguments should be rejected, and the Tribe's claims for appellate relief granted.

LAW AND ARGUMENT

I. The Trial Court Erred When it Determined that it Lacked Jurisdiction over Offenses That Were Derived Entirely from Evidence Discovered by Tribal Law Enforcement, on the Pascua Yaqui Reservation.

The Appellee attempts to argue, unsuccessfully, that the trial court based its dismissal upon a lack of probable cause as opposed to a lack of jurisdiction. This argument is based upon a misreading of the trial court record. As such, it carries no weight.

In its written ruling, the trial court indicated as follows:

IT IS ORDERED that cases [*sic*] shall be dismissed for good cause shown, *due to an illegal act by the state of Arizona Judge* that interfered with the jurisdiction of the Pascua Yaqui tribal court, that deprived the defendant of his rights under the Indian Civil Rights Act, the Pascua Yaqui Constitution, and the Pascua Yaqui Rules of Criminal Procedure.”

Tribe's Opening Brief, Exhibit 5 at p.4 (*emphasis added*).

In its oral ruling, the trial court stated that it felt that its perceived search warrant issue went primarily to the issue of jurisdiction, not probable cause. Opening Brief, Exhibit 4, at p.7. It also indicated that its position was based on the fact that the court — of its own accord and without holding an evidentiary hearing — had determined that the search warrant used to obtain BAC evidence that was not an element of the charged filed against the Appellee was unlawfully obtained. *Id.* at 10. Indeed, a review of the transcript from the initial hearing demonstrates that the trial court did not analyze probable cause, only jurisdiction. Any mention in the oral transcript regarding probable cause was done so only as an unsupported afterthought. While Appellee attempts to spin said afterthoughts into the primary basis for the court's ruling, such attempts are

misleading. Additionally, the Appellee's argument reflects a misunderstanding of the nature of probable cause, which will be discussed *infra.*

II. There Was Ample Evidence of Probable Cause Supporting Appellee's Charges Levied Against the Appellee.

In this case, there was ample evidence of probable cause for each of the offenses Appellee was charged with. Although Appellee attempts to argue otherwise, those attempts fail as they are based upon a flawed interpretation of probable cause, and of the nature and purpose of an initial hearing.

A. The Life of a criminal case under the Pascua Yaqui Tribal Code.

Criminal proceedings are governed by the Pascua Yaqui Tribal Code Rules of Criminal Procedure. 3 PYTC § 2-2-10. The goal of these rules is “to secure simplicity in procedure, fairness in administration, and the *elimination of unnecessary delay and expense*, and to protect the fundamental rights of the individual *while preserving the public welfare.*” 3 PYTC § 2-2-20(A) (*emphasis added*). When the Tribe wishes to prosecute an individual for a violation of the Pascua Yaqui Tribal Code, it must first file a written complaint with the trial court. 3 PYTC § 2-2-90(A). “A complaint is a written statement of *the essential facts constituting an offense*, signed by a law enforcement officer or a prosecutor... and charging that a named individual has committed a particular criminal offense.” *Id.* (*emphasis added*). Ultimately, “[i]f the complaint, or the complaint together with other signed statements, is sufficient to establish probable cause to believe that a crime has been committed by the person charged, the court shall issue a summons commanding the accused to appear before the court at a specified time and place to answer to the charge.” 3 PYTC § 2-2-90(D). While the Pascua Yaqui Tribal Code requires that a criminal complaint include a time and place of offense “as nearly as may be determined,” 3 PYTC § 2-2-90(A), as will be discussed more fully below, it also builds in an accepted “tolerance of imprecision” regarding this detail of form that “recognizes the immense potential for error or mistake early in the initiation of criminal proceedings.” *Baltazar*, CA-01-003, at p.4.

If a complaint is filed subsequent to a defendant's arrest, the defendant must be seen by a trial judge within twenty-four hours for an initial hearing. 3 PYTC § 2-2-170(A); 3 PYTC § 2-2-180. Initial hearings give the trial court a chance to advise a defendant of his rights and the charges against him, and, if necessary, appoint counsel. 3 PYTC § 2-2-180(B). It also provides the parties an opportunity to address release conditions in the event that an arraignment, or other pretrial hearing is set. 3 PYTC § 2-2-190; 3 PYTC § 2-2-200. An initial hearing must be held — and probable cause for a complaint found — before the trial court may set an arraignment. 3 PYTC § 2-2-230.⁴ Arraignment hearings afford a defendant an opportunity to enter a formal plea to the charges, set a trial date, and to be advised of important court deadlines and of their rights going forward. *Id.*

Based on the plain language of the Pascua Yaqui Tribal Code, the trial court's first, and main, opportunity to address the issue of whether a complaint is supported by probable cause is at the initial hearing within twenty-four hours of arrest. This short deadline means that investigation — whether it be by the prosecution or law enforcement — is still in its infancy. Oftentimes, police reports have yet to be written or finalized. Forensic lab tests, if any are appropriate, have yet to be completed, and witnesses may still need to be located for police interviews. As this Court noted in *Baltazar*, CA-01-003 at p.4:

“At this point in the criminal process, there has been insufficient time to determine the reliability and veracity of witnesses. The court's role [at an initial hearing] is to determine whether the basic information necessary to go forward with the criminal prosecution have been met, whether reasonable or probable cause exists that a crime has been committed, and whether the case involves an incident having occurred within the territorial boundaries and involving a person within the Tribe's jurisdiction.”

Accordingly, and as will be discussed more fully, *infra*, the Pascua Yaqui Tribal Code allows for a certain “tolerance of imprecision,” at the initial stages of the court process, reflecting

⁴ In practice, the Pascua Yaqui Trial Court grants defendants the opportunity to proceed directly to arraignment at the conclusion of the initial hearing, or to set an arraignment within ten days. However, the initial hearing must occur before an arraignment can be held.

an understanding that criminal cases can change over the course of continued investigation and witness interviews. *Id.* For this reason, disclosure deadlines are not set until *after* arraignment — the second hearing in the process. *See* 3 PYTC § 2-2-380 (prosecution’s initial disclosure due within ten days of arraignment); *also* 3 PYTC § 2-2-390 (defense initial disclosure due twenty days after arraignment, or within ten days of receipt of prosecution disclosure). More importantly, parties are not required to conduct a formal, complete trial of the evidence until later in the life of a case. *See, e.g., State ex rel. Mahoney v Stevens*, 79 Ariz. 298, 300-01, 288 P.2d 1077, 1078, 79 (1955) (“A preliminary hearing... is not a trial...nor is the determination thereof a final judgment. It is simply a course of procedure whereby a possible abuse of power may be prevented, and accused discharged or held to answer as the facts warrant.”) (*internal citations and quotations omitted*). Definition of “Probable Cause” and the Contents, Sufficiency and Purpose of a Criminal Complaint.

The chief purpose of a charging document is to provide a defendant with notice of the charges against him, thereby giving him an opportunity to “defend or plead his case adequately.” *United States v. Neill*, 166 F.3d 943, 947 (9th Cir. 1999) (*quoting United States v. James*, 980 F.2d 1314, 1316 (9th Cir. 1992)); *Hamling v. United States*, 418 U.S. 87, 117 (1974) (noting that an adequate charging document allows a defendant to establish a bar for future prosecutions for the same crime). While, in general, the “failure of an indictment to detail each *element* of the charged offense constitutes a fatal defect...a minor or technical deficiency in the indictment will not cause reversal of a conviction absent prejudice to the defendant.” *Neill*, 166 F.3d at 947. (*internal quotations and citations omitted, emphasis added*). Nevertheless, a charging document “need do little more than to track the language of the stated charged and state the time and place (in approximate terms) of the alleged crime.” *United States v. Alfonso*, 143 F.3d 772, 776-77 (2nd

Cir. 1998) (*quoting United States v. Stravroulakis*, 952 F.2d 686, 693 (2nd Cir. 1992)). Accordingly, one of the first questions that must be asked is whether an item listed in the charging document constitutes an element of the offense with which the defendant has been charged, or an element of form that has no bearing on the statutory elements of offense. This is largely a factual inquiry that depends on the circumstances of a particular case. The second issue that must be addressed, which is intimately intertwined with the question of statutory elements, is whether the charge levied against a defendant is supported by probable cause. This is inherently a question of law.

The phrase, “probable cause,” has been used as a requirement in a number of situations, including whether there is legal support to initially file charges against a defendant, to whether a suspect may be arrested without a warrant, to whether a court has the authority to issue a warrant. While all of these situations address probable cause in different contexts, the standard is simple at its core and regardless of context. “[P]robable cause [exists] when reasonably trustworthy information and circumstance would lead a person of reasonable caution to believe that a suspect has committed an offense.” *State v. Hoskins*, 199 Ariz. 127, 137-38, 14 P.3d 997, 1007-08 (Ariz. 2000). It is a concept that “deal[s] with probabilities.” *Brinegar v. United States*, 338 U.S. 160, 175 (1949). These probabilities “are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Id.*; *also Baltazar*, CA-01-003 at p.4 (indicating that “common sense and reason prevail over mere technicalities”) (*quoting United States v. Orbitz*, 358 F. Supp. 200 (D.Ct. Puerto Rico, 1973)).

When a court is determining whether probable cause exists to support charges, it is inappropriate to consider whether the prosecution will be able to prove the defendant’s guilt at a later trial beyond a reasonable doubt. *See Alfonso*, 143 F.3d at 776-77 (finding that the trial court

acted inappropriately when it made inferences from evidence provided at the probable cause stage of the criminal case to determine whether the prosecution could prove its case at trial); *see generally Baltazar*, CA-01-003 at p.3-5 (discussing how the facts of a case can change over the life of court proceedings).

Here, Appellee attempts to argue that there was no probable cause to support any of the charges levied against him. This is simply not the case. Furthermore, Appellee resorts to factual arguments that have not been developed at the trial court level, largely because the trial court indicated that it did not feel that further factual development or a formal motion to suppress was necessary. *See* Tribe's Opening Brief, Exhibit 4, p. 9-10. Probable cause is a low standard that is based on the unique facts and circumstances of each case. As discussed below, an analysis of the record demonstrates that there was probable cause for each of Appellee's charges.

1. Probable Cause for Driving Under the Influence Charge

Appellee was charged with committing one count of Driving Under the Influence- Actual physical Control, committed in violation of 8 PYTC § 6-4-10 and A.R.S. § 28-1381(A)(1). To be convicted of such an offense, the prosecution must show that a person drove or was "in actual physical control of a vehicle," that he was "under the influence of intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination of" those substances, and that he was "impaired to the *slightest degree*." A.R.S. § 28-1381(A)(1).

Here, officers received information that a reckless driver had hit a tree near a facility maintenance building. While officers were responding to the area, they received an additional report that the driver had abandoned his vehicle. This report included description of the driver's clothing, and his last known direction of travel. When Appellee was located, he approached an officer in an aggressive manner and smelled of intoxicants. When the officer asked him if he was

okay, Appellee indicated that he had fallen asleep in his car and needed to get away. When asked if he had been driving, Appellee indicated he had “fucked up.” Appellee also appeared to have bruises on his face. Given the totality of the circumstances, there was ample probable cause to believe that Appellee was under the influence of intoxicants which lead to him crashing and abandoning his vehicle. The fact that he hit a stationary tree hard enough to cause significant damage to his vehicle, which ultimately resulted in him abandoning his car, shows that he was impaired — at least — to the slightest degree.

In his brief, Appellee raises a number of questions which he feels show that probable cause was lacking. These arguments relate to areas that would normally be covered either in an evidentiary hearing, or via cross-examination at trial. The fact that Appellee appears to believe that a court’s probable cause determination can only be made after a full trial of the evidence demonstrates a lack of understanding both of probable cause and of the nature and purpose of an initial hearing.

2. Probable Cause for Leaving the Scene of an Accident Charge

Appellee was charged with one count of leaving the scene of an accident, committed in violation of 8 PYTC § 6-4-10 and A.R.S. 28-664(A)(1). Tribe’s Opening Brief, Exhibit 2. Specifically, he was alleged to have crashed into a tree without notifying the owner. Tribe’s Opening Brief, Exhibit 2. The Tribe concedes, upon review of Appellee’s brief, that the proper statutory citation for this charge should have been A.R.S. § 28-665(A)(1), and not 28-664(A)(1). However, the Tribe further notes that the text of the law the Appellee was alleged to have violated was correct, even if the statutory citation was not. Under A.R.S. § 28-665(A)(1), a person commits an offense if they drive a vehicle “involved in an accident resulting only in damage to fixtures or other property legally or on adjacent to a highway,” and if they fail to “[t]ake reasonable steps to locate and notify the owner or person in charge of the property....”

Based on the text of the law included in the complaint — which has been argued above — there was ample probable cause to believe that Appellee committed a property damage offense. Appellee was reported to police as driving recklessly and hit a tree. He was then reported as having abandoned his car after leaving the scene of the accident.. When found, he had facial bruising, smelled of alcohol, and indicated where his car was. The totality of the circumstances presented to the trial court supplied sufficient probable cause for the charge.

3. Probable Cause for Injury to Public Property Charge

Appellee was charged with one count of Injury to Public Property, committed in violation of 4 PYTC § 1-630. Under that statute, a person commits an offense if they “without proper authority use, injure, or misuse any public, Tribal, government or private property....” Specifically, he was charged with having hit a tree near a tribal maintenance building. Tribe’s Opening Brief, Exhibit 1. Under the text of the code, a showing of damage is not required. Using or misusing Tribal, governmental, or private property is enough. As discussed above, the facts demonstrate that Appellee was driving recklessly and impaired to the slightest degree, and hit a tree located by Tribal maintenance hard enough to cause significant damage to his own car. At the very least, this constitutes a use or misuse of Tribal property. Thus, the charge was supported by probable cause.

III. The Appellee’s Arguments Constitute a Dangerous Attempt to Diminish Tribal Sovereignty by Implying that a Tribe Does Not Have the Power to Enter Into Inter-Governmental Agreements, and by Implying that the Tribe is Not Entitled to Rely Upon the Principle of Comity.

As discussed extensively in the Tribe’s Opening Brief, the Pascua Yaqui Tribe has been vested with sovereignty. As a sovereign, it is, thus, entitled to enter into agreements with other sovereign nations as part of its inherent and granted sovereign powers. For instance, the Pascua Yaqui Tribe has entered into agreements — some of the aspects of which have been codified under Tribal and/or Arizona law — allowing Tribal law enforcement to utilize the greater resources of

Arizona law enforcement. As a sovereign, the Tribe is also entitled to rely upon the principle of comity, whereby any inter-governmental agreement it enters into allows all parties involved to rely on the words, spirit, and scope of their mutual contract. This is a natural, proper, and important aspect of Tribal sovereignty.

Appellee, however, takes the novel position of intimating that the Tribe is not allowed to enter into such agreements. More specifically, Appellee appears to be of the opinion that tribal law enforcement cannot, in good faith, rely upon any such agreements, or any search warrants obtained as a direct result of the Tribe's proper exercise of sovereignty. Appellee's position, if accurate, would obviate decades of federal Indian law cases and of comity principles, and would actually serve to diminish Tribal sovereignty.

IV. Appellee Ignores the Tribe's Argument that the Proper Remedy in this Case — Assuming *Arguendo* that a Violation Occurred Requiring Remedy — Would Have Been Preclusion After an Evidentiary Hearing.

Appellee's arguments ignore two important points in addition to the ones discussed above. First, although the Tribe in no way concedes that the search warrant issued in this case was improper, the evidence which served as the basis for probable cause in this case was obtained prior to the issuance of a search warrant. The only evidence obtained as a result of the search warrant was Appellee's blood, and the results of any chemical forensic testing that may have been conducted on the sample. If we assume, purely for argument's sake, that the search warrant issued in this case was unlawful, the proper remedy for such a violation under *Wong Sun v. United States*, 371 U.S. 471 (1963), would have been suppression of the blood sample and associated testing, not the dismissal of charges that were not associated with such evidence. Other than summarizing the Tribe's argument, Appellee utterly fails to address this issue. Indeed, Appellee has cited to no case law holding that preclusion is not the longstanding, legally appropriate remedy in such situations. Indeed, *Wong Sun* and its progeny clearly stand for the proposition that the rule of exclusion is the only appropriate remedy for search and seizure violations. *Id.* at 486; *see also e.g., United States*

v. *Shetler*, 665 F.3d 1150, 1157 (9th Cir. 2011); *State v. Rumsey*, 225 Ariz. 374, 378, 238 P.3d 642, 646 (Ct. App. 2010).

Second, and perhaps most importantly, Appellee fails to take into account the fact that caselaw regarding the issuance of search warrants often turns on specific factual issues elicited during an evidentiary hearing. Without such testimony, it is nearly impossible to determine whether an officer acted reasonably or in good faith. Appellee, throughout his brief, goes so far to indicate areas of inquiry or cross-examination that would be useful during such an evidentiary hearing. This is why the purpose of an initial hearing is mainly limited to determining whether probable cause exists. It is also why the Pascua Yaqui Tribal Code allows parties to file evidentiary motions *after arraignment*. 3 PYTC § 2-2-300. Here, it was improper for the trial court to dismiss the case based on what it held to be a search warrant violation, without first allowing the parties to brief or present testimony on said issue.

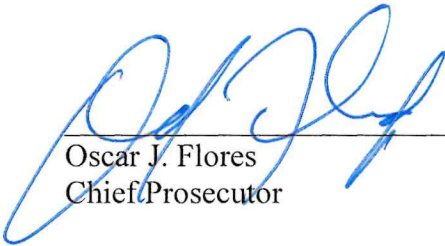
CONCLUSION AND REMEDY SOUGHT

The trial court erred when it dismissed the charges against the Defendant at the initial hearing based upon its belief that the Defendant's blood had been obtained pursuant to an impermissibly issued State court search warrant. Although the Appellant does not concede that the search warrant was invalid, if it had been, the proper remedy under the law would have involved suppression solely of the evidence obtained as a result of the search warrant. In this case, that would have meant that, at most, suppression of the Defendant's blood sample and any subsequent forensic analysis of it. Because the charges that the Defendant faced had nothing to do with the search, and because evidence serving as the basis of probable cause for those charges was obtained well before the warrant was issued, they should not have been dismissed.


Additionally, the trial court's ruling improperly determined that the State court's issuance of a search warrant constituted a violation of ICRA and served to negate the Tribal court's ability

to exercise criminal jurisdiction over the case. Accordingly, the Appellant respectfully requests that the trial court's order be reversed, and that the case be remanded to the trial court for further proceedings.

RESPECTFULLY submitted this 21st day of May, 2019



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:

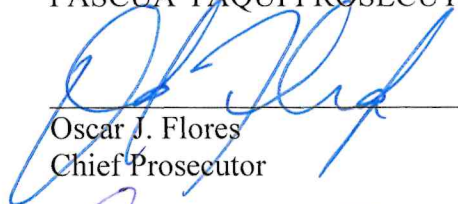
Glaucia Brannock
Glaucia.Brannock@pascuayaqui-nsn.gov
Pascua Yaqui Office of the Public Defender
7474 S. Camino de Oeste
Tucson, AZ 85757

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 21 day of May, 2019.

PASCUA YAQUI PROSECUTOR




Oscar J. Flores
Chief Prosecutor

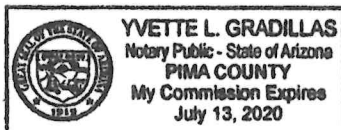


Coleen Thoene
Deputy Prosecutor

Sworn before me this 21st day of May, 2019



Notary Signature



IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,
Appellee,

vs.

JUSTIN THOMAS,
Appellant.

) APPELLATE CASE NO. CA-19-002

) PASCUA YAQUI TRIBAL COURT
) NO. CR-19-072/TR-19-007

APPELLEE'S RESPONSE BRIEF

PASCUA YAQUI PUBLIC DEFENDER
Glaucia Batista Brannock
Deputy Public Defender
PYT Bar #10348
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

TABLE OF CONTENTS

IN THE PASCUA YAQUI COURT OF APPEALS i

TABLE OF AUTHORITIES..... iv

I. JURISDICTIONAL STATEMENT..... 7

A. Tribe’s Jurisdiction.....7

B. Court of Appeals Jurisdiction.....7

I. ISSUES PRESENTED FOR REVIEW 7

II. STANDARD OF REVIEW 8

III. STATEMENT OF THE CASE..... 10

IV. SUMMARY OF ARGUMENT..... 13

V. ARGUMENT. 15

A. The trial court did not dismiss the case due to the lack of subject matter jurisdiction, as it dismissed the matter due to lack of probable cause, based on an illegal warrant issued by the state of Arizona judge for an on-reservation offense by a non-member Indian, thus violating Appellee’s constitutional rights under the law..... 15

B. The trial court correctly dismissed the entire case against Appellee due to the lack of probable cause based on an invalid warrant issued by a state of Arizona judge because according to tribal law, dismissal without prejudice for lack of probable cause is the appropriate remedy at the initial appearance stage..... 19

C. The probable cause affidavit lacked probable cause even to assume the defendant may have committed the offenses charged..... 21

1. *There is no probable cause to believe Mr. Thomas may have committed the offense of Driving Under the Influence-Actual Physical control.* 22

2. *There is no probable cause to believe Mr. Thomas may have committed the offense of Leaving the Scene of Accident of Unattended Vehicle.....* 27

3. *There is no probable cause to charge Mr. Thomas with Injury to Public Property.* 28

D. The Tribe is a sovereign Nation with its own law and it does not have to adopt foreign principles and laws when the PYT code provides its own clear rules..... 28

4. *The good faith exception to a defective search warrant lacking probable cause does not apply to this case* 31

VI. CONCLUSION 33

CERTIFICATE OF COMPLIANCE..... 35

CERTIFICATE OF SERVICE..... 36

TABLE OF AUTHORITIES

CASES

<i>Atkinson v. State</i> , 331 Md. 199, 627 A.2d 1019 (1993).....	23
<i>Becky v. Ohio</i> , 379 U.S. 89, 84 S.Ct. 223 (1964).....	21
<i>Bosteder v. City of Renton</i> , 155 Wn.2d 18,117 P.3d 316 (2005).....	31
<i>Brinegar v. United States</i> , 338 U.S. 160, 69 S.Ct. 1302 (1949).....	20
<i>Davis v. Superior Court</i> , 175 Cal.App.2d 8, 345 P.2d 513 (1959).....	18
<i>Hansen v. Garcia, Fletcher, Lund and McVean</i> , 148 Ariz. 205, 713 P.2d 1263 (App.1985).....	20
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983).....	8
<i>In re Dodd v. Boies</i> , 88 Ariz. 401, 357 P.2d 144 (1960).....	18
<i>Maryland v. Pringle</i> , 540 U.S. 366 (2003).....	14
<i>McClanahan v. State Tax Comm'n of Arizona</i> , 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973).....	15
<i>Michaelson v. Garr</i> , 234 Ariz. 542, 323 P.3d 1193 (Ariz. App. 2014).....	7
<i>Nevada v. Hicks</i> , 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).....	15
<i>Pennsylvania v. Mimms</i> , 434 U.S. 106, 98 S.Ct. 330 (1977).....	20
<i>PYT v. Baltazar</i> , CA-01-003 (PYT Ct. App. 2015).....	7
<i>PYT v. Bustamante</i> , CA-17-004 (PYT Ct. App. 2018).....	6, 7
<i>PYT v. Coleman</i> , CA-15-003 (Ct. of App. 2015).....	7
<i>State v. Emery</i> , 131 Ariz. 493, 642 P.2d 838 (1982).....	18
<i>State v. Howard</i> , 163 Ariz. 47, 785 P.2d 1235 (App. 1989).....	20
<i>State v. Nelson</i> , 129 Ariz. 582, 633 P.2d 391 (Ariz. 1991).....	22
<i>State v. Nelson</i> , 208 Ariz. 5, 90 P.3d 206 (App. 2004).....	29
<i>State v. Vaughn</i> , 12 Ariz.App. 442, 471 P.2d 744 (1970).....	20

<i>State v. Zaragoza</i> , 221 Ariz. 49, 52, ¶ 12, 209 P.3d 629, 632 (2009).....	23
<i>State v. Zavala</i> , 136 Ariz. 356, 666 P.2d 456 (1983).....	25
<i>Terry v. Ohio</i> , 392 U.S. 1, 21, 88 S.Ct. 1868, 1880 (1968)	20, 21
<i>U.S. v. Lara</i> , 541 U.S. 193 (2004).....	12, 17
<i>U.S. v. Wheeler</i> , 435 U.S. 313 (1978)	12, 17
<i>United States v. Brignoni-Ponce</i> , 442 U.S. 873, 95 S.Ct. 2574 (1975).....	21
<i>United States v. Hodson</i> , 543 F.3d 286 (6th Cir. 2008).....	31
<i>United States v. Leon</i> , 468 U.S. 897 (1984).....	30, 31
<i>United States v. Mazurie</i> , 419 U.S. 544, 95 S.Ct. 710, 42 L.ed. 2d 706 (1975).....	15
<i>United States v. Taylor</i> , 119 F.3d 625, 629 (8th Cir.1997).....	31
v. 6, 7, 8, 9, 12, 14, 15, 17, 18, 20, 21, 22, 23, 25, 29, 30, 31	
<i>Washington v. Confederated Tribes of the Colville Indian Reservation</i> , 447 U.S.	
134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980).....	15
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed.	
2d 665 (1980).....	14, 15
<i>Williams v. Lee</i> , 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959).....	15
<i>Wong Sun v. United States</i> , 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) .	20
<i>Wright v. Terrel</i> , 162 Wn.2d 192, 170 P.3d 570 (2007).....	31

PYT STATUTES

3 PYTC § 1-1-10	6
3 PYTC § 1-1-10 (B).....	6
1 PYTC § 2-30.....	8, 18, 19, 30
2 PYTC § 2-8-20	28
2 PYTC § 2-8-90	28
25 U.S.C § 1301	12

3 PYTC § 2-2-180	19
3 PYTC § 2-2-300	13, 19
3 PYTC § 2-2-40	16, 29
3 PYTC § 2-2-90	18
3PYTC § 2-2-180	13
4 PYTC § 1-630.....	27
8 PYTC § 6-4-10	22, 26
PYT Const. Art. 1	14
PYTC §2-2-390	16

FEDERAL STATUTES

25 U.S.C. § 1302	14
25 U.S.C. §1301	17

ARIZONA STATUTES

A.R.S. § 13-3874	28
A.R.S. § 13-3883	22
A.R.S. § 13-3914	17
A.R.S. § 28-1381	22
A.R.S. § 28-1381(A)(1).....	22
A.R.S. § 28-664.....	26

I. JURISDICTIONAL STATEMENT

A. Tribe's Jurisdiction

The Pascua Yaqui Tribe Court had jurisdiction under 3 PYTC § 1-1-10 because the Tribe charged Mr. Thomas, an enrolled member of Tohono O'odham Nation, with three offenses enumerated in the Tribe's Code. The charges allegedly occurred within the boundaries of the Pascua Yaqui Reservation. (*See* 3 PYTC § 1-1-10 (B)).

B. Court of Appeals Jurisdiction

The Court of Appeals has jurisdiction to review this case as the Tribe has the ability to appeal dismissal of a complaint prior to trial, whether dismissal is with or without prejudice. *See* *PYT v. Bustamante*, CA-17-004 (PYT Ct. App. 2018); *In the Matter of Alvarez*, CA-17-008 (PYT Ct. App. 2018); and *PYT v. Baltazar*, CA-01-003 (PYT Ct. App. 2001).

I. ISSUES PRESENTED FOR REVIEW

Did the Pascua Yaqui Tribe abuse its discretion in dismissing the case against Mr. Thomas due to lack of probable cause, based on invalid warrant issued by State of Arizona judge for an on-reservation offense by a non-member Indian?

Did the Pascua Yaqui Tribe err in dismissing the case against Mr. Thomas due to the lack of probable cause based on invalid warrant issued by State of Arizona Judge for an on-reservation offense by a non-member Indian?

II. STANDARD OF REVIEW

The standard of review is for an abuse of discretion. *PYT v. Bustamante*, CA-17-004 (PYT Ct. App. 2018); *In the Matter of Alvarez*, CA-17-008 (PYT Ct. App. 2018); and *PYT v. Baltazar*, CA-01-003 (PYT Ct. App. 2015). In *PYT v. Coleman*, this Court held, “[t]he 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.” CA-15-003 (Ct. of App. 2015) (citing to *Michaelson v. Garr*, 234 Ariz. 542, 544, 323 P.3d 1193, 1195 (Ariz. App. 2014)).

The Tribe requests this Court to review this case *de novo*, indicating the issues involve questions of law. Specifically, the Tribe asserts this case involves questions of suppression of the evidence, sufficient probable cause to proceed with the charges, and the Tribe’s sovereignty, in which in its view are questions of first impression under this jurisdiction. However, the issue here is whether the trial court made an error of law when it dismissed this case without prejudice when it found lack of probable cause due to a warrant illegally obtained by Pascua Yaqui Police, Officer Adame, in violation of Pascua Yaqui Laws. In reaching its decision, the trial court found Mr. Thomas constitutional rights were violated.

Mr. Thomas disagrees this is a case of first impression as similar issues were addressed in *Bustamante*, *Baltazar*, and *In the Matter of Alvarez*, CA-17-008 (PYT

Ct. App. 2018). In those cases, the appellants challenged the sufficiency information in the complaints to establish probable cause to proceed. While the Tribe cites to cases from the Ninth and Second Circuits where *de novo* review was granted, those cases involved questions of interpretation of law when applied to specific facts and circumstances.¹ The issues in those cases differ from this case. The Pascua Yaqui Tribal laws in question provide bright-line rules independent of case-by-case factual analysis. *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”).

Additionally, the Supreme Court of the United States has cautioned appellate courts from reviewing *de novo* a trial court’s probable cause finding. *See Illinois v. Gates*, 462 U.S. 213, 236 (1983) (“...we have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate’s ‘determination of **probable cause** should be paid great deference by reviewing courts.’”). Therefore, this Court should review the trial court’s decision for an abuse of discretion standard.

¹ The Tribe indicated the Court in *PYT v. Miranda* held “this Court may look at Arizona or Federal authority in the absence of controlling Pascua Yaqui law.” This Court did not so hold. This Court rather *found* that decisions of the Arizona and United States Supreme Courts are highly persuasive “particularly when they reflect the majority, or unanimous, legal opinion regarding construction of a disputed term or phrase substantially similar to the terms or phrase under examination.” CA-08-015, p. 22 (PYT Ct. App. 2009). Nevertheless, this case is irrelevant here as the plain language of applicable laws are undisputed.

If the Court is inclined to review this case *de novo*, such review would allow this Court to evaluate the affidavit and the complaint.² Whether this Court reviews the trial court's dismissal without prejudice for an abuse of discretion or *de novo*, the trial court correctly dismissed the case granting leave for the Tribe to re-file the complaint. As such, this Court should affirm the trial court's decision.

III. STATEMENT OF THE CASE

The following information was obtained in Appellant's Exhibit A (Criminal Complaint and Probable Cause Affidavit). Mr. Thomas makes no admissions as to any elements of the charges.

Appellant is the Pascua Yaqui Tribe Office of the Prosecutor (Tribe) and Appellee is Justin Thomas (Mr. Thomas). On January 3, 2019, the Tribe charged Mr. Thomas with Driving under the Influence, Leaving the Scene of the Accident, and Injury to Public Property.

The trial court dismissed Mr. Thomas' case due to lack of probable cause, based on invalid warrant issued by State of Arizona judge for an on-reservation offense by a non-member Indian. The Tribe appealed.

On January 2, 2019, Officer Adame responded to a call made at an unknown time reporting reckless driving that hit a tree near the Facility Maintenance

² This was contemplated in *PYT v. Gonzalez*, CA-07-017 (2007). *Gonzalez* is not precedent, as this decision is designated as an "Order" rather than an "Opinion." ³ PYTC § 2-3-240.

building inside the reservation. Officer Adame described the conditions of the vehicle indicating it might be the vehicle the call reported it had hit a tree. Officer Adame indicated the license plate of the vehicle, but he did not run the plate for the owner of the vehicle. Officer Adame did not find any occupants in the car or nowhere near the car, and after searching the area for several minutes, Officer Adame expanded his search for areas inside the neighborhood. Officer Adame eventually found a male subject wearing a black sweater, gray sweatpants, and with a blue bandana around his neck, which is commonly seen in the reservation. Officer Adame indicated the male subject clothes matched the description of the clothes described in the phone call. The description given by the caller is unknown.

Officer Adame attempted to illicit information from Mr. Thomas to connect him to the abandoned vehicle several times. Those attempts turned to be unsuccessful. According to Officer Adame, Mr. Thomas indicated his car was “over there,” while ‘there’ was never determined; that he fell asleep in his car as he just needed to get away; and that he fucked up but everything is ok. Mr. Thomas appeared to be confused, but he never admitted to be driving the abandoned vehicle.

Officer Adame smelled odor of intoxicants emanating from Mr. Thomas. At that point, Officer Adame arrested Mr. Thomas, failed to read Mr. Thomas *Miranda* rights and took him to the patrol vehicle. Officer Adame never read

Mr. Thomas *Miranda* rights. Officer Adame continued to ask questions to Mr. Thomas while he was in custody. Mr. Thomas expressly refused the field sobriety test, the breathalyzer test, and blood test. Nevertheless, Officer Adame transported Mr. Thomas without his consent, without notifying an attorney, and without a search warrant to the Department of Public Safety (DPS).

Officer Adame then decided to seek a search warrant with an elected judge from Pima County Justice Court, Judge Vince Roberts. Officer Adame explained the search warrant for Mr. Thomas who was then compelled to cooperate with the blood draw. Mr. Thomas refused to sign the forms for the blood drawn as he continually refused to the test.

On January 3, 2019, the trial court held a preliminary hearing. Although the Tribe and the trial court were afforded time to review the criminal complaint and probable cause affidavit, defense counsel received the paperwork at the time of the hearing.

The Tribe argued that the appropriate remedy in this circumstance would be a motion to suppress by Mr. Thomas and defense counsel indicated that a dismissal without prejudice would be appropriate. (Tribe's Exhibit 4, p. 6, 18-23; p. 7, 15-18). The trial court dismissed the criminal complaint without prejudice because Officer Adame violated Mr. Thomas constitutional rights as protected under this jurisdiction. It was very clear that despite the violation of Mr. Thomas constitutional

rights, the affidavit lacked probable cause to proceed. There are several mistakes in the complaint and thus dismissal without prejudice granting leave to the Tribe to re-file the complaint was the appropriate remedy. This appeal followed.

IV. SUMMARY OF ARGUMENT

The trial court dismissed this case without prejudice because Officer Adame acted contrary to PYT laws and violated Mr. Thomas constitutional rights that he was entitled to while impairing the Pascua Yaqui Tribe's ability to create its own laws. The complaint thus lacked probable cause to charge Mr. Thomas with the offenses alleged.

The Tribe argued the wrong issues in its opening brief, as it erroneously claims the trial court dismissed the criminal complaint for finding lack of subject matter jurisdiction due to the issuance of a search warrant issue by a State of Arizona judge. However, in its order the Tribe correctly noted it had subject matter jurisdiction because the offense allegedly occurred within the boundaries of reservation by a non-member Indian. *See* Defendant's Exhibit A, p. 1, 20-23 ("The court notes that the Pascua Yaqui Tribal court has jurisdiction over non-member Indians for offenses committed within the Pascua Yaqui Reservation.

25 U.S.C § 1301(2), ("Duro Fix"), *U.S. v. Wheeler*, 435 U.S. 313 (1978), *U.S. v. Lara*, 541 U.S. 193 (2004)").

The Tribe next argued that Officer Adame's actions to transport Mr. Thomas outside the reservation to seek a search warrant with a State of Arizona judge were reasonable, but if assumed it were not, the appropriate remedy was for Mr. Thomas to file a motion to suppress the evidence he thought were inadmissible. The Tribe's argument is incorrect, as PYT laws clearly states a motion to suppress is appropriate at any time after the arraignment. *See* 3 PYTC § 2-2-300(A) and (B) ("At any time after the *arraignment*, either party may" file a "motion to suppress evidence which was illegally seized, or which was the product of the fruits of an illegal search or seizure."). In this case, the trial court correctly dismissed the complaint without prejudice with leave for the Tribe to file a probable cause affidavit that complies with PYT laws. *See* 3PYTC § 2-2-180 (A) ("At the initial appearance ... the court shall, ...first determine whether or not probable cause exists to continue to detain and prosecute the accused, and if not, shall order the accused released from custody immediately.")

Finally, the Tribe claims the offenses it charged Mr. Thomas require the presentation of information independent from securing a search warrant to probe intoxication, and thus there was probable cause to proceed with the complaint. This claim is misleading. The complaint lacked probable cause, as it fell short from objectively presenting essential elements for each offense brought against

Mr. Thomas. Whether probable cause exists for any offense “depends on the totality of the circumstances.” *Maryland v. Pringle*, 540 U.S. 366 (2003).

V. ARGUMENT

- A. The trial court did not dismiss the case due to the lack of subject matter jurisdiction, as it dismissed the matter due to lack of probable cause, based on an illegal warrant issued by the state of Arizona judge for an on-reservation offense by a non-member Indian, thus violating Appellee’s constitutional rights under the law.**

Indian tribes — as sovereign nations — historically have inherent jurisdictional power over everything occurring within their territory. Tribal courts are courts of general jurisdiction, which continue to have broad criminal jurisdictions. Any analysis of tribal criminal jurisdiction should begin with this sovereign authority and determine whether there has been any way in which this broad sovereign authority had been reduced. *See* 25 U.S.C. 1301.

The Indian Civil Rights Act and the Pascua Yaqui Constitution provide that the Pascua Yaqui Tribe in exercising its powers of self-government shall not deny to any person the equal protection of its laws or deprive a person of liberty without due process of law. 25 U.S.C. § 1302(8); PYT Const. Art. 1, § 1(b) & (h).

Tribal sovereignty may prevent the exertion of state authority in Indian country. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S. Ct. 2578, 2583, 65 L. Ed. 2d 665 (1980) (citing *United States v. Mazurie*, 419 U.S.

544, 557, 95 S.Ct. 710, 42 L.ed. 2d 706 (1975) (internal quotations omitted).

Because of this sovereignty, states may exert their authority over reservation lands only where doing so does not undermine tribal self-governance by “infring[ing] ‘on the right of the reservation Indians to make their own laws and be ruled by them.’” *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172, 93 S. Ct. 1257, 1262, 36 L. Ed. 2d 129 (1973) (quoting *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959)).

"[T]he principle that Indians have the right to make their own laws and be governed by them requires 'an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.'" *Nevada v. Hicks*, 533 U.S. 353, 362, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980)). In the context of a state's execution of criminal process on reservation lands, this accommodation requires consideration of the jurisdiction associated with the *location of the criminal act and any governing tribal criminal procedures. Id.* at 361-65 (emphasis added). "Indian tribes retain 'attributes of sovereignty over both their members and their territory.'" *Bracker*, 448 U.S. at 142 (quoting *Mazurie*, 419 U.S. 544 at 557).

According to the Pascua Yaqui Criminal Code, 3 PYTC § 2-2-40 regarding search warrants,

A search warrant is a written order, **signed by a Tribal Court judge**, and directed to a tribal law enforcement officer ordering him or her to conduct a search and to seize items of property specified in the warrant, or to search for a person for whom an arrest warrant is outstanding.

3 PYTC § 2-2-40 (emphasis added).

The Tribal court also noted that there is a process under this reservation to obtain blood draw warrant for the on-reservation alleged defendant. The police officer must follow the appropriate procedure. The trial court noted,

“[i]f the Pascua Yaqui arresting officer wanted to obtain a blood draw warrant for the on-reservation defendant, he could have followed the process enunciated in the Pascua Yaqui Code of Criminal procedure, 3 PYTC § 2-2-390 (a)(6) & (F), asked for the assistance of the prosecutor in developing a form for a warrant request and supporting affidavit(s), which permits the **Tribal Court Judge** to order that defendant provide the prosecutor with samples of ‘hair, blood, saliva, urine, or other specified materials which involve no unreasonable intrusion of his or her body’”

Appellee’s Exhibit A, p. 3, 17-20.

Under the section cited by the trial court, the defendant is also entitled to the presence of counsel at the taking of evidence. *See* 3 PYTC §2-2-390(a)(9) (“Defendant shall be entitled to the presence of counsel at the taking of such

evidence.”). Mr. Thomas was never even informed he was *entitled* to the presence of counsel.

PYT laws are very clear as to its proceedings for search warrant, and such proceedings differ from Arizona law. According to A.R.S. § 13-3914, “the magistrate may examine on oath the person or persons seeking the warrant....” Therefore, Arizona proceedings differs from PYT law where the prosecutor must assist the officer in issuing a probable cause affidavit for the search. In Arizona, the police officer can provide a probable cause affidavit for the magistrate’s examination. If Officer Adame ever sought a search warrant in the reservation, he should be aware he must do so with the assistance of the prosecutor.

In this case, the trial court did not dismiss the case due to the lack of subject matter jurisdiction, as the Tribe incorrectly claims. The trial court specifically noted that “the Pascua Yaqui Tribal court has jurisdiction over non-member Indians for offenses committed within the Pascua Yaqui Reservation.” Citing 25 U.S.C. §1301 (2), (“Duro Fix”)³, *U.S. v. Wheeler*, 435 U.S. 313 (1978), *U.S. v. Lara*, 541 U.S. 193 (2004). The trial court rather dismissed this matter without prejudice because “the defendant’s civil rights were violated by an illegal warrant issued by a state court judge without authority to take such an action.” *See*

³ The “Duro Fix” doctrine, codified as an amendment to the Indian Civil Rights Act, was enacted by Congress in 1990 restored the inherent tribal power to try nonmember Indians.

Appellee' A, p.4, 14-16. As the law clearly states above, the trial court was correct. Mr. Thomas' rights were violated and the matter was correctly dismissed. *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").

B. The trial court correctly dismissed the entire case against Appellee due to the lack of probable cause based on an invalid warrant issued by a state of Arizona judge because according to tribal law, dismissal without prejudice for lack of probable cause is the appropriate remedy at the initial appearance stage.

Under Tribal law, all criminal complaints shall be initiated by the filing of a complaint in the Tribal Court by the prosecutor. 3 PYTC § 2-2-90(A). In order to proceed with a criminal case, the tribal judge must find probable cause in the statements made in the complaint. *Id.* at (D). In other words, the prosecutor bears the burden of demonstrating that probable cause exists that the defendant may have committed the offense alleged and the Tribal Judge may find probable cause or lack thereof.

In Arizona, probable cause is defined as "such a state of facts as would lead a man of ordinary caution or prudence to believe and consciously entertain a strong suspicion of guilt." *State v. Emery*, 131 Ariz. 493, 506, 642 P.2d 838, 851 (1982) (internal quotations omitted); *See also In re Dodd v. Boies*, 88 Ariz. 401, 357 P.2d 144 (1960); *Davis v. Superior Court*, 175 Cal.App.2d 8, 345 P.2d 513 (1959);

1 PYTC § 2-30 (“Whenever the meaning of a term used in this Code is not clear on its face or in the context of the Code, such term shall have the meaning given to it by the laws of the State of Arizona, unless such meaning would undermine the underlying principles and purposes of this Code.”).

If the trial court finds lack of probable cause to proceed with the case and prosecute the accused, the trial court “shall order the accused released from custody immediately.” 3 PYTC § 2-2-180 (A). If there is probable cause to proceed and later disclosure of evidence uncovers evidence not admissible at trial, “[a]t any time after the *arraignment*, either party may” file “(B)(1) [m]otions to suppress evidence which was illegally seized, or which was the product of the fruits of an illegal search or seizure.” 3 PYTC § 2-2-300 (A) and (B)(1) (emphasis added). Therefore, it is clear that under the plain language of the PYT code, the Tribe cannot shift the burden of proof on the defendant to fix a defective probable cause affidavit in order to proceed with the case. The Tribe had another remedy in this case, by filing the charges again with an effective probable cause affidavit. Therefore, the trial court correctly dismissed the case without prejudice to allow the Tribe to refile the criminal complaint.

C. The probable cause affidavit lacked probable cause even to assume the defendant may have committed the offenses charged.

Probable cause is something less than the proof needed to convict and something more than suspicions. *Hansen v. Garcia, Fletcher, Lund and McVean*, 148 Ariz. 205, 713 P.2d 1263 (App.1985); *State v. Vaughn*, 12 Ariz.App. 442, 471 P.2d 744 (1970); *State v. Howard*, 163 Ariz. 47, 50, 785 P.2d 1235, 1238 (App. 1989)

“It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion[.]” *Wong Sun v. United States*, 371 U.S. 471, 479, 83 S. Ct. 407, 413, 9 L. Ed. 2d 441 (1963) The probable cause standard exist to prevent the use and abuse of the power to arrest, and the relaxation of the probable cause standards would “leave law-abiding citizens at the mercy of the officer’s whim or caprice.” *Id.* quoting *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311 (1949).

A warrantless investigative detention is only lawful if the officer is “able to point specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant... [the officer’s] intrusion” upon the person’s Fourth Amendment rights.” *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880 (1968).

The Supreme Court of the United States in *Pennsylvania v. Mimms* set for the test for Fourth Amendment violations in this fashion:

The touchstone of our analysis under the Fourth Amendment is always ‘the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.’ *Terry* at 19. Reasonableness, of course, depends ‘on a balance between the public interest, and the individual’s right to personal security free from arbitrary interference by law officers.’ *United States v. Brignoni-Ponce*, 442 U.S. 873, 878, 95 S.Ct. 2574 (1975).

434 U.S. 106, 108-09, 98 S.Ct. 330, 332 (1977).

As argued below, Officer Adame’s affidavit lacked probable cause to proceed with the charges the Tribe filed, despite the illegal blood draw from Mr. Thomas.

1. ***There is no probable cause to believe Mr. Thomas may have committed the offense of Driving under the Influence-Actual Physical control.***

An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause and substitutes instead the far less reliable procedure on an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. *Becky v. Ohio*, 379 U.S. 89, 84 S.Ct. 223 (1964). According to *Becky*, the court must weigh the reasons for the arrest with great care. There must be a separation of the information the officer had at the time of the arrest with what he learned after the arrest. To allow the prosecutor to blur the lines between the two will render the term probable cause meaningless.

In TR-19-007, the Tribe charged Appellee with count 1, Driving under the Influence-Actual Physical Control, pursuant to 8 PYTC § 6-4-10^{4/}

A.R.S. § 28-1381(A)(1), to wit: *Defendant drove a vehicle while intoxicated.*

Pursuant to A.R.S. § 28-1381(A)(1),

“It is unlawful for a person to drive or be in actual physical control of a vehicle in this state under any of the following circumstances: (1) [w]hile under the influence of intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substances if the person is impaired to the slightest degree.”

Pursuant to A.R.S. § 13-3883, “[a] peace officer, without a warrant, may arrest a person if the officer has probable cause to believe: (2) A misdemeanor has been committed in the officer's presence and probable cause to believe the person to be arrested has committed the offense.” A.R.S. § 13-3883(A)(2).

“Probable cause to effect an arrest exist where the arresting officer has reasonably trustworthy information or facts and circumstances which are sufficient to lead a reasonable man to believe an offense is being or has been committed and that the person to be arrested is committing or did commit it.” *State v. Nelson*, 129 Ariz. 582, 585, 633 P.2d 391, 395 (Ariz. 1991). Therefore, for a misdemeanor — such as in the present case — probable cause consists of two

⁴ 8 PYTC § 6-4-10: “Except as set forth in this Chapter, the Tribal Council of the Pascua Yaqui Tribe adopts as tribal law, the traffic laws of the State of Arizona as set forth in Title 28 of the Arizona Revised Statutes and any current and future amendments....”

elements: that a crime was committed in the officer's presence and that the person to be arrested has committed the offense. At the very least, identification of a suspect is required.

When prosecuting an individual for driving or being in actual physical control of vehicle while under the influence,

“factors to be considered include, but are not limited to: whether vehicle was running; whether ignition was on; where ignition key was located; where and in what position driver was found **in vehicle**; whether vehicle's headlights were on; where vehicle was stopped; whether driver had voluntarily pulled off road; time of day; weather conditions; whether heater or air conditioner was on; and whether windows were up or down.”

State v. Zaragoza, 221 Ariz. 49, 52, ¶ 12, 209 P.3d 629, 632 (2009) (citing *Atkinson v. State*, 331 Md. 199, 627 A.2d 1019, 1027(1993)).

Officer Adame's investigation fell short of factors usually observed in order to find probable cause.

First, the court cannot assume, without more information, that Officer Adame had reasonably trustworthy information or facts and circumstances sufficient to lead a reasonable man to believe an offense was committed by Mr. Thomas. Officer Adame responded to a call at approximately 2.05pm. There is no information of the time the call was made or who made the phone call, and thus, it cannot simply assume the information was trustworthy without more. It is true Officer Adame observed a car with signs of collision but it is impossible to

determine whether it was reckless driving or simply an accident. It is also impossible to show in Officer Adame's affidavit that Mr. Thomas was the driver or was in actual physical control of the vehicle, since Officer Adame failed to call the individual who reported the event to identify the suspect.

Second, when Officer Adame arrived at the scene, he *did not see any occupants* in the vehicle. He searched the area and was unable to find the driver, so he expanded the search and went on a fishing expedition to find a suspect. Officer Adame eventually found a man wearing a black sweater, gray sweatpants, and had a blue bandana around his neck, a clothing commonly seen at the Tribe. Appellee never made statements indicating he was the driver of the abandoned vehicle. According to Officer Adame, Appellee indicated, "that his car was over there." Based on his affidavit, it is impossible to figure out where "there" is. It is unreasonable to assume Mr. Thomas and Officer Adame were talking about the same vehicle, as Mr. Thomas was nowhere near the abandoned vehicle, as based in his own admissions, Officer Adame had to expand his search for a suspect.

Next, Officer Adame was unable to place Mr. Thomas in the driver seat of the abandoned vehicle. The affidavit indicated Mr. Thomas stated that he "fell asleep in the car and told [Officer Adame] that he just needed to get away." The Tribe in its brief alleges, without specifying, that Mr. Thomas "made statements that placed him in the car's driver seat at the time of the accident." Tribe's

Opening Brief, p. 23. This statement is false. Even assuming by a great stretch of imagination that the above statement placed Mr. Thomas in the driver's seat of a vehicle, in which it did not, there is no specification of time, place, or even which vehicle Mr. Thomas was referring to. Importantly, Mr. Thomas never indicated he was driving at all.

Finally, Officer Adame smelled alcohol in Mr. Thomas and arrested him. In Arizona, a motorist who is impaired but not driving a motor vehicle, or who is not in actual physical control of a motor vehicle should not be found guilty of a DUI. *See State v. Zavala*, 136 Ariz. 356, 666 P.2d 456 (1983); *State v. Zaragoza*, 221 Ariz. 49, 209 P.3d 629 (2009). The statute is very clear on the elements necessary to even assume a DUI occurred. The Tribe needs to show Mr. Thomas was driving or in actual physical control of the vehicle, in which it did not, and that the driver was impaired while driving, in which it did not show as well. Mr. Thomas was not found in or near the vehicle, there was never a positive identification that he was the driver, and Mr. Thomas never admitted he was driving. Even if assumed Mr. Thomas was intoxicated, Officer Adame cannot show whether Mr. Thomas was intoxicated before the alleged incident or after. According to the statute, the Tribe must be able to show Mr. Thomas was intoxicated while driving.

The Tribe implies there was sufficient evidence to establish probable cause for Officer Adame to believe there was a need to draw Mr. Thomas' blood.

However, Officer Adame's Affidavit states otherwise. Officer Adame arrested a random person walking on the streets not near the abandoned vehicle without a witness identifying Mr. Thomas as the driver. While Officer Adame indicated, Mr. Thomas smelled alcohol that just means Officer Adame found a random person walking on the streets with an alcohol odor. This is not enough for a DUI charge.

2. *There is no probable cause to believe Mr. Thomas may have committed the offense of Leaving the Scene of Accident of Unattended Vehicle*

In TR-19-007, the Tribe charged Mr. Thomas with count two, Leaving the scene of Accident of Unattended Vehicle, pursuant to 8 PYTC § 6-4-10/ A.R.S. § 28-664(A)(1), to wit: *Defendant crashed into a tree and did not notify the owner.* Pursuant to A.R.S. § 28-664(A)(1), “[t]he driver of a vehicle that *collides with a vehicle* that is unattended shall immediately: (1) Stop.” (emphasis added).

The Tribe elected to prove that Mr. Thomas hit a tree and did not notify the owner, however, the Tribe charged Mr. Thomas with the wrong statute. The A.R.S. § 28-664 states the duty of an individual driving a vehicle striking an unattended vehicle. In order to succeed under this statute, the Tribe must prove that Mr. Thomas collided with another vehicle that was unattended while failing to notify the owner of the unattended vehicle either by locating the owner of the vehicle or by leaving a note with his information. A.R.S. § 28-664 (A)(a) and (b).

By any stretch of imagination, a tree does not constitute a vehicle, and therefore, the Tribe lacked probable cause to proceed with this charge.

3. ***There is no probable cause to charge Mr. Thomas with Injury to Public Property.***

In CR-19-072, the Tribe charged Mr. Thomas with count one, Injury to Public Property, pursuant to 4 PYTC § 1-630, to wit: *Defendant hit a tree near the PY Facility Maintenance building*. Pursuant to the statute, “[a]ny person who shall without authority use, injure, or misuse any public, Tribal, government or private property shall be deemed guilty of an offense.” 4 PYTC § 1-630.

Nowhere in the probable cause affidavit does Officer Adame indicate the tree was damaged, nor does the Tribe in its criminal complaint indicate an injury occurred. The “to wit: *Defendant hit a tree near the PY Facility Maintenance building*,” which is the fact the Tribe must prove to succeed with its case, is not enough to proceed with an Injury to Public Property charge. Simply stating that the call to 911 indicating somebody hit the tree and no information on whether the tree was damaged is not enough to proceed under this charge. Therefore, the Officer Adame’s affidavit lacked probable cause to proceed with this charge.

D. The Tribe is a sovereign Nation with its own law and it does not have to adopt foreign principles and laws when the PYT code provides its own clear rules.

In its opening brief the Tribe claims that “[t]he fact that a State court judge may rely in good faith upon the information and probable cause statements issues by

Tribal law enforcement also means that Tribal law enforcement should, as a matter of public policy and comity, be able to rely in good faith upon warrants issued by a State court judge.” Tribe’s Opening Brief, p. 29. This claim is incorrect.

The Tribe cited to 2 PYTC § 2-8-90(A)(1) and A.R.S. § 13-3874 indicated that those statutes consider PYPD officers *de facto* law enforcement officers for the State of Arizona while engaged in their official duties and that a State judge may accept a PYPD officer’s affidavit of probable cause supporting the issuance of a warrant. This argument is misleading and ignores PYT Rules of Criminal Proceedings. 2 PYTC § 2-8-90(A)(1) does not consider PYPD officers law enforcement officers for the State of Arizona. Rather, this statute highlights authorized programs the PYPD officers are allowed to participate, including “employees certified by the Tribal Court and the State of Arizona through the Arizona Peace Officer Standard of Training.” The statute simply provides guidelines for the organization of the Pascua Yaqui Police Department. *See* 2 PYTC § 2-8-20(A) (The purpose of the Police Department is to “[p]rovide Law Enforcement Services and Investigations of all Tribal, State and Federal laws in conjunction with other Public Safety Departments to provide services *to the community.*”) (emphasis added).

Pursuant to A.R.S. § 13-3874, a Tribal police officer who is *certified* by Arizona Peace Officer Standards and Training Board (AZ POST) is authorized to

possess and exercise all law enforcement powers of peace officers in this state. It is clear that Arizona law authorizes PYPD officers to act as a police for possible criminal offenses occurring **outside** the reservation, as Arizona has no authority inside this reservation. *See State v. Nelson*, 208 Ariz. 5, 90 P.3d 206 (App. 2004) (holding that law enforcement officer who was employed by governing body of Indian tribe and certified by Arizona Peace Officer Standards and Training Board (AZ POST) was expressly authorized by statute to conduct brief stop and detention of vehicle off the reservation.”)⁵ (emphasis added).

In the present case, the statutes the Tribe cites are irrelevant to this case because the alleged offense occurred inside the Pascua Yaqui Tribe boundaries, under the Pascua Yaqui jurisdictions and allegedly by an Indian. There is no need to adopt Arizona law when this Tribe, as a sovereign nation, has statutes addressing such concerns.

Additionally, there is no information in evidence that Officer Adame is certified under AZ POST, and even if he was, PYT laws still requires a warrant to be issued by a Tribal Court judge. *See* 3 PYTC § 2-2-40 (A search warrant is an order signed by a Tribal Court judge).

⁵ In *State v. Nelson, supra*, the state court noted that while cross-deputization agreements and hot pursuit are the most common methods of granting authority to tribal officers, other methods, like certification by AZ POST, provide an equal and distinct manner for the grant of such authority.

“When there is a conflict between one provision of this Code which treats a subject in a general way and another provision which treats subject in a specific manner, the specific provision will prevail.” 1 PYTC § 2-30.

4. ***The good faith exception to a defective search warrant lacking probable cause does not apply to this case***

The Tribe in its opening brief argued that the good faith exception articulated in *United States v. Leon* and adopted by the State of Arizona is appropriate exception here to justify Officer Adame’s unreasonable and illegal actions. 468 U.S. 897 (1984).

In *Leon*, the officer prepared an affidavit that arguably provided probable cause to search the location specified in the warrant. Despite the subsequent determination that the warrant was not supported by probable cause, the drugs and incriminating evidence seized pursuant to the warrant were not suppressed because the court believed the officer’s reliance on the magistrate’s determination that probable cause existed was objectively reasonable.

In *Leon*, the court established four circumstances in which the good faith exception does *not* apply:

- (1) The judge issuing the warrant was misled by statements made by the affiant that were false or made in reckless disregard for the truth;

- (2) The issuing judge wholly abandoned his or her judicial role;
- (3) The affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or
- (4) *The warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid.*

Leon, 468 U.S. at 923 (See also, *United States v. Taylor*, 119 F.3d 625, 629 (8th Cir.1997); *United States v. Hodson*, 543 F.3d 286, 291 (6th Cir. 2008).

The reasonable reliance argued in *Leon* pertains to circumstances when an officer was granted a search warrant by a detached magistrate and relies in the magistrate's expertise to find probable cause. However, this is not the case here. No reasonable PYPD officer could reasonably believe he or she could go outside of this jurisdiction to seek a search warrant for a crime occurring within the boundaries of this reservation by an Indian and reasonably rely on a finding of probable cause. This is common sense; a police officer in Arizona would not go to a New Mexico judge to request a search warrant for a crime that allegedly occurred in Arizona. A warrant issued without authority is inherently void and cannot authorize a search. *Bosteder v. City of Renton*, 155 Wn.2d 18, 29, 117 P.3d 316 (2005), *superseded by statute on other grounds*, *Wright v. Terrel*, 162 Wn.2d 192, 170 P.3d 570 (2007).

It is reasonable to presume, however, that Officer Adame understands he is a PYPD and works for a sovereign nation. Just as defendants cannot claim ignorance

of the law, Officer Adame cannot claim he did not know he could not ask for a search warrant from a state court judge.

Moreover, as the trial court correctly pointed out, “Vince Roberts is not a Pascua Yaqui Court Judge, he is not a Pascua Yaqui pro tem judge, and he has not been given authority by the Pascua Yaqui Tribal Council to issue search warrants for defendants arrested on the Pascua Yaqui Reservation.” Appellee’s Exhibit A, p.2, 26-27. In fact, Judge Vince Roberts is an elected Justice of the Peace, a retired Arizona Law Enforcement, with no legal training in federal or tribal law. He is not even license under the PYT Bar. *See* Appellee’s exhibit B.⁶ Officer Adame’s actions infringed on the right of the Pascua Yaqui Tribe to make its own laws and be governed by it. Arizona does not have subject matter jurisdiction or personal jurisdiction over Mr. Thomas.

VI. CONCLUSION

The Tribe in its opening brief attempts to set a dangerous precedent where the reservation’s sovereignty to create its own law would be jeopardized. The relief requested ignores PYT established laws and precedents while it would afford the Tribe the opportunity to file criminal complaints with affidavits lacking probable cause to proceed with a criminal case and that violates this reservation clear

⁶ The Tribe claims Judge Vince Roberts is a Superior Court judge, which is not true.

established laws. The Tribe has a remedy of refilling the criminal complaint with appropriate affidavit in compliance with PYT laws.

For the reasons stated above, Counsel requests this Court dismiss this appeal, as the trial court did not err in dismissing the complaint without prejudice granting leave for refilling. Alternatively, Mr. Thomas requests this Court to affirm the trial court's decision, as it correctly ruled on the issue.

RESPECTFULLY SUBMITTED: May 5, 2019

/s/Glaucia B. Brannock
GLAUCIA BATISTA BRANNOCK
Pascua Yaqui Tribe Public Defender
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

Attorney for Defendant-Appellee

CERTIFICATE OF COMPLIANCE

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

PASCUA YAQUI PUBLIC DEFENDER

/s/Glauria B. Brannock

GLAUCIA BATISTA BRANNOCK

Pascua Yaqui Tribe Public Defender

4725 W. Calle Tetakusim, Building B

Tucson, AZ 85757

(520) 883-5013

Attorney for Defendant-Appellee

CERTIFICATE OF SERVICE

On May 5, 2019, the original and three copies of the *Appellee's Response Brief* were filed and conforming copies 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

Thomas Justin, Appellee

PASCUA YAQUI PUBLIC DEFENDER

/s/Glaucia B. Brannock
GLAUCIA BATISTA BRANNOCK
Pascua Yaqui Tribe Public Defender
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

Attorney for Defendant-Appellee

APPELLEE'S
EXHIBIT A

1 IN THE PASCUA YAQUI TRIBAL COURT

2 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

3 PASCUA YAQUI TRIBE
4 Plaintiff,

VS.

5 THOMAS, JUSTIN PAUL
6 Defendant.

7) CASE NO. CR-19-072
8) TR-19-007
9) ORDER DISMISSING
10) CASES DUE TO LACK OF PROBABLE
11) CAUSE, BASED ON INVALID
12) WARRANT ISSUED
13) BY STATE OF ARIZONA JUDGE
14) FOR AN ON-RESERVATION OFFENSE
15) BY A NON-MEMBER INDIAN

16 On January 3, 2019, the defendant's counsel, Glaucia Brannock, and her client, in
17 custody, appeared for an initial hearing. Kendrick Wilson appeared for the Tribe and Tracy
18 Nielsen appeared for pre-trial services.

19 Subject matter jurisdiction may be raised at any time, even by the court itself. The
20 court read the defendant his rights, reviewed the respective complaints which allege that the
21 defendant, an enrolled member of the Tohono O'odham Nation, was driving while intoxicated
22 on the Pascua Yaqui Reservation, crashed into a tree, and then fled the scene of the accident.
23 The court asked the prosecutor why the Pascua Yaqui officer had transported the defendant off-
24 reservation for an involuntary blood draw, and why the officer would have obtained a search
25 warrant for the blood draw from a State Court judge, Vince Roberts, instead of seeking a
26 warrant from a **Tribal Court Judge**, as is required by the Indian Civil Rights Act, Pascua Yaqui
27 Constitution, and the Pascua Yaqui Criminal Procedures Code. The court notes that the Pascua
28 Yaqui Tribal court has jurisdiction over non-member Indians for offenses committed within the
Pascua Yaqui Reservation. 25 U.S.C. § 1301(2), ("Duro Fix"), *U.S. v. Wheeler*, 435 U.S. 313
(1978), *U.S. v. Lara*, 541 U.S. 193 (2004).

Mr. Wilson indicated that any illegal search issue as to the State Court Judge issuing the
blood draw warrant should more appropriately be addressed by the court in a motion to suppress
filed by the defendant's counsel, and that there were enough other facts alleged in each of the
respective complaints for the court to maintain its jurisdiction and find probable cause in the
criminal cases.

1
2 **Legal Authority Regarding Rights to Privacy and Search and Seizure**

3 The Indian Civil Rights Act and the Pascua Yaqui Constitution provide that the Pascua
4 Yaqui Tribe in exercising its powers of self-government shall not deny to any person the equal
5 protection of its laws or deprive a person of liberty without due process of law. 25 U.S.C. §
6 1302(8), PYT Const. Art.1, § 1(b) & (h). Because the U.S. Constitution does not apply to
7 Tribes, *Talton v. Mayes*, 163 U.S. 376 (1896), the Indian Civil Rights Act provides broad
8 Constitutional-like rights to American Indians in tribal court proceedings. *Santa Clara Pueblo*
9 *v. Martinez*, 436 U.S. 49 (1978).

10 The Fourth Amendment of the United States Constitution provides that it is the right of
11 people to be secure in their homes against unreasonable searches and seizures, and such rights
12 apply to Indian reservations through the Indian Civil Rights Act. 25 U.S.C. § 1302(2). The
13 limitations imposed by 25 U.S.C. § 1302(2) are identical to those imposed by the 4th
14 Amendment. *United States v. Strong*, 778 F.2d 13939, 1397 (9th Cir. 1985).

15 The officer's probable cause statement indicated that he:

16 . . . transported Justin to the Department of Public Safety main station where I went
17 over the process of the DUI investigation. He asked me if he could give me a breath
18 sample instead of blood. I told him I would like to have both. Justin then told me that
19 he was not doing shit or words to that effect. I clarified with him and asked him if he
20 was refusing to give me a blood sample, he replied by saying, fuck you, or words to that
21 effect.

22 The defendant's counsel indicated that the defendant refused to consent to any tests. The
23 officer's probable cause statement then relates:

24 **I completed a DUI blood search warrant and presented the Honorable Vince**
25 **Roberts with my probable cause. The honorable judge found enough cause to issue**
26 **the warrant for the blood draw. I explained the warrant to Justin and Trooper Morts**
27 **#7507, drew two gray top tubes. . . .After the blood draw, . . .I asked him [Justin] if he**
28 **wanted to sign the forms, he refused. . . .I transported Justin back to the Pascua**
Yaqui Detention Center. I placed the blood in to the evidence refrigerator with
instructions and request for scientific tests on the blood.

Vince Roberts is not a Pascua Yaqui Court Judge, he is not a Pascua Yaqui pro tem judge, and
he has not been given authority by the Pascua Yaqui Tribal Council to issue warrants for
defendants arrested on the Pascua Yaqui Reservation. Judge Roberts action undermines the

1 ability of the Pascua Yaqui Court to issue its own warrants for on reservation crimes, and such
2 action plainly interferes with the powers of self-government conferred upon the Pascua Yaqui
3 Tribe and exercised through the Pascua Yaqui Tribal Court. Such State Court warrants to be
4 executed on the reservation would subject a dispute arising on the reservation among
5 reservation Indians to a forum other than the one they have established for themselves. It
6 impermissibly infringes on the rights of reservation Indians to make their own laws and be
7 governed by them.

8 The Pascua Yaqui Criminal Code describes the process for a warrant, and it clearly sets
9 out who has proper authority to issue search warrants issued on the Pascua Yaqui reservation:

10 A search warrant is a written order, **signed by a Tribal Court judge**, and directed to a
11 tribal law enforcement officer ordering him or her to conduct a search and to seize items
12 of property specified in the warrant, or to search for a person for whom an arrest warrant
13 is outstanding.

14 3 PYTC § 2-2-40, **Search Warrants**. (Emphasis added).

15 Additionally, the Pascua Yaqui Criminal Procedure code sets out the process for
16 obtaining blood samples from defendants arrested on the Pascua Yaqui reservation. If the
17 Pascua Yaqui arresting officer wanted to obtain a blood draw warrant for the on-reservation
18 defendant, he could have followed the process enunciated in the Pascua Yaqui Code of Criminal
19 Procedure, 3 PYTC § 2-2-390(a)(6)&(F), asked for the assistance of the prosecutor in
20 developing a form for a warrant request and supporting affidavit(s), which permits the **Tribal
21 Court Judge** to order that defendant provide the prosecutor with samples of "hair, blood, saliva,
22 urine, or other specified materials which involve no unreasonable intrusion of his or her body."
23 This he failed to do. Because the State of Arizona judge had no authority vested in him by the
24 Pascua Yaqui Tribal Council to issue such a warrant for an on-reservation offense committed
25 by a non-member Indian, Mr. Thomas's Constitutional rights were violated.

26 In this case, by allowing a state court judge to interfere with the defendant's rights under
27 the Pascua Yaqui Code, the defendant was deprived of his Civil rights under the Indian Civil
28 Rights Act, the Pascua Yaqui Constitution and the Criminal Code, when he was transported
from his detention cell on the Pascua Yaqui Reservation and transported to Tucson, where he
became subject to a foreign court's judge, who had no authority to act on behalf of the Pascua
Yaqui Tribe. But for the officer transporting the defendant across the Pascua Yaqui reservation

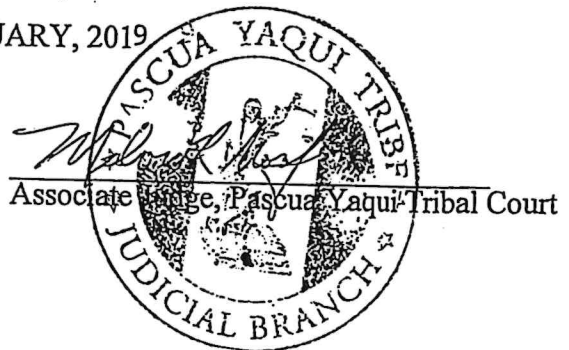
1 boundary, the defendant would have never appeared in front of the state court Judge. The
2 Tohono O'odham Nation citizen, as a non-member Indian, was subject to the authority of the
3 Tribal Court, and its Constitutional protections. He was entitled to the protections of Pascua
4 Yaqui law and not the State of Arizona's laws. The State Court judge's act of issuing a warrant
5 to draw blood against a non-member Indian for an alleged crime committed on the Pascua
6 Yaqui reservation was an ultra vires act, one that was beyond the scope of authority limite3d to
7 his territorial jurisdiction of the State of Arizona. The State Judge's action infringed on the right
8 of the Pascua Yaqui Tribe to make their own laws and be governed by them. See *Williams v.*
9 *Lee*, 358 U.S. 217 (1959). States have no power to regulate the affairs of Indians on reservation.
10 Congress has supported efforts to encourage tribal governments to become stronger and more
11 highly organized. Additionally, the state of Arizona has an express disclaimer of jurisdiction
12 over Indian Lands in its Enabling Act. § 20, 36 Stat.569, and in Art XX, of its Constitution,
13 Cf. *Draper v. United States*, 164 U.S. 240.

14 Just as in illegal search cases, where the fruits of the poisonous tree are found to be
15 inadmissible due to the taint of an illegal search, so too, in this case, the defendant's civil rights
16 were violated by an illegal warrant issued by a state court judge without authority to take such
17 an action. As such, a dismissal should be granted without prejudice.

18 **IT IS ORDERED** that cases shall be dismissed for good cause shown, due to an illegal
19 act by the state of Arizona Judge that interfered with the jurisdiction of the Pascua Yaqui tribal
20 court, that deprived the defendant of his rights under the Indian Civil Rights Act, the Pascua
21 Yaqui Constitution, and the Pascua Yaqui Rules of Criminal Procedure. The case shall be
22 dismissed without prejudice to re-filing.

23 **The defendant shall be released immediately.**

24 **SO ORDERED THIS 3rd DAY OF JANUARY, 2019**



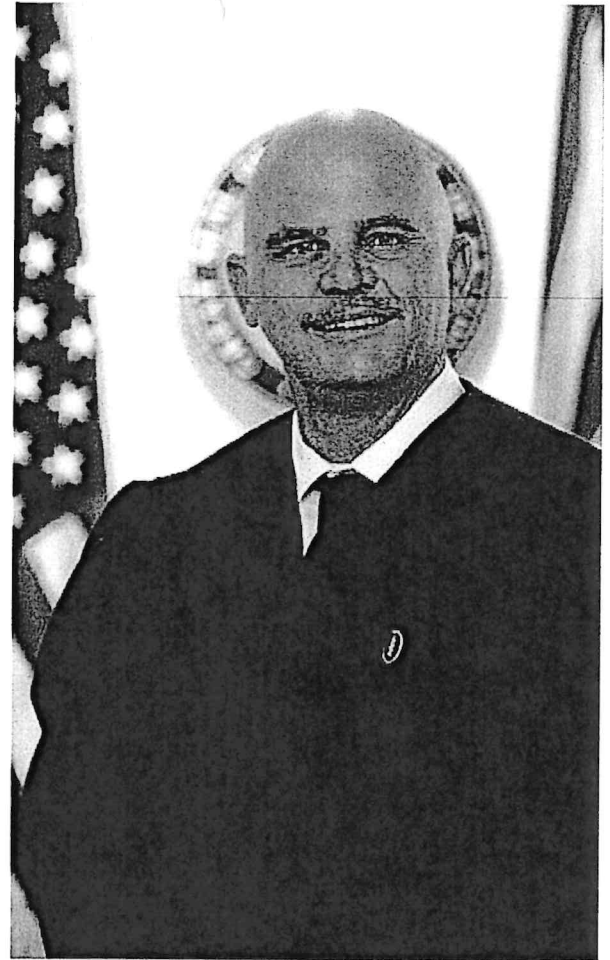
25 cc: Date: 01-03-19
26 Tribe Defendant Counsel

27 [Signature]
Clerk

APPELLEE'S
EXHIBIT B

Hon. Vince Roberts

Precinct 10



About the Judge

Vince Roberts is the newly elected Justice of the Peace for Precinct Ten. Judge Roberts is a retired Arizona Law Enforcement Professional with 26 years of service. During his Law Enforcement career, he served as a Police Officer, Motor Officer/Sergeant, DUI Officer, Undercover Narcotics Officer, Field Training Officer, and conducted internal affairs investigations. During his Law Enforcement career, he was the recipient of the Meritotious Service Award, Life Saving Award, and was named Officer of the Year.

Judge Roberts also served three terms as the elected Pima County Constable for Precinct Ten. During this time, he served as the chairman of the Constable Ethics Standards and Training Board. He was named Arizona Constable of the Year in 2008, 2010, 2012 and was named the National Constable of the Year in 2015. He has also served our community as a 4H volunteer and leader as well as youth sports volunteer, coach and mentor. He is also a past board member and president of a parent teacher organization and is active in several civic organizations.

Online Services	Case Types	Helpful Links	Resources	Contact Us	Hours of Operation
Home	Civil Traffic	Jury Duty	Forms	240 N. Stone Ave.	Monday - Friday

IN THE PASCUA YAQUI COURT OF APPEALS
PVT COA *19/04/05 PM04:26
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

PASCUA YAQUI TRIBE,
OFFICE OF THE PROSECUTOR

Petitioner

vs.

Hon. Melvin Stoof, Judge, Pascua Yaqui Tribal
Court,

JUSTIN PAUL THOMAS,

APPELLATE CASE NO: CA-19-002

TRIBAL COURT CASE NO:

CR-19-072/ TR-19-007

PETITIONER/APPELLANT'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) 876-6251
Oscar.J.Flores@pascuayaqui-nsn.gov
Coleen.Thoene@pascuayaqui-nsn.gov
Attorneys for the Pascua Yaqui Tribe

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

REQUEST FOR ORAL ARGUMENT..... 6

STATEMENT OF JURISDICTION..... 7

STANDARD OF REVIEW 9

ISSUES PRESENTED FOR REVIEW..... 11

STATEMENT OF THE CASE..... 12

 I. FACTS AND PROCEEDINGS BELOW: 12

 II. SUMMARY OF THE ARGUMENT 17

LAW AND ARGUMENT 19

I. **THE TRIAL COURT ERRED WHEN IT DECIDED THE TRIBE HAD NO SUBJECT MATTER JURISDICTION DURING AN INITIAL HEARING OVER CRIMINAL OFFENSES COMMITTED BY A NON-MEMBER INDIAN OCCURRING WITHIN THE TERRITORIAL BOUNDARIES OF THE RESERVATION SOLELY AS THE RESULT OF A PERCEIVED UNLAWFUL ISSUANCE OF A STATE COURT SEARCH WARRANT.**19

II. **THE TRIAL COURT ERRED IN DETERMINING THAT DISMISSAL OF THE ENTIRE CASE AGAINST THE DEFENDANT WAS AN APPROPRIATE REMEDY FOR A PERCEIVED UNLAWFUL BLOOD DRAW, WHEN THE CHARGES THAT WERE DISMISSED REQUIRED NO PROOF OF THE DEFENDANT’S BAC, AND WHERE THE APPROPRIATE REMEDY FOR AN ILLEGAL SEARCH WOULD HAVE BEEN THE SUPPRESSION OF EVIDENCE OBTAINED DURING THAT SEARCH.**..... 20

A. **THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DISMISSED THE CASE BASED ON A LACK OF SUBJECT MATTER JURISDICTION WHERE AN APPROPRIATE REMEDY FOR AN ILLEGAL SEARCH, IF ONE HAD BEEN PERFORMED BY THE TRIBE OFF-RESERVATION, WOULD BE GRANTING A MOTION TO SUPPRESS THE ILLEGALLY SEIZED EVIDENCE.**
 21

III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DECIDED THE TRIBE HAD NO SUBJECT MATTER JURISDICTION OVER THE DEFENDANT’S CRIMINAL CASE BASED ON THE MISTAKEN ASSUMPTION THAT A STATE COURT JUDGE’S ISSUANCE OF A WARRANT VIOLATED ICRA AND DIMINISHED TRIBAL SOVEREIGNTY..... 24

A. THE TRIBE HAD SUBJECT MATTER JURISDICTION OVER THE DEFENDANT..... 24

B. ALTHOUGH THE APPELLANT IN NO WAY CONCEDES THAT AN ICRA VIOLATION OCCURRED, IF THERE WAS SUCH A VIOLATION, IT WOULD NOT DIMINISH THE TRIBE’S CRIMINAL JURISDICTION POWERS, NOR WOULD IT WARRANT DISMISSAL OF THE COMPLAINT AGAINST THE DEFENDANT..... 26

IV. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT BLOOD OBTAINED PURSUANT TO A STATE COURT WARRANT CONSTITUTED AN ILLEGAL SEARCH WHEN THE PRINCIPLE OF COMITY SUPPORTING AN INTERGOVERNMENTAL AGREEMENT BETWEEN THE TRIBE AND STATE DPS ALLOWED TRIBAL LAW ENFORCEMENT TO RELY ON THE WARRANT IN GOOD FAITH..... 28

CONCLUSION AND REMEDY SOUGHT..... 31

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

Authority	Page Number
Pascua Yaqui Cases	
<i>In the Matter of Alvarez</i> , CA-17-008 (PYT Ct. App. June 19, 2018).....	7
<i>Pascua Yaqui Tribe v. Montana</i> , CA-12-001 (PYT Ct. App. July 23, 2013).....	7
<i>PYT v. Baltazar</i> , CA-01-003 (PYT Ct. App., Sept 12, 2001).....	7,9
<i>PYT v. Bustamante</i> , CA-17-004 (PYT Ct. App. July 3, 2017).....	7,9
<i>PYT v. Coleman</i> , CA-15-003, p.2 (PYT Ct. App. Nov. 17, 2015).....	9
<i>PYT v. Miranda</i> , CA-08-015 (PYT Ct. App. 2009).....	9, 21
<i>PYT v. San Juan Southern Paiute Tribe and Mary Lou Boone, et al.</i> CA-09-005, CA-09-004 (PYT Ct. App., September 22, 2010)	25
Pascua Yaqui Tribal Code	
2 PYTC § 2-2-40	16
2 PYTC § 2-8-10	19
2 PYTC § 2-8-90	29
3 PYTC § 1-1-20	24, 26
Art. 4, Pascua Yaqui Const.	19
Art. I, § 1, Pascua Yaqui Const.	7, 19
Art. VI, §1, Pascua Yaqui Const	19
Art. VII, §1, Pascua Yaqui Const.....	19
Art. VIII, Pascua Yaqui Const	7,19
Pascua Yaqui Rules	
3 PYTC § 2-2-300	17, 21
3 PYTC § 2-2-90	21
3 PYTC § 2-3-110	12
3 PYTC § 2-3-180	6
3 PYTC § 2-3-260	6
3 PYTC § 2-3-90	7
Federal Cases	
<i>Alvarado v. Table Mt. Rancheria</i> , 509 F.3d 1008, 1016 (9th Cir. 2007).....	27
<i>Evans v. McKay</i> , 869 F.2d 1341 (9th Cir. 1989).....	27
<i>Hilton v. Guyot</i> , 159 U.S. 113 (1895)	28
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	27
<i>Santa Clara Pueblo</i> , 436 U.S.	27
<i>Selam v. Warm Springs Tribal Corr. Facility</i> , 134 F.3d 948, 950 (9 th Cir. 1998).....	27
<i>Talton v. Mayes</i> , 163 U.S. 376 (1896)	26
<i>United States v. Adrian</i> , 978 F.2d 486 (9 th Cir. 1992)	9
<i>United States v. Alfonso</i> , 143 F.3d 772 (2 nd . Cir. 1998).....	9,24
<i>United States v. Gonzalez-Roque</i> , 301 F.3d 39 (2d Cir. 2002)	10
<i>United States v. Lara</i> , 541 U.S. 193 (2004)	25

<i>United States v. Leon</i> , 468 U.S. 897, 897 (1984).....	29, 30
<i>United States v. Linick</i> , 195 F.3d 538 (9 th Cir. 1999).....	9
<i>United States v. McIntosh</i> , 833 F.3d 1163, (9 th Cir. 2016)	24
<i>United States v. Neyens</i> , 831 F.2d 156 (7 th Cir. 1987).....	24
<i>United States v. Spillone</i> , 879 F.2d 514 (9 th Cir. 1989)	9
<i>United States v. Wheeler</i> , 453 U.S. 313 (1978).....	25
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963)	6, 21

Federal Statutes

25 U.S.C. § 1301	24
25 U.S.C. § 1302	19, 27
25 U.S.C. § 1302(2)	16
42 U.S.C. § 1983	27
Indian Civil Rights Act of 1968 (ICRA).....	6, 16

Arizona Cases

<i>State v. Bolt</i> , 142 Ariz. 260 (1984).....	22, 29
<i>State v. Coats</i> , 165 Ariz. 154, 156 (Ct. App. 1990)	30

Arizona Statutes

A.R.S. § 13-3915.....	29
A.R.S. § 13-3916.....	29
A.R.S. § 28-1381.....	20, 22
A.R.S. § 28-1381(A)(1).....	7
A.R.S. § 28-664.....	22
A.R.S. § 28-664(A)(1).....	7, 12, 14, 20
A.R.S. 13-1382.....	22

Arizona Rules

A.R.S. § 28-1381(A)(1).....	12, 14
-----------------------------	--------

Miscellaneous Authorities

United States government by Public Law 95-375 (92 Stat. 712).....	19
---	----

REQUEST FOR ORAL ARGUMENT

This post-dismissal appeal involves questions of first impression in this jurisdiction, specifically: 1) whether, in the event that a trial court believes that certain evidence was illegally obtained, dismissal of charges that are unrelated to the perceived illegal seizure is an appropriate sanction under *Wong Sun v. United States*, 371 U.S. 471 (1963), and its progeny; and, 2) whether the trial court correctly determined that the blood draw was an illegal search that violated the Indian Civil Rights Act of 1968 (ICRA) and deprived the Pascua Yaqui Tribal court of subject matter jurisdiction over the criminal offense despite the intergovernmental agreement between the Tribe and Arizona and related principle of comity. 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 is in the interests of justice. *See* 3 PYTC § 2-3-180; 3 PYTC § 2-3-260(C)(6) & (D)

STATEMENT OF JURISDICTION

The Pascua Yaqui Tribe Constitution, Art. VIII, Sec. 5, asserts that the Court of Appeals “shall have the power of judicial review of all civil and criminal matters appealed from the Pascua Yaqui Tribal Court.” The Pascua Yaqui Tribal Rules of Appellate Procedure also grant parties the right to appeal in most, but not all, circumstances. *See generally* 3 PYTC § 2-3-30, *et seq.* For instance, the Tribe does not have the right to appeal a judgment acquitting a defendant in a criminal case. 3 PYTC § 2-3-90(G); Art. I, § 1(c), Pascua Yaqui Const.; *Pascua Yaqui Tribe v. Montana*, CA-12-001 (PYT Ct. App. July 23, 2013). The Tribe may, however, appeal a dismissal. *See In the Matter of Alvarez*, CA-17-008 (PYT Ct. App. June 19, 2018) (dismissal with prejudice of a juvenile complaint inappropriate when based on an incorrect interpretation of statutory timelines). *See also* *PYT v. Bustamante*, CA-17-004 (PYT Ct. App. July 3, 2017) (dismissal without prejudice appropriate when prosecution failed to include complete statutory language and references in its complaint); *PYT v. Baltazar*, CA-01-003 (PYT Ct. App., Sept 12, 2001) (dismissal with prejudice based on technical defects in complaint as to time and location of offense inappropriate).

The Defendant/Appellee is an enrolled member of the Tohono O’odham Tribe and was charged with committing the following offenses while on the Pascua Yaqui Reservation: Injury to Public Property, in violation of 4 PYTC § 1-630, Driving Under the Influence – Actual Physical Control, in violation of 8 PYTC § 6-4-10/A.R.S. § 28-1381(A)(1), and Leaving the Scene of Accident of Unattended Vehicle, in violation of 8 PYTC § 6-4-10/A.R.S. § 28-664(A)(1). The trial court dismissed the complaint against the Defendant without prejudice at the initial hearing for lack of probable cause based on the fact that it believed that a State-issued warrant for the Defendant’s blood was invalid. Specifically, the court indicated that — because the State court judge issued the warrant for an act occurring on the reservation — an illegal search occurred, and

the Tribe's subject matter jurisdiction over the Tribal criminal matter was, thereby, diminished.

Because the Tribe is appealing this dismissal, this Court has jurisdiction over the appeal.

STANDARD OF REVIEW

The dismissal of a criminal case “without prejudice is reviewed for an abuse of discretion.” *Bustamante*, CA-17-004, p.2 (citing *United States v. Adrian*, 978 F.2d 486, 493 (9th Cir. 1992), *overruled on other grounds by United States v. Grace*, 526 F.3d 499 (9th Cir. 2008); *Baltazar*, CA-01-003, at pp. 3-6 (applying same abuse of discretion standard of review to complaints with prejudice). 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.” *PYT v. Coleman*, CA-15-003, p.2 (PYT Ct. App. Nov. 17, 2015).

The Pascua Yaqui Court of Appeals has never addressed whether the use of a *de novo* standard of review in this context would be more appropriate than using an “abuse of discretion” standard. This is a question that has, however, been addressed by Federal Courts of Appeals in the Ninth and Second Circuits. *See PYT v. Miranda*, CA-08-015, p.22 (PYT Ct. App. 2009) (holding that this Court may look to Arizona or Federal authority in the absence of controlling Pascua Yaqui law). Both circuits have held that, where the dismissal of a charging document involves either pure questions of law, or mixed questions of law and fact, *de novo* review is appropriate. *See United States v. Linick*, 195 F.3d 538, 541 (9th Cir. 1999) (*de novo* review used in light of defendant’s constitutional challenge to the charges listed in the indictment); *United States v. Alfonso*, 143 F.3d 772, 776 (2d Cir. 1998) (*de novo* review where trial court “looked beyond the fact of the indictment” and “dr[ew] inferences as to the proof” it believed the prosecution would produce at trial to establish jurisdiction); *United States v. Spillone*, 879 F.2d 514, 520 (9th Cir. 1989) (*de novo* review appropriate when dismissal based on mixed questions of law and fact regarding alleged prosecutorial misconduct before the grand jury); *United States v.*

Gonzalez-Roque, 301 F.3d 39, 44 (2d Cir. 2002) (*de novo* review of dismissal involving mixed questions of law and fact relating to defendant's prior deportation proceeding).

As will be discussed in more detail, *infra*, suppression of evidence determinations often involve very specific factual inquiries relating to the justification for the search or seizure, the reasonableness of police actions, and whether the evidence obtained resulted in the collection of other evidence that would not have been located without conducting the first search or seizure. The factors considered when determining whether an alleged illegal search mandated suppression of evidence unrelated to the charges filed against a defendant is a purely legal question. Likewise, whether a search warrant granted by another sovereign pursuant to an intergovernmental agreement destroys a Tribal court's subject matter jurisdiction over a criminal case is a pure question of law. Because these questions are intimately intertwined, *de novo* review is appropriate. Regardless of whether this Court employs a "*de novo*" or an "abuse of discretion" standard of review, it is clear that the trial court erred in dismissing the complaints against the Defendant.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err when it dismissed the case against the Defendant when the only charges involved were unrelated to the evidence the court felt was illegally obtained, and when the appropriate sanction in that circumstance would simply be suppression of the illegally obtained evidence?

2. Did the trial court err when it determined, without an evidentiary hearing, that a State court warrant was issued illegally and without jurisdiction, and that the warrant and resulting search negated the Tribal sovereignty and subject matter jurisdiction over Tribal criminal charges unrelated to the warrant?

STATEMENT OF THE CASE

I. Facts¹ and Proceedings Below:

The Defendant/Appellee, Justin Paul Thomas, is a resident and enrolled member of the Tohono O’odham Nation. On January 3, 2019, the Defendant was charged with one count each of Injury to Public Property in violation of 4 PYTC § 1-630, Driving Under the Influence – Actual Physical Control in violation of 8 PYTC § 6-4-10/A.R.S. § 28-1381(A)(1), and Leaving the Scene of Accident of Unattended Vehicle in violation of 8 PYTC § 6-4-10/A.R.S. § 28-664(A)(1). The charges stem from an investigation that occurred on January 2, 2019.

On January 2, 2019, tribal police officers responded to a report of a collision by a male driver at or near the 4700 Block of W. Calle Torim, a residential neighborhood located within the physical boundaries of the Pascua Yaqui Reservation. Upon their arrival, they saw signs of a vehicle having collided with a tree. *Exhibit 1* at 3. A trail of fluids led from the collision site to a nearby abandoned Toyota Camry four-door sedan. *Id.* Officers were able to see obvious damage to the fender, door, wheel well, and right tire along the Toyota’s passenger side. *Id.* The driver of the Toyota was not in the vehicle when officers arrived. *Id.* However, an officer observed a male subject walking west one-half mile away near the 5100 block of West Calle Tarook. *Id.* The subject matched the description of the driver that had been provided to officers. *Id.* The subject was later identified as the Defendant, Justin Paul Thomas.

¹ Because the trial court dismissed the case for lack of jurisdiction at the initial hearing, it is unknown whether the parties contest the facts and circumstances as set forth in the complaint and supporting probable cause affidavit. Unless otherwise stated, the factual summary herein is taken from the Criminal Complaint, Pascua Yaqui Tribe v. Thomas, CR-19-072 (Jan. 3, 2019) (*Exhibit 1*), Traffic Criminal Complaint, Pascua Yaqui Tribe v. Thomas, TR-19-007 (Jan. 3, 2019) (*Exhibit 2*), and “Probable Cause Statement” dated January 2, 2019 (*Exhibit 3*), and a transcript of the initial hearing that was held on January 3, 2019 (*Exhibit 4*) See 3 PYTC § 2-3-110(c) and (e).

When the officer asked the Defendant to stop walking, he confronted the officer in an aggressive manner, clenching his fists and asked, “What the fuck you want man?” *Id.* at 4. The officer approached the Defendant and noticed both that he had bruises along the left side of his face and that he smelled strongly of intoxicants. *Id.* The officer asked the Defendant if he was injured while driving his vehicle, but the Defendant refused to answer. *Id.* The officer arrested the Defendant and placed him in the patrol car. *Id.* He informed the Defendant he smelled alcohol and would be conducting a DUI investigation. *Id.* The Defendant refused to participate in Standardized Field Sobriety Tests. *Id.* He also initially refused to consent to a DUI blood draw as part of the investigation. *Id.* However, the Defendant later said that “he did not want [officers] to get a warrant for his blood because that would make things worse to his P.O.” *Id.* Following that statement, the Defendant “freely consented to the blood draw.” *Id.*

Once the Defendant consented to having his blood drawn, the officer transported him to a Department of Public Safety (DPS) substation located approximately eight miles from the Pascua Yaqui Reservation. *Exhibit 1* at 4. The Pascua Yaqui Police Department (PYPD) does not have a certified phlebotomist on staff qualified to conduct blood draws, nor does the department currently possess an operational Intoxilyzer or other certified breath testing device, the results of which may be admitted as evidence at trial. As a result, the Tribe has entered into intergovernmental agreements² with other local, State, and Federal governments in order to optimize its efficiency with regard to the execution of its sovereignty to assure its citizens’ general health, safety, and welfare. In the case of DUI investigations, this interagency cooperation allows Pascua Yaqui law

² The power to execute contracts and agreements with federal, state, and local governments enumerated in the PYT Constitution at Article VI, Section 1(a) is reserved to the Executive Branch as defined in Article VII. Further, the Judicial Branch may not exercise Executive Branch powers, as asserted by Article IV that “no group or persons charged with the exercise of powers belonging to one of these branches, shall exercise any powers properly belonging to the others.” Arguably actions related to consensual intergovernmental agreements with the state of Arizona are the exclusive authority of the Executive Branch.

enforcement to use the resources and officers from the Arizona Department of Public Safety to address local lack of specially trained personnel or equipment when such shortages arise.

Upon arriving at the DPS substation located off the Pascua Yaqui Reservation in Pima County, the officer explained the process of the DUI investigation, at which time, the Defendant asked if he could give a breath sample instead of a blood. *Exhibit 3* at 4. The officer informed him that both kinds of samples were desired. *Id.* The Defendant *then* refused and revoked his earlier consent by saying “fuck you, or words to that effect.” *Id.* The officer then requested a telephonic search warrant. Due to where they were located, the officer contacted a non-Tribal Pima County Superior Court Judge and obtained a warrant for the Defendant’s blood.³

The Officer provided the State court judge with information that led the judge to find that probable cause to issue a warrant for the Defendant’s blood. *Id.* The evidence supporting the application for a search warrant included the signs and symptoms of intoxication observed by officers at the time of the investigation, and information regarding the accident that the Defendant had recently been involved in. *Id.* The Judge issued the warrant for the blood draw, which was completed by a certified DPS phlebotomist. *Id.* A sample of the Defendant’s blood was provided to tribal law enforcement, which later submitted the item for forensic alcohol analysis, and the Defendant was transported to Tribal detention. *Id.* The Defendant was later charged with one count each of Injury to Public Property in violation of 4 PYTC § 1-630, Driving Under the Influence – Actual Physical Control, in violation of 8 PYTC § 6-4-10/A.R.S. § 28-1381(A)(1), and Leaving the Scene of Accident of Unattended Vehicle in violation of 8 PYTC § 6-4-10/A.R.S. § 28-664(A)(1).

³ Such action was authorized under both the Pascua Yaqui Tribal Code, 2 PYTC § 2-8-90(A)(1), and Arizona law (A.R.S. § 13-3874).

An initial hearing was held on January 3, 2019. At the hearing, the trial court indicated that it had concerns about the legality of the search warrant that was issued by the State court judge, and expressed concerns that the issuance of the warrant was an attempt to infringe upon Tribal sovereignty. The prosecutor provided the court with additional facts not included in the complaint or its supporting affidavit of probable cause. He stated:

[T]he officer had initially contacted me to get a Tribal Court warrant while the Defendant was detained here at the Pascua Yaqui Detention Center. Then informed [sic] that the Defendant had agreed to voluntarily submit to a blood draw...I believe that the reason that they sought a State Court warrant at that time [...] was because he was off of the Reservation and had voluntarily agreed to be taken off of the Reservation at that time.” Exhibit 4, at p.5-6.

The trial court, in turn, indicated that it had concerns about the fact that Tribal law enforcement did not have any certified phlebotomists or working Intoxilyzer instruments. The court stated:

Now, I have no clue what sort of mechanisms that they have actually working here at the police department, but I will tell you that 14 and a half years ago when I started here there was an Intoxilyzer machine, there was a phlebotomist, so there was someone here who was certified in the machinery to ensure that it was properly calibrated and working, always in working order and then they had several officers who were qualified as phlebotomists. *Id.* at p.8

The court went on to indicate that it had concerns that officers had obtained a State court warrant for the Defendant’s blood instead of a Tribal court warrant. In response, the prosecutor explained that, in the event that the trial court determined that the search in this case was illegal, the proper remedy would be suppression *only* of the evidence obtained as a result of that search. Specifically, he stated:

[T]he fact that blood was taken in this case, uh, that may be the, uh, subject of a motion to suppress later if there is an invalid warrant for gaining the blood. So, to the extent that, uh, there, and the Court may certainly suppress that, so *we would ask the Court to consider all of the other evidence*, uh, that was not subject to that warrant. We believe that a motion to suppress would be the correct remedy if there is a warrant that was granted with no jurisdiction or if there's some other defect in the warrant. *Id.* at 6 (*emphasis added*).

After hearing from both parties, the trial judge again expressed significant concern that the police lacked on-reservation resources to complete DUI blood draws. The court stated:

My understanding now is that there is no breathalyzer, uh, machine that's actually operative or in good repair and as far as I understand, uh, there's what? One officer who can be a phlebotomist over here, *but that's not satisfactory* and that is not something that the Court feels that its responsible for ensuring. What it is, *it's a Department of Public Safety issue of whether they want to vigorously prosecute DUI's and whether they're going to follow a standard of procedures as far as preserving evidence* for the DUI investigations looking for, towards to filing of a complaint.[...] So, the police department or the public, Department of Public Safety, they're going to have to figure out some way for preservation of evidence *rather than going outside to a State Court Judge* who has no authority here. *Id.* at 8-9, 11. (*emphasis added*)

The court then addressed the issue of a formal motion to suppress that could potentially have been filed at a later date:

[I]f there's a defect in the process and procedure, uh, the Court can raise this on its own and *I don't even need at this point a motion to suppress*, it would be helpful, and it would certainly have some authority for the Court to base its decision, but *the fact that Mr. Thomas was transported from this jurisdiction off of Reservation to have the testing done, a State Court Judge impermissibly interfered with the duties and responsibilities of Tribal Court Judges to issue warrants* and there is a very specific provision in our Criminal Code as to the issuance of finding probable cause for purposes of warrants, whether they be search warrants or search warrants for blood. *Id.* at 9-10 (*emphasis added*).

The trial court did not address at the hearing the fact that the charges filed against the Defendant existed independently of any potential future charges that might relate to the Defendant's BAC. The trial court ultimately dismissed all charges against the Defendant. *See* Exhibit 5, Initial Hearing Order, *PYT v. Thomas*, CR-19-072/TR-19-007 (Jan. 3, 2019). In its written ruling, the trial court explained its interpretation of the doctrine of subject matter jurisdiction. It indicated that the granting of a blood draw warrant by a State Court judge violated the requirements of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302(2), Pascua Yaqui Constitution, Article 1(b) & (h) and 2 PYTC § 2-2-40. *Id.* at 3. The trial court asserted that the State court judge "is not a Pascua Yaqui Court Judge, he is not a Pascua Yaqui pro tem judge, and

he has not been given authority by the Pascua Yaqui Tribal Council to issue warrants for defendants arrested on the Pascua Yaqui Reservation.” Id. at 2 [emphasis added]. The court went on to state that:

[The judge’s] action undermines the ability of the Pascua Yaqui Court to issue its own warrants for on reservation crimes, and such action plainly interferes with the powers of self-government conferred upon the Pascua Yaqui Tribe and exercised through the Pascua Yaqui Tribal Court. *Id.* at 3.

The trial court also indicated that dismissal of all charges, regardless of whether they were dependent upon the blood evidence seized, was an appropriate remedy.

II. Summary of the Argument

According to the Pascua Yaqui Tribal code, and to well-established precedent in Federal criminal and Indian law, it is clear that the proper remedy for an illegal search would be suppression of the evidence obtained as a result of the search. Doing otherwise confuses, as it did here, the issues of evidence suppression, Tribal sovereignty, and the principle of comity between sovereigns. Further, if, as the trial court suggested, the granting of a limited state search warrant robbed the Tribal court of subject matter jurisdiction over the entire criminal complaint, the correct process would be dismissal of the complaint with prejudice pursuant to 3 PYTC § 2-2-300. Here, the trial court erred in a multitude of ways when it dismissed the charges against the Defendant prior to holding an evidentiary hearing regarding the perceived search issue.

First, the trial court failed to take into account the fact that the Defendant was charged with three separate counts that do not require proof at trial of what his actual blood alcohol level (BAC) was. For the crimes of Injury to Property, Leaving the Scene of an Accident, and Driving Under the Influence while Impaired to the Slightest degree, proof of a quantifiable BAC is not a statutory element. Indeed, individuals may be charged and convicted of these crimes without blood evidence ever having been obtained, much less tested for the presence and amount of alcohol.

Second, assuming, *arguendo*, that an illegal search occurred in this case, which the Tribe does not concede, the proper remedy under the law would be suppression only of the evidence that was illegally obtained which, in this case, was the Defendant's blood. Thus, the trial court erred when it dismissed charges where guilt was not dependent on BAC evidence.

Third, the trial court conflated the issues of whether a Tribal court has subject matter jurisdiction over a *criminal offense* involving a Tribal defendant, with whether a non-Tribal court has jurisdiction to issue a *search warrant* against a Tribal defendant. As a result, the trial court's ruling mistakenly suggested that a perceived jurisdictional ICRA violation by a State court judge when it issued a warrant diminished the Tribe's sovereign ability to prosecute non-member Indian defendants for violations of the Pascua Yaqui Criminal Code. Finally, even though no evidentiary hearing was conducted with regards to the search warrant, its reasonableness, or its legality, the search was not illegal in light of the unique relationship that exists between the Pascua Yaqui Tribe and Arizona for the purposes of law enforcement cooperation.

LAW AND ARGUMENT

I. The Trial Court Erred when it Decided the Tribe had no Subject Matter Jurisdiction During an Initial Hearing over Criminal Offenses Committed by a Non-Member Indian Occurring Within the Territorial Boundaries of the Reservation Solely as the Result of a Perceived Unlawful Issuance of a State Court Search Warrant.

In dismissing the case, the trial court indicated its belief that the State court lacked jurisdiction to issue a warrant for officers to obtain the Defendant's blood. The trial court specifically relied upon its interpretation of the Indian Civil Rights Act, and the Pascua Yaqui Tribal Constitution and Rules of Criminal Procedure. 25 U.S.C. § 1302(8); PYT Const. Art. 1 § 1(b) & (h). The court also appeared to suggest that these rules were not only controlling, but also that any extra-jurisdictional acts performed by the State court were *vicariously attributable* to the Tribe, and ultimately reduced the Tribal Court's jurisdiction over Indian defendants.⁴ The court further determined that the Defendant's rights were violated to such a degree that dismissal of the entire case—including charges that were not dependent upon evidence obtained via the search warrant — was appropriate. That is simply not the case.

The Pascua Yaqui Tribe, like many recognized tribes, possesses inherent sovereignty. Under that principal of sovereignty, as well as authority delegated by the United States government by Public Law 95-375 (92 Stat. 712) (establishing the boundaries of the Pascua Yaqui Reservation), the Tribe possesses and retains adjudicatory jurisdiction over crimes committed its criminal code by an Indian defendant on the reservation. In this case, it meant that the Tribal Court had jurisdiction over the offenses of Injury to Public Property, 4 PYTC § 1-630, Driving Under

⁴ The Pascua Yaqui Constitution establishes three separate branches of government, "the Legislative, the Executive and the Judicial." Art. 4, Pascua Yaqui Const. It further states that "no person or group of persons charged with the exercise of powers properly belonging to one of these branches, shall exercise any powers properly belonging to the others." *Id.* The legislative branch has the power to enact laws, and "[t]o negotiate and to execute contracts and agreements with federal, state and local governments," Art. VI, §1, Pascua Yaqui Const., and to "appropriate available tribal funds for ... purposes serving the general welfare." The judicial branch is tasked with presiding over legal matters arising out of the Tribal code, Art. VIII, Pascua Yaqui Const. The police department is considered a member of the Executive branch of government and is tasked with enforcing the laws created by the legislature. 2 PYTC § 2-8-10; Art. VII, §1, Pascua Yaqui Const.

the Influence, 8 PYTC § 6-4-10/A.R.S. § 28-1381(A)(1), and Leaving the Scene of Accident of Unattended Vehicle, 8 PYTC § 6-4-10/A.R.S. § 28-664(A)(1), for which the Defendant had been charged. As will be discussed, *infra*, a court's ability to exercise jurisdiction over a criminal adjudication is a separate question from whether lawfully or unlawfully obtained evidence is admissible at trial.

Here, the collection of blood evidence was a good faith search under tribal, state, and federal law. However, even assuming that officers unlawfully obtained the Defendant's blood, the trial court retained jurisdiction over his non-BAC related charges, and dismissal of those charges was an inappropriate sanction. In the event that this Court agrees that the trial court erred in dismissing charges unrelated to evidence obtained as a result of the search warrant and blood draw in this case, it need not determine whether the search warrant itself was valid.

II. The Trial Court Erred in Determining that Dismissal of the Entire Case Against the Defendant was an Appropriate Remedy for a Perceived Unlawful Blood Draw, when the Charges that were Dismissed Required no Proof of the Defendant's BAC, and Where the Appropriate Remedy for an Illegal Search Would have Been the Suppression of Evidence Obtained During that Search.

At the initial hearing, the trial court indicated that, while it "would be helpful" for the parties to file a motion to suppress containing relevant legal authority, it determined that it did not need any such motions. Exhibit 4, at p.9. In doing so, the trial court implicitly ruled that it did not desire to hear testimony or further argument from the parties regarding whether the search warrant issued in this case was lawful, or whether law enforcement officers acted in good faith when they relied upon the State court's warrant. While this particular issue will be discussed in greater detail below, if we assume purely for the sake of argument that the warrant was unlawful, the question that must first be addressed is whether the court had the ability to dismiss charges that were independent of any illegally obtained evidence.

A. The trial court abused its discretion when it dismissed the case based on a lack of subject matter jurisdiction where an appropriate remedy for an illegal search, if one had been performed by the Tribe off-reservation, would be granting a motion to suppress the illegally seized evidence.

The Pascua Yaqui Tribe Code Rules of Criminal Procedure enumerates a remedy in cases where evidence is obtained as the result of an illegal search. Under the Code, either party after arraignment may file a motion “to suppress evidence which was illegally seized, or which was the product of the fruits of an illegal search or seizure.” 3 PYTC § 2-2-300(B)(1). In contrast, a complaint may be set aside if: (1) “it is found not to comply with the requirements of 3 PYTC § 2-2-90;” (2) “the defendant has been charged without reasonable or probable cause;” or (3) “[u]pon a determination that the Court has no jurisdiction over the person or the offense.” 3 PYTC § 2-2-300(C). The Pascua Yaqui Tribal Code, therefore, recognizes that the appropriate remedy for an unlawful search is the suppression of evidence obtained as a result of that search.

The issue of when and the circumstances under which unlawfully obtained evidence should be suppressed has been addressed extensively by the United States Supreme Court, starting with the seminal case of *Wong Sun v. United States*, 371 U.S. 471 (1963); see *Miranda*, CA-08-015, at p.22 (holding that this Court may look to Arizona or Federal authority in the absence of controlling Pascua Yaqui law). *Wong Sun* was a multi-defendant case that dealt with a number of different Fourth Amendment issues, including whether one suspect’s unlawful arrest meant that statements and evidence obtained against each of the suspects was still admissible at trial. *Id.* at 486. The Supreme Court ultimately ruled that evidence obtained as the direct result of an unlawful search or arrest is inadmissible at trial *unless* the connection between the unconstitutional police conduct and the evidence’s seizure is remote, or somehow interrupted by an intervening circumstance. *Id.* at 486.

The “exclusionary rule” outlined in *Wong Sun* has also been adopted by Arizona courts. In *State v. Bolt*, the Arizona Supreme Court explained that “the exclusionary rule to be applied as a matter of state law is no broader than the federal rule.” 142 Ariz. 260 (1984). In *Bolt*, police officers justified an illegal entry and protective sweep of the house based on exigency the Court deemed was created by the officers. *Id.* at 260. The Court explained that, in situations where evidence is derived from a source that is independent of an illegal search is unnecessary, and not a requirement under federal law. *Id.* “The independent source doctrine may be applied under the Arizona constitutional provision, and exclusion of evidence obtained under a legal warrant need not be required because of the prior state constitutional violation.” *Id.* at 269. The scope of State exclusionary provisions is limited by federal law.

Here, the Defendant was charged with three separate crimes, all with different statutory elements. In order to be convicted of Driving Under the Influence, the prosecution must show that a defendant “drove or was in actual physical control of a vehicle while under the influence of intoxicating liquor,” drugs, vapor releasing substances, or a combination thereof. A.R.S. § 28-1381(A)(1); 8 PYTC § 6-4-10.⁵ The prosecution must additionally show that the defendant was “impaired to the slightest degree.” In order to be convicted of Leaving the Scene of an Accident, the prosecution must show that a defendant was driving “a vehicle involved in an accident resulting” only in damage to property or fixture located on or next to a highway, and that the defendant “did not take reasonable steps to locate and notify the owner or person in charge of the property.” A.R.S. § 28-664(A)(1); 8 PYTC § 6-4-10. Finally, in order to be convicted of

⁵ By way of contrast, there are separate statutory offenses that do require the prosecution to present evidence of a defendant’s blood alcohol content both in a charging document and at trial. *See* A.R.S. § 28-1381(A)(2) (criminalizing driving with a BAC of 0.08 or more); A.R.S. 13-1382(A) (listing separate offenses for a BAC of 0.15, or of 0.20 or more).

committed Injury to Public Property, the prosecution need only show that a defendant “without proper authority, used, injured, or misused any public, Tribal, government or private property. 4 PYTC § 1-630.

Tribal police received information about a “reckless driver” who hit a tree located beside a road. Exhibit 1, at p.3. Officers were informed that a male driver was involved, and that he drove away from the scene, only to then abandon his vehicle. Officers received a description of the driver’s clothing and were able to locate the individual and identify him as the Defendant. *Id.* A fluid trail lead from the scene of the accident to where the car had been abandoned, and the car appeared to be damaged. *Id.* The Defendant indicated where his car was and appeared to have bruises on his face. *Id.* at 4. He also made statements that placed him in the car’s driver seat at the time of the accident. *Id.* Finally, there was a strong odor of intoxicants emanating from his body and breath. *Id.* All of this evidence was observed by officers *before* the Defendant’s blood was obtained.

The Defendant initially refused to consent to a blood draw. According to information presented by the prosecution at the initial hearing, the Defendant then changed his mind and consented to a blood draw. He also consented to being transported off the reservation to a nearby DPS facility so that a trained phlebotomist could obtain a blood sample. Upon arriving at State DPS, the Defendant revoked his consent to the procedure. At that time, the police officer sought a warrant in the jurisdiction where the Defendant was located — in the State of Arizona — based on his probable cause evidence supporting his arrest.

The evidence that relates to the crimes for which the Defendant had been charged was obtained prior to the Defendant’s blood draw, and, therefore, was completely independent of any

legal or jurisdictional concerns surrounding the blood draw itself.⁶ Under *Wong Sun* and the Pascua Yaqui Code, if the blood draw was done without lawful authority, the proper remedy would have been suppression of the evidence obtained directly as a result of the illegal search. In this particular case, that would have involved suppression of any BAC value obtained as a result of forensic alcohol testing of the Defendant's blood. For this reason, the trial court erred when it dismissed the charges against the Defendant on the basis of the blood draw being illegal.

III. The Trial Court Abused its Discretion when it Decided the Tribe had no Subject Matter Jurisdiction over the Defendant's Criminal Case Based on the Mistaken Assumption that a State Court Judge's Issuance of a Warrant Violated ICRA and Diminished Tribal Sovereignty.

A. The Tribe had Subject Matter jurisdiction over the Defendant.

The main issue raised by the trial court's ruling concerns whether the Tribe's subject matter jurisdiction over a criminal case committed by an Indian defendant, and arising on the reservation can be diminished by a State judge's act in violation of ICRA. The rule is clearly established both by the Tribe's Constitution and judicial code. Federal Indian law is also clear on this issue that, as a federally recognized tribe, the Tribe has criminal jurisdiction where the incident occurs within reservation boundaries and the perpetrator was a non-member Indian, which the trial court did not contest. Article II, Constitution of PYT; 3 PYTC § 1-1-20(A)-(C); 25 U.S.C. § 1301(2) (so-called "Duro Fix" legislation reaffirming tribe's authority to prosecute non-member Indians); *United*

⁶ The fact that the trial court expressed frustration at the fact that local law enforcement, being a smaller department, did not have access to certain resources such as specially trained phlebotomists or its own breath testing devices has no bearing on whether the search warrant in this case was lawful. Assuming, solely for the sake of argument, that it did, dismissal of the case was still an inappropriate remedy in light of the fact that the offenses for which the Defendant had been charged did not require proof of a BAC. Additionally, to the extent that the trial court's ruling was motivated by its frustration at a perceived lack of resources, it amounted to a violation of the separation of powers doctrine. *See supra*, footnote 4; *see e.g. United States v. Neyens*, 831 F.2d 156, 162 (7th Cir. 1987) (noting courts cannot dictate parole release dates as that is a function of the executive); *also United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) (determining that USDOJ could not use funds that had not been appropriated by the legislature as that would violated separation of powers); *also cf. United States v. Alfonso*, 143 F.3d 772, 776 (2nd Cir. 1998) (inappropriate for a court to dismiss an indictment by looking beyond the scope of the indictment and drawing inferences to what proof prosecution/executive would be able to introduce at trial).

States v. Lara, 541 U.S. 193 (2004); see also *United States v. Wheeler*, 453 U.S. 313 (1978) (holding the Navajo Nation retained its inherent sovereignty, which included the power to prosecute its citizens).

In *Lara*, for example, a member of Turtle Mountain Band of Chippewa married a member of the Spirit Lake Tribe, and they lived on the Spirit Lake Reservation until he was ordered excluded from the reservation for repeated severe misconduct. 541 U.S. at 196. Lara violated the exclusion order and assaulted a federal officer when he was stopped on the reservation. *Id.* Lara pled guilty in Spirit Lake tribal court to the assault charges. The Supreme Court affirmed that the “Duro fix” legislation had relaxed the prior restriction on tribes’ inherent sovereignty to prosecute non-member Indians. *Id.* at 217. The Pascua Yaqui Court of Appeals has previously addressed the issue of the interplay between subject matter jurisdiction and tribal sovereignty in the context of a civil action. *PYT v. San Juan Southern Paiute Tribe and Mary Lou Boone, et al.* CA-09-005, CA-09-004 (PYT Ct. App., September 22, 2010) (hereinafter *San Juan Southern Paiute Tribe*), involved a civil action in which one of the parties to the case was a different tribe that benefitted from its own sovereign immunity. Because of this sovereign immunity, the Court of Appeals ruled that Pascua Yaqui Courts had no jurisdiction over the civil case. In reaching this ruling, the Court relied on longstanding precedent from cases with multiple federally recognized tribes where sovereign immunity was not expressly and unequivocally waived, and the opposing parties lacked subject matter jurisdiction. *Id.* at 7.⁷ Although this case involved a civil, and not a criminal, matter, the rationale used in that case can be easily applied to the current case, and further demonstrates why the State judge’s issuance of a warrant did not deprive the trial court of jurisdiction over the Defendant’s charges.

⁷ Although this particular case involved a civil matter, its rationale can be applied in the criminal arena, and further demonstrates why the State judge’s issuance of a warrant did not deprive the trial court of jurisdiction over the Defendant’s criminal charges.

Here, the Defendant is subject to the jurisdiction of the Pascua Yaqui Courts as a non-member Indian committing acts that arose within the Reservation boundaries. 3 PYTC § 1-1-20(A)-(C). The Defendant here is a person who is a member of a federally recognized tribe with no grounds for asserting immunity from prosecution. Like *Lara*, the Defendant here is a non-Member Indian living off the reservation who committed alleged criminal acts on the Reservation. His presence on the Reservation during the course of his criminal conduct was sufficient to grant the trial court subject matter jurisdiction over his criminal case. The “Duro fix” legislation and related case law clearly demonstrate that the trial court had subject matter jurisdiction over the Defendant’s criminal matter. Accordingly, the trial court erred when it determined that the actions of the State Court judge deprive the Pascua Yaqui courts of jurisdiction.

B. Although the appellant in no way concedes that an ICRA violation occurred, if there was such a violation, it would not diminish the Tribe’s criminal jurisdiction powers, nor would it warrant dismissal of the complaint against the Defendant.

The next issue raised by the trial court in its oral and written ruling concerns whether a State court’s violation of ICRA as part of a criminal investigation negates the Tribe’s ability to exercise jurisdiction over the resulting criminal matter. While the Tribe does not concede that an ICRA violation occurred, such an occurrence would not affect the Tribal court’s jurisdictional authority.

A Tribe’s power to enforce its laws arises from inherent tribal sovereignty. *Talton v. Mayes*, 163 U.S. 376 (1896). In *Talton*, a Cherokee tribal member was accused of murdering another tribal member. He was convicted by a grand jury in contravention of the Fifth Amendment of the United States Constitution. *Id.* The Supreme Court held that “as the powers of local self-

government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment.” *Id.* at 384.⁸

Under ICRA, sovereign immunity limits relief available in federal court to writs of habeas corpus and precludes additional remedies such as injunctive or declaratory relief. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (declining to read Title I of ICRA, 25 U.S.C. §§ 1301-1303, to authorize a cause of action for declaratory and injunctive relief to enforce its substantive provisions); *see also Alvarado v. Table Mt. Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007) (dismissed for a lack of subject matter jurisdiction over the civil case and distinguishing *Santa Clara Pueblo* as standing for a lack of federal subject matter jurisdiction over cases against tribes under ICRA because of sovereign immunity); *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 950 (9th Cir. 1998) (where Court held a tribal member convicted of sex offenses filed for writ of habeas corpus in federal courts, determining that comity requires exhaustion of tribal remedies before habeas writ under ICRA could be heard); *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989) (reaffirming, in part, the dismissal of the 42 U.S.C. § 1983 claim by member-Indian for alleged constitutional rights violations during a criminal case, where the tribe had not waived sovereign immunity). In *Santa Clara Pueblo*, for example, a female tribal member sought injunctive and declaratory relief for the disparate treatment she received under the gender-biased tribal code; however, the Court was unwilling to diminish tribal sovereignty by ruling on the substantive merits of the case and held it lacked subject matter jurisdiction for non-habeas corpus relief. *Santa Clara Pueblo*, 436 U.S. at 49.

Unlike *Santa Clara Pueblo*, the Defendant here has alleged no tribal violation of his rights under ICRA for acts by the State the trial judge *vicariously attributed* to the Tribe. Indeed, no such violation existed. Additionally, nothing in ICRA or the caselaw cited above stands for the

⁸ The passage of the Indian Civil Rights Act in 1968 established certain restrictions on federally recognized tribes' adjudicatory processes and required them to comply with most of the Federal Bill of Rights, as applied to the States under the Fourteenth Amendment. 25 U.S.C. § 1302(8).

proposition that an action taken by a State judge trumps the criminal jurisdictional powers afforded to Tribal governments as part of its sovereignty.

IV. The Trial Court erred when it determined that blood obtained pursuant to a State Court warrant constituted an illegal search when the principle of comity supporting an Intergovernmental Agreement between the Tribe and State DPS allowed Tribal Law Enforcement to rely on the warrant in good faith.

A. The Principle of Comity permits the Tribe to delegates its power to DPS to conduct blood draw searches.

The Principle of Comity is well-established in federal Indian and international customary law. It authorizes a tribe to delegate some of its governing power to allow another sovereign nation to exercise “legislative, executive or judicial acts... having due regard... to the rights of its own citizens or of other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895); *see also* Comity, Black's Law Dictionary (10th ed. 2014) (defining comity as “[a] practice among political entities (as countries, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts”). In the context of this case, comity allowed the Pascua Yaqui Tribe the authority to delegate its power to issue blood draw search warrants to the State pursuant to an authorizing Intergovernmental Agreement. The principle of comity between the Tribe and the State is represented both by its customary practice of transporting persons in custody to DPS for blood draws and by its Intergovernmental Agreement to do so.

Here, the willingness of the State court to recognize the probable cause evidence supporting the request for the warrant of the Tribe’s police officer is an illustrative example of mutual respect, cooperation, and comity between two governments. Rather than send the officer back to Tribal court to request a warrant and risk the deterioration of blood alcohol evidence, the State court

accepted the officer's probable cause affidavit as valid under the principle of comity. The State judge issued the warrant in recognition of the officer's affidavit that he had accorded the Defendant sufficient due process to search and seize blood evidence. Therefore, the warrant issued by the State was valid and no illegal search occurred. The State's cooperative issuance of the blood search warrant bolstered the Tribe's exercise of sovereignty in these circumstances so that evidence could be obtained in the interests of justice and did not "undermine[...] the ability of the Pascua Yaqui Court to issue its own warrants for on reservation crimes, and [...] interfere[] with the powers of self-government." *Exhibit 5*, at p.3.

B. State law effectively deputizes PYPD officers, thus allowing courts to consider their probable cause affidavits when attempting to obtain a warrant from State court, and also allowing officers rely in good faith upon validly issued State court warrants.

According to powers authorized under both Pascua Yaqui and Arizona law, 2 PYTC § 2-8-90(A)(1), A.R.S. § 13-3874, PYPD officers are considered *de facto* law enforcement officers for the State of Arizona while engaged in their official duties. Further, a State judge may accept a PYPD officer's affidavit of probable cause supporting the issuance of a warrant. A.R.S. § 13-3915(A). *See also* A.R.S. § 13-3916 (D) (allowing Tribal officers to execute state-issued warrants). The fact that a State court judge may rely in good faith upon the information and probable cause statements issued by Tribal law enforcement also means that Tribal law enforcement should, as a matter of public policy and comity, be able to rely in good faith upon warrants issued by a State court judge.

State v. Bolt, discussed *supra*, discussed both *Wong Sun's* exclusionary rule, but also an "independent source" exception. *Bolt*, 142 Ariz. at 260. That case also relied heavily on another United States Supreme Court case, *United States v. Leon*, 468 U.S. 897, 897 (1984), which detailed what has come to be known as a "good faith" exception. In *Leon*, the Supreme Court was asked to determine whether an officers could rely upon a search warrant that was later determined to be

defective in some way. The Supreme Court in that case set forth guidelines for when evidence may still be admitted at trial even if the seizure was based on a defective warrant. It stated “(1) the Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution’s case in chief of evidence obtained by officers *acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid*; (2) standard of reasonableness is an objective one; (3) suppression is appropriate where officers have no reasonable ground for believing that the warrant was properly issued; and (4) officer's reliance on magistrate's determination of probable cause in instant case was objectively reasonable.” *Leon*, 468 U.S. at 897 (emphasis added). *See also State v. Coats*, 165 Ariz. 154, 156 (Ct. App. 1990).

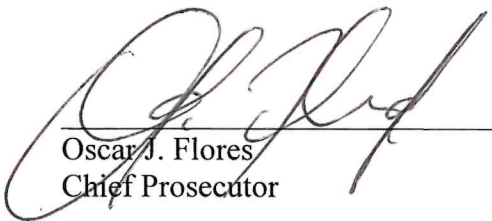
Here, Pascua Yaqui Police were reasonably entitled to rely on the Intergovernmental Agreement, Tribal, and State law as giving him the ability to request a warrant from a State court judge, and for the judge to accept his probable cause affidavit. Officers then acted in objectively reasonable reliance on the warrant. While it is the Tribe’s position that there was no legal issue with the State’s court’s warrant, assuming that there was, law enforcement’s good faith reliance on that warrant and supporting law indicates that the trial court’s application of the exclusionary rule was inappropriate.

CONCLUSION AND REMEDY SOUGHT


The trial court erred when it dismissed the charges against the Defendant at the initial hearing based upon its belief that the Defendant's blood had been obtained pursuant to an impermissibly issued State court search warrant. Although the Appellant does not concede that the search warrant was invalid, if it had been, the proper remedy under the law would have involved suppression solely of the evidence obtained as a result of the search warrant. In this case, that would have meant that, at most, suppression of the Defendant's blood sample and any subsequent forensic analysis of it. Because the charges that the Defendant faced had nothing to do with the search, and because evidence serving as the basis of probable cause for those charges was obtained well before the warrant was issued, they should not have been dismissed.

Additionally, the trial court's ruling improperly determined that the State court's issuance of a search warrant constituted a violation of ICRA and served to negate the Tribal court's ability to exercise criminal jurisdiction over the case. Accordingly, the Appellant respectfully requests that the trial court's order be reversed, and that the case be remanded to the trial court for further proceedings.

RESPECTFULLY submitted this 5th day of April, 2019



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:

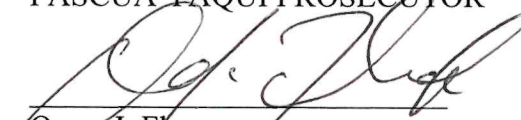
Glaucia Brannock
Glaucia.Brannock@pascuayaqui-nsn.gov
Pascua Yaqui Office of the Public Defender
7474 S. Camino de Oeste
Tucson, AZ 85757

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 5 day of April, 2019.

PASCUA YAQUI PROSECUTOR



Oscar J. Flores
Chief Prosecutor



Coleen Thoene
Deputy Prosecutor

Sworn before me this 5th day of April, 2019



Notary Signature

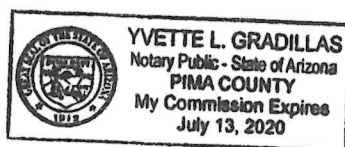


Exhibit 1
Criminal Complaint
(PYT v. Thomas, CR-19-072)

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

2019 JAN -3 AM 10:18

~~Pascua Yaqui Tribe~~
Plaintiff,

Case No.

DOCKET NO. CL 19-072

vs.

CLW
CLERK

THOMAS, JUSTIN PAUL

CRIMINAL COMPLAINT

Defendant.

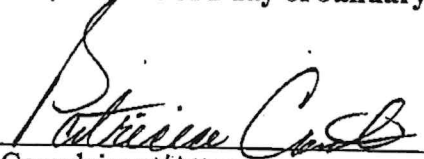
The PASCUA YAQUI TRIBE, hereby complains and alleges, upon information and belief, that the above named defendant, an Indian, while on the Pascua Yaqui Reservation, did commit the following offense(s):

COUNT 1: 4 PYTC § 1-630 ~ Injury to Public Property

On or about January 02, 2019 at approximately 2:05 p.m., at or near 4700 Block of W. Calle Torim, Defendant, without proper authority, used, injured, or misused any public, Tribal, government or private property, to wit: *Defendant hit a tree near the PY Facility Maintenance building.*

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

DATED this 3rd day of January, 2019.


Complainant/Attorney

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

DEFENDANT: Justin Paul Thomas
ADDRESS: 2019 W. San Xavier Rd Tucson, AZ 85746
DOB: 07/31/1983 SSN: 600-07-6792 ORIGIN: Tohono O'odham
SEX: Male HT: 5'11" WT: 270 EYES: Brown - HAIR: Black

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

Exhibit 2
Traffic Criminal Complaint
(*PYT v. Thomas*, TR-19-007)

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

2019 JAN 3 AM 10:18

Pascua Yaqui Tribe

Case No.

DOCKET NO. **TR 19-007**

Plaintiff,

CRIMINAL TRAFFIC COMPLAINT

vs.

Justin Paul Thomas

Defendant.

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

COUNT 1: 8 PYTC § 6-4-10/ A.R.S. § 28-1381(A)(1) ~ Driving under the Influence - Actual Physical Control

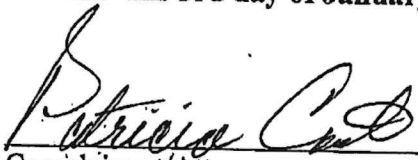
On or about January 2, 2019 at approximately 2:05 p.m., at or near 4700 Block of Calle Torim, Defendant drove or was in actual physical control of a vehicle while under the influence of intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substances thereby being impaired to the slightest degree, To Wit: **Defendant drove a vehicle while intoxicated.**

COUNT 2: 8 PYTC § 6-4-10/ A.R.S. § 28-664(A)(1) ~ Leaving Scene of Accident of Unattended Vehicle

On or about January 2, 2019 at approximately 2:05 p.m., at or near 4700 Block of Calle Torim, Defendant drove a vehicle involved in an accident resulting in only damage to fixtures or other property legally on or adjacent to a highway and did not take reasonable steps to locate and notify the owner or person in charge of the property, To Wit: **Defendant crashed in to a tree and did not notify the owner.**

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

DATED this 3rd day of January, 2019.


Complainant/Attorney

1
2 Pursuant to Article I, § 1(g) of the Pascua Yaqui Constitution, 4 PYTC § 4-20, and 25 U.S.C. §
3 1302(a)(b), the Pascua Yaqui Tribe shall seek punishment that may include imprisonment at sentencing.

4 DEFENDANT: Justin Paul Thomas

5 ADDRESS: 2019 W. San Xavier Rd Tucson, AZ 85746

6 DOB: 07/31/1983

7 SSN: 600-07-6792

8 ORIGIN: Tohono O'odham

9 SEX: Male

10 HT: 5' 11"

11 WT: 270

12 EYES: Brown HAIR: Black

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
Note: Accused persons may obtain disclosure information about their case ten days after arraignment by contacting the Prosecutor's Office at 7777 S. Camino Huivisim, Bldg. A, 2nd Floor, Tucson AZ 85757. [3 PYT R.Crim.P. Rule 38]

Exhibit 3
Probable Cause Statement/Affidavit
(*PYT v. Thomas*, CR-19-072, TR-19-007)

IN THE PASCUA YAQUI TRIBAL COURT IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION	
PASCUA YAQUI TRIBE, Plaintiff Vs. JUSTIN PAUL THOMAS, Defendant	COURT USE ONLY [Signature]
	CASE NUMBER P19010222
PROBABLE CAUSE STATEMENT	

512

AFFIRMATION

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

- A. I am the arresting officer in this case; OR
 I am a law enforcement officer and make this statement on information and belief derived from Officer Juan C. Adame

2. **SUSPECTED PARTY (Defendant)**

Name: JUSTIN PAUL THOMAS
 Driver's License Number: D01050199
 Tribal Enrollment Number: 600-07-6792
 Non-Tribal Member (VAWA)
 Date Of Birth: 07/31/1983

- JUSTIN PAUL THOMAS is an enrolled member of the Pascua Yaqui Tribe.
 is an Indian subject to the jurisdiction of the Pascua Yaqui Tribe.
 is subject to the Tribal Jurisdiction of the Pascua Yaqui Tribe under the Violence Against Women Reauthorization Act of 2013 (VAWA).

3. The Defendant was Arrested on 1/2/2019 at 2:23:00 PM

4. I have probable cause to believe that the defendant committed the following offense(s) at or near, 4700 BLOCK W. CALLE TORIM which is within the exterior boundaries of the Pascua Yaqui Indian Reservation.

<u>PYTC</u>	<u>28-1381A1</u>	<u>Driving impaired to the slightest degree</u>
<u>PYTC</u>	<u>28-662A1</u>	<u>Leaving the scene of an accident</u>
<u>PYTC</u>	<u>28-701</u>	<u>Failure to control vehicle</u>
<u>PYTC</u>	<u>4-1-640</u>	<u>Open alcohol containers in vehicle</u>
<u>PYTC</u>	<u>4-1-630</u>	<u>Injury to public property</u>

5. Statement Of Probable Cause:

On January 2, 2019 at approximately 1405 hours, I responded to the 4700 block of W. Calle Torim in reference to a collision. Communications advised of a reckless driver that hit a tree near the Facility Maintenance building no information about injuries was available at that time.

While responding to the area, communications advised the male driver that collided was not driving north on S. Camino Rahum by the speedbump and later updated that the driver abandoned the vehicle. Communications also provided a clothing description of the male subject and last known direction of travel on foot.

Upon arriving to the area, I observed a brown Toyota Camry four-door sedan bearing Arizona plate CJC2706 stopped on the side of the road. I also noticed a trail of fluids from the collision cite on W. Calle Torim to the Toyota Camry on the side of the road. The vehicle had front-end damage, damage to the right fender and front passenger door, damage to the wheel well, and a front right flat tire. I did not see any occupants in the vehicle so I searched the area for the male subject who was driving the vehicle. After several minutes of no contact with the driver, I expanded my search.

I saw a male subject walking west in the 5100 block of W. Calle Tarook that matched the description of the driver who fled the scene. The male subject was wearing a black sweater, gray sweatpants, and had a blue bandana around his neck. This matched the description provided to us by communications. I pulled up to the male subject in my fully marked police car and called him to me by his name, Justin. I called him to me several times, but he continued to walk west and subsequently walked north into a yard of a residence of 5120 W. Calle Tarook. At this point, I stepped out of my unit and gave him a verbal command to stop walking. Justin stopped walking, balled up his fists, turned around and approached me in a very aggressive manner.

Justin got close to me, took an aggressive stance and asked me, what the fuck you want man? or words to that effect. I told Justin that he was named as a driver from a hit and run and I wanted to make sure he was okay. Justin told me that everything was okay and told me not to worry about it he further stated that his car was over there. I asked him if he was okay, Justin told me, I'm okay homie what's up? Or words to that effect. Justin continued his aggressiveness towards me. I asked Justin if he was hurt, he told me that he fell asleep in the car and told me that he just needed to get away. I asked him if he was driving the car, he told me that he fucked up but everything was okay or words to that effect. I noticed that Justin had bruises on the left side of his face. I asked him if he was injured while driving his vehicle, he refused to answer.

I smelled a strong odor of intoxicating liquors emanating from his breath and person during my contact with him. I arrested Justin and walked him to my police car. Once in there, I told him that I smelled a strong odor of intoxicants on his breath and told him that I would be conducting a DUI investigation. I asked him if he would cooperate with Standardized Field Sobriety Tests, he said no. I asked him if he would give me a breath sample, he said, "fuck no". I asked him if he would give me two tubes of blood for the DUI investigation, he said, "no". I transported him to the Pascua Yaqui Detention Center and explained the process for the DUI investigation. Justin then told me that he did not want me to get a warrant for his blood because that would make things worse with his P.O. and freely consented to a blood draw.

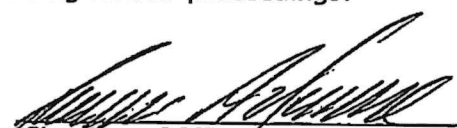
I later transported Justin to the Department of Public Safety main station where I went over the process of the DUI investigation. He asked me if he could give me a breath sample instead of blood. I told him that I would like to have both. Justin told me that he was not doing shit or words to that effect. I clarified with him and asked him if he was refusing to give me a blood sample, he replied by saying, fuck you, or words to that effect.

I completed a DUI blood search warrant and presented the Honorable Judge Vince Roberts with my probable cause. The Honorable Judge found enough cause to issue the warrant for the blood draw. I explained the warrant to Justin and Trooper Morts #7507 drew two gray top tubes. Justin did not resist and cooperated with the blood draw. After the blood draw, I explained all the administrative forms to him, I made sure there were no questions, and asked him if he wanted to sign the forms, he refused. Trooper Morts sealed the blood in a cardboard box and I took custody of the blood. I transported Justin back to the Pascua Yaqui Detention Center. I placed the blood in to the evidence refrigerator with instructions and request for scientific tests on the blood.

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

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

EXECUTED ON:


Signature of Officer

01/02/2018
Date

IN THE PASCUA YAQUI TRIBAL COURT IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION	
PASCUA YAQUI TRIBE, Plaintiff Vs. JUSTIN PAUL THOMAS Defendant	<i>CA</i> COURT USE ONLY
	CASE NUMBER P19010222
PROBABLE CAUSE STATEMENT	

RT
-007

AFFIRMATION

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

- A. I am the arresting officer in this case; OR
 I am a law enforcement officer and make this statement on information and belief derived from Officer Juan C. Adame

2. SUSPECTED PARTY (Defendant)

Name: JUSTIN PAUL THOMAS
 Driver's License Number: D01050199
 Tribal Enrollment Number: 600-07-6792
 Non-Tribal Member (VAWA)
 Date Of Birth: 07/31/1983

- JUSTIN PAUL THOMAS is an enrolled member of the Pascua Yaqui Tribe.
 is an Indian subject to the jurisdiction of the Pascua Yaqui Tribe.
 is subject to the Tribal Jurisdiction of the Pascua Yaqui Tribe under the Violence Against Women Reauthorization Act of 2013 (VAWA).

3. The Defendant was Arrested

on 1/2/2019 at 2:23:00 PM

4. I have probable cause to believe that the defendant committed the following offense(s) at or near, 4700 BLOCK W. CALLE TORIM which is within the exterior boundaries of the Pascua Yaqui Indian Reservation.

<u>PYTC</u>	<u>28-1381A1</u>	<u>Driving impaired to the slightest degree</u>
<u>PYTC</u>	<u>28-662A1</u>	<u>Leaving the scene of an accident</u>
<u>PYTC</u>	<u>28-701</u>	<u>Failure to control vehicle</u>
<u>PYTC</u>	<u>4-1-640</u>	<u>Open alcohol containers in vehicle</u>
<u>PYTC</u>	<u>4-1-630</u>	<u>Injury to public property</u>

5. Statement Of Probable Cause:

On January 2, 2019 at approximately 1405 hours, I responded to the 4700 block of W. Calle Torim in reference to a collision. Communications advised of a reckless driver that hit a tree near the Facility Maintenance building no information about injuries was available at that time.

While responding to the area, communications advised the male driver that collided was not driving north on S. Camino Rahum by the speedbump and later updated that the driver abandoned the vehicle. Communications also provided a clothing description of the male subject and last known direction of travel on foot.

Upon arriving to the area, I observed a brown Toyota Camry four-door sedan bearing Arizona plate CJC2706 stopped on the side of the road. I also noticed a trail of fluids from the collision cite on W. Calle Torim to the Toyota Camry on the side of the road. The vehicle had front-end damage, damage to the right fender and front passenger door, damage to the wheel well, and a front right flat tire. I did not see any occupants in the vehicle so I searched the area for the male subject who was driving the vehicle. After several minutes of no contact with the driver, I expanded my search.

I saw a male subject walking west in the 5100 block of W. Calle Tarook that matched the description of the driver who fled the scene. The male subject was wearing a black sweater, gray sweatpants, and had a blue bandana around his neck. This matched the description provided to us by communications. I pulled up to the male subject in my fully marked police car and called him to me by his name, Justin. I called him to me several times, but he continued to walk west and subsequently walked north into a yard of a residence of 5120 W. Calle Tarook. At this point, I stepped out of my unit and gave him a verbal command to stop walking. Justin stopped walking, balled up his fists, turned around and approached me in a very aggressive manner.

Justin got close to me, took an aggressive stance and asked me, what the fuck you want man? or words to that effect. I told Justin that he was named as a driver from a hit and run and I wanted to make sure he was okay. Justin told me that everything was okay and told me not to worry about it he further stated that his car was over there. I asked him if he was okay, Justin told me, I'm okay homie what's up? Or words to that effect. Justin continued his aggressiveness towards me. I asked Justin if he was hurt, he told me that he fell asleep in the car and told me that he just needed to get away. I asked him if he was driving the car, he told me that he fucked up but everything was okay or words to that effect. I noticed that Justin had bruises on the left side of his face. I asked him if he was injured while driving his vehicle, he refused to answer.

I smelled a strong odor of intoxicating liquors emanating from his breath and person during my contact with him. I arrested Justin and walked him to my police car. Once in there, I told him that I smelled a strong odor of intoxicants on his breath and told him that I would be conducting a DUI investigation. I asked him if he would cooperate with Standardized Field Sobriety Tests, he said no. I asked him if he would give me a breath sample, he said, "fuck no". I asked him if he would give me two tubes of blood for the DUI investigation, he said, "no". I transported him to the Pascua Yaqui Detention Center and explained the process for the DUI investigation. Justin then told me that he did not want me to get a warrant for his blood because that would make things worse with his P.O. and freely consented to a blood draw.

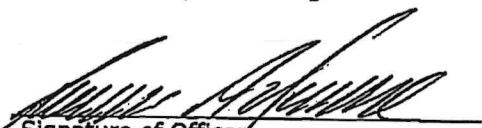
I later transported Justin to the Department of Public Safety main station where I went over the process of the DUI investigation. He asked me if he could give me a breath sample instead of blood. I told him that I would like to have both. Justin told me that he was not doing shit or words to that effect. I clarified with him and asked him if he was refusing to give me a blood sample, he replied by saying, fuck you, or words to that effect.

I completed a DUI blood search warrant and presented the Honorable Judge Vince Roberts with my probable cause. The Honorable Judge found enough cause to issue the warrant for the blood draw. I explained the warrant to Justin and Trooper Morts #7507 drew two gray top tubes. Justin did not resist and cooperated with the blood draw. After the blood draw, I explained all the administrative forms to him, I made sure there were no questions, and asked him if he wanted to sign the forms, he refused. Trooper Morts sealed the blood in a cardboard box and I took custody of the blood. I transported Justin back to the Pascua Yaqui Detention Center. I placed the blood in to the evidence refrigerator with instructions and request for scientific tests on the blood.

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

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

EXECUTED ON:


Signature of Officer

01/02/2018
Date

Exhibit 4
Transcript of Initial Hearing
(*PYT v. Thomas*, CR-19-072, TR-19-007)

IN THE PASCUA YAQUI TRIBAL COURT
COUNTY OF PIMA, STATE OF ARIZONA

PASCUA YAQUI TRIBE,)	NO. CR19072 & TR19007
Plaintiff,)	
vs.)	
)	
JUSTIN THOMAS,)	
Defendant.)	Unknown Date
)	Tucson, Arizona
_____)	

BEFORE: THE HONORABLE MELVIN R. STOOF, JUDGE OF THE PASCUA YAQUI TRIBAL COURT

APPEARANCES:
KENDRICK WILSON, ESQ.
appearing for the State

GLAUCIA BRANNOCK, ESQ.
appearing for Defendant

RE: INITIAL HEARING

Christine McGarvey
Legal Transcription Services Plus

1 **INDEX**

2 Witness(s)

3 -----

4 THE COURT: This is CR19072, TR19007. Pascua

5

6 Yaqui Tribe versus Justin Holt Thomas. And this is an initial

7 appearance. The purpose of an initial hearing is to determine

8

9 your true name and address, to see whether the prosecutor wishes

10 to amend the complaint that's been filed against you, to inform

11

12 you of your rights and to determine whether you should be released

13

14 on your own recognizance under a cash bond or under any other

15 special conditions of release. And you have the following rights

16

17 at this proceeding; the right to be informed of the charges that

18

19 have been filed against you. The right to remain silent and that

20

21 any statement you make may be held against you. No inference may

22

23 be drawn from the Defendant's exercise of a right not to testify.

24

25 You have a right to a speedy trial by a judge or a jury if the

26

27 sentence may impose jail time on you unless the right to a speedy

28

trial is waived or the right to a jury trial is waived. If you do

1 not request a trial by jury in writing at least 30 days prior to
2
3 your trial then you will waive your right to a jury trial under
4 the Pascua Yaqui Criminal Code and under the Indian Civil Rights
5 Act. You have a right to defense in person or by counsel at your
6 own expense because you do qualify for appointment of counsel, uh,
7
8
9 Glaucia Brannock will be helping you with this case?

10 MR. THOMAS: (No audible response.)

11
12 THE COURT: You have the right to confront and
13 cross-examine any witnesses who may be testifying against you. A
14 right to subpoena and call witnesses to testify on your own
15 behalf. A right to ask the Court to issue a subpoena for the
16 production of any books, records, documents or other things
17 necessary to defense yourself on the charges. A right to be free
18 from excessive bail and cruel or unusual punishment. A right to
19 appeal any decisions of the Tribal Court to the Court of Appeals
20 and a right to file for a writ of habeas corpus to the Court of
21 Appeals for any unlawful detention. And do you understand all the
22
23
24
25
26
27
28

1 rights I have just read to you, Mr. Thomas?

2
3 MR. THOMAS: Yes.

4 THE COURT: And is this your correct address
5 listed on the criminal complaint at the bottom on CR19072?
6

7 MR. THOMAS: Yes, it is.

8
9 THE COURT: And you have an ongoing duty to
10 inform the Court if you have any changes in your address. Now, in
11 looking at the probable cause statement in both cases on the very
12 last paragraph, which is located on page three of the probable
13 cause statement. And this is again, identical probable cause for
14 both cases, uh, the affidavit reads, I completed a DUI blood
15 search warrant and presented the Honorable Judge Vince Roberts
16 with my probable cause. The Honorable Judge found enough cause to
17 issue the warrant for the blood draw. I explained the warrant to
18 Justin and Trooper Morts, number 7507, drew two gray top tubes.
19 Justin did not resist, cooperating with the blood draw. So, my
20 question is if this allegedly arose here on the Pascua Yaqui
21
22
23
24
25
26
27
28

1 Reservation and this is, uh, located, the allegation or at least
2
3 is 4700 Block of Calle Torim, which is located on the Pascua Yaqui
4 Reservation, why is a State Court Judge issuing warrants for
5
6 execution on the Pascua Yaqui Reservation? Why does that not
7
8 impermissibly infringe on the right of the Tribal Court under the
9
10 Constitution, under statutory provisions that gives sole and
11
12 exclusive jurisdiction to the Tribal Court for issuance of any
13
14 warrants on the Reservation, for on Reservation offenses? That's
15
16 my simple question.

15 KENDRICK WILSON: And, Your Honor, uhm, with regard
16
17 to, uhm, that particular paragraph and I, I realize that the Court
18
19 may only consider what's listed in the affidavit, uhm, I happen to
20
21 know a little bit more about this case, uh, because after this
22
23 occurred the officer contacted me, uh, so the Court can give that
24
25 whatever weight it deems appropriate. Uhm, the officer had
26
27 initially contacted me to get a Tribal Court warrant while the
28
29 Defendant was detained here at the Pascua Yaqui Detention Center.

1 Then informed that the Defendant had agreed to voluntarily submit
2 to a blood draw, uhm, and had agreed voluntarily to be taken off
3 of the Reservation to the Arizona Department of Public Safety.
4 While there he was off of the Reservation. Uhm, I did not hear
5 from the officer until after that. I believe that the reason that
6 they sought a State Court warrant at that time and again, I don't
7 have an officer here to provide testimony, uh, was because he was
8 off of the Reservation and had voluntarily agreed to be taken off
9 of the Reservation at that time. And again, the fact that blood
10 was taken in this case, uh, that may be the, uh, subject of a
11 motion to suppress later if there is an invalid warrant for
12 gaining the blood. So, to the extent that, uh, there, and the
13 Court may certainly suppress that, so we would ask the Court to
14 consider all of the other evidence, uh, that was not subject to
15 that warrant. We believe that a motion to suppress would be the
16 correct remedy if there is a warrant that was granted with no
17 jurisdiction or if there's some other defect in the warrant.
18
19
20
21
22
23
24
25
26
27
28

1 GLAUCIA BRANNOCK: Thank you, Your Honor. Uhm, my
2
3 client indicates that he did not voluntarily provide a blood
4 sample. The officer kept threatening him that he was going to be
5 locked up if he didn't do it. Uh, quite frankly, I haven't even
6 had an opportunity to review this with the client and even talk to
7 him. I just got the pretrial service, uhm, uh, paperwork, which I
8 briefly read, I don't know what the remedy would be, certainly
9 that's not okay if this is here and my client indicates that it
10 wasn't voluntary, I do have a problem with a State Judge giving
11 warrants inside the Tribe as well, so, uhm, maybe a dismissal and
12 amendment of the complaint with a new affidavit, but, uh, as it
13 stands now I have a problem with this. Thank you.
14
15
16
17
18

19 THE COURT: Okay. In illegal search and
20 seizure cases if there's a defect in the issuance of the warrant
21 and here it's a jurisdictional issue, jurisdiction can be raised
22 at any time even by the Court itself. (Inaudible) subject matter
23 as to who has authority to do so, so the way I read the affidavit
24
25
26
27
28

1 and the facts alleged is that he was stopped here on the
2
3 Reservation, the officer then says I later transported him to the
4 Department of Public Safety Main Station going over the process of
5
6 DUI. Now, I have no clue what sort of mechanisms that they have
7
8 actually working here at the police department, but I will tell
9
10 you that 14 and a half years ago when I started here there was an
11
12 Intoxilyzer machine, there was a phlebotomist, so there was
13
14 someone here who was certified in the machinery to ensure that it
15
16 was properly calibrated and working, always in working order and
17
18 then they had several officers who were qualified as
19
20 phlebotomists. So, I know in the past they've had, uh, meet those
21
22 requirements and I think part of that is for those folks who are
23
24 certified also, uh, commissioned, uh, to ensure that they follow
25
26 all the process for DUI's including for non-Indians who are
27
28 stopped on the Reservation so that they can be booked into State
court, uh, so there is a process and a mechanism that was in place
at one time. My understanding now is that there is no

1 breathalyzer, uh, machine that's actually operative or in good
2
3 repair and as far as I understand, uh, there's what? One officer
4 who can be a phlebotomist over here, but that's not satisfactory
5
6 and that is not something that the Court feels that its
7 responsible for ensuring. What it is, it's a Department of Public
8
9 Safety issue of whether they want to vigorously prosecute DUI's
10 and whether they're going to follow a standard of procedures as
11
12 far as preserving evidence for the DUI investigations looking for,
13 towards to filing of a complaint. Now, fruits of the poisonous
14
15 tree, if there's a defect in an illegal search all the subsequent
16 evidence would be defective and although there are allegations
17
18 made that Mr. Thomas was driving under the influence, left the
19
20 scene of an accident and purportedly caused injury to public
21 property, if there's a defect in the process and procedure, uh,
22
23 the Court can raise this on its own and I don't even need at this
24
25 point a motion to suppress, it would be helpful, and it would
26
27 certainly have some authority for the Court to base its decision,
28

1 but the fact that Mr. Thomas was transported from this
2 jurisdiction off of Reservation to have the testing done, a State
3 Court Judge impermissibly interfered with the duties and
4 responsibilities of Tribal Court Judges to issue warrants and
5 there is a very specific provision in our Criminal Code as to the
6 issuance of finding probable cause for purposes of warrants,
7 whether they be search warrants or search warrants for blood, uh,
8 there's just a recent case that came down from the Court of
9 Appeals where they didn't take jurisdiction over an order that the
10 Court had made to have DNA testing, so the Court of Appeals at
11 this time has, uh, I guess they're reserving on that issue of
12 whether the Court had the authority under the statute. But
13 nonetheless, it all addresses the issues of a motion to suppress
14 based on illegally obtained evidence. The Court finds that the
15 State Court Judge had no authority to issue any sort of a blood
16 draw for a Defendant where this arose on the Pascua Yaqui
17 Reservation and the Public Safety Department must acquire some
18
19
20
21
22
23
24
25
26
27
28

1 kind of mechanism to ensure that these DUI's are properly
2 investigated and I'm not going to tell them how to do their
3 business, but I will say this, that in the time that I was here
4 when I first arrived I had breathalyzer test results, I had
5 certified officers, I had certification of the machines, I had
6 calibration reports for machines, I had a whole policy and
7 procedure manual that they would use to show how they implement
8 those machines and how they administered them. I also had a whole
9 series of cases where people who had refused the breathalyzer, but
10 then decided to have a draw, uh, they had phlebotomist who was
11 qualified and competent and certified to do so. So, the police
12 department or the public, Department of Public Safety, they're
13 going to have to figure out some way for preservation of evidence
14 rather than going outside to a State Court Judge who has no
15 authority here, as far as I know Judge Vince Roberts is not a pro
16 tem judge here, he is not a Tribal Court Judge, I think he is
17 without any authority whatsoever to interfere with evidence or to
18
19
20
21
22
23
24
25
26
27
28

1 order that any evidence be obtained from a Defendant if that arose
2
3 on the Reservation. Now, the other issue is Mr. Thomas is
4 purportedly Tohono O'odham member, as such there's several U.S.
5 Supreme Court cases that state the Tribe has an exclusive subject
6 matter jurisdiction over misdemeanors committed by non-member
7 Indian, so even if he were mistakenly thought to be a non-Indian
8 and then brought into a State Court, uh, the point remains that he
9 at this point is determined to be a non-member Indian, not a, not
10 Indian. And as such, this Court would maintain its jurisdiction
11 over prosecutions and any motions to suppress ever raised by the
12 Defense, but without even hearing from the Defense or having a
13 motion before me, the Court on its own is going to simply dismiss
14 this case out for a defect based on lack of jurisdiction based on
15 lack of probable cause based on an illegal search warrant issued
16 by a State Court Judge who is not familiar with any of our
17 procedures or process and it's an Ultra Vires act on behalf of the
18 officer, uh, going far beyond what he's, what his, uh, charge is,
19
20
21
22
23
24
25
26
27
28

1 | which is to ensure that the evidence is preserved here on
2 |
3 | Reservation through whatever means is available and if the, uh,
4 | the Tribe has some difficulty getting a Intoxilyzer machine
5 |
6 | repaired or a phlebotomist to do a blood draw in the event that
7 | they can't do the, uh, breathalyzer test, uh, it's going to affect
8 |
9 | all of the cases that are here with DUI's. I am hopeful that any
10 | future DUI that's filed on this does not have the same type of
11 |
12 | process being used to try to preserve the evidence for driving
13 | under the influence. I'm going to dismiss out both cases, uh,
14 |
15 | CR19072 and TR19007 due to the defect of the warrant. And, uh,
16 | it's going to be a dismissal without prejudice to refileing. So,
17 |
18 | Mr. Thomas, they can file at a later time if they wish to do so to
19 |
20 | refile the charges if they have the proper procedure and process
21 | in place. But I'm going to dismiss both of these for defect on
22 | the warrant on the blood draw and the probable cause. Dismissal
23 |
24 | for lack of probable cause.

25 | GLAUCIA BRANNOCK: Thank you, Your Honor.
26 |
27 |
28 |

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

MR. THOMAS: Thank you.

THE COURT: Court is adjourned.

BAILIFF: All rise.

[END OF HEARING]

[Transcriber's Certification Follows:]

C E R T I F I C A T E

I certify that, to the best of my ability, the foregoing is a true and accurate transcription of the original digitally recorded court proceeding in the case referenced on page 1 above.

Transcription Completed: February 24, 2019

CHRISTINE MCGARVEY
LEGAL TRANSCRIPTION SERVICES PLUS
TRANSCRIBED BY: Stacey Archambault

SIGNED BY: Christine McGarvey
Christine MCGARVEY

Exhibit 5
Court's Initial Hearing Written Order
(*PYT v. Thomas*, CR-19-072, TR-19-007)

1 IN THE PASCUA YAQUI TRIBAL COURT

2 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

3 PASCUA YAQUI TRIBE
4 Plaintiff,

VS.

5 THOMAS, JUSTIN PAUL
6 Defendant.

)
) CASE NO. CR-19-072
) TR-19-007
) ORDER DISMISSING
) CASES DUE TO LACK OF PROBABLE
) CAUSE, BASED ON INVALID
) WARRANT ISSUED
) BY STATE OF ARIZONA JUDGE
) FOR AN ON-RESERVATION OFFENSE
) BY A NON-MEMBER INDIAN

7
8
9
10 On January 3, 2019, the defendant's counsel, Glaucia Brannock, and her client, in
11 custody, appeared for an initial hearing. Kendrick Wilson appeared for the Tribe and Tracy
12 Nielsen appeared for pre-trial services.

13 Subject matter jurisdiction may be raised at any time, even by the court itself. The
14 court read the defendant his rights, reviewed the respective complaints which allege that the
15 defendant, an enrolled member of the Tohono O'odham Nation, was driving while intoxicated
16 on the Pascua Yaqui Reservation, crashed into a tree, and then fled the scene of the accident.
17 The court asked the prosecutor why the Pascua Yaqui officer had transported the defendant off-
18 reservation for an involuntary blood draw, and why the officer would have obtained a search
19 warrant for the blood draw from a State Court judge, Vince Roberts, instead of seeking a
20 warrant from a Tribal Court Judge, as is required by the Indian Civil Rights Act, Pascua Yaqui
21 Constitution, and the Pascua Yaqui Criminal Procedures Code. The court notes that the Pascua
22 Yaqui Tribal court has jurisdiction over non-member Indians for offenses committed within the
23 Pascua Yaqui Reservation. 25 U.S.C. § 1301(2), ("Duro Fix"), *U.S. V. Wheeler*, 435 U.S. 313
(1978), *U.S. v. Lara*, 541 U.S. 193 (2004).

24 Mr. Wilson indicated that any illegal search issue as to the State Court Judge issuing the
25 blood draw warrant should more appropriately be addressed by the court in a motion to suppress
26 filed by the defendant's counsel, and that there were enough other facts alleged in each of the
27 respective complaints for the court to maintain its jurisdiction and find probable cause in the
28 criminal cases.

1
2 **Legal Authority Regarding Rights to Privacy and Search and Seizure**

3 The Indian Civil Rights Act and the Pascua Yaqui Constitution provide that the Pascua
4 Yaqui Tribe in exercising its powers of self-government shall not deny to any person the equal
5 protection of its laws or deprive a person of liberty without due process of law. 25 U.S.C. §
6 1302(8), PYT Const. Art.1, § 1(b) & (h). Because the U.S. Constitution does not apply to
7 Tribes, *Talton v. Mayes*, 163 U.S. 376 (1896), the Indian Civil Rights Act provides broad
8 Constitutional-like rights to American Indians in tribal court proceedings. *Santa Clara Pueblo*
9 *v. Martinez*, 436 U.S. 49 (1978).

10 The Fourth Amendment of the United States Constitution provides that it is the right of
11 people to be secure in their homes against unreasonable searches and seizures, and such rights
12 apply to Indian reservations through the Indian Civil Rights Act. 25 U.S.C. § 1302(2). The
13 limitations imposed by 25 U.S.C. § 1302(2) are identical to those imposed by the 4th
14 Amendment. *United States v. Strong*, 778 F.2d 13939, 1397 (9th Cir. 1985).

15 The officer's probable cause statement indicated that he:

16 **. . .transported Justin to the Department of Public Safety main station** where I went
17 over the process of the DUI investigation. He asked me if he could give me a breath
18 sample instead of blood. I told him I would like to have both. Justin then told me that
19 he was not doing shit or words to that effect. I clarified with him and asked him if he
20 was refusing to give me a blood sample, he replied by saying, fuck you, or words to that
21 effect.

22 The defendant's counsel indicated that the defendant refused to consent to any tests. The
23 officer's probable cause statement then relates:

24 **I completed a DUI blood search warrant and presented the Honorable Vince**
25 **Roberts with my probable cause. The honorable judge found enough cause to issue**
26 **the warrant for the blood draw.** I explained the warrant to Justin and Trooper Morts
27 #7507, drew two gray top tubes. . . After the blood draw, . . .I asked him [Justin] if he
28 wanted to sign the forms, he refused. . . .**I transported Justin back to the Pascua**
Yaqui Detention Center. I placed the blood in to the evidence refrigerator with
instructions and request for scientific tests on the blood.

 Vince Roberts is not a Pascua Yaqui Court Judge, he is not a Pascua Yaqui pro tem judge, and
he has not been given authority by the Pascua Yaqui Tribal Council to issue warrants for
defendants arrested on the Pascua Yaqui Reservation. Judge Roberts action undermines the

1 ability of the Pascua Yaqui Court to issue its own warrants for on reservation crimes, and such
2 action plainly interferes with the powers of self-government conferred upon the Pascua Yaqui
3 Tribe and exercised through the Pascua Yaqui Tribal Court. Such State Court warrants to be
4 executed on the reservation would subject a dispute arising on the reservation among
5 reservation Indians to a forum other than the one they have established for themselves. It
6 impermissibly infringes on the rights of reservation Indians to make their own laws and be
7 governed by them.

8 The Pascua Yaqui Criminal Code describes the process for a warrant, and it clearly sets
9 out who has proper authority to issue search warrants issued on the Pascua Yaqui reservation:

10 A search warrant is a written order, **signed by a Tribal Court judge**, and directed to a
11 tribal law enforcement officer ordering him or her to conduct a search and to seize items
12 of property specified in the warrant, or to search for a person for whom an arrest warrant
13 is outstanding.

14 **3 PYTC § 2-2-40, Search Warrants.** (Emphasis added).

15 Additionally, the Pascua Yaqui Criminal Procedure code sets out the process for
16 obtaining blood samples from defendants arrested on the Pascua Yaqui reservation. If the
17 Pascua Yaqui arresting officer wanted to obtain a blood draw warrant for the on-reservation
18 defendant, he could have followed the process enunciated in the Pascua Yaqui Code of Criminal
19 Procedure, 3 PYTC § 2-2-390(a)(6)&(F), asked for the assistance of the prosecutor in
20 developing a form for a warrant request and supporting affidavit(s), which permits the **Tribal
21 Court Judge** to order that defendant provide the prosecutor with samples of "hair, blood, saliva,
22 urine, or other specified materials which involve no unreasonable intrusion of his or her body."
23 This he failed to do. Because the State of Arizona judge had no authority vested in him by the
24 Pascua Yaqui Tribal Council to issue such a warrant for an on-reservation offense committed
25 by a non-member Indian, Mr. Thomas's Constitutional rights were violated.

26 In this case, by allowing a state court judge to interfere with the defendant's rights under
27 the Pascua Yaqui Code, the defendant was deprived of his Civil rights under the Indian Civil
28 Rights Act, the Pascua Yaqui Constitution and the Criminal Code, when he was transported
from his detention cell on the Pascua Yaqui Reservation and transported to Tucson, where he
became subject to a foreign court's judge, who had no authority to act on behalf of the Pascua
Yaqui Tribe. But for the officer transporting the defendant across the Pascua Yaqui reservation

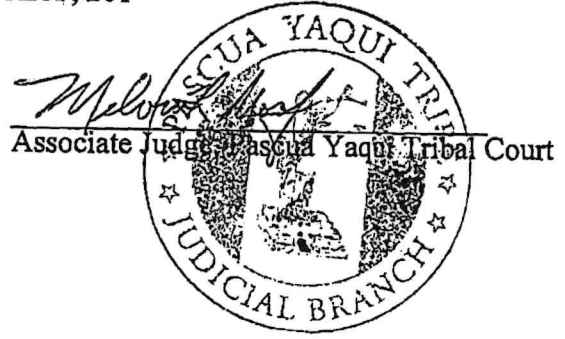
1 boundary, the defendant would have never appeared in front of the state court Judge. The
2 Tohono O'odham Nation citizen, as a non-member Indian, was subject to the authority of the
3 Tribal Court, and its Constitutional protections. He was entitled to the protections of Pascua
4 Yaqui law and not the State of Arizona's laws. The State Court judge's act of issuing a warrant
5 to draw blood against a non-member Indian for an alleged crime committed on the Pascua
6 Yaqui reservation was an ultra vires act, one that was beyond the scope of authority limite3d to
7 his territorial jurisdiction of the State of Arizona. The State Judge's action infringed on the right
8 of the Pascua Yaqui Tribe to make their own laws and be governed by them. See *Williams v.*
9 *Lee*, 358 U.S. 217 (1959). States have no power to regulate the affairs of Indians on reservation.
10 Congress has supported efforts to encourage tribal governments to become stronger and more
11 highly organized. Additionally, the state of Arizona has an express disclaimer of jurisdiction
12 over Indian Lands in its Enabling Act. § 20, 36 Stat.569, and in Art XX, of its Constitution,
13 Cf. *Draper v. United States*, 164 U.S. 240.

14 Just as in illegal search cases, where the fruits of the poisonous tree are found to be
15 inadmissible due to the taint of an illegal search, so too, in this case, the defendant's civil rights
16 were violated by an illegal warrant issued by a state court judge without authority to take such
17 an action. As such, a dismissal should be granted without prejudice.

18 **IT IS ORDERED** that cases shall be dismissed for good cause shown, due to an illegal
19 act by the state of Arizona Judge that interfered with the jurisdiction of the Pascua Yaqui tribal
20 court, that deprived the defendant of his rights under the Indian Civil Rights Act, the Pascua
21 Yaqui Constitution, and the Pascua Yaqui Rules of Criminal Procedure. The case shall be
22 dismissed without prejudice to re-filing.

23 **The defendant shall be released immediately.**

24 **SO ORDERED THIS 3rd DAY OF JANUARY, 2019** 9



25 cc: Date: 01-03-19
26 Tribe Defendant Counsel

27 [Signature]
28 Clerk

OFFICE OF THE PROSECUTOR

PASCUA YAQUI TRIBE

7777 S. CMO. HUIVISIM

TUCSON, ARIZONA 85757

(520) 879-6251

1

2

3

**ORIGINAL of the forgoing filed
this 28 day of March, 2019.**

4

Clerk of the Court

5

Pascua Yaqui Tribal Court of Appeals

6

Copy of the foregoing

7

delivered/mailed/provided to:

8

Glaucia Brannock,

9

Public Defender

10

Attorney for Appellee Defendant

11

12

Clerk of the Court (x1)

13

Pascua Yaqui Tribal Court

14

15

Clerk of the Court (x4)

16

Pascua Yaqui Tribal Court of Appeals

17

By: _____

1
2

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI RESERVATION, ARIZONA

THE PASCUA YAQUI TRIBE,
OFFICE OF THE PROSECUTOR

Appellant

vs.

JUSTIN PAUL THOMAS

Appellee

CA-19-002

TRIBAL COURT CASE NO: CR-19-072 &
TR-19-007

NOTICE Re: SUBMISSION OF TRANSCRIPT

3
4
5
6
7
8
9
10
11

COMES NOW the PASCUA YAQUI TRIBE/Appellant, by and through Chief Prosecutor, Oscar J. Flores, and Deputy Prosecutor, Coleen Thoene, and hereby notifies the Court that a transcript of any relevant lower court hearings has been prepared and submitted to the Clerk of Court for the Court of Appeals.

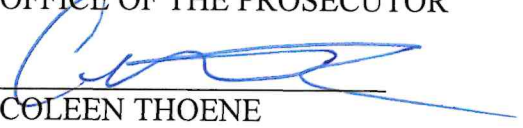
On March 27, 2019, the Clerk indicated that a copy of the transcript could be added to the "shared drive" for the Pascua Yaqui Court. Because undersigned counsel did not have IT permissions to be able to upload copies of the transcript to the appropriate shared drive, a copy of the transcript was emailed to this Court's Clerk that same date.

A copy of the transcript has been provided to counsel for the Appellee.

12
13
14
15
16
17
18
19

RESPECTFULLY submitted this 28 day of March, 2019.


OSCAR J. FLORES
CHIEF PROSECUTOR
Oscar.J.Flores@pascuayaqui-nsn.gov

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR

COLEEN THOENE
DEPUTY PROSECUTOR
Coleen.Thoene@pascuayaqui-nsn.gov

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

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

THE PASCUA YAQUI TRIBE,
OFFICE OF THE PROSECUTOR

Appellant

vs.

JUSTIN PAUL THOMAS

Appellee

CA-19-002

TRIBAL COURT CASE NO: CR-19-072 &
TR-19-007

ORDER

3 Upon application from the Pascua Yaqui Office of the Prosecutor, and for good cause
4 shown, IT IS ORDERED that the deadline for Appellant to file its opening brief shall be extended
5 for thirty (30) days. Appellant shall file its opening brief no later than April 5, 2019.

6 SO ORDERED this 20th day of February, 2019.


7 Hon. Robert Miller

Sent via electronic mail this 20th day of February, 2019, to:

Kendrick Wilson
Pascua Yaqui Office of the Prosecutor
Attorney for Appellant

8 Glaucia Brannock,
9 Public Defender
10 *Attorney for Appellee Defendant*
11

12 By: _____

OFFICE OF THE PROSECUTOR
PASCUA YAQUI TRIBE
7777 S. CMO. HUIVISIM
TUCSON, ARIZONA 85757
(520) 879-6251

1 be able to prepare a transcript on short notice. Even if the transcript can be prepared on short
2 notice, it will leave the Appellant with a limited opportunity to review the record before filing a
3 meaningful and accurate brief.

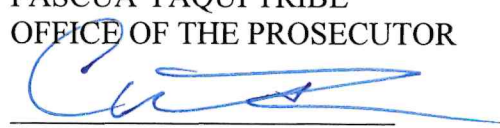
4 The Appellant's Opening Brief is currently due on March 1, 2019. The Appellant
5 respectfully requests that this deadline be continued for thirty (30) days to allow the parties to
6 obtain and review copies of the hearing transcript prior to preparing their respective briefs.

7 Pursuant to 3 PYTC § 2-3-50 the Appellate Court may "suspend the requirements or
8 provisions of any of" the Pascua Yaqui Rules of Appellate procedure "upon motion for good cause
9 shown." Additionally, 3 PYTC § 2-3-70(B) allows the Court to shorten or extend the time for
10 parties to file briefings with the Court either "upon stipulation of the parties ... filed with the
11 appellate court, or upon written motion for good cause shown." The Tribe respectfully requests
12 that this Court find that extraordinary circumstances exist, and that there is good cause for a thirty
13 day continuance.

14 The Tribe has contacted counsel for the Appellee/Defendant, who has indicated that she
15 has no objection to the requested continuance.

16 **RESPECTFULLY** submitted this 19 day of February, 2019.

17
18
19
20
21 
22 OSCAR J. FLORES
23 CHIEF PROSECUTOR
Oscar.J.Flores@pascuayaqui-nsn.gov

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR
24 
25 COLEEN THOENE
DEPUTY PROSECUTOR
Coleen.Thoene@pascuayaqui-nsn.gov

OFFICE OF THE PROSECUTOR

PASCUA YAQUI TRIBE

7777 S. CMO. HUIVISIM

TUCSON, ARIZONA 85757

(520) 879-6251

1 **ORIGINAL of the forgoing filed**
2 **this 19 day of February, 2019.**

3 Clerk of the Court
4 Pascua Yaqui Tribal Court of Appeals

5 **Copy of the foregoing**
6 **delivered/mailed/provided to:**

7 Glaucia Brannock,
8 Public Defender
9 *Attorney for Appellee Defendant*

10
11 Clerk of the Court (x1)
12 Pascua Yaqui Tribal Court

13
14 Clerk of the Court (x4)
15 Pascua Yaqui Tribal Court of Appeals

16 By: _____

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

Kendrick Wilson
Deputy Prosecutor

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

PASCUA YAQUI TRIBE,
Appellant,

Vs.
THOMAS, Justin Paul

Defendant.

APPEALS CASE NO.:

(Tribal Court No. CR-19-072/TR-19-007)

NOTICE OF APPEAL
(Oral argument requested)

Notice is hereby given that the Pascua Yaqui Tribe appeals to the Appellate Court of the Pascua Yaqui Tribe from the judgment entered in these actions by the Pascua Yaqui Tribal Court on January 3, 2019 by order of Associate Judge Melvin Stoof. [see attached]

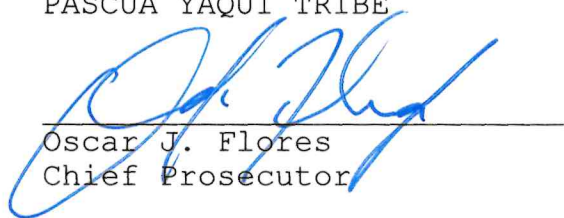
The Trial Court erred in finding a lack of subject matter jurisdiction because police officers used a state court warrant to obtain a blood sample while Defendant was off of the Reservation and within the jurisdiction of the State of Arizona.

The Tribe further appeals the Trial Court's dismissal of all charges and implicit suppression of all evidence obtained prior to the search warrant as fruit of the poisonous tree, rather than the recognized standard of suppressing only evidence gleaned as a result of an improper search.

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

Respectfully submitted this 4th day of January, 2019.

OFFICE OF THE PROSECUTOR
PASCUA YAQUI TRIBE



Oscar J. Flores
Chief Prosecutor



Kendrick Wilson
Deputy Prosecutor

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

Clerk of the Court, Pascua Yaqui Tribe Court of Appeals

Copy delivered/mailed to:
Pascua Yaqui Tribal Court

Pascua Yaqui Appellate Court

Glaucia Brannock
Public Defender's Ofc.
Attorney for Defendant

By:

1 IN THE PASCUA YAQUI TRIBAL COURT

2 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

3 PASCUA YAQUI TRIBE

Plaintiff,

4 VS.

5 THOMAS, JUSTIN PAUL

Defendant.

CASE NO. CR-19-072

TR-19-007

ORDER DISMISSING

CASES DUE TO LACK OF PROBABLE
CAUSE, BASED ON INVALID

WARRANT ISSUED

BY STATE OF ARIZONA JUDGE

FOR AN ON-RESERVATION OFFENSE

BY A NON-MEMBER INDIAN

9
10 On January 3, 2019, the defendant's counsel, Glauca Brannock, and her client, in
11 custody, appeared for an initial hearing. Kendrick Wilson appeared for the Tribe and Tracy
12 Nielsen appeared for pre-trial services.

13 Subject matter jurisdiction may be raised at any time, even by the court itself. The
14 court read the defendant his rights, reviewed the respective complaints which allege that the
15 defendant, an enrolled member of the Tohono O'odham Nation, was driving while intoxicated
16 on the Pascua Yaqui Reservation, crashed into a tree, and then fled the scene of the accident.
17 The court asked the prosecutor why the Pascua Yaqui officer had transported the defendant off-
18 reservation for an involuntary blood draw, and why the officer would have obtained a search
19 warrant for the blood draw from a State Court judge, Vince Roberts, instead of seeking a
20 warrant from a **Tribal Court Judge**, as is required by the Indian Civil Rights Act, Pascua Yaqui
21 Constitution, and the Pascua Yaqui Criminal Procedures Code. The court notes that the Pascua
22 Yaqui Tribal court has jurisdiction over non-member Indians for offenses committed within the
23 Pascua Yaqui Reservation. 25 U.S.C. § 1301(2), ("Duro Fix"), *U.S. v. Wheeler*, 435 U.S. 313
(1978), *U.S. v. Lara*, 541 U.S. 193 (2004).

24 Mr. Wilson indicated that any illegal search issue as to the State Court Judge issuing the
25 blood draw warrant should more appropriately be addressed by the court in a motion to suppress
26 filed by the defendant's counsel, and that there were enough other facts alleged in each of the
27 respective complaints for the court to maintain its jurisdiction and find probable cause in the
28 criminal cases.

1
2 **Legal Authority Regarding Rights to Privacy and Search and Seizure**

3 The Indian Civil Rights Act and the Pascua Yaqui Constitution provide that the Pascua
4 Yaqui Tribe in exercising its powers of self-government shall not deny to any person the equal
5 protection of its laws or deprive a person of liberty without due process of law. 25 U.S.C. §
6 1302(8), PYT Const. Art.1, § 1(b) & (h). Because the U.S. Constitution does not apply to
7 Tribes, *Talton v. Mayes*, 163 U.S. 376 (1896), the Indian Civil Rights Act provides broad
8 Constitutional-like rights to American Indians in tribal court proceedings. *Santa Clara Pueblo*
9 *v. Martinez*, 436 U.S. 49 (1978).

10 The Fourth Amendment of the United States Constitution provides that it is the right of
11 people to be secure in their homes against unreasonable searches and seizures, and such rights
12 apply to Indian reservations through the Indian Civil Rights Act. 25 U.S.C. § 1302(2). The
13 limitations imposed by 25 U.S.C. § 1302(2) are identical to those imposed by the 4th
14 Amendment. *United States v. Strong*, 778 F.2d 13939, 1397 (9th Cir. 1985).

15 The officer's probable cause statement indicated that he:

16 . . . **transported Justin to the Department of Public Safety main station** where I went
17 over the process of the DUI investigation. He asked me if he could give me a breath
18 sample instead of blood. I told him I would like to have both. Justin then told me that
19 he was not doing shit or words to that effect. I clarified with him and asked him if he
20 was refusing to give me a blood sample, he replied by saying, fuck you, or words to that
21 effect.

22 The defendant's counsel indicated that the defendant refused to consent to any tests. The
23 officer's probable cause statement then relates:

24 **I completed a DUI blood search warrant and presented the Honorable Vince**
25 **Roberts with my probable cause. The honorable judge found enough cause to issue**
26 **the warrant for the blood draw.** I explained the warrant to Justin and Trooper Morts
27 #7507, drew two gray top tubes. . . .After the blood draw, . . .I asked him [Justin] if he
28 wanted to sign the forms, he refused. . . . **I transported Justin back to the Pascua**
Yaqui Detention Center. I placed the blood in to the evidence refrigerator with
instructions and request for scientific tests on the blood.

Vince Roberts is not a Pascua Yaqui Court Judge, he is not a Pascua Yaqui pro tem judge, and
he has not been given authority by the Pascua Yaqui Tribal Council to issue warrants for
defendants arrested on the Pascua Yaqui Reservation. Judge Roberts action undermines the

1 ability of the Pascua Yaqui Court to issue its own warrants for on reservation crimes, and such
2 action plainly interferes with the powers of self-government conferred upon the Pascua Yaqui
3 Tribe and exercised through the Pascua Yaqui Tribal Court. Such State Court warrants to be
4 executed on the reservation would subject a dispute arising on the reservation among
5 reservation Indians to a forum other than the one they have established for themselves. It
6 impermissibly infringes on the rights of reservation Indians to make their own laws and be
7 governed by them.

8 The Pascua Yaqui Criminal Code describes the process for a warrant, and it clearly sets
9 out who has proper authority to issue search warrants issued on the Pascua Yaqui reservation:

10 A search warrant is a written order, **signed by a Tribal Court judge**, and directed to a
11 tribal law enforcement officer ordering him or her to conduct a search and to seize items
12 of property specified in the warrant, or to search for a person for whom an arrest warrant
13 is outstanding.

14 3 PYTC § 2-2-40, **Search Warrants**. (Emphasis added).

15 Additionally, the Pascua Yaqui Criminal Procedure code sets out the process for
16 obtaining blood samples from defendants arrested on the Pascua Yaqui reservation. If the
17 Pascua Yaqui arresting officer wanted to obtain a blood draw warrant for the on-reservation
18 defendant, he could have followed the process enunciated in the Pascua Yaqui Code of Criminal
19 Procedure, 3 PYTC § 2-2-390(a)(6)&(F), asked for the assistance of the prosecutor in
20 developing a form for a warrant request and supporting affidavit(s), which permits the **Tribal
21 Court Judge** to order that defendant provide the prosecutor with samples of “hair, blood, saliva,
22 urine, or other specified materials which involve no unreasonable intrusion of his or her body.”
23 This he failed to do. Because the State of Arizona judge had no authority vested in him by the
24 Pascua Yaqui Tribal Council to issue such a warrant for an on-reservation offense committed
25 by a non-member Indian, Mr. Thomas’s Constitutional rights were violated.

26 In this case, by allowing a state court judge to interfere with the defendant’s rights under
27 the Pascua Yaqui Code, the defendant was deprived of his Civil rights under the Indian Civil
28 Rights Act, the Pascua Yaqui Constitution and the Criminal Code, when he was transported
from his detention cell on the Pascua Yaqui Reservation and transported to Tucson, where he
became subject to a foreign court’s judge, who had no authority to act on behalf of the Pascua
Yaqui Tribe. But for the officer transporting the defendant across the Pascua Yaqui reservation



1 boundary, the defendant would have never appeared in front of the state court Judge. The
2 Tohono O'odham Nation citizen, as a non-member Indian, was subject to the authority of the
3 Tribal Court, and its Constitutional protections. He was entitled to the protections of Pascua
4 Yaqui law and not the State of Arizona's laws. The State Court judge's act of issuing a warrant
5 to draw blood against a non-member Indian for an alleged crime committed on the Pascua
6 Yaqui reservation was an ultra vires act, one that was beyond the scope of authority limite3d to
7 his territorial jurisdiction of the State of Arizona. The State Judge's action infringed on the right
8 of the Pascua Yaqui Tribe to make their own laws and be governed by them. See *Williams v.*
9 *Lee*, 358 U.S. 217 (1959). States have no power to regulate the affairs of Indians on reservation.
10 Congress has supported efforts to encourage tribal governments to become stronger and more
11 highly organized. Additionally, the state of Arizona has an express disclaimer of jurisdiction
12 over Indian Lands in its Enabling Act. § 20, 36 Stat.569, and in Art XX, of its Constitution,
13 Cf. *Draper v. United States*, 164 U.S. 240.

14 Just as in illegal search cases, where the fruits of the poisonous tree are found to be
15 inadmissible due to the taint of an illegal search, so too, in this case, the defendant's civil rights
16 were violated by an illegal warrant issued by a state court judge without authority to take such
17 an action. As such, a dismissal should be granted without prejudice.


18 **IT IS ORDERED** that cases shall be dismissed for good cause shown, due to an illegal
19 act by the state of Arizona Judge that interfered with the jurisdiction of the Pascua Yaqui tribal
20 court, that deprived the defendant of his rights under the Indian Civil Rights Act, the Pascua
21 Yaqui Constitution, and the Pascua Yaqui Rules of Criminal Procedure. The case shall be
22 dismissed without prejudice to re-filing.

23 **The defendant shall be released immediately.**

24 **SO ORDERED THIS 3rd DAY OF JANUARY, 2019**

25 
26 Associate Judge, Pascua Yaqui Tribal Court
27 

28 cc: Date: 01-03-19
X Tribe X Defendant Y Counsel


Clerk