No. CA-19-005

Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribe, Appellant,

v.

Santiago Luis Valencia, Appellee.

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

For the Appellee: Annamarie L. Valdivia, Pascua Yaqui Public Defender

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Opinion

Martinez, Associate Justice

Appellant Pascua Yaqui Tribe appeals a trial court decision dismissing, without prejudice, a criminal complaint.

Facts

On January 10, 2019, the Pascua Yaqui Tribe charged Appellee with one criminal count of Possessing Narcotics and Dangerous Drugs in violation of 4 PYTC §1-780(C). Appellant's Exhibit A. Along with the criminal complaint, Appellant filed a supporting probable cause statement signed by the arresting Pascua Yaqui Police Department Officer (hereinafter "tribal officer"). *Id.*

The probable cause statement describes the incident on January 9, 2019, that led to Appellee's arrest and subsequent criminal charge for possession of narcotics. *Id.* In the probable cause statement, the tribal officer states that on January 9, 2019, at approximately 6:09 p.m., she made contact with Appellee and:

> "...immediately exited [her] patrol unit and directed [Appellee] to take his hands out of his pocket; [she] observed something green in his right hand. As he pulled his hands out of his pockets, he threw the green object away from his persons, which [she] later identified to be Marijuana."

At the initial hearing, on January 10, 2019, the trial court dismissed Appellant's criminal complaint, without prejudice, because the trial court found insufficient probable cause that Appellee did in fact possess a narcotic and dangerous drug in violation of 4 PYTC §1-780(C). *Id.* Exhibit C. The trial court held that although the tribal officer indicated in her probable cause statement that she determined the alleged substance was marijuana, she did not provide sufficient facts as to how she came to that conclusion. *Id.* Exhibit B and Exhibit C.

Standard of Review

The appellate court's standard of review of decisions dismissing a criminal case without prejudice, are for an abuse of discretion. *Pascua Yaqui Tribe v. Bustamante,* CA-17-004, at 2 (PYT Ct. App. Jul. 3, 2017). "The court abuses its discretion when it makes an error of law in reaching a discretionary conclusion or when the record, viewed in the light most favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision." *Pascua Yaqui Tribe v. Coleman*, No. CA-15-003, at 2 (PYT Ct. App. Nov. 17, 2015).

Discussion

Appellant's probable cause statement used to support its criminal complaint charging Appellee with possession of narcotics and dangerous drugs, describes the alleged substance as a "green object." The probable cause statement goes on to state that the arresting officer, later identified that "green object" to be marijuana. However, the probable cause statement does not provide any additional factual information as to how the tribal officer came to the conclusion that the "green object" was marijuana. Specifically, there is no mention of the training and experience the tribal officer has acquired to be able to identify narcotics, or any other descriptive or factual information that led the officer to conclude that the "green object" was marijuana.

At the initial hearing, the trial court evaluated Appellant's criminal complaint and supporting probable cause statement. The trial court dismissed the complaint without prejudice, based on the lack of factual information surrounding the tribal officer's identification of the substance. In our opinion, the trial court reasonably concluded that there were insufficient facts to provide a reasonable and articulable suspicion that Appellee was in possession of a narcotic and dangerous drug in violation of 4 PYTC §1-780(C). Without more factual information, it was reasonable for the trial court to find insufficient probable cause. Additionally, the trial court dismissed the complaint, without prejudice, giving Appellant leave to amend and re-file its complaint and probable cause statement. Appellant had the opportunity to remedy the factual deficiencies in its probable cause statement and re-file, but did not do so.

Consequently, the facts and circumstances surrounding the trial court's dismissal of Appellant's criminal complaint, without prejudice, lead us to conclude that the trial court did not abuse its discretion.

Conclusion

We hold that the trial court did not abuse its discretion in dismissing Appellant's criminal complaint, without prejudice, and thus we affirm that court's decision.

So ORDERED this 19th day of August, 2019.

Hon. Kendra A. Martinez

We CONCUR:

Hon. Robert Miller

Hon. Rebecca Plevel

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

PASCUA YAQUI TRIBE, OFFICE OF THE PROSECUTOR Appellant vs. SANTIAGO LUIS VALENCIA, Appellee	APPELLATE CASE NO: CA-19-005 TRIBAL COURT CASE NO: CR-19-083

PETITIONER/APPELLANT'S REPLY BRIEF

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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 5.

STATEMENT OF JURISDICTION

The parties agree that the Court of Appeals has jurisdiction over this matter. *See* Tribe's Opening Brief, at 6-7; Appellee's Response Brief, at 1.

STATEMENT OF THE CASE

Based on the arguments and facts outlined in the Appellee's Response Brief, no additions or corrections need to be made to the factual or procedural recitation outlined in the Tribe's Opening Brief. However, the Tribe notes that the Appellee's statements contained with regard to the amount of time that Officer Fimbres has been working as a solo officer, *see* Appellee's Response Brief, at 4, fails to include mention of the time that Officer Fimbres trained at a law enforcement academy, as well as the amount of time she worked as an officer under the supervision of more senior officers as part of field training requirements. The Tribe also notes that, although the Appellee claims it to have been "common knowledge" that Officer Fimbres "had been practicing as an officer" for only two months, in addition to not painting a complete and accurate picture, it is also not information contained in the trial court record.

Additionally, although the Appellee asserts that the Tribe admitted in its Opening Brief, specifically on page 9, that Officer Fimbres was "in training," such is not the case. When detailing the issues presented for review in this case, the Tribe, under item #2, wrote "training" instead of "trained." This was a typographical error. Furthermore, it is clear from a review of

the remainder of the Opening Brief that the Tribe intended to use the word "trained" in this section, which mirrors the language used elsewhere in the brief. *See* Opening Brief, at 10, 12, 14, 23.

ISSUES PRESENTED FOR REVIEW

No new issues have been presented to this Court for review based on the Appellee's response, save a disagreement between the parties as to what standard of review is appropriate for this case.

STANDARD OF REVIEW

The parties disagree as to what standard of review is appropriate for this appeal. That 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. The Appellee then suggests, incorrectly, that because this court has used an "abuse of discretion" standard in the past, *PYT v. Miranda*, CA-08-015, p.22 (PYT Ct. App. Mar. 29, 2009), "is irrelevant." Appellee's Response Brief, at 7. However, a closer analysis of the Pascua Yaqui Court of Appeals cases cited by both parties demonstrates that this Court has never reviewed whether a trial court's probable cause determination involves a mixed question of law and fact. 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.

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] Then, 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 refiling it as a non-arrest matter when the first complaint was dismissed for an identification-related error. Even *PYT v. Baltazar*, CA-01-003 (PYT Ct. App., Sept. 12, 2001), which discussed whether location or date issues are fatal to the form of a complaint, did not address that issue in the context of probable cause.

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, the 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. *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,

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[1] This case relied upon *PYT v. Gonzalez*, CA-07-017 (PYT Ct. App., Oct. 9, 2007), which the Appellee describes as "contemplat[ing]" *de novo* review of a court's probable cause determination. This is inaccurate, as a review of the relevant appellate order clearly shows that this Court dismissed the appeal based on the Appellant's failure to provide a complete record. *Id.* The Courts order mentions nothing indicating it came at all close to analyzing what standard of review it should apply.

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.

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 7-8. *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 do — involve a nuanced interplay between factual and legal interpretation. The Appellee has cited to no case law that addresses the issue raised in this case and says otherwise.

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 proof of a specific chemical test result — which is what the trial court relied upon in both its oral and written

rulings in this case — is a purely legal question. The factual and legal interpretive issues involved with both of these questions are intimately intertwined and virtually inseparable from one another in analysis.

Because the issue presented in this case involves 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.

LAW AND ARGUMENT

I. The Trial Court's Oral and Written Rulings Clearly Indicate that its Probable Cause Determination in this Case was Based Upon a Lack of Evidence of a Chemical Test Having Been Provided.

Despite Appellee's attempts to argue to the contrary, a review of the trial court record clearly demonstrates that the court dismissed the complaint in this case for want of probable cause because no chemical test had been performed on the substance Officer Fimbres located. For instance, in its written ruling, the trial court indicated the following:

> The Court finds that there is no probable cause as to Count One, Narcotics and Dangerous Drugs, and that Count should be dismissed. Although the officer indicated he determined that the alleged substance was marijuana, he did not provide any facts to provide a reasonable and articulable suspicion, *based on no field test (narco pouch)*.
>
> Opening Brief, Exhibit B (*emphasis added*).

In its oral ruling, the trial court, again, used language that clearly indicated a reliance upon the presence or absence of chemical testing as a basis for its probable cause determination. Specifically, it stated:

> And then the allegation was he, [the Appellee] took his hands out of his pocket, observed something green in the hand, which he *later identified to be marijuana*, uh, there is *no indication if there's even a NarcoPouch* test in this, in this affidavit to have the reas — to articulate a reasonable suspicion to even support probable cause.

Opening Brief, Exhibit C, p.5 (*emphasis added*)

Clearly, the plain language of the court's oral and written rulings relied solely upon the absence of chemical testing, and directly contradicts Appellee's attempts to expand the nature of the trial court's ruling. The plain language also shows that the trial court recognized that the officer "identified" the substance found in this case as marijuana. Had the situation been otherwise, it would have been stated in both the oral record and the trial court's written ruling.

II. Because the Trial Court Expressly Based its Probable Cause Determination Upon Evidence which Jurisdictions Have Held to Not Be Required for a Finding of Guilt Beyond a Reasonable Doubt at Trial, Error Occurred.

In its opening brief, the Tribe argued that the trial court's ruling was error, in part, because the trial court, in effect, required to meet a level of evidentiary proof at the probable cause stage of proceedings that it would not be required to meet at trial, where the higher "beyond a reasonable doubt" standard is at play. *See* Opening Brief, at 19-23. Although the Appellee attempts to argue that whether drug testing evidence needs to be introduced at trial under Pascua Yaqui law is an issue that is unripe for review, this particular argument misses the point of the Tribe's brief. The Tribe is not asserting that this Court must decide whether chemical drug test evidence must be admitted at trial before a conviction may be obtained. What the Tribe is arguing is that — in light of the number of cases holding that chemical evidence is not needed to prove guilt beyond a reasonable doubt—requiring the prosecution to introduce such evidence during probable cause proceedings effectively requires the prosecution to prove charging decisions under a "beyond a reasonable doubt" standard.

As argued extensively in the Tribe's Opening brief, probable cause involves a relatively low standard of proof. It is a concept that "deal[s] with probabilities," and not necessarily the rigorous sort of testimony, evidence, or proof required at trial. *Brinegar v. United States*, 338

U.S. 160, 175 (1949). Such probabilities are based on "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. In short "probable 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). Requiring proof of a chemical test goes beyond this clear standard, especially when a trained officer indicates that they recognize a substance to be a particular type of drug. Because the trial court based its probable cause determination on the absence of a chemical test, error occurred.

III. The Complaint, When Read in Conjunction with Officer Fimbres' Affidavit Establishes Reasonably Trustworthy Information and Circumstances that Would Lead a Person of Reasonable Caution to Believe that a Suspect has Committed an Offense.

In her affidavit, Officer Fimbres indicated that she was a duly authorized law enforcement officer. She further indicated that the information contained in her affidavit was "true an[d] accurate to the best of [her] knowledge and belief." Opening Brief, Exhibit A, p.2. She witnessed the Appellee involved in a physical altercation with unknown subjects. She then witnessed the Appellee throw an item away from himself. A person of normal and rational understanding would believe that such an action, when done in the face of approaching law enforcement, is designed to distance oneself from potentially incriminating evidence. Officer Fimbres also indicated that, as a duly authorized and, thus, trained law enforcement officer, she recognized the substance to have been marijuana. This was sufficient for a finding of probable cause.

The Appellee raises a number of arguments that boil down to one principle: a desire for a level and breadth of information that goes beyond the scope of probable cause and, instead, is of

the sort that would be introduced at trial to prove guilt beyond a reasonable doubt. Some of the arguments she raises, including the scope of the officer's training, whether she picked up, held, smelt, or otherwise examined the drug evidence seized, goes towards cross-examination at trial. It does not go to a determination of probable cause at an initial hearing where trial of the case is not at issue. The Appellee's contention is not only unpersuasive, but evinces a misunderstanding of the nature of an initial hearing under the Pascua Yaqui Tribal code.

CONCLUSION AND REMEDY SOUGHT

The trial court's dismissal of the complaint against the Defendant at the initial hearing was contrary to law and was the result of the court requiring the prosecution to submit evidence that it would not have been required to submit at trial. Because the trial court held the prosecution to a standard greater than probable cause, this amounted to legal error. The Appellee has presented no arguments to refute this issue other than to assert a desire for more evidence. That is not the standard for probable cause. Accordingly, the Appellant respectfully requests this Court reverse the trial court's ruling, reinstate the complaint, and remand the case to the trial court for further proceedings.

RESPECTFULLY submitted this 20th 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
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And that one (1) copy of the Tribe's pleading was delivered, this date to:

Annamarie Valdivia
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Pascua Yaqui Office of the Public Defender
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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 20th day of May, 2019.

PASCUA YAQUI PROSECUTOR

Oscar J. Flores
Chief Prosecutor

Coleen Thoene
Deputy Prosecutor

Sworn before me this 20th day of May, 2019

Notary Signature

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

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Appellee, vs. SANTIAGO LUIS VALENCIA, Appellant.	APPELLATE CASE NO. CA-19-005 PASCUA YAQUI TRIBAL COURT NO. CR-19-083

APPELLEE'S RESPONSE BRIEF

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STATUTES

I. JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction to review this case as the Tribe has the ability to appeal the dismissal of a complaint prior to trial, whether or not dismissal is with or without prejudice. *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). In the present case, the Pascua Yaqui trial court dismissed a complaint without prejudice that was filed on January 9, 2019. The complaint alleged Defendant/Appellee Santiago Luis Valencia, and enrolled member of the Pascua Yaqui Nation, was in possession of marijuana in violation of 4 PYTC § 1-780(C) on January 9, 2019.

II. ISSUE PRESENTED FOR REVIEW

A. **Whether the trial court abused its discretion when it dismissed, without prejudice to refiling, a complaint supported only by an affidavit that failed to indicate how the officer in training was able to determine that the "green object" purported to be marijuana was actually or why it was suspected to be marijunana, even where it was not stated to have been collected or placed into evidence for future testing?**

III. STATEMENT OF THE CASE

A. Summary of Incident and Arrest

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

On January 9, 2019 at 6:09 p.m., Officer Monique Fimbres was dispatched to an address on the Pascua Yaqui Nation "in response to a 911 hang-up/check welfare." Appellant's Exhibit A at page 3. As the officer arrived at the address, Sandra Molina approached the officer to inform the officer that her son, Santiago Valencia was drunk and was chasing after kids that passed her house. Ms. Molina gave a physical description of her son. *Id.*

Officer Fimbres, left Ms. Molina in search of Mr. Valencia and found him nearby along with three other young men "in what appeared to be a physical altercation." *Id.* She identified Mr. Valencia based on the description provided by Ms. Molina. As Officer Fimbres approached Mr. Valencia, she had him remove his hands from his pockets. When Mr. Valencia removed his hands from his pocket, Officer Fimbres reported seeing "something green." She then indicated that Mr. Valencia "threw the green object." *Id.* It is this "green object" that is purported to be the identified marijuana in the *to wit* line of the complaint. However, the officer never described her training and experience to suspect that the object was marijuana, nor did she describe the item in any way other than that it was green, nor did she perform a chemical test to verify any idea she might have had that it was marijuana. It is this lack of specificity which was to become the subject of the ruling being appealed here.

Beyond the physical characteristics important to identify the object here called marijuana, there were no statements. Neither Ms. Sandra Molina nor Santiago Valencia made statements to

suggest the reported item was marijuana, and if they did, they were not offered in this affidavit. Ms. Molina never accused her son of using marijuana or any other illicit drugs. Officer Fimbres was dispatched after a 911 hang up call was made to police. After verifying that the possible caller was safe, Officer Fimbres heard that Mr. Valencia was drunk and chasing some kids. That was the extent of the purpose of the call.

No warrant was requested or issued in this case.

Officer Fimbres arrested Mr. Valencia on one count of disorderly conduct and one count of possession of marijuana. Mr. Valencia was taken into custody at the Pascua Yaqui Detention Center to await his initial appearance before the trial court. It is common knowledge that at the time of the arrest, Officer Fimbres had been practicing as an officer (as opposed to a recruit) for the Pascua Yaqui Tribe for a little over two months. Failed attempts were made to collect verification of employment with the Tribe and Human Resource. Exhibit 1.

B. **Summary of Trial Court Proceedings**

On January 10, 2019 at 10:17 a.m., a one-count complaint was filed alleging the following: "On or about January 9, 2019, at approximately 6:09 p.m., at or near Benem and Vicam, Defendant did possess or have under his control, any narcotic, hallucinatory or other dangerous drug, to wit: ***possessed marijuana.***" This was in alleged to be a violation of 4 PYTC § 1-780(C) – Narcotics and Dangerous Drugs. The Tribe did not file a complaint alleging disorderly conduct as originally anticipated by Officer Fimbres. Appellant's Exhibit A at p. 3.

An affidavit was attached to the complaint on January 10, 2019, alleging the information cited to in subsection III(A). An initial hearing was held later that day. After review of the complaint and affidavit, the trial court dismissed the complaint, without prejudice, finding that the Tribe had not established probable cause. Specifically the court stated:

> "... I read this four times now and I've, it says the officer observed four males in the intersection of Benem and Vicam in what appeared to be a physical altercation. And then the allegation was he, Mr. Valencia took his hands out of his pocket, observed *something green* in the hand, which [the officer] later *identified* to be marijuana, uh, there's no indication if there's even a NarcoPouch test in this, in this affidavit to have the reas--, to articulate a reasonable suspicion to articulate probable cause..."

(Emphasis added).

The trial court dismissed the complaint without prejudice because the officer never stated what she used to positively identify the object as marijuana nor did she articulate why, based on her experience and or training, or the totality of the circumstances that she had probable cause to believe that the object was marijuana. The Tribe appealed the dismissal to the Appellate Court.

IV. SUMMARY OF ARGUMENT

The trial court dismissed without prejudice a complaint where an officer in training provided insufficient information to show probable cause to arrest Mr. Valencia for possession of marijuana. In its appellant brief, the Tribe misinterprets the trial court's finding and requests this Court to determine whether or not chemical testing of alleged narcotics is necessary at both the probable cause phase and at trial. The Court's finding was that is that probable cause did not exist in this case because the officer in training "did not provide *any* facts to provide a reasonable and articulable suspicion" that the object was marijuana, when the officer specifically stated that she identified the object as marijuana, absent a field test

Whether probable cause exists for any offense "depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366 (2003). In the present case the Officer merely stated that she saw Mr. Valencia bring out a green object and he threw it. She then stated she was able to "identify" it as marijuana. She did not state how or why she had probable cause to believe that the object was marijuana nor did she articulate that she believed so based on the totality of the circumstances.

V. ARGUMENT

A. Standard of Review

The standard of review in this case is abuse of discretion. *PYT v. Bustamante*, CA-17-004 (PYT Ct. App. June 19, 2018); *In the Matter of Alvarez*, CA-17-008 (PYT Ct. App. 2018); and *PYT v. Baltazar*, CA-01-003 (PYT Ct. App. 2015). Therefore, *PYT v. Miranda*, CA-08-015 (PYT Ct. App. 2009) is irrelevant as there is no absence of controlling Pascua Yaqui Law with regards to the standard of review in this case. *In PYT v. Coleman*, CA-15-003 (PYT Ct App. 2015), this Court, citing to *Michaelson v. Garr*, 234 Ariz. 542, 544, (Ariz. App. 2014), held that "[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."

De novo review would allow this Court to evaluate the affidavit and the complaint to see if sufficient facts were alleged to support a finding of probable cause. This was contemplated in *PYT v. Gonzalez*, CA-07-017 (PYT Ct. App. 2007). However, this decision is designated as an "Order" rather than an "Opinion." Therefore, it is not precedent. 3 PYTC § 2-3-240. The United States Supreme Court has cautioned appellate courts from reviewing *de novo* a trials courts probable cause finding. *See Illinois v. Gates*, 462 U.S. 213, 236, (1983) ("Similarly, 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.")

Nevertheless, even if this Court reviewed the affidavit *de novo*, the officer failed to provide sufficient facts, details or evidence to show probable cause based on her observations, stated training and experience at the time of arrest.

B. **Issue for Review**

Whether the trial court abused its discretion when it dismissed, without prejudice to refiling, a complaint supported only by an affidavit that failed to indicate how the officer in training was able to determine that the "green object" purported to be marijuana was actually or why it was suspected to be marijunana, even where it was not stated to have been collected or placed into evidence for future testing?

1. **The Trial Court did not abuse its discretion when it dismissed without prejudice to refiling a complaint where an Officer failed to provide a reasonable and articulable suspicion to support probable cause for the arrest of the Appellee in her supporting affidavit submitted to the trial court.**

A trial court is not to look beyond the complaint and supporting affidavit for its facts upon which to determine probable cause. The trial court did not do so here. Instead the trial court looked solely to the complaint and affidavit for the elements that it required to be established- identity, jurisdiction and probable cause to believe that the Defendant committed the alleged offense. At the initial hearing, the trial court in this case stated specifically:

> ...[P]robable cause is a set of facts found to exist upon reasonable inquiry that when you say reasonably intelligent and prudent to believe in a criminal case, uh that the accused has committed a crime, mere suspicion or belief unsupported by facts or circumstances is insufficient to support probable cause, there should be a reasonable and articulable suspicion annunciated in the probable cause statement or by the officer in live testimony. ...I read this four times now and I've, it says the officer observed four males in the intersection of Benem and Vicam in what appeared to be a physical altercation. And then the allegation was that Mr. Valencia took his hands out of his pocket, observed *something green* in the hand, which [the officer] later *identified* to be marijuana, uh, there's no indication if there's even a NarcoPouch test in this, in this affidavit to have the reas--, to articulate a reasonable suspicion to articulate probable cause...

See Appellant's Exhibit C, pp. 4-5.

The Court never stated it dismissed solely because no NarcoPouch test was completed.

Officer Fimbres, stated that she identified an object to be marijuana. To make a positive identification, Officer Fimbres would be required to perform some sort of test or explain how she was able to identify the substance. According the Miriam Webster's dictionary, the definition of "identify" is "to establish the identity of" something.[1] What was unclear to the trial court in this case was how Officer Fimbres was able to establish the identity of the substance because she did not provide sufficient information.

Officer Fimbres failed to provide a single description beyond its being a "green object." She did not cite a texture. She did not describe its shape. She failed to state how it was packaged, if at all. She did not describe whether it had an odor or what it smelled like if it did. Officer Fimbres, did not indicate what kind of training and experience she had that gave her reason to believe it was more probable than not that the object was marijuana.

Further, Officer Fimbres never states that she examined the object and how. She did not state whether she touched or picked up the object, nor whether she actually packaged it herself as evidence to be tested at a later time. And, as though this were her only failure to identify the "green object," she also did not attempt to use a Narcopouch field test which would have provided a more clear idea of what the object was. Instead of offering any of the vast possibilities listed here, she merely stated, "he threw the green object away from his persons (*sic*), which I later identified to be marijuana." Appellant's Exhibit A at p. 3.

Beyond the physical characteristics important to identify the object here called marijuana, there were no statements. Neither Ms. Sandra Molina nor Santiago Valencia made statements to suggest the reported item was marijuana, and if they did, they were not offered in this affidavit. Ms. Molina never accused her son of using marijuana or any other illicit drugs.

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[1] https://www.merriam-webster.com/dictionary/identify

The affidavit states only that Officer Fimbres was dispatched after a 911 hang up call was made to police. After verifying that the possible caller was safe, Officer Fimbres heard that Mr. Valencia was drunk and chasing some kids. That was the extent of the purpose of the call.

Under the totality of these circumstances, it was reasonable for the trial court to find that there were insufficient facts to support probable cause that the "green object" was marijuana. Because a trial court is not to look beyond the complaint and supporting affidavit for its facts upon which to determine probable cause, it would have been improper in this case for the trial court to make a finding that the officer had the necessary experience and training to identify the "green object" as marijuana.

Additionally, while neither the trial court nor the Mr. Valencia contends that it was necessary to perform preliminary chemical testing in this case, the officer was required to provide "specific and articulable facts" from which a court could have determined if the Officer acted reasonably in performing a warrantless search and arrest. *Terry v. Ohio*, 392 U.S. 1. 21. 88 S. Ct. 1868, 1880 (1968). The trial Court found that absent any specific facts, including a chemical test, the officer failed to provide it with such facts.

2. *De novo* review of the affidavit and complaint would render the same decision as the trial court.

Whether probable cause exists for any offense "depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366 (2003). A positive field test can certainly help to establish probable cause that a substance is contraband, but the absence of a positive field test does not necessarily mean that probable cause is lacking. Other circumstances, like the packaging of the substance, where it is located, the presence of large amounts of cash or other drug paraphernalia, and the defendant's statements about the identity of the substance, may provide reason to believe that it is a controlled substance. At the probable cause stage, it is common for

investigators to be awaiting further scientific testing. For example, a DUI arrest may be supported by a defendant's bad driving, the odor of alcohol coming from his person, slurred speech, red, watery blood-shot eyes even though a blood test for alcohol has not been analyzed. And in a sexual assault case, the victim's statements and other physical evidence may combine to provide probable cause even though DNA testing on the rape kit remains to be performed. Again, it is the totality of the circumstances that counts, and when there are few or no circumstances suggesting that a substance (e.g., a "green object" or "something green") is a controlled substance, a field test may be essential to probable cause.

There was insufficient foundation laid by Officer Fimbres in her affidavit to permit an inference about the identity of a substance that is sufficient at the probable cause stage. As argued above, Officer Fimbres failed to provide a single description beyond its being a "green object." She did not articulate the item's texture, shape, its odor if there was one, how it was packaged, if at all. The officer did not indicate that she had any specific training to determine a marijuana substance, and if so what kind of training and experience it was that gave her reason to believe it was more probable than not that the object was marijuana. She never states that she examined, touched, photographed or packaged the object to be examined or tested at a later time. *See* section VB1 above for further argument.

It is common knowledge that Officer Fimbres is new to the PYT force. This fact is admitted to in the Tribe's opening brief when it describes Officer Fimbres as a "training officer" or an officer in training. Appellant's Brief, p. 9. The Tribe also admitted that Officer Fimbres initially charged Mr. Valencia with disorderly conduct, but that remained uncharged as insufficient evidence was collected to support this claim. *Id.* at p. 10 footnote 2. No information about Officer Fimbres' training was provided in her affidavit. No badge number was provided in the affidavit

submitted to the trial and appellate courts. No disclosures have been made to the defense in the trial case even though the Tribe's intention is to refile the information against Mr. Valencia.

The Tribe argues on page 23 of its brief that "[a]ll certified police officers in Arizona go through rigorous academy training" a prerequisite to join the Pascua Yaqui law enforcement team. The Tribe further states that "[i]t is common knowledge that such training includes recognition of drugs, including marijuana." However, none of this information was offered at the initial hearing in this case. The evidence on appeal in limited to the record from the trial court. It is not the court's job to assume that any officer is qualified to make a probable cause finding, the officer bears that burden. That foundation is always required unless stipulated to at any hearing whether that is a probable cause hearing or a trial. 3 PYT R.Evid. Rule 24 and 3 PYT R.Evid. Rule 44.

In this case, even a statement of personal experience or training, and additional details relating to the arrest for marijuana (and not disorderly conduct) may have cured the defective affidavit. Had the officer elaborated on how she later concluded that the green thing was marijuana, then a Narcopouch would have been unnecessary. However, where an officer fails entirely to state how she came to the conclusion that a green object was marijuana, some type of field test would be necessary to obtain probable cause.

Nowhere in the officer's affidavit did it indicate that the 911 caller or the officer witnessed anyone consume any type of narcotic or illegal substance. No one stated that they smelled marijuana, the caller never observed the marijuana and Mr. Valencia made no admissions. There are a number of other plants and synthetics that may be confused for marijuana.[2] For example, K2

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[2] *See e.g.*, David The Good, "Five plants that look like Marijuana: a helpful visial guide for law enforcement and the curios," The Survival Gardener, available at: http://www.thesurvivalgardener.com/five-plants-that-look-like-marijuana/ (Oct. 3, 2014).

or Spice, is also known as synthetic marijuana and has a similar resemblance to marijuana. However, packaging and smell between the two are different.[3]

A description of the packaging used to contain the green object, or how the product smelled may have assisted the trial court in making a probable cause finding. Also, knowing whether or not Mr. Valencia had an odor of marijuana emanating from him would have contributed to a finding based on the totality of the circumstances. But that did not happen in this case.

There was certainly reasonable suspicion for Officer Fimbres to continue her investigation and to either conduct a field test *or* lay specific and articulable facts as required to show probable cause existed to believe that Mr. Valencia was in possession of marijuana. The Officer never even stated that "in light of her training" she was able to identify the object as marijuana. Nevertheless, that statement alone would not be sufficient specific and articulable facts to satisfy her burden to show probable cause existed to arrest Mr. Valencia for possession of marijuana.

3. The Court of Appeals need not decide whether chemical testing is needed at trial as this issue is not ripe and was not addressed by the trial court in this matter.

While this Court has not adopted a position on whether or not chemical testing is required at trial, nowhere in the trial court's decision, did it state that chemical testing was required at the time of trial in this case. Because this issue has not been addressed in this case, this issue is not ripe. Whether chemical testing is needed at trial might depend on what type of narcotic a defendant is alleged to have possessed. For example, in determining the identity of a white powder substance, and distinguishing one narcotic from another, a chemical test may be required. In *State v. Ward,* 364 N.C. 133 (2010), the Supreme Court of North Carolina held that "[u]nless the State establishes

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[3] Susan Scutti, "What is K2?," CNN, available at: https://www.cnn.com/2018/08/18/health/k2-synthetic-weed-explainer/index.html (last updated Aug. 18, 2018).

before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required." But the Appellate Court need not address this issue as the only issue before the Appellate Court is whether the trial judge abused his discretion or erred by dismissing without prejudice to refiling a complaint and supporting affidavit that failed to comport with the basic principles of justice.

VI. CONCLUSION

Here, there is sufficient, competent evidence to support the trial court's decision. This case is entirely distinguishable from *PYT v. Baltazar*, *supra*, a case that was relied upon by the Tribe in its opening brief. There were no victims in this case and the trial court dismissed this case without prejudice to refiling. Neither the Tribe nor the public was prejudiced by this decision. The Tribe has an alternative remedy. The defects in the officer's affidavit were substantial. Permitting officers to perform arrests without a proper showing of probable cause would be contrary to the Pascua Yaqui tribal code, the Fourth Amendment to the United States Constitution, and the Indian Civil Rights Act. 25 U.S.C.§§ 1302 (a)(2). For these reasons, Appellee respectfully requests that this Court find that the trial court did not abuse its discretion when it dismissed the complaint without prejudice to refile, and deny any requested relief.

RESPECTFULLY SUBMITTED: May 6, 2019

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CERTIFICATE OF SERVICE

When All Case Participants are Registered for the
Appellate CM/ECF System

I hereby certify that on May 6, 2019, I filed an original and submitted a copy of the Appellee's Response Brief to the following:

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Appellee's Exhibit 1:
Email requests for Officer Information

Annamarie Valdivia

From: Annamarie Valdivia
Sent: Wednesday, May 01, 2019 9:14 AM
To: Coleen Thoene
Subject: Officer Monique Fimbres

Good morning Coleen,

Can you get me verification of how long Officer Monique Fimbres has been an officer? Thank you.

Kind regards,

Annamarie L. Valdivia

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Annamarie Valdivia

From: Annamarie Valdivia
Sent: Thursday, May 02, 2019 10:55 AM
To: Monique Fimbres
Subject: Start Date

Good morning Officer Fimbres, I am writing to obtain information on your start date with the Tribe as an officer as opposed to a recruit. I am including the information in my appeal and mean no disrespect to you in requesting this information. I apologize for any inconvenience. I spoke with HR and I need your consent to release this information.

Kind regards,

Annamarie L. Valdivia

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IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

PASCUA YAQUI TRIBE, OFFICE OF THE PROSECUTOR Appellant vs. SANTIAGO LUIS VALENCIA, Appellee	APPELLATE CASE NO: CA-19-005 TRIBAL COURT CASE NO: CR-19-083

PETITIONER/APPELLANT'S OPENING BRIEF

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REQUEST FOR ORAL ARGUMENT

The issue raised by this appeal is simple: namely, whether probable cause to charge a defendant with a marijuana offense hinges upon law enforcement conducting a field test or laboratory analysis of any narcotics recovered at the time of arrest. It is an issue of first impression before this Court. Because resolution of this question will turn upon this Court's interpretation of relevant Tribal, Federal, and State law, setting the matter for oral argument would be in the interests of justice. *See* 3 PYTC § 2-3-180; 3 PYTC § 2-3-260(C)(6) and (D). The Tribe, therefore, respectfully requests that this Court set the matter for oral argument.

STATEMENT OF JURISDICTION

The Pascua Yaqui Tribal Rules of Appellate Procedure grant parties the right to appeal in most, but not all, circumstances. *See generally* 3 PYTC § 2-3-30, *et seq.* The Tribe may not, for instance, appeal a judgment acquitting a defendant in a criminal case. 3 PYTC § 2-3-90(G); Art. I, § 1(c), Pascua Yaqui Const.; *PYT v. Montana*, CA-12-001 (PYT Ct. App. July 23, 2013). However, the Tribe may appeal the dismissal of a complaint. *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); *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); *Baltazar*, CA-01-003 (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 Pascua Yaqui Tribe, and was alleged to have committed the criminal offense of Possession of Narcotics or Dangerous Drugs, in violation of 4 PYTC § 1-780(C), while on the Pascua Yaqui Reservation. The trial court dismissed the complaint against the Defendant without prejudice at the initial hearing for want of probable cause. Specifically, the court stated that it could not find probable cause because the law enforcement officer's supporting affidavit of probable did not indicate that the drug evidence seized had been subjected to a field test to confirm that it was, in fact, marijuana. This ruling amounted to the court finding that the prosecution had to introduce a certain type of evidence at the initial hearing that it would not be required to produce at the time of trial. 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 Unites 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 dismissals 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*, probable cause determinations often involve very specific factual inquiries. The definition of probable cause, however, and whether it requires a proof of chemical or laboratory testing in narcotics cases, is a purely legal question. 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 complaint against the Defendant.

ISSUES PRESENTED FOR REVIEW

1. Does a trial court's pre-arraignment determination of probable cause in a marijuana case depend on whether law enforcement has completed field or laboratory testing on any drug evidence seized, when the prosecution is not required to produce such evidence at trial?
2. Did the trial court err when it dismissed the complaint against the Defendant for want of probable cause where a training police officer indicated that she recognized drug evidence to be marijuana, but where no field or laboratory testing had yet been completed on the item seized?

STATEMENT OF THE CASE

I. Facts[1] and Proceedings Below:

On January 9, 2019, at approximately Pascua Yaqui Police Department Officer Monique Fimbres was dispatched to the home of a witness in response to a "911 hang up/check welfare" call. *See* Exhibit A, Criminal Complaint and Affidavit, *PYT v. Valencia*, CR-19-083, p.3 (Jan. 10, 2019). After the officer arrived, the witness immediately approached her and yelled that her son, Santiago Valencia[2], the Defendant/Appellee, had left to chase "some 'kids'" who were passing by. *Id.* She described the Defendant's clothing and indicated that he was "drunk and dangerous." *Id.* Officer Fimbres began driving around the area in an effort to locate the suspects. *Id.* She drove onto a nearby street and observed four individuals who appeared to be involved in a physical altercation. *Id.* One of the subjects matched the description provided by the witness and was later identified as the Defendant. *Id.*

Officer Fimbres exited her patrol vehicle and directed the Defendant to take his hands out of his pockets. The Defendant appeared to have "something green in his right hand," which he subsequently "threw… away from his person[]." *Id.* Officer Fimbres indicated that she was able to "later identif[y]" the object as marijuana. *Id.* The Defendant was ultimately arrested and charged with a single count of marijuana possession.[3] Officer Fimbres prepared a formal affidavit of probable cause documenting her investingation. The affidavit indicated both that she

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[1] The facts as outlined in this appeal, and in the trial court record, are taken from the criminal complaint, supporting probable cause affidavit, and the trial court's Initial Hearing order. No motions have been filed, or testimony taken, regarding whether any evidence obtained by officers was done so in violation of the Defendant's rights under applicable law. As such, the parties may disagree as to some of the facts of the case.

[2] The Defendant was identified in the affidavit and complaint as being an enrolled member of the Pascua Yaqui Tribe.

[3] At the time of his initial arrest, the Officer Fimbres also proposed that the Defendant be charged with a single count of disorderly conduct. Although that charge was listed in Officer Fimbres' affidavit of probable cause, the prosecution did not feel there was enough evidence to file a formal charge as to that offense.

was a trained law enforcement officer, and that she had recognized the item the Defendant had thrown away to be marijuana. *Id.*

On January 10, 2019, the day after his arrest, the Defendant was charged via formal complaint with one count of Possessing Narcotics and Dangerous Drugs, in violation of 4 PYTC § 1-780(C). *Id.* at p.1. The complaint read as follows:

> On or about January 9, 2019 at approximately 6:09 p.m., at or near Benem and Vicam, Defendant did possess or have under his control, any narcotic, hallucinatory or other dangerous drug, to wit: possessed marijuana. *Id.* at p.1 (*emphasis from original removed*)

An initial hearing was held the same day that charges were filed. *See* Exhibit B, Initial Hearing Order, *PYT v. Valencia*, CR-19-083, p.1 (Jan. 10, 2019). The Court indicated that one of the purposes of the initial hearing, in addition to informing the Defendant of his rights, was to determine whether the complaint filed against him was supported by probable cause. *See* Exhibit C, Transcript of January 10, 2019 Initial Hearing, *PYT v. Valencia*, CR-19-083, p. 4. The Court correctly noted that "mere suspicion or belief unsupported by facts or circumstances is insufficient to support probable cause." *Id.* at 4-5. The Court then stated:

> "[T]he allegation was... [the Defendant] took his hands out of his pocket, observed something green in the hand, which [the officer] later identified to be marijuana, uh, there's no indication if there's even a NarcoPouch[4] test in this, in this affidavit to have the reas—, to articulate a reasonable suspicion to even support probable cause, uh, I do not find probable cause on the case...."
>
> *Id.* at 5.

The trial court dismissed the complaint without prejudice to refiling. *Id.* In a subsequent written order, the court reiterated that its reason for dismissing the complaint was because,

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[4] "NarcoPouch" is the brand name of a line of field test kits marketed to law enforcement. The results are typically not admissible at trial, and some law enforcement agencies will not use the tests due to the risk of officers being directly exposed to drugs, unknown substances, and/ or the byproducts of the chemical test in the field.

"[a]lthough the officer indicated [s]he determined that the alleged substance was marijuana, [s]he did not provide any facts to provide a reasonable and articulable suspicion, based on no field test (narco pouch)." Exhibit B. The Tribe filed a timely notice of appeal on January 11, 2019. This appeal follows. *See* Notice of Appeal, *PYT v. Valencia*, CR-19-083 (Jan. 11, 2019)

II. Summary of the Argument

Under the Pascua Yaqui Tribal Code, initial hearings are an opportunity for the trial court to determine whether probable cause exists to support the charges listed in a criminal complaint. This hearing typically happens within twenty-four hours of a defendant's arrest, long before the parties are able to conduct any investigation, witness interviews, and formal forensic testing, and before the parties are able to formally exchange disclosure. As a result, the standard of proof the prosecution must meet in order to establish probable cause for a criminal charge is far lower than the "beyond a reasonable doubt" burden the prosecution must meet at trial in order to support a conviction. In order to establish probable cause for an offense, the prosecution need only demonstrate that there is reason to believe that a violation of the Pascua Yaqui Tribal Criminal Code occurred, and that a particular defendant was responsible for the infraction.

In this case, the complaint and supporting affidavit contained evidence demonstrating that the Defendant/Appellee had committed the offense of Possession of Narcotic of Dangerous Drugs. The supporting affidavit was prepared by a trained law enforcement officer, who saw a green object in the Defendant's hand at the time of the investigation. She witnessed the Defendant attempt to dispose of the item, and ultimately determined based on her training that the item was marijuana. This information was sufficient to establish probable cause for the Defendant's subsequent marijuana charge. Additionally, although this Court has never been asked to determine whether the prosecution is required to present evidence of chemical drug

testing at the time of an initial hearing or trial, this is a topic that has been addressed in other jurisdictions. Courts in those jurisdictions have held that the prosecution is *not* required to admit evidence of chemical testing in narcotics cases, even at the time trial. Indeed, these same courts have upheld narcotic convictions even when no scientific test results were produced at trial. Furthermore, even though the Pascua Yaqui Court of Appeals has not had an opportunity to address this issue, it has previously recognized an understanding that criminal cases often evolve over the course of continued investigation and witness interviews by the parties. Indeed, the evidence known by the parties at the time of the probable cause determination will often be expanded as a result of this investigation. *See generally PYT v. Baltazar*, CA-01-003 (PYT Ct. App., Sept. 12, 2001).

The dismissal in this case was in error because the trial court required the prosecution to introduce evidence and meet a higher standard of proof than what it would be required to meet at the time of trial. For this reason, the Appellant respectfully requests that the trial court's ruling be reversed.

LAW AND ARGUMENT

I. An Initial Hearing Gives the Trial Court an Opportunity to Determine Whether a Criminal Complaint is Supported by Probable Cause, and Involves a Lower Standard of Proof than What the Prosecution Must Meet at Trial.

The trial court erred in this case when it determined that there was no probable cause for the complaint filed against the Defendant. Although the officer's supporting affidavit, Exhibit A p. 2, did not include any indication that law enforcement had conducted a field or laboratory test of the drug evidence seized, it indicated that the arresting officer was trained, and that she recognized the evidence seized during the investigation to be marijuana. As a result, the complaint and affidavit demonstrated sufficient probable cause to believe that the Defendant had committed the offense of Possession of Narcotic or Dangerous Drugs.

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.[5] 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

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[5] 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.

> 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 an understanding that criminal cases can evolve 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*). Formal trials are governed by 3 PYTC § 2-2-430. At trial, a defendant "is presumed to be innocent until the contrary is proven." 3 PYTC § 2-2-430(D). That is the only point in the life of a criminal case at which the prosecution bears "the burden of proving [a defendant] guilty beyond a reasonable doubt." *Id.*

B. 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, 94 S.Ct 2887, 2907 (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 statute 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. 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[6] 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). It is also important to note that the level of proof needed for a finding of probable cause is far lower than the level of proof needed to prove that a defendant is guilty beyond a reasonable doubt at trial. It is inappropriate, as a matter of public policy, to require the prosecution to meet a higher burden at the probable cause stage of criminal proceedings than what it is required to meet at trial. As will be discussed below, the trial court incorrectly assumed that it could not find probable cause to support the marijuana charge against the Defendant simply because officers did not conduct a field or laboratory test of the drugs seized.

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[6] It should be noted that some jurisdictions leave probable cause determinations to a grand jury, which is tasked with issuing formal complaints, instead of to a judge or magistrate using a complaint process. The Pascua Yaqui Tribe does not have a sitting grand jury, nor access to the same. Furthermore, the Pascua Yaqui Tribal Code requires that the trial court judge made any necessary determinations of probable cause. 3 PYTC § 2-2-90.

II. The complaint and affidavit filed in this case adequately established probable cause to believe that the Defendant committed a criminal offense in violation of the Pascua Yaqui Tribal Code, and provided the Defendant with sufficient notice of the charges so that she could prepare a defense.

Any review of probable cause must start with an analysis of the statutory elements of the offense with which a defendant has been charged. Here, the Defendant was charged with committing the offense of Possession of Narcotics and Dangerous Drugs, in violation of 4 PYTC § 1-780(C). That statute makes it "unlawful for any person to...possess, have under their control, ...[or] carry... any narcotic, hallucinatory or other dangerous drug...." *Id.* Marijuana is classified as a "hallucinogen" under the Pascua Yaqui Tribal Code. 4 PYTC § 1-780(F).

The officer's supporting affidavit made clear that there was probable cause to believe that the Defendant a violation of 4 PYTC § 1-780(C) by virtue of the fact that he possessed marijuana. The affidavit first noted that the officer was "a duly authorized law enforcement officer," and that the information contained in the affidavit "was true and correct." Exhibit A, p.2. When the officer first contacted the Defendant, he had his hands in his pockets. *Id.* at p.3. The Defendant removed his hands from his pockets when ordered to do so by the officer. *Id.* Once he did, the officer saw that he had something green in his right hand. *Id.* The Defendant then threw the green object away from himself. *Id.* The officer indicated that she was later able "to identify the green object as being marijuana. *Id.*

The trial court indicated that it could not find probable cause to charge the Defendant with possession of marijuana solely because the affidavit did not contain any evidence that the officer had conducted a NarcoPouch, or field test, of the drug evidence. This resulted in the trial court holding the prosecution to a level and type of evidentiary proof at the probable cause stage

that it would not be required to produce at trial, where it would need to prove the Defendant's guilt beyond a reasonable doubt.

Whether evidence of a field or laboratory test must be presented at the initial hearing before a court can find probable cause to support narcotics charges is an issue of first impression before this court. Courts in other jurisdictions have, however, addressed whether the prosecution must present scientific evidence at the time of trial. *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). Those cases have held that such evidence is *not* required. Indeed, they stand for the proposition that cases should be evaluated on their individual and unique circumstances, and that there is no *per se* requirement that drugs be subjected to testing before trial. Indeed, circumstantial evidence, combined with reasonable inferences, may be enough to support a conviction.

For example, the defendant in *United States v. Wright*, for instance, was charged, and ultimately convicted, by a jury of cocaine base trafficking charges. 16 F.3d 1429, 1430 (6th Cir. 1994). On appeal, the defendant argued that there was insufficient evidence supporting his conviction because law enforcement officers "did not recover" the drug evidence related to these charges. As a result, the prosecution was not able to enter the drugs into evidence at trial, or to produce evidence of any scientific analysis of the drugs. *Id.* at 1439. The Sixth Circuit first noted that, when reviewing sufficiency of the evidence claims, courts look at "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (*emphasis in original, citations and quotations omitted*). The Court then stated that, "[t]he identity of a

drug may be ascertained by circumstantial evidence... and such evidence need not remove every reasonable hypotheses except that of guilt." *Id.* (*citations and quotations omitted*).

The Court further explained that this circumstantial evidence can include such things as the physical appearance of the narcotics seized, evidence that the narcotics produced a "high" effect in users, the substance's cost, "that transactions involving the substance were carried on with secrecy or deviousness," or whether a defendant or other individual called the drug by its common or street names. *Id.* The Sixth Circuit ultimately found that there was substantial evidence produced at trial to support the defendant's conviction despite the absence of physical drugs or chemical testing. The prosecution had introduced testimony from lay witnesses who were involved in, or customers of, the defendant's trafficking organization, who called the drugs by their "street" name, and who testified how the drugs were packaged, sold, and used. *Id.* at 1439-40. It is important to note in this case that—even though the Court's opinion did not address the probable cause stage of criminal proceedings— law enforcement also did not have scientific evidence at the time the charging decision was made.

Wright relied heavily on an earlier Sixth Circuit case, *United States v. Schrock*, 855 F.2d 327, 334 (6th Cir. 1984), in reaching its ruling. The defendant in *Schrock* had been charged with methamphetamine-related offenses. The defendants in both *Schrock* and *Wright* argued that the prosecution's failure to introduce drug analysis evidence at trial created the possibility that the substances involved in their cases "might not" have actually been narcotics. *Wright*, 16 F.3d at 1440. Both Courts rejected this argument, stating:

> "Illegal drugs will often be unavailable for scientific analysis because their nature is to be consumed. As a practical matter, therefore, the evidentiary rule urged by [defendant] would insulate from prosecution a large class of unlawful acts involving illicit drugs when the government happens upon a scene too late to seize a sample of the substance. To our knowledge, no court has held that scientific identification of a substance is an absolute prerequisite to conviction for

> a drug-related offense....In view of the limitations that such a burden would place of prosecutors, and in accordance with general evidentiary principles, courts have held that the government may establish the identity of a drug through cumulative circumstantial evidence. So long as the government produces sufficient evidence, direct or circumstantial, from which the jury is able to identify the substance beyond a reasonable doubt, the lack of scientific evidence is not objectionable."
>
> *Id.* at 1440-41, *quoting Schrock*, 855 F.2d at 334.

Other cases at the federal and state level have reached similar conclusions to the Sixth Circuit using similar reasoning. *See United States v. Moskowitz, et. al*, 888 F.2d 223 (2nd Cir. 1989) (rejecting defendant's argument that the government was required to conduct chemical testing on the contents of alleged butane canisters taken onto an airplane in light of testimony that defendant knew that the canisters were needed to "cook crack," also found in his possessions); *United States v. Bryce*, 208 F.3d 346 (2nd Cir. 1999) (in narcotics case, prosecution failed to meet its evidentiary burden at trial when it produced no physical drugs or testing, no witness testimony linking the defendant to the drugs or drug sales for the dates listed in the charges of conviction, and only the defendants statements relating drug sales); *United States v. Orduno-Aguilera*, 183 F.3d 1138 (9th Cir. 1999) (agreeing with the Sixth Circuits reasoning in *Shrock*, but ultimately reversing a defendant's conviction for transportation of anabolic steroids on the ground that the law only criminalized certain chemical formulations of steroids, which could not be determined upon a visual inspection); *State v. Jonas*, 162 Ariz. 32, 34, 780 P.2d 1080, 1082 (Ariz. App. 1988) (fact that a substance is an illegal drug can be proven by circumstantial evidence); *State v. Saez,* 173 Ariz. 624, 845 P.2d 1119, 1124 (Ariz. App. 1993) (upholding a drug conviction based on lay testimony providing "substantial" evidence of guilt, and noting that "[i]f reasonable [persons] *may fairly differ* as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial")

All of the cases discussed above focused on the type of proof the prosecution must introduce at trial, where the prosecution must establish a defendant's guilt beyond a reasonable doubt. Probable cause involves a lower standard of proof. Thus, if the prosecution is not *necessarily* required to introduce evidence of chemical drug analysis at trial when the stakes are higher, it should not be required to produce such evidence at the time of an initial hearing, when the only issue before the court is whether there is probable cause to believe a defendant committed an offense.

Here, the officer involved in the investigation was a trained law enforcement officer. All certified police officers in Arizona go through rigorous academy training. This certification and training is a prerequisite for those officers being able to work as law enforcement with the Pascua Yaqui Police Department. *See* 2 PYTC § 2-8-90(A)(1) (indicating that officers are to be certified both by the Tribal Court "and the State of Arizona through Arizona Peace Officer Standards of Training" (AZPOST)). It is common knowledge that such training includes the recognition of illegal drugs, including marijuana. When the officer first encountered the Defendant, his hands were in his pockets. When the officer ordered him to remove his hands from his pockets, she saw that there was a green item in his right hand. The Defendant then threw the item away from him. It is not uncommon for suspects who have drugs in their possession to attempt to distance themselves from those drugs when confronted by police. After the Defendant threw the item away, the officer was able to retrieve it and identify it in light of her training as being marijuana.

Clearly, the circumstances of this case demonstrate that there was probable cause for the Defendant to possess marijuana. The fact that the trial court dismissed the complaint solely because there was no chemical testing of the drugs seized amounted to legal error as it amounted

to requiring that the prosecution prove the drugs were marijuana to a "beyond a reasonable doubt" standard.

CONCLUSION AND REMEDY SOUGHT

The trial court's dismissal of the complaint against the Defendant at the initial hearing was contrary to law and was the result of the court requiring the prosecution to submit evidence that it would not have been required to submit at trial. Because the trial court held the prosecution to a standard greater than probable cause, this amounted to legal error. Accordingly, the Appellant respectfully requests this Court reverse the trial court's ruling, reinstate the complaint, and remand the case 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:

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

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

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

Dated this 5th 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

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

Exhibit A
Criminal Complaint and Supporting Affidavit
(*PYT v. Valencia*, CR-19-083)

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME
2019 JAN 10 AM 10: 17

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

DOCKET NO. CR-19-083

CLERK

Pascua Yaqui Tribe,
Plaintiff,

vs.

VALENCIA, SANTIAGO LUIS

Defendant.

Case No.

CRIMINAL COMPLAINT

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

COUNT 1: 4 PYTC § 1-780(C) ~ Narcotics and Dangerous Drugs

On or about January 09, 2019 at approximately 6:09 p.m., at or near Benem and Vicam, Defendant did possess or have under his control, any narcotic, hallucinatory or other dangerous drug, to wit: ***possessed marijuana***.

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 10th 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: Santiago Luis Valencia
ADDRESS: 7419 South Camino Potam Tucson, AZ 85757
DOB: 11/03/1989 SSN: 601-82-5142 ORIGIN: Pascua Yaqui Tribe #2694U08640
SEX: Male HT: 5'6" WT: 185 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]

10 JAN 2019 AM10:22

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

COURT
IME
0: 17
CR19-083

PASCUA YAQUI TRIBE, Plaintiff,

VS.

Santiago Luis Valencia, Defendant.

COURT USE ONLY

CASE NUMBER
P19010937

PROBABLE CAUSE STATEMENT

AFFIRMATION

1. I, Monique A. Fimbres, 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 Monique A. Fimbres

2. **SUSPECTED PARTY (Defendant)**

Name: Santiago Luis Valencia
Driver's License Number:
Tribal Enrollment Number:
Non-Tribal Member (VAWA) ☐
Date Of Birth: 11/3/89

Santiago Luis Valencia ☑ 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 1/9/2019 at 6:15:00 PM

4. I have probable cause to believe that the defendant committed the following offense(s) at or near, Intersection Benem/Vicam which is within the exterior boundaries of the Pascua Yaqui Indian Reservation.

PYTC	4-1-300	Disorderly Conduct
PYTC	4-1-780.C	possession of narcotics and dangerous dr...

5. Statement Of Probable Cause:

On January 9, 2019 at approximately 1809 hours, I was dispatched to 7419 S Camino Potam in response to a 911 hang-up/check welfare.

Upon arriving at the location Sandra Molina (DOB 5/25/65) was out front of her home, she immediately approached my patrol unit as I pulled up yelling her son Santiago Valencia (11/3/89) left up the street, chasing some "kids" that were passing by. She advised he was drunk and dangerous wearing blue jeans and a work shirt.

I advised Sandra to go to her home; we would contact her once we located her son. I proceeded right onto Vicam where I observed four male subjects in the intersection of Benem and Vicam in what appeared to be a physical altercation. I identified one male matching the description wearing blue jeans and a reflective yellow jacket.

I immediately exited my patrol unit and directed Santiago to take his hands out of his pocket; I observed something green in his right hand. As he pulled his hands out of his pockets, he threw the green object away from his persons, which I later identified to be Marijuana. I proceeded to place Mr. Valencia in handcuffs and double locked them for officer safety. Mr. Valencia had apparent injuries to his knuckles on his left hand. I took pictures to place in evidence.

I escorted Mr. Valencia to my patrol unit when he began saying he twisted his ankle and he could not walk. Upon telling him to get into the back of the patrol unit, he stated he could not get in because his ankle was hurting too bad. Mr. Valencia was assisted into the unit by officers Pallanes and Leve. I requested Pascua Fire Paramedics be dispatched to Pascua Yaqui Detention to evaluate Mr. Valencia's stated injuries. Santiago was medically cleared by paramedics.

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

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

EXECUTED ON:

Signature of Officer

1/9/19

Date

Exhibit B
Initial Hearing and Order of Dismissal
(*PYT v. Valencia*, CR-19-083)

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, PLAINTIFF, vs. VALENCIA, SANTIAGO LUIS DEFENDANT.	Case No. CR-19-083 INITIAL HEARING ORDER

On January 10, 2018, the defendant, Santiago Luis Valencia, appeared with his legal counsel, Annamarie Valdivia, for an arraignment. O.J. Flores appeared for the Tribe, and Milissa Mace appeared for pre-trial. The defendant was read his rights.

The Court finds that there is no probable cause as to Count One, Narcotics and Dangerous Drugs, and that Count should be dismissed. Although the officer indicated he determined that the alleged substance was marijuana, he did not provide any facts to provide a reasonable and articulable suspicion, based on no field test (narco pouch).

IT IS ORDERED that the matter shall be dismissed, due to lack of probable cause. The dismissal is made without prejudice to re-filing.

SO ORDERED THIS 10th DAY OF JANUARY, 2019.

Associate Judge, Pascua Yaqui Tribal Court

cc: Date: January 10, 2019
__ Tribe __ Defendant/Counsel __ Pre-trial

Clerk

PASCUA YAQUI TRIBE ☆ JUDICIAL BRANCH ☆

Exhibit C
Transcript of Initial Hearing
(*PYT v. Valencia*, CR-19-083)

IN THE PASCUA YAQUI TRIBAL COURT

COUNTY OF PIMA, STATE OF ARIZONA

PASCUA YAQUI TRIBE, Plaintiff, vs. SANTIAGO RUIZ VALENCIA, Defendant.	))))))))	NO. CR19083 Unknown Date Tucson, Arizona

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

APPEARANCES:
OSCAR J. FLORES, ESQ.
appearing for the Pascua Yaqui Tribe

ANNAMARIE VALDIVIA, ESQ.
appearing for Defendant

RE: HEARING

Christine McGarvey
Legal Transcription Services Plus

INDEX

Witness(s)

THE COURT: Good afternoon, please be seated. And this is CR19083, Pascua Yaqui Tribe versus Santiago Ruiz Valencia, who is present with Counsel, Annamarie Valdivia. I have OJ Flores here for the Tribe and Milissa Mace here with pretrial services. Would you like to have rights read or waiving rights?

MISS VALDIVIA: Your Honor, if you can read him his Rights, please?

THE COURT: Okay. And this is an initial appearance. The purpose of an initial hearing is to determine your true name and address, to see whether the prosecutor wishes to amend the complaint that's been filed against you. To inform you of your rights and to determine whether you should be released on your own recognizance under a cash bond or under any other special conditions of release. And you have the following rights at this proceeding; the right to be informed of the charges filed

against you; the right to remain silent and that any statement you make may be used against you. No inference may be drawn from Defendant's exercise of a right not to testify. You have a right to a speedy trial by a judge or jury if a sentence may impose jail time on you unless the right to a speedy trial is waived or the right to a jury trial is waived. If you do not request a trial by jury in writing at least 30 days prior to the trial, then you will waive your right to a jury trial under the Pascua Yaqui Criminal Code and under the Indian Civil Rights Act. You have a right to a defense in person or by counsel, a right to plead not guilty, a right to confront and cross-examine any witnesses who may be testifying against you and a right to subpoena and call witnesses to testify on your own behalf. You have a right to ask the Court to issue a subpoena for the production of any books, records, documents or other things necessary to defense yourself on the charges. A right to be free from excessive bail and cruel or unusual punishment. A right to appeal any decisions of the Tribal

Court to the Court of Appeals and a right to file for a writ of habeas corpus to the Court. And do you understand all the rights I've just read?

MR. VALENCIA: Yes.

THE COURT: Do you have a copy of the complaint?

MR. VALENCIA: Yes.

THE COURT: Is the information correct as far as name and address?

MR. VALENCIA: Yes.

THE COURT: And you have an ongoing duty to inform the Court if you have any changes in your address. In determining probable cause if it exists, uh, generally probable cause is a set of facts found to exist upon reasonable inquiry that when you say reasonably intelligent and prudent (inaudible) to believe in a criminal case, uh, that the accused has committed a crime, mere suspicion or belief unsupported by facts or

circumstances is insufficient to support probable cause, uh, there should be a reasonable and articulatable suspicion annunciated in the probable cause statement or by the officer in live testimony. I glean this, I read this four times now and I've, it says the officer observed four males in the intersection of Benem and Vicam in what appeared to be a physical altercation. And then the allegation was he, Mr. Valencia took his hands out of his pocket, observed something green in the hand, which he later identified to be marijuana, uh, there's no indication if there's even a NarcoPouch test in this, in this affidavit to have the reas--, to articulate a reasonable suspicion to even support probable cause, uh, I do not find probable cause on the case, but I will be dismissing this without prejudice, uh, to refiling, so understand, Mr. Valencia, although I'm dismissing this for a defect based on lack of probable cause, they may refile at a later date. Okay.

Court is adjourned.

[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

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

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. SANTIAGO VALENCIA, Appellee	**CA-19-005** **TRIBAL COURT CASE NO: CR-19-083** NOTICE Re: SUBMISSION OF TRANSCRIPT

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.

RESPECTFULLY submitted this 29 day of March, 2019.

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR

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

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

ORIGINAL of the forgoing filed this 29 day of March, 2019.

Clerk of the Court
Pascua Yaqui Tribal Court of Appeals

Copy of the foregoing delivered/mailed/provided to:

Annamarie Valdivia,
Public Defender
Attorney for Appellee Defendant

Clerk of the Court (x1)
Pascua Yaqui Tribal Court

Clerk of the Court (x4)
Pascua Yaqui Tribal Court of Appeals

By: _____

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. SANTIAGO LUIS VALENCIA Appellee	**CA-19-005** **TRIBAL COURT CASE NO: CR-19-083** **ORDER**

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

SO ORDERED this 20th day of February, 2019.

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

Annamarie Valdivia
Public Defender
Attorney for Appellee Defendant

By: _____

OFFICE OF THE PROSECUTOR
PASCUA YAQUI TRIBE
7777 S. CMO. HUIVISIM
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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. SANTIAGO VALENCIA, Appellee	**CA-19-005** **TRIBAL COURT CASE NO: CR-19-083** Motion to Extend Deadline for Filing of Appellant's Opening Brief

COMES NOW the PASCUA YAQUI TRIBE/Appellant, by and through Chief Prosecutor, Oscar J. Flores, and Deputy Prosecutor, Coleen Thoene, and hereby requests that this Court order that the filing deadline for the Appellant's Opening Brief be continued by a period of thirty (30) days for the reasons outlined below.

The Appellant filed its Notice of Appeal in this case on January 11, 2019. On February 4, 2019, a notice issued pursuant to 3 PYTC § 2-3-120(a), indicating that the record from the trial court had been transmitted to the Court of Appeals. Copies of that record were delivered to counsel for both parties. On February 11, 2019, undersigned counsel discovered that the Record on Appeal (ROA) did not include a copy of the audio/visual recording of the hearing that is the subject of this appeal, or a transcript of said hearing. A copy of the recording was requested, and was provided on February 18, 2019. Counsel for the Appellant contacted an outside agency that same date and requested that a transcript of the recording be prepared. However, due to ongoing issues with the Pascua Yaqui Tribe's email system, there have been difficulties in delivering copies of the recording to the transcriptionist, or to receive confirmation as to whether the transcriptionist will

OFFICE OF THE PROSECUTOR
PASCUA YAQUI TRIBE
7777 S. CMO. HUIVISIM
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be able to prepare a transcript on short notice. Even if the transcript can be prepared on short notice, it will leave the Appellant with a limited opportunity to review the record before filing a meaningful and accurate brief.

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

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

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

RESPECTFULLY submitted this 19 day of February, 2019.

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR

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

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

Clerk of the Court
Pascua Yaqui Tribal Court of Appeals

Copy of the foregoing delivered/mailed/provided to:

Annamarie Valdivia,
Public Defender
Attorney for Appellee Defendant

Clerk of the Court (x1)
Pascua Yaqui Tribal Court

Clerk of the Court (x4)
Pascua Yaqui Tribal Court of Appeals

By: _____

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Kendrick Wilson
Deputy Prosecutor

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

PASCUA YAQUI TRIBE, Appellant, Vs. VALENCIA, Santiago Defendant.	APPEALS CASE NO.: **(Tribal Court No. CR-19-083)** **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 9, 2019 by order of Associate Judge Melvin Stoof. [see attached]

The Trial Court erred in finding a lack of probable cause because the Affidavit submitted by the law enforcement officer did not specify facts to identify the substance as marijuana and did not conduct a field test (narco pouch).

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 11th 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

Annamarie Valdivia
Public Defender's Ofc.
Attorney for Defendant

By:

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, PLAINTIFF, vs. VALENCIA, SANTIAGO LUIS DEFENDANT.	Case No. CR-19-083 INITIAL HEARING ORDER

On January 10, 2018, the defendant, Santiago Luis Valencia, appeared with his legal counsel, Annamarie Valdivia, for an arraignment. O.J. Flores appeared for the Tribe, and Milissa Mace appeared for pre-trial. The defendant was read his rights.

The Court finds that there is no probable cause as to Count One, Narcotics and Dangerous Drugs, and that Count should be dismissed. Although the officer indicated he determined that the alleged substance was marijuana, he did not provide any facts to provide a reasonable and articulable suspicion, based on no field test (narco pouch).

IT IS ORDERED that the matter shall be dismissed, due to lack of probable cause. The dismissal is made without prejudice to re-filing.

SO ORDERED THIS 10th DAY OF JANUARY, 2019.

Associate Judge, Pascua Yaqui Tribal Court

cc: Date: January 10, 2019
__Tribe __Defendant/Counsel __Pre-trial

Clerk

PASCUA YAQUI TRIBE ☆ JUDICIAL BRANCH ☆