

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

Pascua Yaqui Tribe Office of the)	
Prosecutor, Appellant)	No. CA-21-002
)	
)	Trial Court Case No. CR-21-239
)	
v.)	OPINION & ORDER
)	
)	
Jose J. Montana, Appellee.)	
)	

For the Appellant: Malena Acosta & Coleen Thoene, Office of the Prosecutor
For the Appellee: Glaucia Brannock & Stuart deHaan, Office of the Public Defender

Miller, Chief Justice

Concurring: Associate Justice Plevel and Associate Justice Martinez

This matter comes before the Court of Appeals on appeal from the trial court’s decision dismissing one count of a criminal complaint without prejudice.

Jurisdiction

The Pascua Yaqui Tribe Court of Appeals has jurisdiction to hear this matter pursuant to 3 PYTC §§ 1-1-10(A) & 2-3-30 *et seq.* The trial court dismissed Count 3 of the complaint without prejudice and that act constitutes an appealable order. *In the Matter of Alvarez*, CA-17-008 (PYT Ct. App. 2018); *Pascua Yaqui Tribe v. Bustamante*, CA-17-004 (PYT Ct. App. 2017)

Facts

The defendant was arrested on September 9, 2021. At his Initial Hearing on September 10, the defense challenged probable cause for Count 3 of the Tribe’s complaint. Appellant’s Opening Brief at 12-13; Attachment A at 5-15; Att. E. The trial court took the matter under advisement. Att. A at 15. At the arraignment on September 20, the judge dismissed Count 3 of the complaint without prejudice due to a lack of probable cause because the “date range” for when the offense allegedly occurred spanned more than a month. Att. B at 3-5; Att. F at 1.

Standard of Review

Our standard of review for trial court decisions dismissing a criminal count or complaint without prejudice is for abuse of discretion. *Pascua Yaqui Tribe v. Rodriguez*, CA-19-004, at 2 (PYT Ct. App. Oct. 7, 2019); *Pascua Yaqui Tribe v. Bustamante*, CA-17-004, at 2 (PYT Ct. App.

July 3, 2017). A trial 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

We must address whether a trial court in examining a criminal complaint for probable cause can dismiss the complaint or a count for a technical defect with respect to foundational facts. The Tribal Code requires the court to determine if “probable cause exists to continue to detain and prosecute the accused.” 3 PYTC § 2-2-180(A). Probable cause is a determination as to whether it is more likely than not that a crime was committed and that the accused committed it. *Rodriguez*, CA-19-004, at 2.

The Tribal Code states that criminal prosecutions can be initiated by the filing of a complaint. A complaint must contain a “written statement, describing in ordinary language the offense committed, including the time and place *as nearly as may be determined*, and the name or description of the person alleged to have committed the offense” 3 PYTC § 2-2-90(B)(1) (emphasis added).

The issue presented in this appeal concerns the language in the Code “including the time.” As stated, the trial court in this case dismissed the complaint for lack of probable cause because the alleged date of the incident charged covered a range of more than a month.

While the Tribal Code states that a “time” must be included in a complaint, it is qualified by the language “as nearly as may be determined.” *Id.* We have already held in *Rodriguez*, that an exact time of the hour “5 a.m. or 5 p.m. is of minor consequence to the charge.” *Id.* CA-19-004, at 3. Several federal courts have said the same about stating dates in federal charging instruments: “Where a particular date is not a substantive element of the crime charged, strict chronological specificity or accuracy is not required.” *United States v. Morris*, 700 F.2d 427, 429 (1st Cir. 1983); *accord United States v. Kimberlin*, 18 F.3d 1156, 1159 (4th Cir. 1994).

As we stated in 2001,

“This suggested tolerance of imprecision built into the criminal process recognizes the immense potential for error or mistake early in the initiation of criminal proceedings. At this point in the criminal process, there has been insufficient time to determine the reliability and veracity of witnesses. The court's role here is to determine whether the basic information necessary to go forward with a 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.”

Pascua Yaqui Tribe v. Baltazar, CA-01-003, at 4 (PYT Ct. App. 2001).

“In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.”

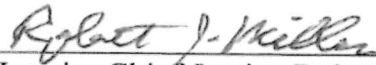
Brinegar v. United States, 338 U.S. 160, 173 (1949).

In conclusion, the Count at issue in this appeal met the statutory requirement to state the “time” of the alleged offense “as nearly as may be determined.” Moreover, the Tribal Code does not define any specific “time” as an additional element essential to charging and proving the offenses alleged in Count 3. *See* 4 PYTC §§ 1-400 & 3-10(A). Consequently, the trial court abused its discretion by requiring additional facts to be alleged in Count 3 other than those required by the Tribal Code and by the legal rules surrounding probable cause findings.

Holding

The trial court abused its discretion by making an error of law when it imposed additional requirements that are unwarranted by law on its probable cause determination.¹ The September 20, 2021 Order is reversed, and this case is remanded for further proceedings consistent with this Opinion and Order.

ORDERED this 15th of March, 2022.


Interim Chief Justice Robert J. Miller

We CONCUR:


Hon. Rebecca Plevel


Justice Kendra A. Martinez

¹ In addition, while we do not address nor analyze here the trial court’s apparent denial of the Prosecutor’s motion to dismiss Counts 1, 2, and 4 of the complaint, Appellant’s Att. C, we do note that the decision is questionable in light of almost absolute prosecutorial discretion. *See, e.g., In re Flynn*, 961 F.3d 1215, 1220 (D.C. Cir. 2020) (“decisions to dismiss pending criminal charges—no less than decisions to initiate charges and to identify which charges to bring—lie squarely within the ken of prosecutorial discretion.”); *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (“Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion . . . whether to dismiss a proceeding once brought.”).

No. CA-21-002

Pascua Yaqui Tribe Court of Appeals

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)	ORDER FOR ORAL ARGUMENT
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For the Appellant: Malena Acosta & Coleen Thoene, Office of the Prosecutor

For the Appellee: Glaucia Brannock, Office of the Public Defender

Order

As requested by the Office of the Prosecutor, and unopposed, telephonic (judges) oral argument in this appeal is scheduled for Friday March 11 at 10 a.m. MST.

Parties will have twenty (20) minutes each.

So ORDERED March 8, 2022.

/s/ RJM
Interim Chief Justice Robert J. Miller

**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.

Jose J. Montana,
Appellee

APPELLATE CASE NO: CA-21-002

TRIBAL COURT CASE NO: CR-21-239

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS..... 2

TABLE OF AUTHORITIES..... 3

REQUEST FOR ORAL ARGUMENT 4

STATEMENT OF JURISDICTION 4

STANDARD OF REVIEW 5

ISSUES PRESENTED FOR REVIEW 6

STATEMENT OF THE CASE 7

 I. FACTS AND PROCEEDINGS BELOW: 7

 II. SUMMARY OF THE ARGUMENT:..... 7

LAW AND ARGUMENT 8

 I. THE SIMPLE FACT THAT A TRIAL COURT DISMISSES ONE
 COUNT OF A MULTI-COUNT CHARGING DOCUMENT DOES NOT
 AUTOMATICALLY CONVERT ANY APPEAL OF THAT
 DISMISSAL INTO A SPECIAL ACTION.8

 II. THE DEFENDANT IGNORES THE MOST BASIC AND
 FUNDAMENTAL ISSUES THAT WERE BROUGHT BEFORE THIS
 COURT IN *PYT V. BALTAZAR*, AND *PYT V. RODRIGUEZ*, AND,
 THUS, IGNORES THE APPLICABILITY OF THOSE CASES TO THE
 ONE AT BAR. 11

 III. ASSUMING, *ARGUENDO*, THAT THIS CASE IS AN
 INTERLOCUTORY APPEAL OR PETITION FOR SPECIAL
 ACTION, THE TRIBE HAS STANDING TO PURSUE ITS CLAIM OF
 RELIEF, AND THIS COURT HAS JURISDICTION OVER THE
 MATTER. 12

CONCLUSION AND REMEDY SOUGHT 15

CERTIFICATE OF SERVICE.....I

TABLE OF AUTHORITIES

Authority	Page Number
Pascua Yaqui Tribal Code	
3 PYTC § 2-2-90(B)(1).....	11
Pascua Yaqui Cases	
<i>PYT v. Baltazar</i> , CA-01-003 (PYT Ct. App. Sept. 2001)	11
<i>PYT v. Flores ex rel. Alvarez</i> , CA-18-002 (Oct. 2018).....	9, 10
<i>PYT v. Rodriguez</i> , CA 19-004 (PYT Ct. App. Oct. 2019)	11
<i>PYT v. Stoof ex rel. Lopez</i> , CA-18-001 (Oct. 2018);.....	9, 12, 13
Federal Cases	
<i>Fawcett v. Bablitch</i> , 962 F.2s 617, 619 (7 th Cir. 1992).....	11
Other Authorities	
Rule 1, Ariz. R. P. Spec. Act.....	12, 13

REQUEST FOR ORAL ARGUMENT

The Tribe respectfully renews its request for oral argument in this matter, based upon the arguments and authority discussed in its opening brief. The Tribe further notes that the Defendant, in his Response, has not articulated a position with regards to the request for oral argument.

STATEMENT OF JURISDICTION

As will be discussed in more detail below, this case was filed pursuant to an appellate track, involving a timely filed Notice of Appeal, as to Count Three. It was not, despite Defendant's contentions to the contrary, filed as a Petition for Special Action.¹ The remaining Counts — specifically, Counts One, Two and Four — were the subject of a motion to dismiss filed on the same date and at the same time as the notice of appeal that was filed as to Count Three. As will be discussed in more detail, *supra*, the Defendant's repeated attempts to characterize this appeal as a petition for special action despite the record and relevant caselaw is, at best, misguided.

¹ The Rules for Notices of Appeal and for Petitions for Special action will be discussed in more detail *infra*.

STANDARD OF REVIEW

In his Response, the Defendant fails to address what standard of review is appropriate for the issues raised in this appeal. However, the Defendant does cite to certain cases in which the Pascua Yaqui Court of Appeals applied an “abuse of discretion” standard when determining whether the trial court’s dismissal of a charge or charges was legally appropriate. The Tribe defers to the arguments regarding standard of review raised in its opening brief.

ISSUES PRESENTED FOR REVIEW

The arguments contained in the Defendant/Appellee's Response Brief raised the following issues in addition to the ones raised in the Tribe/Appellant's Opening Brief.

1. Does the mere fact that a trial court's dismissal of one count of a charging document automatically convert any standard appeal of that specifically dismissed count into a special action?
2. Did the Tribe in this case file an appeal or a special action?
3. Does the Tribe have standing to bring an appeal when a trial court abuses its discretion in dismissing a single charge from a charging document for a perceived lack of probable cause?

STATEMENT OF THE CASE

I. Facts and Proceedings Below:

The Tribe hereby incorporates the facts as outlined in its opening Appellate brief, filed on November 11, 2021, with the following additions and clarifications required by the arguments raised in the Defendant's Response Brief.

Although the Tribe's Motion to Dismiss Counts One, Two, and Four was filed on September 24, 2021, at 2:04 p.m., the Trial Court did not issue an order staying the case and denying the Tribe's Motion to Dismiss until December 3, 2021. December 3rd was also, coincidentally, the date that the Defendant's Response Brief was filed and occurred nearly a month after the Tribe's Opening Brief was timely filed on November 5, 2021. *See* Attachment C, Tribe's Opening Brief, Motion to Dismiss without Prejudice for the Purposes of Appeal (Sept. 24, 2021); *PYT v. Montana*, CA-21-002, Notice of Appeal (Sept. 24, 2021)^{2,3}.

II. Summary of the Argument:

In his Response, the Defendant attempts to characterize the appeal that was filed in this case as to Count Three — the count that was dismissed because of the trial court's

² The Defendant claims that the Tribe's motion to dismiss Counts One, Two and Four, which are not being appealed, was filed *after* the notice of appeal was filed. *See* Defendant's Response Brief, *PYT v. Montana*, CA-21-002. The order of filing for these particular documents is unimportant given the procedural posture of this case. Nevertheless, a careful examination of the court clerk times stamps for both documents show that they were both filed on September 24, 2021, at 2:04 p.m. It is unclear from the record where the Defendant's assumption that the Motion to Dismiss was filed after the Notice of Appeal is drawn from.

³ The only motions filed in this matter after the motion to dismiss was filed was a mandatory pretrial disclosure statement required by 3 PYTC § 2-2-380(A). Said statement is required to be filed by the prosecution within ten days of arraignment. In this particular instance, Count Three had already been dismissed, and an appeal had been initiated as to that count *alone*. The disclosure statement was filed as to Counts One, Two and Four. Because the trial court did not rule on the Motion to Dismiss until December 3, 2021, the Tribe was left in a position of having to file its initial disclosure statement as to those counts alone in order to comply with local rules of criminal procedure. Said disclosure statement was filed on September 30, 2021. The Defendant's claims that more than one pleading has been filed, *See* Response Brief, p.2, is, unsupported by the record. And, as with the Defendant's other arguments, the fact that the Tribe fulfilled its statutory duties as to counts that are not involved in this appeal does not, in any way, change the procedural posture of this case.

misapplication of the probable cause standard — as a petition for special action. Presumably, the Defendant’s argument is couched in this fashion because the Defendant believes that the procedural standards involved in petitions for special action are somehow more beneficial to his position. However, the Defendant’s arguments are unpersuasive, for reasons that will be discussed *infra*.

Additionally, the Defendant fails to address with any depth the substantive arguments raised in the Tribe’s Opening Brief regarding notice or probable cause, and simply argues that the cases promulgated by this Court do not stand as benchmarks of probable cause analysis. More importantly, the Defendant fails to discuss how the cases cited in the Tribe’s Opening Brief with regards to the nature of probable cause or notice are unpersuasive or do not apply to the case at hand. For the reasons discussed below, and based on the reasons and argument set forth in the Tribe’s Opening Brief, standing and jurisdiction exist, and relief should be granted.

LAW AND ARGUMENT

I. The Simple Fact that a Trial Court Dismisses One Count of a Multi-Count Charging Document Does Not Automatically Convert Any Appeal of that Dismissal Into a Special Action.

The record clearly demonstrates that the Tribe filed an appeal of the trial court’s order dismissing Count Three of the charging document in this case. In his Response, the Defendant attempts to suggest that — simply because there were other counts listed in the original complaint that were not dismissed at the time the notice of appeal was filed — any appeal of the decision as to Count Three must automatically be considered a petition for special action. And yet, while the Defendant discusses the nature of interlocutory appeals at great length, he fails to cite to any caselaw standing for this novel proposal. Furthermore, although the Defendant repeatedly refers to this case as a petition for special action or interlocutory appeal, such repeated referrals cannot and do not alter the reality of this case, or the fact that it is an appeal that this

court has jurisdiction over. The Defendant's arguments should, therefore, be rejected and relief should be granted.

First, the Defendant's argument fails on a procedural front. In this case, the complaint was filed on September 10, 2021. *See* Attachment D, Tribe's Opening Brief. While an initial hearing was held on that same date, *see* Attachment E, Tribe's Opening Brief, Count Three was not dismissed by the trial court until the arraignment hearing, which occurred on September 20, 2021. *See* Attachment F, Tribe's Opening Brief. The Notice of Appeal as to the court dismissed Count Three was filed on September 24, 2021. That same date, and at the same time, the Tribe filed a motion to dismiss the remaining counts of the complaint in an effort to preserve judicial economy by reducing the need for two separate cases to proceed forward, and to reduce the possibility that the victims in this case — one of whom is a minor — would need to testify against the Defendant at two separate hearings. The fact that the trial court did not issue its order of stay until the day that the Defendant filed his response to the appeal — and which, based on the text of the order, was not issued *nunc pro tunc* — does not negate the fact that the trial court dismissed Count Three on September 20th. It does not negate that, effective September 20th, Count Three no longer functionally existed. And, most importantly, it does not negate the fact that the Tribe is entitled to appeal the dismissal of a charge based on a trial court's abuse of discretion.

Second, the local Pascua Yaqui Tribal cases that the Defendant relies upon do not stand for the novel proposition he proposes. The Pascua Yaqui Court of Appeals has adopted the rules and procedures for petitions for special action as promulgated by the State of Arizona. *See generally* *PYT v. Stoof ex rel. Lopez*, CA-18-001 (Oct. 2018); *PYT v. Flores ex rel. Alvarez*, CA-18-002 (Oct. 2018). Although the Defendant relies upon *Flores* for the proposition that the briefing should be considered a special action and not an appeal, *Flores* never addressed the issue raised by the Defendant. In *Flores*, the trial court, months after an initial hearing, granted a

more recently filed motion to dismiss based on allegations of multiplicity. *Flores*, CA-18-002 at 2. The charges involved there concerned identical incident dates and did not include date ranges for any of the involved offenses. *Flores* did not deal with questions of probable cause or dismissals granted after the initial hearing. Nor did *Flores* address the question raised by the Defendant, namely whether the fact that a charge involving a range of dates—and dates different than the dates involved in other counts—means that any notice of appeal filed is automatically converted into a petition for special action. Equally as importantly, *Flores* was filed by the Tribe as a petition for special action, not as an appeal.

Flores, while instructive in terms of basic special action jurisprudence in this jurisdiction, does not apply to this case. Here, a notice of appeal was filed specifically and solely with regards to count three. That count involves different date ranges even though it involves similar witnesses. It could have been filed as a separate criminal cause number, thus exposing the Defendant to two potential convictions that could each have an impact upon his sentencing in any future criminal cases. The dismissal in this case occurred at the arraignment hearing, and not months into proceedings, as what happened in *Flores*. Moreover, the dismissal in *Flores* was made *with* prejudice, unlike the dismissal in this case. A dismissal with prejudice, as the Defendant notes in his response, has the same effect as an acquittal. Here, the dismissal was made without prejudice. And *Flores* did not deal with whether an appeal should be considered a petition for special action, or *vice versa*, because that issue was not brought before the court. For all of these reasons, *Flores* does not apply to the case at bar.

II. The Defendant Ignores the Most Basic and Fundamental Issues that were Brought Before this Court in *PYT v. Baltazar*, and *PYT v. Rodriguez*, and, thus, Ignores the Applicability of Those Cases to the One at Bar.

In his brief, the Defendant attempts to argue that neither *PYT v. Baltazar*, CA-01-003 (PYT Ct. App. Sept. 2001), nor *PYT v. Rodriguez*, CA 19-004 (PYT Ct. App. Oct. 2019) apply to the issues in this case simply and solely because they involved dismissals of cases due to either a perceived technical defect, in the case of *Baltazar*, or a time discrepancy, in the case of *Rodriguez*. This interpretation of these cases is superficial and ignores the core issue addressed by each one. As discussed extensively in the Tribe's Opening Brief, both *Baltazar* and *Rodriguez* dealt with the fundamental question of what constitutes probable cause for a particular charge. While the Pascua Yaqui Tribal code requires the Tribe to note things like locations, dates, and times "as nearly as may be determined," 3 PYTC § 2-2-90(B)(1), the code does not require exactitude and does not require these elements of form to be proven before probable cause may be found. This Court, in *Rodriguez*, also noted that elements of time are not related to probable cause when they are not an element "essential to the offense." *Rodriguez*, CA-19-004, p. 3.

Here, the Defendant subtly suggests that temporality becomes a vital and necessary element of probable cause — even if it is not an element identified in a statute of offense — if and only when it is listed as a date range. This argument is unsupported based on an understanding of the fundamental issues at play in *Baltazar* and *Rodriguez*⁴, and it further ignores case law from federal and state jurisdictions that the Pascua Yaqui Court of Appeals regularly relies upon as persuasive authority. *See e.g. Fawcett v. Bablitch*, 962 F.2s 617, 619 (7th Cir. 1992). The simple fact of the matter is that, for the specific charge involved as to Count Three, time, date, and temporality are not elements of the offense. *Baltazar* and *Rodriguez* apply

⁴ The Defendant correctly notes that neither *Baltazar* nor *Rodriguez* involved a petition for special action. But neither does the case currently before this Court. As will be discussed in more detail, *infra*, the reasoning in *Baltazar*, *Rodriguez*, and the remaining cases cited in the Tribe's opening brief—along with their attendant legal precepts—apply regardless of whether a matter is reviewed as an appeal or as a petition for special action.

as they address, either separately or in conjunction with one another, the definition of probable cause and what constitutes a legally sufficient complaint. Thus, the Defendant's argument fails, and relief should be granted.

III. Assuming, *Arguendo*, that this Case is an Interlocutory Appeal or Petition for Special Action, the Tribe has Standing to Pursue its Claim of Relief, and this Court Has Jurisdiction Over the Matter.

This Court has jurisdiction over this appeal, despite the Defendant's repeated attempts — despite the record — to mistakenly characterize this as a petition for special action. However, if we were to assume, *arguendo*, that this case does involve a petition for special action, the Defendant's arguments concerning standing and jurisdiction fail. While the Tribe in no way concedes that this matter is, or should have, been brought as a petition for special action pursuant to the rules set forth in *Lopez*, CA-18-001, the Tribe would have standing to proceed. And this Court would be able to accept jurisdiction over the claim for relief.

In *Lopez*, CA-18-001, the Court of Appeals formally adopted the Arizona Rules regarding petitions for special actions, something that is sometimes referred to as an “interlocutory appeal” in other jurisdictions. *See Lopez*, CA-18-001, p.1-2; also Rule 1, Ariz. R. P. Spec. Act., *et seq.* This was done in recognition of the fact that the Pascua Yaqui Tribe had historically allowed for the filing of interlocutory appeals. *Lopez*, CA-18-001, p.1. The Arizona Rules provide specific guidance with regards to the format of petitions for special action, the time and method of filing, the contents of petitions, and when the Court may accept jurisdiction. *See generally*, Rule 1, Ariz. R. P. Spec. Act., *et seq.* As this court stated:

“Special action relief may only be granted where: 1) the trial judge has failed to exercise discretion which he/she has a duty to exercise, or to perform a duty required by law as to which he/she has no discretion; and 2) the trial judge has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority, and 3) the trial judge's determination was arbitrary capricious or an abuse of discretion.” *Lopez*, CA-18-001, p.2 (*citing* Rule 3, Ariz. R. P. Spec. Act.).

Additionally, the party requesting relief pursuant to a petition for special action is required to demonstrate that it possesses no “equally plain, speedy, and adequate remedy” short of appeal. *Lopez*, CA-18-001 (citing Rule 1(a), Ariz. R. P. Spec. Act.).

Again, the Tribe does not agree with the Defendant’s assertions that this matter was filed as a special action. Nevertheless, if we were to assume that the Defendant’s assertions were accurate — despite clear evidence in the record to the contrary — the Tribe would have standing to bring this action, and this Court would have jurisdiction over it.

The Tribe has no “equally plain, speedy, and adequate remedy” in this case.⁵ While the Defendant asserts that the Tribe could simply refile Count Three with a specific date, the Defendant’s argument assumes that the prosecution can create new or different evidence out of thin air. The evidence provided in this case, which was included in the affidavit of probable cause submitted with the criminal complaint, *see* Tribe’s Opening Brief, Attachment D, indicated that the witnesses said that the Defendant caused damage to the wall of their house approximately a month prior to September 9th. One of those witnesses was a child, who pointed out the damage, but who, according to the affidavit, did not supply a date or date range. *Id.* The adult victim in the case, C.M., indicated that the damage happened about a month prior. *Id.* C.M. also told officers that the Defendant would get violent approximately twice a month but, again, did not provide specific dates regarding when the damage to the wall occurred, or when the Defendant had previously acted violently. *Id.*

While the Defendant claims that the charging document can simply be refiled when the prosecution has more information, that assumption ignores the fact of the situation. Specifically, it assumes that additional investigation will cause the adult or child victims in this case — despite the statements they gave in September 2021 — to suddenly develop memory of a date that they did not have on September 9th, 2021, when the Defendant was arrested. As a result,

⁵ Again, and for the reasons set forth in the Tribe’s Opening Brief, the Tribe is entitled to appeal a dismissal made without prejudice. *See* Tribe’s Opening Brief, p. 6-7.

refiling the complaint will result in the same date range as to Count Three, whether it is filed as a separate count or as part of a separate criminal complaint. This means that the trial court will apply the same misunderstanding of probable cause used in this case to any new filing, which will result in a new appeal. This would be similar to the burglary example discussed in the Tribe's Opening Brief, p. 25-26. In that situation, questioning the victims to try to pin down an exact date for the burglary of their home would yield no new information, wisdom, or specific dates.

And, yet, if the Court were to follow the Defendant's logic, those victims would be denied justice simply because they were not home and did not know the exact date that the defendant broke in. Likewise, the child victim who cannot understand the concept of dates but who knows that they were molested during the summer of their 11th birthday would be denied justice. The tribal elder suffering from age-related dementia would be denied justice for charges relating to her neglect, abuse, or financial fraud, because s/he could not remember dates except as part of a general range. The domestic violence victim who is regularly subjected to violence to the point that it becomes a matter of routine would be denied justice because routine makes it impossible to remember a specific date.

The Tribe clearly has no equally plain or speedy avenue of relief short of appeal. Thus, the Defendant's argument fails.


The Defendant also argues that the trial court's decision in the case was not a final judgment. It is difficult to imagine a decision more final than the dismissal of a charge, regardless of whether it is with or without prejudice. The Defendant's argument fails on this ground as well. Finally, and for the reasons outlined in its Opening Brief, the Tribe has shown that the trial court's decision was in excess of its legal authority and an abuse of discretion because the trial court applied a more stringent definition of probable cause than what is contemplated by Pascua Yaqui law, and case law from jurisdictions upon which the Pascua

Yaqui Tribe relies. Accordingly, even if the Court were to adopt the Defendant's tortured and legally unsupported argument that this case should be considered a petition for special action even though it was filed as an appeal, the Tribe has demonstrated standing. This Court retains jurisdiction. And relief should, therefore, be granted.

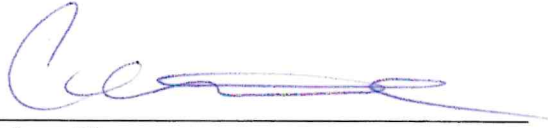
CONCLUSION AND REMEDY SOUGHT

Based on the caselaw and arguments provided in the Tribe's Opening Brief and in this Reply, the Tribe respectfully requests that relief be granted.

RESPECTFULLY submitted this 20 day of December, 2021.



Malena Acosta
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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Tucson, AZ 85757

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

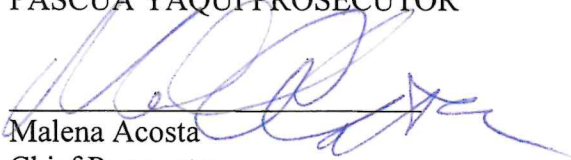
Glaucia Brannock
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And that one (1) copy of the Tribe's pleading was delivered this date to:

Associate Judge Veronica Darnell
Pascua Yaqui Tribal Court
7777 S. Camino Huivisim
Tucson, AZ 85757

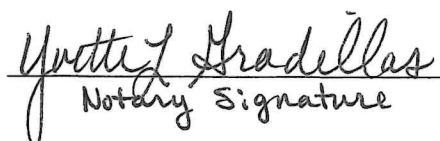
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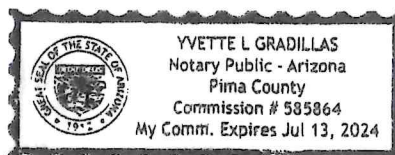
PASCUA YAQUI PROSECUTOR


Malena Acosta
Chief Prosecutor


Coleen Thoene
Deputy Prosecutor

Sworn before me this 20th day of December, 2021


Notary Signature



**Attachment G: Order: Motion to Dismiss without
Prejudice for the Purposes of Appeal (Dec. 3, 2021)**

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

PASCUA YAQUI TRIBE)
Plaintiff,)
vs.)
MONTANA, JOSE)
Defendant.)

Case No. CR-21-239

ORDER
MOTION TO DISMISS WITHOUT PREJUDICE
FOR THE PURPOSES OF APPEAL

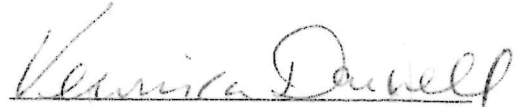
On September 24, 2021, the Pascua Yaqui Tribe, by and through Coleen Thoene, filed a Motion to Dismiss Without Prejudice for the Purposes of Appeal. The Motion stated that a Notice of Appeal has been filed with the Pascua Yaqui Court of Appeals on September 24, 2021. The Tribe also requested that the Bench Trial set for December 6, 2021, be vacated. The Tribe stated that the Defense was contacted and had to objection to the Motion to Dismiss Without Prejudice. The Tribe stated that the victims were also contacted and concurred with the Motion. The Court does not find good cause to grant the Motion to Dismiss Without Prejudice. However, the Court does find good cause to stay the proceedings on its own motion pending the ruling of the Pascua Yaqui Court of Appeals. The Tribe's Motion should be denied, but the matter should be stayed pending the ruling of the Pascua Yaqui Court of Appeals.

IT IS ORDERED THAT the Court denies the Tribe's Motion to Dismiss Without Prejudice.

IT IS FURTHER ORDERED that the Court on its own motion, stays the proceedings pending the ruling of the Pascua Yaqui Court of Appeals.

IT IS FURTHER ORDERED that the Bench Trial currently set for December 6, 2021 at 2:00 p.m. IS VACATED.

SO ORDERED THIS 3RD DAY OF DECEMBER, 2021.



Judge, Pascua Yaqui Tribal Court

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Cc:

Date: 12/3/91

Tribe Defendant/Counsel _____ Pre-trial/Probation ___ Detention ___ Victim Advocate

Clerk: [Signature]

**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.

Jose J. Montana,
Appellee

APPELLATE CASE NO: CA-21-002

TRIBAL COURT CASE NO: CR-21-239

APPELLANT'S REPLY BRIEF

Malena Acosta,
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TABLE OF CONTENTS

TABLE OF CONTENTS..... 2

TABLE OF AUTHORITIES..... 3

REQUEST FOR ORAL ARGUMENT 4

STATEMENT OF JURISDICTION 4

STANDARD OF REVIEW 5

ISSUES PRESENTED FOR REVIEW 6

STATEMENT OF THE CASE 7

I. FACTS AND PROCEEDINGS BELOW: 7

II. SUMMARY OF THE ARGUMENT:..... 7

LAW AND ARGUMENT 8

I. THE SIMPLE FACT THAT A TRIAL COURT DISMISSES ONE COUNT OF A MULTI-COUNT CHARGING DOCUMENT DOES NOT AUTOMATICALLY CONVERT ANY APPEAL OF THAT DISMISSAL INTO A SPECIAL ACTION.8

II. THE DEFENDANT IGNORES THE MOST BASIC AND FUNDAMENTAL ISSUES THAT WERE BROUGHT BEFORE THIS COURT IN *PYT V. BALTAZAR*, AND *PYT V. RODRIGUEZ*, AND, THUS, IGNORES THE APPLICABILITY OF THOSE CASES TO THE ONE AT BAR. 11

III. ASSUMING, *ARGUENDO*, THAT THIS CASE IS AN INTERLOCUTORY APPEAL OR PETITION FOR SPECIAL ACTION, THE TRIBE HAS STANDING TO PURSUE ITS CLAIM OF RELIEF, AND THIS COURT HAS JURISDICTION OVER THE MATTER.12

CONCLUSION AND REMEDY SOUGHT 15

CERTIFICATE OF SERVICE.....I

TABLE OF AUTHORITIES

Authority	Page Number
Pascua Yaqui Tribal Code	
3 PYTC § 2-2-90(B)(1).....	11
Pascua Yaqui Cases	
<i>PYT v. Baltazar</i> , CA-01-003 (PYT Ct. App. Sept. 2001).....	11
<i>PYT v. Flores ex rel. Alvarez</i> , CA-18-002 (Oct. 2018).....	9, 10
<i>PYT v. Rodriguez</i> , CA 19-004 (PYT Ct. App. Oct. 2019).....	11
<i>PYT v. Stoof ex rel. Lopez</i> , CA-18-001 (Oct. 2018);.....	9, 12, 13
Federal Cases	
<i>Fawcett v. Bablitch</i> , 962 F.2s 617, 619 (7 th Cir. 1992).....	11
Other Authorities	
Rule 1, Ariz. R. P. Spec. Act.....	12, 13

REQUEST FOR ORAL ARGUMENT

The Tribe respectfully renews its request for oral argument in this matter, based upon the arguments and authority discussed in its opening brief. The Tribe further notes that the Defendant, in his Response, has not articulated a position with regards to the request for oral argument.

STATEMENT OF JURISDICTION

As will be discussed in more detail below, this case was filed pursuant to an appellate track, involving a timely filed Notice of Appeal, as to Count Three. It was not, despite Defendant's contentions to the contrary, filed as a Petition for Special Action.¹ The remaining Counts — specifically, Counts One, Two and Four — were the subject of a motion to dismiss filed on the same date and at the same time as the notice of appeal that was filed as to Count Three. As will be discussed in more detail, *supra*, the Defendant's repeated attempts to characterize this appeal as a petition for special action despite the record and relevant caselaw is, at best, misguided.

¹ The Rules for Notices of Appeal and for Petitions for Special action will be discussed in more detail *infra*.

STANDARD OF REVIEW

In his Response, the Defendant fails to address what standard of review is appropriate for the issues raised in this appeal. However, the Defendant does cite to certain cases in which the Pascua Yaqui Court of Appeals applied an “abuse of discretion” standard when determining whether the trial court’s dismissal of a charge or charges was legally appropriate. The Tribe defers to the arguments regarding standard of review raised in its opening brief.

ISSUES PRESENTED FOR REVIEW

The arguments contained in the Defendant/Appellee's Response Brief raised the following issues in addition to the ones raised in the Tribe/Appellant's Opening Brief.

1. Does the mere fact that a trial court's dismissal of one count of a charging document automatically convert any standard appeal of that specifically dismissed count into a special action?
2. Did the Tribe in this case file an appeal or a special action?
3. Does the Tribe have standing to bring an appeal when a trial court abuses its discretion in dismissing a single charge from a charging document for a perceived lack of probable cause?

STATEMENT OF THE CASE

I. Facts and Proceedings Below:

The Tribe hereby incorporates the facts as outlined in its opening Appellate brief, filed on November 11, 2021, with the following additions and clarifications required by the arguments raised in the Defendant's Response Brief.

Although the Tribe's Motion to Dismiss Counts One, Two, and Four was filed on September 24, 2021, at 2:04 p.m., the Trial Court did not issue an order staying the case and denying the Tribe's Motion to Dismiss until December 3, 2021. December 3rd was also, coincidentally, the date that the Defendant's Response Brief was filed and occurred nearly a month after the Tribe's Opening Brief was timely filed on November 5, 2021. *See* Attachment C, Tribe's Opening Brief, Motion to Dismiss without Prejudice for the Purposes of Appeal (Sept. 24, 2021); *PYT v. Montana*, CA-21-002, Notice of Appeal (Sept. 24, 2021)^{2,3}.

II. Summary of the Argument:

In his Response, the Defendant attempts to characterize the appeal that was filed in this case as to Count Three — the count that was dismissed because of the trial court's

² The Defendant claims that the Tribe's motion to dismiss Counts One, Two and Four, which are not being appealed, was filed *after* the notice of appeal was filed. *See* Defendant's Response Brief, *PYT v. Montana*, CA-21-002. The order of filing for these particular documents is unimportant given the procedural posture of this case. Nevertheless, a careful examination of the court clerk times stamps for both documents show that they were both filed on September 24, 2021, at 2:04 p.m. It is unclear from the record where the Defendant's assumption that the Motion to Dismiss was filed after the Notice of Appeal is drawn from.

³ The only motions filed in this matter after the motion to dismiss was filed was a mandatory pretrial disclosure statement required by 3 PYTC § 2-2-380(A). Said statement is required to be filed by the prosecution within ten days of arraignment. In this particular instance, Count Three had already been dismissed, and an appeal had been initiated as to that count *alone*. The disclosure statement was filed as to Counts One, Two and Four. Because the trial court did not rule on the Motion to Dismiss until December 3, 2021, the Tribe was left in a position of having to file its initial disclosure statement as to those counts alone in order to comply with local rules of criminal procedure. Said disclosure statement was filed on September 30, 2021. The Defendants claims that more than one pleading has been filed, *See* Response Brief, p.2, is unsupported by the record. And, as with the Defendant's other arguments, the fact that the Tribe fulfilled its statutory duties as to counts that are not involved in this appeal does not, in any way, change the procedural posture of this case.

misapplication of the probable cause standard — as a petition for special action. Presumably, the Defendant’s argument is couched in this fashion because the Defendant believes that the procedural standards involved in petitions for special action are somehow more beneficial to his position. However, the Defendant’s arguments are unpersuasive, for reasons that will be discussed *infra*.

Additionally, the Defendant fails to address with any depth the substantive arguments raised in the Tribe’s Opening Brief regarding notice or probable cause, and simply argues that the cases promulgated by this Court do not stand as benchmarks of probable cause analysis. More importantly, the Defendant fails to discuss how the cases cited in the Tribe’s Opening Brief with regards to the nature of probable cause or notice are unpersuasive or do not apply to the case at hand. For the reasons discussed below, and based on the reasons and argument set forth in the Tribe’s Opening Brief, standing and jurisdiction exist, and relief should be granted.

LAW AND ARGUMENT

I. The Simple Fact that a Trial Court Dismisses One Count of a Multi-Count Charging Document Does Not Automatically Convert Any Appeal of that Dismissal Into a Special Action.

The record clearly demonstrates that the Tribe filed an appeal of the trial court’s order dismissing Count Three of the charging document in this case. In his Response, the Defendant attempts to suggest that — simply because there were other counts listed in the original complaint that were not dismissed at the time the notice of appeal was filed — any appeal of the decision as to Count Three must automatically be considered a petition for special action. And yet, while the Defendant discusses the nature of interlocutory appeals at great length, he fails to cite to any caselaw standing for this novel proposal. Furthermore, although the Defendant repeatedly refers to this case as a petition for special action or interlocutory appeal, such repeated referrals cannot and do not alter the reality of this case, or the fact that it is an appeal that this

court has jurisdiction over. The Defendant's arguments should, therefore, be rejected and relief should be granted.

First, the Defendant's argument fails on a procedural front. In this case, the complaint was filed on September 10, 2021. *See* Attachment D, Tribe's Opening Brief. While an initial hearing was held on that same date, *see* Attachment E, Tribe's Opening Brief, Count Three was not dismissed by the trial court until the arraignment hearing, which occurred on September 20, 2021. *See* Attachment F, Tribe's Opening Brief. The Notice of Appeal as to the court dismissed Count Three was filed on September 24, 2021. That same date, and at the same time, the Tribe filed a motion to dismiss the remaining counts of the complaint in an effort to preserve judicial economy by reducing the need for two separate cases to proceed forward, and to reduce the possibility that the victims in this case — one of whom is a minor — would need to testify against the Defendant at two separate hearings. The fact that the trial court did not issue its order of stay until the day that the Defendant filed his response to the appeal — and which, based on the text of the order, was not issued *nunc pro tunc* — does not negate the fact that the trial court dismissed Count Three on September 20th. It does not negate that, effective September 20th, Count Three no longer functionally existed. And, most importantly, it does not negate the fact that the Tribe is entitled to appeal the dismissal of a charge based on a trial court's abuse of discretion.

Second, the local Pascua Yaqui Tribal cases that the Defendant relies upon do not stand for the novel proposition he proposes. The Pascua Yaqui Court of Appeals has adopted the rules and procedures for petitions for special action as promulgated by the State of Arizona. *See generally* *PYT v. Stoof ex rel. Lopez*, CA-18-001 (Oct. 2018); *PYT v. Flores ex rel. Alvarez*, CA-18-002 (Oct. 2018). Although the Defendant relies upon *Flores* for the proposition that the briefing should be considered a special action and not an appeal, *Flores* never addressed the issue raised by the Defendant. In *Flores*, the trial court, months after an initial hearing, granted a

more recently filed motion to dismiss based on allegations of multiplicity. *Flores*, CA-18-002 at 2. The charges involved there concerned identical incident dates and did not include date ranges for any of the involved offenses. *Flores* did not deal with questions of probable cause or dismissals granted after the initial hearing. Nor did *Flores* address the question raised by the Defendant, namely whether the fact that a charge involving a range of dates—and dates different than the dates involved in other counts—means that any notice of appeal filed is automatically converted into a petition for special action. Equally as importantly, *Flores* was filed by the Tribe as a petition for special action, not as an appeal.

Flores, while instructive in terms of basic special action jurisprudence in this jurisdiction, does not apply to this case. Here, a notice of appeal was filed specifically and solely with regards to count three. That count involves different date ranges even though it involves similar witnesses. It could have been filed as a separate criminal cause number, thus exposing the Defendant to two potential convictions that could each have an impact upon his sentencing in any future criminal cases. The dismissal in this case occurred at the arraignment hearing, and not months into proceedings, as what happened in *Flores*. Moreover, the dismissal in *Flores* was made *with* prejudice, unlike the dismissal in this case. A dismissal with prejudice, as the Defendant notes in his response, has the same effect as an acquittal. Here, the dismissal was made without prejudice. And *Flores* did not deal with whether an appeal should be considered a petition for special action, or *vice versa*, because that issue was not brought before the court. For all of these reasons, *Flores* does not apply to the case at bar.

II. The Defendant Ignores the Most Basic and Fundamental Issues that were Brought Before this Court in *PYT v. Baltazar*, and *PYT v. Rodriguez*, and, thus, Ignores the Applicability of Those Cases to the One at Bar.

In his brief, the Defendant attempts to argue that neither *PYT v. Baltazar*, CA-01-003 (PYT Ct. App. Sept. 2001), nor *PYT v. Rodriguez*, CA 19-004 (PYT Ct. App. Oct. 2019) apply to the issues in this case simply and solely because they involved dismissals of cases due to either a perceived technical defect, in the case of *Baltazar*, or a time discrepancy, in the case of *Rodriguez*. This interpretation of these cases is superficial and ignores the core issue addressed by each one. As discussed extensively in the Tribe's Opening Brief, both *Baltazar* and *Rodriguez* dealt with the fundamental question of what constitutes probable cause for a particular charge. While the Pascua Yaqui Tribal code requires the Tribe to note things like locations, dates, and times "as nearly as may be determined," 3 PYTC § 2-2-90(B)(1), the code does not require exactitude and does not require these elements of form to be proven before probable cause may be found. This Court, in *Rodriguez*, also noted that elements of time are not related to probable cause when they are not an element "essential to the offense." *Rodriguez*, CA-19-004, p. 3.

Here, the Defendant subtly suggests that temporality becomes a vital and necessary element of probable cause — even if it is not an element identified in a statute of offense — if and only when it is listed as a date range. This argument is unsupported based on an understanding of the fundamental issues at play in *Baltazar* and *Rodriguez*⁴, and it further ignores case law from federal and state jurisdictions that the Pascua Yaqui Court of Appeals regularly relies upon as persuasive authority. *See e.g. Fawcett v. Bablitch*, 962 F.2s 617, 619 (7th Cir. 1992). The simple fact of the matter is that, for the specific charge involved as to Count Three, time, date, and temporality are not elements of the offense. *Baltazar* and *Rodriguez* apply

⁴ The Defendant correctly notes that neither *Baltazar* nor *Rodriguez* involved a petition for special action. But neither does the case currently before this Court. As will be discussed in more detail, *infra*, the reasoning in *Baltazar*, *Rodriguez*, and the remaining cases cited in the Tribe's opening brief—along with their attendant legal precepts—apply regardless of whether a matter is reviewed as an appeal or as a petition for special action.

as they address, either separately or in conjunction with one another, the definition of probable cause and what constitutes a legally sufficient complaint. Thus, the Defendant's argument fails, and relief should be granted.

III. Assuming, *Arguendo*, that this Case is an Interlocutory Appeal or Petition for Special Action, the Tribe has Standing to Pursue its Claim of Relief, and this Court Has Jurisdiction Over the Matter.

This Court has jurisdiction over this appeal, despite the Defendant's repeated attempts — despite the record — to mistakenly characterize this as a petition for special action. However, if we were to assume, *arguendo*, that this case does involve a petition for special action, the Defendant's arguments concerning standing and jurisdiction fail. While the Tribe in no way concedes that this matter is, or should have, been brought as a petition for special action pursuant to the rules set forth in *Lopez*, CA-18-001, the Tribe would have standing to proceed. And this Court would be able to accept jurisdiction over the claim for relief.

In *Lopez*, CA-18-001, the Court of Appeals formally adopted the Arizona Rules regarding petitions for special actions, something that is sometimes referred to as an “interlocutory appeal” in other jurisdictions. *See Lopez*, CA-18-001, p.1-2; *also* Rule 1, Ariz. R. P. Spec. Act., *et. seq.* This was done in recognition of the fact that the Pascua Yaqui Tribe had historically allowed for the filing of interlocutory appeals. *Lopez*, CA-18-001, p.1. The Arizona Rules provide specific guidance with regards to the format of petitions for special action, the time and method of filing, the contents of petitions, and when the Court may accept jurisdiction. *See generally*, Rule 1, Ariz. R. P. Spec. Act., *et seq.* As this court stated:

“Special action relief may only be granted where: 1) the trial judge has failed to exercise discretion which he/she has a duty to exercise, or to perform a duty required by law as to which he/she has no discretion; and 2) the trial judge has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority, and 3) the trial judge's determination was arbitrary capricious or an abuse of discretion.” *Lopez*, CA-18-001, p.2 (*citing* Rule 3, Ariz. R. P. Spec. Act.).

Additionally, the party requesting relief pursuant to a petition for special action is required to demonstrate that it possesses no “equally plain, speedy, and adequate remedy” short of appeal. *Lopez*, CA-18-001 (*citing* Rule 1(a), Ariz. R. P. Spec. Act.).

Again, the Tribe does not agree with the Defendant’s assertions that this matter was filed as a special action. Nevertheless, if we were to assume that the Defendant’s assertions were accurate — despite clear evidence in the record to the contrary — the Tribe would have standing to bring this action, and this Court would have jurisdiction over it.

The Tribe has no “equally plain, speedy, and adequate remedy” in this case.⁵ While the Defendant asserts that the Tribe could simply refile Count Three with a specific date, the Defendant’s argument assumes that the prosecution can create new or different evidence out of thin air. The evidence provided in this case, which was included in the affidavit of probable cause submitted with the criminal complaint, *see* Tribe’s Opening Brief, Attachment D, indicated that the witnesses said that the Defendant caused damage to the wall of their house approximately a month prior to September 9th. One of those witnesses was a child, who pointed out the damage, but who, according to the affidavit, did not supply a date or date range. *Id.* The adult victim in the case, C.M., indicated that the damage happened about a month prior. *Id.* C.M. also told officers that the Defendant would get violent approximately twice a month but, again, did not provide specific dates regarding when the damage to the wall occurred, or when the Defendant had previously acted violently. *Id.*

While the Defendant claims that the charging document can simply be refiled when the prosecution has more information, that assumption ignores the fact of the situation. Specifically, it assumes that additional investigation will cause the adult or child victims in this case — despite the statements they gave in September 2021 — to suddenly develop memory of a date that they did not have on September 9th, 2021, when the Defendant was arrested. As a result,

⁵ Again, and for the reasons set forth in the Tribe’s Opening Brief, the Tribe is entitled to appeal a dismissal made without prejudice. *See* Tribe’s Opening Brief, p. 6-7.

refiling the complaint will result in the same date range as to Count Three, whether it is filed as a separate count or as part of a separate criminal complaint. This means that the trial court will apply the same misunderstanding of probable cause used in this case to any new filing, which will result in a new appeal. This would be similar to the burglary example discussed in the Tribe's Opening Brief, p. 25-26. In that situation, questioning the victims to try to pin down an exact date for the burglary of their home would yield no new information, wisdom, or specific dates.

And, yet, if the Court were to follow the Defendant's logic, those victims would be denied justice simply because they were not home and did not know the exact date that the defendant broke in. Likewise, the child victim who cannot understand the concept of dates but who knows that they were molested during the summer of their 11th birthday would be denied justice. The tribal elder suffering from age-related dementia would be denied justice for charges relating to her neglect, abuse, or financial fraud, because s/he could not remember dates except as part of a general range. The domestic violence victim who is regularly subjected to violence to the point that it becomes a matter of routine would be denied justice because routine makes it impossible to remember a specific date.

The Tribe clearly has no equally plain or speedy avenue of relief short of appeal. Thus, the Defendant's argument fails.

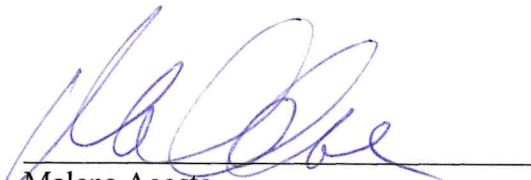
The Defendant also argues that the trial court's decision in the case was not a final judgment. It is difficult to imagine a decision more final than the dismissal of a charge, regardless of whether it is with or without prejudice. The Defendant's argument fails on this ground as well. Finally, and for the reasons outlined in its Opening Brief, the Tribe has shown that the trial court's decision was in excess of its legal authority and an abuse of discretion because the trial court applied a more stringent definition of probable cause than what is contemplated by Pascua Yaqui law, and case law from jurisdictions upon which the Pascua

Yaqui Tribe relies. Accordingly, even if the Court were to adopt the Defendant's tortured and legally unsupported argument that this case should be considered a petition for special action even though it was filed as an appeal, the Tribe has demonstrated standing. This Court retains jurisdiction. And relief should, therefore, be granted.

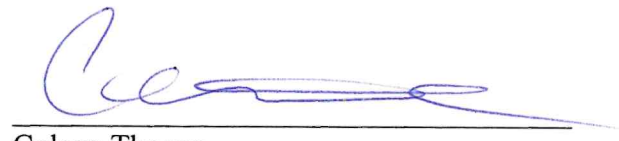
CONCLUSION AND REMEDY SOUGHT

Based on the caselaw and arguments provided in the Tribe's Opening Brief and in this Reply, the Tribe respectfully requests that relief be granted.

RESPECTFULLY submitted this 20 day of December, 2021.



Malena Acosta
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:

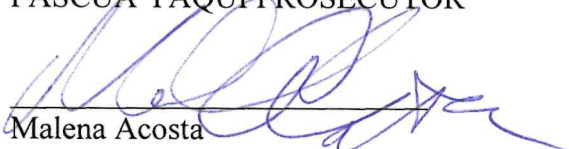
Glauca Brannock
Glauca.Brannock@pascuayaqui-nsn.gov
Pascua Yaqui Office of the Public Defender
7474 S. Camino de Oeste
Tucson, AZ 85757

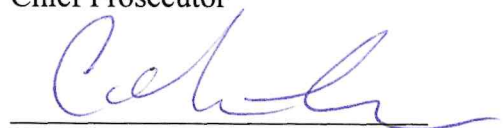
And that one (1) copy of the Tribe's pleading was delivered this date to:

Associate Judge Veronica Darnell
Pascua Yaqui Tribal Court
7777 S. Camino Huivisim
Tucson, AZ 85757

Dated this 20 day of December, 2021.

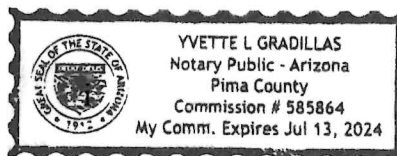
PASCUA YAQUI-PROSECUTOR


Malena Acosta
Chief Prosecutor


Coleen Thoene
Deputy Prosecutor

Sworn before me this 20th day of December, 2021


Notary Signature



**Attachment G: Order: Motion to Dismiss without
Prejudice for the Purposes of Appeal (Dec. 3, 2021)**

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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE)
Plaintiff,)
vs.)
MONTANA, JOSE)
Defendant.)

Case No. CR-21-239

**ORDER
MOTION TO DISMISS WITHOUT PREJUDICE
FOR THE PURPOSES OF APPEAL**


On September 24, 2021, the Pascua Yaqui Tribe, by and through Coleen Thoene, filed a Motion to Dismiss Without Prejudice for the Purposes of Appeal. The Motion stated that a Notice of Appeal has been filed with the Pascua Yaqui Court of Appeals on September 24, 2021. The Tribe also requested that the Bench Trial set for December 6, 2021, be vacated. The Tribe stated that the Defense was contacted and had no objection to the Motion to Dismiss Without Prejudice. The Tribe stated that the victims were also contacted and concurred with the Motion. The Court does not find good cause to grant the Motion to Dismiss Without Prejudice. However, the Court does find good cause to stay the proceedings on its own motion pending the ruling of the Pascua Yaqui Court of Appeals. The Tribe's Motion should be denied, but the matter should be stayed pending the ruling of the Pascua Yaqui Court of Appeals.

IT IS ORDERED THAT the Court denies the Tribe's Motion to Dismiss Without Prejudice.

IT IS FURTHER ORDERED that the Court on its own motion, stays the proceedings pending the ruling of the Pascua Yaqui Court of Appeals.

IT IS FURTHER ORDERED that the Bench Trial currently set for December 6, 2021 at 2:00 p.m. IS VACATED.

SO ORDERED THIS 3RD DAY OF DECEMBER, 2021.


Judge, Pascua Yaqui Tribal Court

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Cc:

Date: 12/3/21

Tribe Defendant/Counsel Pre-trial/Probation Detention Victim Advocate

Clerk: VO

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.

Jose J. Montana,
Appellee

APPELLATE CASE NO: CA-21-002

TRIBAL COURT CASE NO: CR-21-239

APPELLANT'S OPENING BRIEF

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Attorneys for the Pascua Yaqui Tribe

TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES.....	3
REQUEST FOR ORAL ARGUMENT	5
STATEMENT OF JURISDICTION	6
STANDARD OF REVIEW	8
ISSUES PRESENTED FOR REVIEW	10
STATEMENT OF THE CASE	11
I. Facts and Proceedings Below:	11
II. Summary of the Argument.....	15
LAW AND ARGUMENT	16
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.	16
A. The life of a criminal case under the Pascua Yaqui Tribal Code	16
B. Definition of “Probable Cause” and the Contents, Sufficiency and Purpose of a Criminal Complaint:.....	19
II. Differences in Technical Aspects of a Complaint’s Form and Supporting Affidavit Regarding the Time of an Alleged Offense have no Bearing on the Substance of Probable Cause.	21
III. The Complaint and Affidavit Filed in this Case Adequately Established Probable Cause to Believe that the Defendant Committed Criminal Offense in Violation of the Pascua Yaqui Tribal Code and Provided the Defendant with Sufficient notice so that he Could Prepare a Full and Complete Defense.	24
IV. Because Exact Time and Date Time are Not Elements of Probable Cause, the Inclusion of a Date Range Does not Render a Criminal Complaint Defective for Want of Adequate Notice.....	27
CONCLUSION AND REMEDY SOUGHT	30
CERTIFICATE OF SERVICE	I

TABLE OF AUTHORITIES

Authority	Page Number
Pascua Yaqui Constitution	
Art. I, § 1(c), Pascua Yaqui Const.....	6
Pascua Yaqui Rules	
3 PYTC § 2-2-10.....	16
3 PYTC § 2-2-170.....	17
3 PYTC § 2-2-180.....	17
3 PYTC § 2-2-20.....	16
3 PYTC § 2-2-230.....	17
3 PYTC § 2-2-380.....	18
3 PYTC § 2-2-390.....	18
3 PYTC § 2-3-180.....	5
3 PYTC § 2-3-260.....	5
3 PYTC § 2-3-30.....	6
3 PYTC § 2-3-90.....	6
Pascua Yaqui Tribal Code	
3 PYTC § 2-2-200.....	17
4 PYTC § 1-300.....	6, 12
4 PYTC § 1-40.....	7
4 PYTC § 1-400.....	24, 25
4 PYTC § 3-10.....	6, 12, 24, 25
4 PYTC § 3-90.....	7
Pascua Yaqui Cases	
<i>In the Matter of Alvarez</i> , CA-17-008 (PYT Ct. App. 2018).....	6
<i>PYT v. Baltazar</i> , CA-01-003 (PYT Ct. App. 2001).....	5, 7, 8, 13, 17, 18, 20, 21, 22, 23, 29
<i>PYT v. Bustamante</i> , CA-17-004 (PYT Ct. App. 2017).....	6, 8
<i>PYT v. Coleman</i> , CA-15-003 (PYT Ct. App. 2015);.....	8
<i>PYT v. Miranda</i> , CA-08-015, p.22 (PYT Ct. App. 2009).....	8
<i>PYT v. Montana</i> , CA-12-001 (PYT Ct. App. 2013).....	6
<i>PYT v. Rodriguez</i> , CA-19-004 (PYT Ct. App. 2019).....	5, 6, 7, 8, 13, 17, 20, 23, 24
<i>PYT v. Thomas</i> , CA-19-002 (PYT Ct. App. 2019).....	6
<i>PYT v. Valencia</i> , CA-19-005 (PYT Ct. App. 2019).....	6
United States Supreme Court Cases	
<i>Brinegar v. United States</i> , 338 U.S. 160 (1949).....	20, 21
<i>Hamling v. United States</i> , 418 U.S. 87, 94 S.Ct 2887 (1974).....	19, 27

Federal Cases

Coles v. Smith, 577 F. App'x 502, 509–10 (6th Cir. 2014) (unpublished)..... 28
Fawcett v. Bablitch, 962 F.2d 617 (7th Cir. 1992)..... 28
Hunter v. State of N.M., 916 F.2d 595 (10th Cir. 1990)..... 28
United States v. James, 980 F.2d 1314 (9th Cir. 1992) 19
United States v. Neill, 166 F.3d 943 (9th Cir. 1999)..... 19, 27
United States v. Adrian, 978 F.2d 486 (9th Cir. 1992) 8
United States v. Gonzalez-Roque, 301 F.3d 39 (2d Cir. 2002) 9
United States v. Grace, 526 F.3d 499 (9th Cir. 2008)..... 8
United States v. Kimberlin, 18 F.3d 1156 (4th Cir.1994) 27
United States v. Linick, 195 F.3d 538, 541 (9th Cir. 1999)..... 8
United States v. Orbitz, 358 F. Supp. 200 (D.Ct. Puerto Rico, 1973)..... 20
United States v. Spillone, 879 F.2d 514 (9th Cir. 1989) 8
United States v. Stravroulakis, 952 F.2d 686 (2nd Cir. 1992) 19
United States v. Talebnejad, 460 F.3d 563, 571 (4th Cir.2006)..... 27

State Cases

State ex rel. Mahoney v Stevens, 79 Ariz. 298, 288 P.2d 1077 19
State v. Hoskins, 199 Ariz. 127, 14 P.3d 997, (Ariz. 2000). 20

Other Authorities

1 Charles A. Wright, et al., *Federal Practice & Procedure* § 125 (4th ed.)..... 27

REQUEST FOR ORAL ARGUMENT

The issue raised by this appeal is simple: namely, whether probable cause to charge a defendant with a criminal offense hinges upon whether charging documents include a specific date and time of offense. This Court has previously, and repeatedly, held that specificity in terms of time, date, and location are not prerequisites to a finding of probable cause. *PYT v. Baltazar*, CA-01-003 (PYT Ct. App. 2001); *PYT v. Rodriguez*, CA-19-004 (PYT Ct. App. 2019).

The current case, however, presents a unique question. The trial court ruled that whether a complaint contains a date *range* — as opposed to a specific date — is relevant to a probable cause analysis even when the statute of offense does not require proof of a specific time or date as an element of the offense. Given the unique factual and procedural posture of this case, the fact that resolution of this question will turn upon this Court's interpretation of relevant Tribal, Federal, and State law, and the fact that similar arguments continue to be made at the trial court level despite clear precedent to the contrary, setting this matter for oral argument is 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. 2013). However, the Tribe may appeal the dismissal of a complaint. *See In the Matter of Alvarez*, CA-17-008 (PYT Ct. App. 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. 2017) (reviewing 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); *Rodriguez*, CA-19-004; *PYT v. Valencia*, CA-19-005 (PYT Ct. App. 2019) (reviewing dismissal *without* prejudice for probable cause reasons relating to drug identification); *PYT v. Thomas*, CA-19-002 (PYT Ct. App. 2019) (reviewing dismissal *without* prejudice when issues involving the validity of a search warrant were conflated with the issue of subject matter jurisdiction).¹

The Defendant/Appellee, is an enrolled member of the Pascua Yaqui Tribe, and was charged with committing, the offenses following offenses: 1) Disorderly Conduct, Domestic Violence committed in violation of 4 PYTC § 1-300(A) /4 PYTC § 3-10(A); 2) Disorderly Conduct, Family Violence committed in violation of 4 PYTC § 1-300(A)/4 PYTC § 3-10(B); 3)

¹ Although the Court of Appeals opinion in *Thomas* remanding the case to the trial court for further proceedings is entitled "Order on Petition for Special Action," a careful examination of the appellate court record in that case shows that it was not submitted as a special action and was, instead, filed as a *standard* appellate proceeding via a notice of appeal.

Malicious Mischief, Domestic Violence, committed in violation of 4 PYTC § 1-40/4 PYTC § 3-10(A), and, 4) Endangering Welfare of Minor, Family Violence, committed in violation of 4 PYTC § 3-90/4 PYTC § 3-10(B).

The Trial court dismissed Count Three of the complaint against the Defendant, which was the charge involving Malicious Mischief committed by an individual against a victim with whom they shared a romantic and/or sexual relationship.² The dismissal was made without prejudice and appeared to be based upon the trial court's determination that probable cause could not exist because the charged offense included a range of dates for the proposed offense and not a specific date. *See* Tribe's Attachment B, Transcript of Arraignment Hearing, p. 4-5. This ruling ignored the precedent set forth by this Court in *Baltazar* and *Rodriguez*, and effectively resulted in the trial court placing greater weight on the form of the complaint than upon its substance. In doing so, the trial court failed to adequately consider the substantive information contained in the affidavit which clearly established probable cause for the charged offenses. Because the Tribe is entitled to appeal a dismissal regardless of whether the dismissal was made with or without prejudice, this Court has jurisdiction over the current appeal.³

² To be clear, the Tribe is only appealing the trial court's order relating to the dismissal of Count Three of the complaint. While the Tribe moved to dismiss the remaining counts (specifically, counts One, Two, and Four) for the purposes of appeal and judicial economy, this appeal does not touch upon any issues relating to those additional counts. *See* Attachment C, *PYT v. Montana*, CR-21-239, Motion to Dismiss without Prejudice for the Purposes of Appeal (Sept. 24, 2021). It should also be noted that, as of the date of this brief's filing, no trial court order regarding the motion to dismiss counts One, Two and Four has been received.

³ The Defendant filed an Objection to the Notice of Appeal on October 4, 2021. In it, the Defendant specifically — albeit incorrectly — claims that the Tribe filed a petition for special action. *PYT v. Montana*, CR-21-239, Objection to Notice of Appeal, p.1-2 (Oct. 4, 2021). The Tribe filed a notice of appeal, *not* a Petition for Special Action. As mentioned above in this section, the Pascua Yaqui Court of Appeals has *repeatedly* accepted jurisdiction over questions involving whether a trial court's dismissal of charges comport with Pascua Yaqui law — regardless of whether they are made with or without prejudice.

STANDARD OF REVIEW

The dismissal of a criminal case “without prejudice is reviewed for an abuse of discretion.” *Bustamante*, CA-17-004, p.2 (citing *United States v. Adrian*, 978 F.2d 486, 493 (9th Cir. 1992), *overruled on other grounds by United States v. Grace*, 526 F.3d 499 (9th Cir. 2008); *Baltazar*, CA-01-003, at pp. 3-6 (applying same abuse of discretion standard of review to dismissals with prejudice); *Rodriguez*, CA-19-004, p.1-2. 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. 2015); *Rodriguez*, CA-19-004 at p.2.

The Tribe notes that the Pascua Yaqui Court of Appeals has never fully 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 proof of elements such as time, date, or a range of either is a purely legal question. Because these issues are intimately intertwined, *de novo* review is appropriate. However, regardless of whether this Court employs a “*de novo*” or an “abuse of discretion” standard of review, the trial court clearly erred in dismissing the complaint against the Defendant.

ISSUES PRESENTED FOR REVIEW

1. Does a finding of probable cause depend on whether a charging document lists a range of offense dates as opposed to a specific offense date, even when proof of date or time is not an element of the charged offense?

STATEMENT OF THE CASE

I. Facts⁴ and Proceedings Below:⁵

On September 9, 2021, at approximately 8:01 p.m, officers from the Pascua Yaqui Police Department officers were dispatched to a residence located on South Camino Benem⁶ in reference to a report made by the adult victim in this case, Ms. C.M.⁷ Attachment D, *PYT v. Montana*~~Error! Bookmark not defined.~~, CR-21-239, Criminal Complaint, p.4. The adult victim indicated that she needed officers because the Defendant/Appellee, who was later identified as Jose J. Montana, was angry, hitting things, and yelling. *Id.* The adult victim did not want anyone to know that she had called police. *Id.* When officers arrived at the residence and knocked upon the door, the Defendant answered. *Id.* He began arguing with and yelling at responding officers. He was ultimately detained so that officers could conduct their investigation. *Id.* During his interactions with law enforcement, officers were able to notice signs and symptoms of intoxication emanating from the Defendant. *Id.*

Officers spoke with the adult victim following Defendant's detention. *Id.* C.M. stated that she and the Defendant were in a relationship and shared a child in common, the minor victim, A.M. *Id.* at 5 C.M. indicated that she had not been physically hurt, but that the Defendant would become violent upon drinking hard liquor. *Id.* at 4-5. According to C.M., on September 9, 2021, the Defendant had been watching a football game and began yelling and screaming at her and their child, A.M. *Id.* at 4-5. During her conversation with law enforcement, C.M. indicated that

⁴ The facts outlined in this appeal, and in the trial court record, are taken from the criminal complaint, supporting probable cause affidavit, and from the trial court's orders issued at the initial and arraignment hearings. No formal testimony by witnesses has been taken regarding the events alleged in the complaint, and, as a result, no formal findings have been made on that front. No formal pre-trial interviews have been conducted. Accordingly, the parties may disagree as to some of the facts of the case.

⁵ As discussed, *supra*, the Tribe is only contesting the dismissal of Count 3.

⁶ The residence at issue rests within the physical boundaries of the Pascua Yaqui Reservation.

⁷ The victims in this case are being referred to by their initials in the interest of preserving their privacy. C.M. is an adult victim. The other victim listed in this case, A.M., is a minor.

she was afraid of the Defendant, but that she did not want an order of protection. *Id.* She further stated that the Defendant only became violent when drinking “hard liquor,” and that it would happen “about twice a month.” *Id.* at 5.

An officer also spoke with the minor victim, A.M. *Id.* During that conversation, A.M. appeared to be crying and upset. *Id.* He indicated that he was afraid of his father when his father “yells.” *Id.* He also pointed to a hole in the wall and said that his father, the Defendant, caused the damage when the Defendant was mad. *Id.* Following this conversation, officers spoke again with the adult victim, C.M., who stated that the Defendant had punched a whole in the wall while angry about a month prior to this incident.

The Defendant was arrested on September 9, 2021, and subsequently charged with the following offenses: 1) Disorderly Conduct/Domestic Violence, committed in violation of 4 PYTC § 1-300 (A)/4 § PYTC 3-10(A); 2) Disorderly Conduct/Family Violence, committed in violation of 4 PYTC § 1-300(A)/4 PYTC § 3-10 (B); 3) Malicious Mischief/Domestic Violence, committed in violation of 4 PYTC § 1-400/4 PYTC § 3-10(A); and 4, Endangering Welfare of Minor/Family Violence, committed in violation of 4 PYTC § 3-9/4 PYTC 3-10(B). *Id.* at 1-2. An initial hearing was held on September 10, 2021. Attachment E, Order: Initial Appearance, *PYT v. Montana*, CR-21-239, p.1 (Sept 20, 2021).

The Defendant was present in custody at the initial hearing. *Id.* at 1. Attachment A, *PYT v. Montana*, Transcript: Initial Hearing Conducted September 10, 2021, p. 2-3. The Defendant, through counsel, challenged probable cause as to Count Three of the complaint. *Id.* 5-7. Specifically, defense counsel argued that there was “a due process concern... because I do not have the date[,] a ‘month or so ago.’” *Id.* Counsel then argued that the prosecution “could have a date” and that the lack of having a specific date created “a barrier for me ...to defend my client,

not knowing exactly the day of the charge, so I would move that to dismiss for lack of probable cause.” *Id.* at 5-6.

In response, the Tribe pointed towards the precedent established by this Court in *Baltazar*, and in *Rodriguez*. *Id.* at 7. The Tribe argued that there are certain offenses wherein the timing of offense is a vital element of probable cause, but ones in which time was not an element of probable cause. *Id.* at 7-9. The Tribe pointed out that there are certain types of offenses in which a witness may not be able — for whatever reason — to point to an exact date of offense. *Id.* at 8-10. The Tribe also argued that listing an exact date of offense was not an element of the offense of malicious mischief as it was charged in Count Three. *Id.* at 10-11.

The Defendant argued that “[j]urisdiction involves date and time and place,” and that having a date range in the complaint rendered the complaint insufficient for want of probable cause. *Id.* at 11-12. The trial court ultimately took the probable cause issue under advisement. *Id.* at 16. An arraignment hearing was set for September 20, 2021. *Id.* at 37. Both the Defendant and the trial court requested copies of this Court’s opinions issued in *Baltazar* and *Rodriguez*.

Prior to the arraignment hearing, the Tribe, as requested, submitted a notice to the trial court containing copies of *PYT v. Baltazar* and *PYT v. Rodriguez*, and brief summaries of each respective case. *PYT v. Montana*, CR-21-239, Notice to Court and Defendant Re: *PYT v. Baltazar*, and *PYT v. Rodriguez* (Sept. 13, 2021). Defendant then filed a “Reply to Motion to Dismiss” on September 14, 2021 in which he argued the facts of the current case as they relate to Appellate court precedent in *Baltazar* and *Rodriguez*. *PYT v. Montana*, CR-21-239, Reply to Motion to Dismiss (Sept. 14, 2021). The Tribe filed a formal request to set a supplemental briefing schedule in light of the Defendant’s motion. *PYT v. Montana*, CR-21-239, Request to Set Briefing Schedule Re: Motion to Dismiss (Sept. 15, 2021). The Defendant filed a formal

objection to that request. *PYT v. Montana*, CR-21-239, Motion to Strike the Tribe's Request to Set Briefing Schedule Re: Motion to Dismiss (Sept. 16, 2021).

An arraignment hearing was held on September 20, 2021. At said hearing, the trial court indicated that it had reviewed the pleadings filed by both parties. The trial court stated as follows:

"I'm going to go ahead and dismiss without prejudice count 3. And for the reasons I'm saying that is because being that probable cause is a case by case basis when we look at it, you know, each individual circumstance. In this particular case, when I'm looking at what was said at the last hearing. I know, Ms. Thoene, you're very good at illustrating... examples and things like that."

"Being that one of those examples kind of struck me and reminded me that, you know, your example of, say I think it was like a child sexual abuse case or something like that where possibly a child couldn't remember certain details of the case. Here, it seems like there-, there should have been a memory maybe a little bit tighter of a timeline to where the person can remember. It was-, it was I think it was over a month of a timeline. And it's not just kind of within a day or two of when this happened, and I would think that... being an adult victim, that it would be that the person could remember, unless it just wasn't written in the P.C. statement, to a little bit more of a certain degree when somebody, you know, put a big hole in the wall."

Attachment B, Transcript: Arraignment Hearing Conducted September 20, 2021, p. 3-4

The trial court indicated that it was dismissing the case without prejudice, and that it was denying the requests of supplemental briefing, saying, "because I think that we can dispose of that right now and I would just like to see a little bit more certainty with the dates." *Id.* at 4-5.

Counsel for the Tribe then asked the court to clarify its ruling, and the following exchange occurred:

Prosecutor: "Thank you, Your Honor. And just to clarify, the Court is dismissing because the Court feels that the date range, the fact that it's not pinned down, is an element of probable cause?"

Court: Um, in this case, yes, because of the type of charge."

Id. at 5. See also *PYT v. Montana*, CR-21-239, Order: Arraignment (Sept. 20, 2021)

Following the arraignment hearing, the Tribe filed an unopposed Motion to Dismiss the remaining counts of the complaint, and specifically, counts one, two, and four.⁸ *PYT v. Montana*, CR-21-239, Motion to Dismiss without Prejudice for the Purposes of Appeal (Sept. 24, 2021). A timely Notice of Appeal was filed that same date. *PYT. v. Montana*, CA-21-002, Notice of Appeal (Sept. 24, 2021). On October 4, 2021, the Defendant filed an objection to the Tribe's notice of appeal with the trial court. That pleading was subsequently transmitted to the Court of Appeals. *PYT v. Montana*, CR-21-239 Objection to Notice of Appeal (Oct. 5, 2021). The Clerk of the Court transmitted the trial court record on October 6, 2021.

II. Summary of the Argument

The arguments presented in this Appeal are simple, straightforward, and supported by precedent set forth by the Pascua Yaqui Court of Appeals, Arizona, and various federal circuits. This Court has held in two separate cases, specifically *Baltazar* and *Rodriguez*, that questions of time and location are *not* elements of probable cause. Furthermore, in *Rodriguez*, this Court specifically noted that time only becomes an issue when the crime charged requires proof of timing as an “*essential*” element of the offense. *Rodriguez*, CA-19-004 at p.3 (*emphasis added*).

At the trial court level, the Defendant and the trial court conflated two very different issues. The first involves probable cause. The second involves notice. In this case, the trial court abused its discretion in dismissing Count Three because it misinterpreted the level of proof required for a finding of probable cause, and because it mistakenly determined that notice of a

⁸ The decision to dismiss the remaining counts was made to ensure the victims and witnesses in the case, one of whom is a minor child — would only need to testify at one trial. Were the Tribe to proceed with prosecution on the remaining counts, there was a realistic possibility that a separate trial might have to be conducted as to Count Three on a future date. Conducting two trials would go against basic principles of judicial economy, and would expose — in particular, the minor aged witness — to the stress of having to testify twice.

particular date of offense is required before probable cause can exist. Because the trial court abused its discretion, relief should be granted

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 Count Three of the complaint filed against the Defendant. Although the officer's supporting affidavit, Attachment D, p. 3-7, did not include a specific date of offense for Count Three, it did include sufficient information obtained from victims and witnesses indicating that the offense had happened within approximately a month of the date of arrest. The affidavit also detailed evidence meeting the elements of the crime for which the Defendant had been charged. The affidavit and complaint adequately apprised the Defendant of the charges that he faced, and when they were alleged to have occurred. If Count Three of the complaint had not been dismissed at the probable cause hearing, and an arraignment and trial hearing as to that count set, the information provided in the complaint and affidavit would have allowed the Defendant to mount a full and complete defense. For the reasons discussed below, the trial court abused its discretion in dismissing Count Three of the complaint.

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) (*emphasis added*), 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;⁹ *Rodriguez*, CA-19-004, at p.2.

If a complaint is filed following 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 if 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 § 2-2-230.¹⁰ Arraignment hearings afford a defendant an opportunity to enter a formal plea to the

⁹ The Tribe recognizes, and will discuss, *infra*, that there is certain information contained in a complaint that cannot be considered “details of form” as contemplated by the Code, *Baltazar*, or federal case law. Such elements include language identifying the statutory elements of a charge, and identification of the statute and or subsection of offense a defendant is being charged with.

¹⁰ 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.

charges, set a trial date, and to be advised of important court deadlines and of their rights going forward. *Id.*

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

“At this point in the criminal process, there has been insufficient time to determine the reliability and veracity of witnesses. The court's role [at an initial hearing] is to determine whether the basic information necessary to go forward with the criminal prosecution ha[s] 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.”

The reasoning first set out in *Baltazar* was recently affirmed by this Court in *Rodriguez*, CA-19-004, at p.2-3.

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 change over the course of continued investigation and witness interviews. *Baltazar*, CA-01-003 at p.4; *Rodriguez*, CA-19-004, at p.2-3. 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, an accused discharged or held to answer as the facts warrant.”) (*internal citations and quotations omitted, emphasis added*).

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.” *Alfonso*, 143 F.3d at 776-77 (*quoting United States v. Stravroulakis*, 952 F.2d 686, 693 (2nd Cir. 1992)) (*emphasis added*). Accordingly, one of the first questions that must be asked when reviewing a lower court’s decision is whether an item listed in the charging document constitutes an element of the offense with which the Defendant has been charged, or an element of form that has no bearing on the statutory elements of offense. This is largely a factual inquiry that depends on the circumstances of a particular case. The second issue that must be addressed, and 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 discussed in several 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); *Rodriguez*, CA-19-004, at p.3 (*citing McKenzie v. Lamb*, 738 F.2d 1005 (9th Cir. 1984) and *Brinegar*, 338 U.S. at 160, *et seq.*).

When a court is determining whether probable cause exists to support charges, it is inappropriate to consider whether the prosecution will be able to prove the defendant’s guilt at a later trial beyond a reasonable doubt. *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); also *Rodriguez*, CA-19-004, at p. 3. Indeed, as this Court has stated:

“The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating...often opposing interests. Requiring *more* would *unduly hamper* law enforcement. To allow *less* would be to leave law abiding citizens at the mercy of the officers’ *whim or caprice*.” *Rodriguez*, CA-19-004, at p.3 (*quoting Brinegar*, 338 U.S. at 176) (*emphasis added*).

As will be discussed below, the trial court incorrectly assumed that establishment of a specific time of offense in law enforcements supporting affidavit was required before probable cause for the complaint could be found to exist. Accordingly, the Tribe is entitled to relief.

II. Differences in Technical Aspects of a Complaint’s Form and Supporting Affidavit Regarding the Time of an Alleged Offense have no Bearing on the Substance of Probable Cause.

The Pascua Yaqui Court of Appeals has previously addressed whether issues in a criminal complaint regarding non-statutory elements of an offense are fatal to a finding of probable cause. *See Baltazar*, CA-01-003, at p.1; *Rodriguez*, CA-19-004, at p.1. Pursuant to the Pascua Yaqui Tribal Code Rules of Criminal Procedure, complaints must contain “a written statement, describing in ordinary language the offense committed, including the time and place *as nearly as may be determined*, and the name or description of the person alleged to have committed the offense,” as well as “[t]he section of the Tribal Code allegedly violated.” 3 PYTC § 2-2-90 (B) (*emphasis added*). Although 3 PYTC § 2-2-90 (B) has not recently been analyzed by this Court, the *Baltazar* court analyzed the statutory precursors to this procedural rule. *Id.*¹¹ In *Baltazar*, the Court stated:

“The terms of Section 1.30 are, themselves, cast in very liberal fashion. For instance, it is not necessary to identify the defendant with precision. *See* Section 1.30(b).¹² The “time and place” requirements themselves only require a precision

¹¹ *Baltazar* addressed the scope of initial hearings and the sufficiency of criminal complaints filed under § 1.30(bd)-(c) of the old Pascua Yaqui Tribal Code that was in effect in 2001. The language of the older code provisions is nearly identical in terms of form and substance to the current code.

¹² Equivalent to 3 PYTC § 2-2-90(B)(1) under the current code.

“as near as they can be ascertained.” Section 1.30(c).¹³ This suggested tolerance of imprecision built into the criminal process recognizes the immense potential for error or mistake early in the initiation of criminal proceedings. At this point in the criminal process, there has been insufficient time to determine the reliability and veracity of witnesses. The court’s role here is to determine whether the basic information necessary to go forward with a 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. The court is determining whether there has been any mistake *ab initio* as to whether this is even the proper court for the filing of the criminal case; the court is determining whether a gross error exists leading to an erroneous conclusion as to the reasonableness or probability of the conclusion that a crime has been committed.” *Id.*

In *Baltazar*, the Court of Appeals was tasked with determining whether defects contained in a complaint and amended complaint required dismissal. In that case, the defendant had been charged with assaulting a victim and causing bodily injury. *Id.* at 2. The complaint filed against the defendant was based upon a probable cause affidavit submitted by law enforcement, which included an incorrect date of offense.¹⁴ *Id.* The prosecution first requested a stipulation from defense counsel to amend the complaint, but ultimately elected to dismiss the complaint and file an amended complaint with the correct date, a motion which was granted, which allowed the case to proceed through the discovery process. *Id.*

When the complaint was filed, law enforcement and the prosecution believed that the offense had occurred at one address. *Id.* However, after the initial hearing, and after the parties had an opportunity to conduct their own investigations and witness interviews, the victim clarified that the offense occurred at a different address located on the same street. *Id.* The Prosecution asked law enforcement to submit a new affidavit of probable cause in support of a motion to amend the complaint. *Id.* Although law enforcement corrected the address of offense in the new complaint, they, again, entered the incorrect date of offense. *Id.* Defense counsel

¹³ Equivalent to 3 PYTC § 2-2-90(B)(1) under the current code.

¹⁴ The affidavit and complaint mistakenly indicated that the offense had happened on August 4, 2000, when it actually occurred on August 5, 2000. *Id.*

argued that “mistakes of date and location would prejudice the defenses available to the Defendant.” *Id.* The court dismissed the complaint with prejudice and found that the mistakes and resulting amendments “can prejudice” a defendant. *Id.* at 2, 5.

On review, the Court of Appeals ultimately determined that the trial court had abused its discretion in dismissing the complaint with prejudice. *Id.* at 6. Specifically, the Court indicated that the prosecution had “fulfilled the requirements of 1 PYTC § 1.30 in the filing of the charges.” *Id.* at 5. “The mere fact that certain allegations [as to location and date] were in error could not work a prejudice either against a defense possessed by the defendant or against any rights he may have.” *Id.* at 5-6. In reaching this ruling, the Court of Appeals acknowledged that a trial court must balance competing interests at the initial hearing stage. On the one hand, there is “a question of fairness to the defendant that provides a court with a policy basis to render determinations.” *Id.* However, a “court must also recognize that a victim, too, relies upon the Tribe to recognize that some harm has occurred, and that the Tribe sits in a position of trust to remedy that harm.” *Id.* For these reasons, trial courts are required to balance “these competing concerns” to determine “whether... justice can be accomplished.” *Id.* “This becomes more important in the early stages of the criminal process when a confrontational opportunity to examine the factual basis for the complaint has not yet happened.” *Id.* at 4-5. This is compounded by the fact that, at the time of an initial hearing, almost no investigation has been conducted by the parties. *Id.* at p.4. Indeed, the Pascua Yaqui Tribal Code does not contain any criminal offenses in which the prosecution is required to prove a specific time of offense as an element of the crime.

More recently, this Court addressed a different — but very much related issue — in *Rodriguez*, CA-19-004, at p.1. The defendant in that case had been charged with committing an offense involving damage to property in the context of a family violence case. *Id.* The trial court in that case dismissed the complaint because, even though the complaint listed an approximate

time of offense based on information contained in the affidavit, the affidavit of probable cause did not include a specific time of offense. *Id.* at 1. This Court, in discussing the requirements for a criminal complaint, specifically noted that “[w]hile 3 PYTC § 2-2-90 states that a time and place must be included in a complaint, it is qualified by the language ‘*as nearly as may be determined.*’” *Id.* at 2 (*emphasis in original*). This Court ultimately held that the trial court had abused its discretion in light of the Pascua Yaqui Tribal code and “by imposing requirements on the probable cause determination which were unwarranted.” *Id.* at 1-3. This Court also specifically indicated that the criminal damage offense involved in that case did “not have an element of time which is essential to the offense.” *Id.* at 3.

Neither *Rodriguez* nor *Baltazar* addressed the exact issue involved in this appeal as neither case specifically discussed whether including a date or time range—as opposed to a specific date or time— somehow converts time or date into elements of probable cause when they normally would not be. As will be discussed in more detail below, it does not.

III. The Complaint and Affidavit Filed in this Case Adequately Established Probable Cause to Believe that the Defendant Committed Criminal Offense in Violation of the Pascua Yaqui Tribal Code and Provided the Defendant with Sufficient notice so that he Could Prepare a Full and Complete Defense.

Any analysis of probable cause must begin with an analysis of the statutory elements of the offense with which a defendant has been charged. Here, the Defendant was charged with in Count Three committing the offense of malicious mischief, committed in violation of 4 PYTC § 1-400. That statute indicates that “[a]ny person who shall maliciously disturb, injure or destroy any livestock or other domestic animal or other property shall be deemed guilty” of an offense. *Id.*¹⁵ The Tribe further alleged that the offense was a domestic violence offense pursuant to 4 PYTC § 3-10 (A). That statute indicates that an offense can be considered a family violence offense when a defendant commits a crime against an individual with whom, among other

¹⁵ Much like the injury to public property statute, 4 PYTC § 1-630 at issue in *Rodriguez*, this statute does not require a showing of time as a necessary element of the offense.

possibilities, s/he shares a romantic and/or cohabitating relationship, or with whom s/he shares a child in common. *Id.* Neither 4 PYTC § 1-400 or 4 PYTC § 3-10 requires the prosecution to prove a specific time or date as an element of the offense.

The officer's affidavit in this case made clear that there was probable cause to believe that the offense of malicious mischief had been committed, that the Defendant was the one who committed it, and that a domestic violence relationship existed. The adult victim in the case, C.M., requested the assistance of law enforcement "asap" because the Defendant was "angry and [wa]s hitting things and yelling." Attachment D at 4. C.M. indicated that she "did not want anyone to know that she was calling police." *Id.* Additionally, neighbors had reported hearing yelling. *Id.* C.M. indicated that the Defendant becomes "violent when he drinks hard liquor." *Id.* The minor victim in the case, A.M.,¹⁶ appeared to be upset and crying. *Id.* at 5. A.M. indicated that he was afraid of his dad, the Defendant, and pointed out a hole in the wall of the residence. *Id.* He indicated that the Defendant had made the hole "when he was mad." *Id.* Officers spoke again with C.M., who indicated that the hole had been made "about a month ago," and that it was caused when the Defendant "punched the wall in anger." *Id.* Later, and outside the presence of the child, C.M. indicated that the Defendant would become violent about twice per month. *Id.* C.M. further indicated that she was in a relationship with the Defendant, and that A.M. was their shared child. *Id.* Under these circumstances, the Defendant clearly damaged property belonging to another, under circumstances constituting a domestic violence offense. Because probable cause existed establishing all the critical elements of the offense, dismissal of Count Three was unwarranted. The fact that the trial court indicated that time, because it involved a range of offense dates, rendered Count Three void for want of probable cause was an abuse of discretion.

If the arguments raised by the Defendant and the trial court's interpretation of probable cause were to be taken to their logical and realistic conclusions, it would result in several types

¹⁶ A.M. is identified as being eight (8) years old. *Id.*

of cases being dismissed out of hand. It would, in short, lead to an absurd result that would counteract the very spirit of the Pascua Yaqui Tribal Code and Rules of Criminal Procedure. For instance, an individual may be a victim of a burglary that occurs at their home while they are out of town for several weeks. Prior to leaving, that victim checked their home and belongings and knew that everything was in order. However, upon returning home several weeks later, the victim discovers that a window has been broken, a door opened, and that property is missing. The victim reports the incident to police, who investigate and discover fingerprints and DNA evidence on the broken window that is later determined to match the defendant. Police locate the items stolen at a local pawn shop. A fingerprint matching the defendant is affixed to the pawn slip for said items, and there is a specific date indicated on that slip for the date of pawning.

The defendant is subsequently charged with trafficking in stolen property for a specifically delineated date. The defendant is also charged with having committed burglary of the house to obtain the items that were later trafficked; however, the burglary charge includes a range for the date of offense that encompasses the time that the victim was out of town and not present at home. If courts were to follow the logic used in this case, it would mean that the defendant in that case could never be charged for burglary because the victim and law enforcement could not assign a date certain to the time of offense even though they clearly know the time period in which the burglary occurred. And yet, the defendant in this hypothetical case would have ample notice of the time frame in which the offense was alleged to have occurred. The defendant would also have been charged for offenses—burglary¹⁷ and trafficking in stolen

¹⁷ 4 PYTC § 1-270 governs the offense of burglary and states that “[a]ny person who shall knowingly in any manner enter any dwelling, vehicle, watercraft, or other structure, moveable or immovable, without the consent of the owner or occupant with the intent to commit another criminal offense defined under this Code, shall be guilty of an offense.”

property¹⁸— that do not require proof of a specific time or date as elements. The dismissal of the burglary count, therefore, would be simply and solely due to the victim — through no fault of their own — being unable to pinpoint an exact date of the offense. Such a result is absurd and would violate the principles and purpose of Pascua Yaqui Tribal law.

In this case, Count Three was supported by probable cause. The trial court’s determination that the inclusion of a date range rendered the complaint deficient was an abuse of discretion. Therefore, the requested relief should be granted.

IV. Because Exact Time and Date Time are Not Elements of Probable Cause, the Inclusion of a Date Range Does not Render a Criminal Complaint Defective for Want of Adequate Notice.

As stated previously, the chief purpose of a charging document is to provide a defendant with notice of the charges he faces, and an opportunity to begin preparing a defense. *Neill*, 166 F.3d at 947; *Hamling*, 418 U.S. at 117, 94 S.Ct at 2907; *Alfonso*, 143 F.3d at 776-77 (noting that 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”) (*emphasis added, internal citations and quotation omitted*). If the date of an offense is not an element of the crime charged, “great generality in the date allegation is acceptable.” 1 Charles A. Wright, et al., *Federal Practice & Procedure* § 125 (4th ed.); *see United States v. Talebnejad*, 460 F.3d 563, 571 (4th Cir.2006) (“Where a particular date is not a substantive element of the crime charged, strict chronological specificity or accuracy is not required.”) (*internal quotation marks omitted*). Additionally, courts in federal jurisdictions have declined to find a fatal variance to exist even if proof of the date of a charged crime falls outside of the dates alleged in the charging document. *See, e.g., United States v. Kimberlin*, 18 F.3d 1156, 1159 (4th Cir.1994) (no error where the

¹⁸ Pursuant to 4 PYTC § 1-410, a person can be found guilty of trafficking in stolen property if they “recklessly traffic[] in the property of another that has been stolen...,” or if they “knowingly initiate[], organize[], plan[], finance[], direct[], manage[] or supervise[] the theft ad trafficking in the property of another....”

indictment charged the date “[i]n or about July, 1991,” but the proof at trial showed that the offense occurred in August 1991) (alteration in original). Federal courts have, for instance, found no error when a charging document included a potential date range of six months. *Fawcett v. Bablitch*, 962 F.2d 617, 619 (7th Cir. 1992). Likewise, it is not an uncommon occurrence, nor has it been considered necessarily fatal in cases involving sexual offenses committed against a minor even where the date range included spanned a number of years. *See e.g. Coles v. Smith*, 577 F. App’x 502, 509–10 (6th Cir. 2014)¹⁹; *also Hunter v. State of N.M.*, 916 F.2d 595, 600 (10th Cir. 1990) (finding defendant’s arguments that an indictment was deficient because it failed to allege specific offense dates unpersuasive.)

The complaint in this case alleged as follows:

On or about August 1, 2021, through September 9, 2021, at or near [the victim’s address] Defendant maliciously disturbed, injured or destroyed any livestock or other domestic animal or other property, to wit: Defendant caused damage to a wall of a house owned and/or occupied by [C.M.] a person with whom [he] shared a romantic relationship... and/or with whom he had a child in common.

Attachment D, at p.1 (*emphasis added*).

The offense charged, as argued *supra*, does not require proof of an exact date or time as an element of the offense. The time period supporting the range was provided by the adult victim and was included in the affidavit. It is a relatively small period of time and provides the Defendant more than adequate notice as to when the crime was alleged to have occurred. The complaint issued in this case addressed these concerns. Although the Defendant, at the time of the initial hearing — held within only twenty-four hours of arrest — indicated that he could not prepare a defense as to Count Three because the charge included a date range of offense as opposed to a specific date, that argument ignores certain fundamental truths. The initial hearing

¹⁹ Note that *Coles* is an unpublished case and, thus, carries no precedential value. However, it is included here as persuasive authority in light of the fact that the Pascua Yaqui Tribe currently has no precedent addressing this particular issue.

occurred well before the parties had an opportunity to engage in a detailed investigation of the case, to interview witnesses, or to exchange disclosure. Knowing and providing the range of dates — as indicated by C.M., in particular — gave sufficient notice of when the crime was alleged to have been committed, thereby granting the Defendant sufficient notice of the time period he would need to investigate to see if certain, as yet undisclosed defenses, may apply.

Coincidentally, the argument regarding notice raised by the Defendant at the trial court level was like an argument raised by the defendant in *Baltazar*, CA-01-003, p.2 & 5. Although the issue of notice was not fully explored in *Baltazar*, the Court's detailed analysis of whether technical issues in a complaint — considered in light of the fact that complaints are often filed before the parties have a chance to exchange disclosure or conduct any necessary investigation — suggests that the Court found the notice provided in that case to be adequate.²⁰


Based on this Court's ruling in *Baltazar*, and the remaining authority cited above, the Defendant was given adequate notice of the charges against him at the time of the initial hearing. This notice, provided in advance of arraignment hearings, pretrial hearings, disclosure deadlines, and trial, would have allowed him and his attorney to better shape and guide their pretrial investigation and disclosure requests. Because there was sufficient notice to the Defendant of the charge against him, and there was probable cause supporting that charge, and the trial court erred when it dismissed Count Three.

²⁰ Coincidentally, a similar argument had been raised at both the trial court and appellate court levels in *Rodriguez*, CA-19-004. However, the Court of Appeals' opinion in that case did not specifically address the issue of notice, presumably, because it is an issue that is separate from probable cause, and because the court found — on some level — the notice provided to be adequate.


CONCLUSION AND REMEDY SOUGHT

The trial court's dismissal of the complaint against the Defendant at the initial hearing was contrary to the Pascua Yaqui Tribal Code and relevant case law. The Tribe 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 November, 2021.



Malena Acosta
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:

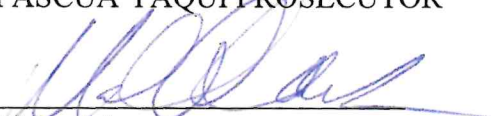
Glauca Brannock
Glauca.Brannock@pascuayaqui-nsn.gov
Pascua Yaqui Office of the Public Defender
7474 S. Camino de Oeste
Tucson, AZ 85757

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

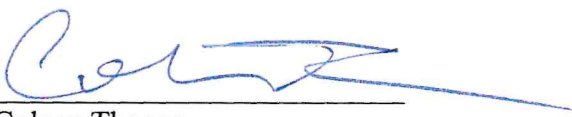
Associate Judge Veronica Darnell
Pascua Yaqui Tribal Court
7777 S. Camino Huivisim
Tucson, AZ 85757

Dated this 5th day of November, 2021.

PASCUA YAQUI PROSECUTOR




Malena Acosta
Chief Prosecutor

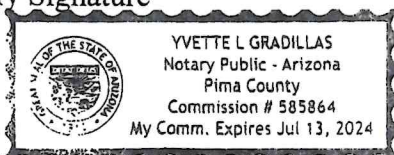


Coleen Thoene
Deputy Prosecutor

Sworn before me this 5th day of November, 2021



Notary Signature



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.

Jose J. Montana,

Appellee

APPELLATE CASE NO: CA-21-002

TRIBAL COURT CASE NO: CR-21-
239

APPELLANT'S SUPPLEMENTAL EXHIBITS

Malena Acosta, Chief Prosecutor
Coleen Thoene, Deputy Prosecutor
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Attorneys for the Pascua Yaqui Tribe

CERTIFICATE OF SERVICE

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

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

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

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

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

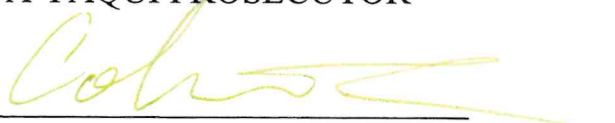
Associate Judge Veronica Darnell
Pascua Yaqui Tribal Court
7777 S. Camino Huivisim
Tucson, AZ 85757

Dated this 5 day of November, 2021.

PASCUA YAQUI PROSECUTOR

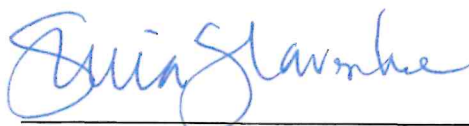


Malena Acosta
Chief Prosecutor

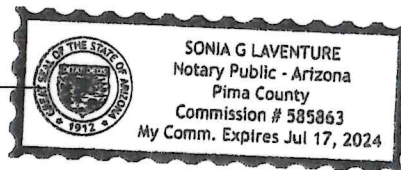


Coleen Thoene
Deputy Prosecutor

Sworn before me this 5th day of November, 2021



Notary Signature



**Attachment A: Transcript of Initial Hearing
conducted in CR-21-239 on Sept. 10, 2021.**

IN THE PASCUA YAQUI COURT
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

PASCUA YAQUI TRIBE,)
)
 Plaintiff,)
)
vs.)
)
JOSE JUAN MONTANA,)
)
 Defendant.)

NO. CR-21-239

INITIAL HEARING

September 10, 2021
Tucson, Arizona

BEFORE: THE HONORABLE _____, JUDGE OF THE PASCUA YAQUI
TRIBAL COURT

APPEARANCES:

COLEEN THOENE, ESQ.
Appearing for Plaintiff

GLAUCIA BRANNOCK, ESQ.
Appearing for Defendant

MILISSA MACE
Appearing for Pre-Trial Services

1 COURT: Okay, all right. So we'll go ahead and do Jose
2 Juan Montana. And who's that? Is that you?

3 MR. MONTANA: (Inaudible)

4 COURT: Okay, all right. So we'll go ahead and call
5 that case. This is in the matter of the *Pascua Yaqui Tribe*
6 *versus Jose Juan Montana*, case number CR dash 21 dash 239. And
7 can we have the parties state your name?

8 MS. THOENE: Thank you, Your Honor. Coleen Thoene on
9 behalf of the Tribe.

10 MS. BRANNOCK: Glauca Brannock with the Public
11 Defender's Office representing Mr. Montana who is present, in
12 custody, he's seated at the jury box.

13 COURT: Okay, all right, thank you. And can you state
14 your full name, please?

15 MR. MONTANA: Pardon me?

16 COURT: State your full name.

1 MR. MONTANA: Jose Juan Montana.

2 COURT: Okay. I'm sorry, Miss Mace, you're appearing on
3 this one as well, right?

4 MS. MACE: Yeah, yes.

5 COURT: Okay, sorry about that.

6 MS. MACE: That's okay.

7 COURT: Okay. Mr. Montana, what is your date of birth?

8 MR. MONTANA: 11/16/80.

9 COURT: Okay, all right. Okay and can I get you to tell me
10 your current address?

11 MR. MONTANA: My address?

12 COURT: Yes.

13 MR. MONTANA: 7651 South Camino Benem.

14 COURT: Okay, all right. Thank you. Okay, as you heard
15 me state before, the purpose of the hearing is to make sure we
16 have all your information correct on your complaint and also

1 to advise you of your charges and determine what your release
2 conditions are going to be going for-, forward in the case.

3 And so Ms. Brannock, do you wish for me to read the rights?

4 MS. BRANNOCK: Yes, Your Honor, please.

5 COURT: Okay, sure.

6 MS. BRANNOCK: I-, I wasn't sure if he was listening at
7 the time (inaudible).

8 COURT: Okay, sure. Fair enough. Okay, all right. So
9 these are the following rights you have throughout your
10 proceeding. You have the right to be informed of the charges
11 filed against you. You have the right to remain silent as
12 anything you say could be held against you. You have the right
13 to a speedy trial by a judge or a jury if the sentence may
14 impose jail time on you, unless the right to a speedy trial is
15 waived or the right to a jury trial is waived. If you do not
16 request a trial by jury in writing at least thirty days before

1 the trial, then you'll waive your right to a jury trial under
2 the Pascua Yaqui Criminal Code and under the Indian Civil
3 Rights Act.

4 You have the right to plead not guilty. You have the
5 right to a defense in person or by counsel; a right to
6 confront and cross-examine witnesses who may testify against
7 you; a right to subpoena and call witnesses on your own
8 behalf; a right to call-, ask the Court to issue a subpoena
9 for the production of any books, records, documents or other
10 things necessary to defend your charges.

11 A right to be free from excessive bail and cruel or
12 unusual punishment; a right to appeal any decision of the
13 Tribal Court to the Court of Appeals and the right to file for
14 a writ of habeas corpus in this court and federal court if you
15 believe that you're being illegally held. Do you understand
16 those rights?

1 MR. MONTANA: Yes.

2 COURT: Okay. All right. And Miss Glaucia Brannock, did
3 you have a chance to go over the charges with him?

4 MS. BRANNOCK: Yes. I took-, I reviewed the complaint,
5 Your Honor, and I did have a challenge to the probable cause
6 after review.

7 COURT: Okay, all right. And let's see, and does he
8 understand his charges?

9 MS. BRANNOCK: He understands his charges.

10 COURT: Okay. And you don't want me to read them?

11 MS. BRANNOCK: We don't need to read his charges at this
12 time.

13 COURT: Correct, okay. All right, okay. So let's see.
14 All right, let's go ahead and have you make your motion now.

15 MS. BRANNOCK: Thank you, Your Honor. I am challenging
16 count-, count 3 of this complaint, that it states the

1 defendant caused damage to the wall on the house owned or
2 occupied by Cons-, Concepcion Molina, the person who-, with
3 whom he shared-, with whom he shared a romantic relationship,
4 and a child.

5 So the complaint states that on or about August 1st 2021
6 that my client broke the-, or punched a hole in the wall. When
7 you read the complaint, the small child said that he punched
8 that when my client was angry and when he was asked about it,
9 it was "a month or so ago." I just see a due process concern
10 here because I do not have the date "a month or so ago." I
11 know that the prosecutor could have a date, I-, but the
12 probable cause affidavit does not say it, it just says "a
13 month or so ago."

14 So that is a barrier for me to defend-, to defend my
15 client, not knowing exactly the day of the charge, so I would
16 move that to dismiss for lack of probable cause. Thank you.

1 COURT: Okay. All right, let me just take a look at
2 this really quick.

3 MS. BRANNOCK: Sure.

4 COURT: Okay, all right. So let's have your response,
5 Ms. Thoene.

6 MS. THOENE: Thank you, Your Honor. And first, Your Honor,
7 I would ask you to look towards local Pascua Yaqui case law,
8 specifically *Pascua Yaqui v. Baltazar*, I do not remember the
9 citation off the top of my head, but also *Pascua Yaqui versus*
10 *Yesenia Rodriguez*, which dealt with a very similar issue and
11 which affirmed the language contained in *PYT versus Baltazar*.

12 In each of those cases, they concerned whether or not
13 issues regarding specific times or specific locations went to
14 the heart of probable cause. And to quote them-, or not quote
15 them but paraphrase them, both cases said that there was a
16 certain tolerance for imprecision in terms of whether or not

1 something happened on a particular date or at a particular
2 time or at a particular location even.

3 And what those cases discuss is that when you deal with
4 an investigation that happens and a charging decision that
5 happens within 24 hours, we don't even have reports. Neither
6 side has reports. We have an affidavit; that's what we're
7 working from. But additionally, Your Honor, probable cause
8 comes down to a certain set of very specific questions: What
9 does the law say with regards to the elements of a particular
10 charge and whether or not there's evidence hitting those
11 elements. Time, date, location, are not elements of most
12 charges.

13 Now they are in DUI cases. DUI cases, if somebody is
14 charged with saying having a blood alcohol concentration of
15 over a .08 within two hours of driving, there's a very
16 specific element that we have to show, within two hours of

1 driving. But when it comes to things like criminal damage,
2 there's no such element. The criminal damage statute basically
3 indicates what is listed in the-, in the complaint here. Did
4 somebody injure property and did it belong to somebody? That's
5 basically what it boils down to, and I am paraphrasing because
6 I know the Court has a very busy docket today, but that's what
7 it is.

8 And I understand that, you know, there's questions about
9 notice and things like that from defense counsel's
10 perspective, but also looking at the complaint, there is a
11 date range and it is based on the information that is in the
12 affidavit. And when the Court thinks about it, and I'm not
13 saying that these allegations are present at all in this case,
14 but I am just using this as a way of example. There are
15 situations where a child may be hurt, a child may be molested
16 even, and they cannot narrow down an exact date of when the

1 event happened, but those cases can still be charged and
2 there's not an issue with notice because there is a date
3 range.

4 They're able to say "it happened while I was eleven,"
5 which is a year-long, a twelve-month long span of time when
6 you think about it. Or "it happened around Christmas when I
7 was twelve." Or "it happened around my birthday when I was
8 ten." What we have here gives plenty of notice. And frankly,
9 we don't even have to get to the issue of notice because all
10 they're dealing with right now is probable cause and the
11 probable cause is did-, do we have enough to show that there
12 was damage that occurred, that it was property belonging to a
13 certain person and that it was unlawful. That's it. This is
14 probable cause.

15 And the child, and based on the information in the
16 affidavit, it said it happened about a month before, and the

1 date range is a month before. And so I would ask the Court to
2 deny the motion because this is not a probable cause motion.
3 Now it may be something that defense counsel after we get the
4 reports and everything wants to file a new motion to dismiss,
5 and that's totally fine. I'm not saying that they can't reurge
6 the motion, but as of today it's premature and it does not
7 fit.

8 COURT: Okay, thank you. Miss Brannock?

9 MS. BRANNOCK: Your Honor, I'm going to try to keep my
10 argument to the four corners of the complaint. At the initial
11 hearing, we need to find probable cause and jurisdiction is
12 part of it. Jurisdiction involves date and time and place. So
13 I still think that what the witness said, in the four corners
14 of this affidavit, doesn't even tell me if it was August or
15 not. It was a child saying "about a month or so ago." It could

1 have been July. We would need the date in this case for due
2 process issues.

3 That's my only response but I would ask Your Honor to
4 order the Tribe to print those cases. I have requested the
5 Court of Appeals for the *Baltazar* case that keeps being cited.
6 I don't find that one. But *Yesenia Rodriguez*, I am familiar
7 and it's about the Court of Appeals actually sanctioning the
8 Tribe for failure to provide disclosure in a timely fashion. I
9 do not know if what Miss Thoene is explaining about the case
10 that there is a (inaudible), it's I don't remember and
11 (inaudible) you to have the case printed because I cannot find
12 it and our Court of Appeals right now is actually offline. So
13 thank you.

14 COURT: Okay, thank you.

15 MS. THOENE: Thank you, Your Honor. And...

1 MS. BRANNOCK: And I'm sorry, this was my motion and I
2 have the last word. I filed the motion, she responded and I
3 replied.

4 MS. THOENE: And Your Honor, if I may, I am very familiar
5 with the *Yesenia Rodriguez* case because myself and (inaudible)
6 worked on the appeal, I would ask to clarify.

7 COURT: Okay, I'll let you clarify just that, that
8 part.

9 MS. THOENE: Understood. *Yesenia Rodriguez* dealt-, was a
10 case that involved charges that were dismissed at a probable
11 cause initial hearing, specifically regarding the time that an
12 alleged basically criminal damage offense occurred. It was
13 appealed and in the appeal what we relied on was *State*
14 *versus-*, was *PYT versus Baltazar*. And...

15 MS. BRANNOCK: May I respond? I'm sorry.

16 COURT: Go ahead.

1 MS. THOENE: Thank you. And in said appeal, we discussed
2 whether or not time was an element that needed to be
3 determined for probable cause for the criminal damage. I am
4 absolutely happy to provide to the Court and counsel copies of
5 the Court of Appeals rulings for both *PYT versus Baltazar* and
6 *PYT versus Rodriguez*. And I can get that done-, I don't know
7 if I can get it done today because of the late hour, but I can
8 certainly get it done by Tuesday.

9 COURT: Okay.

10 MS. THOENE: And I would be happy to file that as part of
11 a notice to the Court and to counsel. But the case itself did
12 not deal with lack of disclosure, it dealt entirely with the
13 probable cause issue.

14 COURT: Okay, all right. So...

15 MS. BRANNOCK: Your Honor, I'm sorry, she is correct...

16 COURT: ...thank you.

1 MS. BRANNOCK: ...that that's what the case was about, it
2 was actually my case. I got-, I won on probable cause. She is
3 correct. It was untimely and we actually won the case in the
4 Court of Appeals, that timing was an issue. So if we are going
5 to rule on probable cause and whether the time is not-, I just
6 would like to see that ruling because it is definitely a
7 precedent.

8 COURT: Okay, so what I'm going to do on that, on your
9 motion right now is I'm going to take it under advisement and
10 I will wait until I can get those, you know, the cases and
11 take a look so we can possibly have a separate hearing about
12 it, if necessary, but I think that will help a little bit,
13 shed...

14 MS. BRANNOCK: Thank you, Your Honor.

15 COURT: ...light on it. Okay, so I'll put down here
16 that you will file it, and you said by Tuesday?

1 MS. THOENE: Tuesday would be fine, Your Honor. I can
2 work on it this weekend.

3 COURT: Okay. All right. Okay, so I'll put by the end
4 of the day on Tuesday that you'll file that, those things so
5 we can take a look at those. And so moving on from that...

6 MS. BRANNOCK: So Your Honor, do you mean that you will
7 reserve the probable cause finding (inaudible)?

8 COURT: Yes.

9 MS. BRANNOCK: Thank you.

10 COURT: Yes. Okay. Okay, all right. And so, yeah, so
11 that'll be under advisement. I do, I'm going to go ahead and
12 affirm that prob-, probable cause finding as to counts 1 and
13 2. And at this time, we will go ahead and talk about release
14 conditions. We're going to ask the parties what their
15 recommendations are. We'll set that and then we'll set you up
16 for your arraignment. So Ms. Mace?

1 MS. MACE: Yes, Your Honor. Pre-trial is asking for the
2 defendant to be released on a suspended bond, report to Pre-
3 Trial supervision and be ordered to report within 24 hours of
4 his release. We ask that he not possess or consume alcohol,
5 subject to random testing; not to possess or consume drugs,
6 subject to random testing; and not to harm and harass
7 Concepcion Molina and the Minor A.M.

8 I personally didn't have a chance to speak with the
9 victim at this time, so I'm not really sure if the prosecutors
10 were. But just, just some of the stuff that I was looking at,
11 I feel that a No Harm and Harass at this time would be okay.
12 And you know, I didn't put it on my report but I do want to
13 ask for an order (inaudible) so we can do an evaluation and,
14 and get-, (inaudible) evaluation on him as well.

15 COURT: Okay. All right, thank you. And Miss Thoene?

1 MS. THOENE: Thank you, Your Honor. And I am largely
2 echoing the recommendations of Pre-Trial Services. I have had
3 a chance to speak with the adult victim in the case. I have
4 not had a chance to speak with the minor victim because it's a
5 school day. And I spoke with her, we got off the phone about
6 1:20 this afternoon, so it was right before court. My concerns
7 are-, there are many.

8 COURT: Is what?

9 MS. THOENE: There are many concerns that I have.

10 COURT: Okay.

11 MS. THOENE: Now I want to-, I want to say that before I
12 start talking about what the victim has indicated, because
13 even in talking to the victim, and the victim can vouch to the
14 Court that she herself expressed concerns. But this is 24
15 hours after a domestic violence offense and her concerns
16 appear to be largely based on the fact that her child, who is

1 also a victim in the case, well-, I'll just refer to him as
2 "A", just for the sake of making sure we don't have his name
3 in, in a public record, indicated that he missed his daddy.

4 Now that being said, if you look at the affidavit, it's
5 clear from the start of the affidavit that she indicated that
6 she was afraid, the adult was afraid. It's clear that the
7 child was crying, was upset, also appeared afraid. And when I
8 spoke with the adult victim, she indicated that the
9 defendant's biggest problem was alcohol, that when he drinks
10 hard liquor, he becomes violent. And it-, she also indicated,
11 and this is clear from the affidavit, that happens on a
12 regular basis.

13 And this is not something that any partner, any child
14 should be exposed to. Now the mother asked me to tell the
15 Court to ask-, to request a No Harm/No Harass condition and I
16 am telling the Court that I am making that request on her

1 behalf, but I do not believe that it's a good request. I
2 believe that a no-contact order, at least in the interim, at
3 least for the short term, would better serve community and
4 safety for these victims based on what they're saying and
5 based on what's in the affidavit. So I would ask the Court to
6 consider for the sake of the victims ordering a no-contact
7 order that can be revisited in the future.

8 Now when I also spoke with the adult victim, she
9 indicated that even if there was a No Harm/No Harass order,
10 she does not want the defendant to be at the residence. So she
11 asked me...

12 COURT: She doesn't want what now?

13 MS. THOENE: Does not want the defendant to be at her
14 residence, so she's asking for a no return to the incident
15 location condition.

16 COURT: Okay.

1 MS. THOENE: And I do agree with Pre-Trial Services that
2 the defendant needs to submit, or should have to submit to a
3 substance abuse evaluation to see what's going on, to see, you
4 know, if there's an issue that's leading to this.

5 And whether or not we resolve this case through
6 treatment, through diversion or something like that, that's
7 beside the point, that's down the road. But right now what
8 we're looking at is keeping everybody safe and trying to
9 address the issue that led us here to court today.

10 COURT: Okay. And did you have an amount on the
11 suspended bond?

12 MS. THOENE: I would leave it to the Court, Your Honor.
13 And I would actually ask for a cash bond, however, I would
14 also leave the issue of whether it's suspended or cash up to
15 the Court's discretion.

16 COURT: Okay.

1 MS. THOENE: Based again on the conversations with the
2 victim.

3 COURT: Ah-ah.

4 MS. THOENE: My main concern is a no-contact order.

5 COURT: Okay.

6 MS. THOENE: He has some limited history, he has some
7 history that is concerning, which I'm not going to speak about
8 in open court.

9 COURT: Okay.

10 MS. THOENE: If the Court wants us to approach, I'm happy
11 to do that.

12 COURT: Yeah, let's go ahead and do that. I want to
13 know...

14 MS. THOENE: Thank you, Your Honor.

15 (Bench conference)

1 COURT: Okay, all right. So we were talking about
2 release conditions and we have some recommendations. Let's
3 see. Let's hear from-, yeah.

4 MS. BRANNOCK: Thank you, Your Honor. Recommendation
5 suspended, you-, cash bond. I'm just trying to remember, okay.
6 I (inaudible) adopt the recommendations by Pre-Trial Service
7 in this letter, and I will ask you to take into consideration
8 that the second page of the probable cause affidavit, it's
9 written there, that the victim did not want an order of
10 protection against my client. And the contact-, that the
11 conditions of the victim, who should be heard on the release
12 conditions, is No Harm and Harass.

13 As pointed out, I don't-, the-, the dangers for me right
14 now thinking about a no-contact rule is that they are married.
15 I don't know who is the bread winner of the house and I don't
16 know who the house belongs to. If she is the bread winner and

1 she is asking for him not to return to the house and they
2 being married, is she responsible financially to pay another
3 house, you know, what are the other family law issues.

4 COURT: Ah-ah.

5 MS. BRANNOCK: So I would ask, she said she doesn't-, she
6 wants a No Harm/No Harass, to-, to, it will make it easier for
7 us. It is her wishes and then Pre-Trial can monitor him. He
8 will do an assessment, I'll follow up with (inaudible) and
9 then Pre-Trial will, correct me if I'm wrong, Miss Mace, you
10 guys will write if the person doesn't check with you two weeks
11 in a row, you guys will write them up?

12 MS. MACE: Correct.

13 MS. BRANNOCK: So we would, you know, if this is an issue,
14 we can even ask like if he failed one week to check, we can be
15 brought to the court for a status, but I would ask at this
16 point to just adopt the Pre-Trial recommendations. Thank you.

1 COURT: Thank you.

2 MS. MACE: I can add, he did ask for services if he gets
3 placed on Pre-Trial Services through us. So he's-, he's
4 already looking for his own type of services for himself.

5 MS. BRANNOCK: So I would take-, ask you to take into
6 consideration that he is willing also to participate in the
7 process. Thank you.

8 COURT: Okay, thank you. Any response, Ms. Thoene?

9 MS. THOENE: Your Honor, also on page 2, I would direct
10 your attention to the top of the page and I'm going to read it
11 verbatim. "I asked Concepcion if she was afraid of Jose at
12 this time and she stated that yes, she was."

13 COURT: Okay, all right. Did you have any follow-up,
14 or?

15 MS. BRANNOCK: I'm not going to try the case today, Your
16 Honor.

1 COURT: Okay.

2 MS. BRANNOCK: It's just-, it's just the probable cause
3 hearing. (Inaudible).

4 COURT: Okay, all right. Okay, all right. After
5 listening to the conditions, what I'll-, we'll go ahead and do
6 is I'm going to do a suspended bond, but like I mentioned to
7 the young lady before that, you know, if you don't appear the
8 next time, if any of those release conditions are violated,
9 it's just going to get more strict and more strict if you, if
10 you don't appear, okay. So I'm going to put it as a-, did you
11 recommend an amount Miss Brannock, or Miss-, I don't think we
12 have an amount.

13 MS. THOENE: I deferred it to the Court, Your Honor.

14 COURT: Okay.

15 MS. BRANNOCK: No amount recommended.

1 COURT: Okay, all right. So I'm going to have a fifty
2 dollar suspended bond, report to Pre-Trial Services. I'm not
3 going to put like, you know, the thing that you were-, I
4 appreciate your recommendation about the thing after a week,
5 but we'll, being that he seems like he's already, you know,
6 trying to engage in those services, we'll just, whatever your
7 normal course of business is on that. So but I will put that
8 you have to report within 24 hours over to, to Pre-Trial
9 Services. Do you understand?

10 MR. MONTANA: So what-, I'm-, I really don't understand
11 because you said 24 hours, but today's Friday.

12 COURT: Yeah, I-, I was going to ask about that, but do
13 you have any thoughts on that?

14 MS. MACE: We'll see him on Monday. I'm going to give him
15 all the information he needs...

16 COURT: Monday.

1 MS. MACE: ...and I will see you Monday.

2 COURT: End of Monday...

3 MS. MACE: Oh no, actually, I'm not sure how long it'll
4 take to have them come out, so we'll-, we'll talk to him
5 before he leaves, I'll talk to him, yeah.

6 COURT: Okay. Let's see. I think that I would feel more
7 comfortable giving you a date, and Miss Mace, you can, you
8 know, kind of let us know if there's any circumstances where
9 he can't come in, but I will just say by the end of the day on
10 Monday...

11 MR. MONTANA: To-, to see her? To see her for Pre-Trial
12 Services? I can come on Monday.

13 MS. MACE: Yeah.

14 COURT: Okay.

15 MR. MONTANA: There's no problem with that.

1 COURT: Okay. And that's a fair question because it is
2 Friday, so.

3 MS. MACE: Yeah.

4 COURT: Okay, all right. And so I am going to also
5 order that you have no drugs or alcohol, subject to random
6 testing. Now the issue of the no-contact is, is a hard one,
7 being that she has stated directly that she wants it to be a
8 No Harm or Harass. I'm going to go ahead and honor her wishes
9 on that part, but that could also change. You know, she can
10 always let...

11 MR. MONTANA: What...

12 COURT: ...the prosecutor know if she doesn't feel
13 comfortable with it anymore, that could also be changed.

14 MR. MONTANA: What does that mean?

15 COURT: So...

16 MS. BRANNOCK: (Inaudible)

1 COURT: I have a, kind of spiel that I usually say
2 regardless and so...

3 MS. BRANNOCK: Yeah, that's all right, I know what you
4 usually say. (Inaudible)

5 COURT: Okay, all right. So thank you. So if-, the No
6 Harm or Harass, it doesn't mean you can't contact her. It's
7 not a no-contact. What it is is you can't argue with her,
8 fight with her or you could get additional charges.

9 MR. MONTANA: Yeah.

10 COURT: Okay. And so does that answer the question?

11 MS. BRANNOCK: So if you do talk with her, you can
12 (inaudible)...

13 MR. MONTANA: (Inaudible) I mean, that's-, (inaudible),
14 but with the, with me, I mean, that's-, (inaudible) our house,
15 that's where I live.

1 MS. BRANNOCK: You-, she's allowing you to return and
2 we'll-, that discussion you don't have to worry about at the
3 house, is that right?

4 COURT: Actually, Miss Brannock, let me-, let me
5 address that though because I think that it is...

6 MR. MONTANA: (Inaudible) sleep in a separate room, I
7 mean...

8 COURT: Hold on. I think it is...

9 MR. MONTANA: (Inaudible)

10 COURT: ...possible to tailor it to again, this is-,
11 this is based on the victim's input, which is very, very
12 important.

13 MR. MONTANA: Yeah.

14 COURT: She says that she does not want you to return
15 to the home, and so but that could also be changed later on if
16 she does feel comfortable with that aspect. And so I am going

1 to put that you cannot return to the home. You can still
2 contact her. Is there a question on that, Miss Thoene?

3 MS. THOENE: No, Your Honor. I was just concerned about
4 what I was hearing over here.

5 COURT: Okay.

6 MR. MONTANA: I honestly just ask...

7 MS. BRANNOCK: Do you have a place to stay tonight?

8 MR. MONTANA: Yes.

9 MS. BRANNOCK: Okay.

10 MR. MONTANA: I have a question with that. I have...

11 COURT: Why don't you ask-, why don't you go ahead and
12 ask her first and then we can...

13 MS. BRANNOCK: Ask me.

14 COURT: ...clarify anything.

15 MR. MONTANA: Like I said, I-, all my stuff's over there.
16 All my belongings.

1 MS. BRANNOCK: Ah-ah. Your Honor, his concern is that all
2 his belongings are there and I believe the victim
3 representative is speaking with the prosecutor.

4 COURT: Okay.

5 MS. THOENE: And Your Honor, I have some information from
6 one of our victim advocates that was just given to me. They
7 are not married and this is her home.

8 COURT: Okay. Okay. And so I am...

9 MS. BRANNOCK: You're not married?

10 MR. MONTANA: Yeah, we're not married, no.

11 COURT: ...going to go ahead and order that you not go
12 back to the home. Just, this is part of the proceedings going
13 forward. And so you will need to find another place to stay.

14 MR. MONTANA: Yeah, that-, that'll be fine, but...

15 MS. BRANNOCK: Your Honor, his concern is his belongings,
16 his personal property that is there right now.

1 COURT: Right. Is he able to ask law enforcement for
2 supp-, some per-, you know...

3 MR. MONTANA: Yeah, that'll be the best (inaudible)...

4 COURT: ...a peaceful assist? What's that?

5 MR. MONTANA: (Inaudible) like after all this, I go home
6 and (inaudible). I've been in this with her numerous times.

7 MS. BRANNOCK: Yeah, no, let's not get into...

8 COURT: Yeah, I don't-, let's not talk about that.

9 But...

10 MS. BRANNOCK: So you're saying you can go home today,
11 take care of your stuff and leave, right?

12 MR. BRANNOCK: I-, I get my stuff and, and leave, if
13 that's what she wants. I just want to-, my concern, too is
14 with my child...

15 COURT: Okay, and that's the same. It's the same...

16 MS. BRANNOCK: (Inaudible)

1 COURT: ...No Harm and Harass, okay.

2 MS. BRANNOCK: No Harm and Harass, and so he's not allowed
3 to go to the house to see his child, Your Honor?

4 COURT: No. Not for the proceedings. If she wants to
5 set something up at a mutual place, you know, I'm going to
6 leave that visitation to her basically, because she's-, she's
7 there at home with the child. So but it is, again, it's not a
8 no-contact with your child, it's a No Harm or Harass. So did
9 you have something else?

10 MS. THOENE: Yes, Your Honor. Just to address a couple of
11 the issues that have just been brought up. First of all,
12 regarding the contact with child visitation. I'm happy to
13 reach out to the victim and I'm happy to, to work with Miss
14 Brannock to, you know, see if there-, that's something that
15 can be worked on. I'm always happy to do that.

1 With regards to escorts to be able to get some of his
2 belongings, I'm also happy to reach out to law enforcement and
3 again, coordinate with Miss Brannock to arrange an escort so
4 that, a police escort so that that can be accomplished in a
5 safe and-, a safe and legally justified manner.

6 COURT: Okay, I appreciate that. Because that was the
7 other things I was going to say, is I feel that allegedly this
8 just happened last night, so it's fresh. I'm going to put that
9 you have to have a law enforcement accompany you to get any
10 belongings that you need for the meantime. And like I said,
11 this could all change down the road, it just depends on, on
12 kind of the input that we get from the victim and the
13 arguments that we get from the-, from the parties.

14 Okay, so I'm going to put that it has to be law
15 enforcement with. Okay, all right. Now is there anything else
16 besides the arraignment we need to get to, Ms. Thoene?

1 MS. THOENE: Not from my perspective, Your Honor.

2 COURT: Okay. Miss Brannock?

3 MS. BRANNOCK: No.

4 COURT: Okay. And Miss Mace?

5 MS. MACE: No, Your Honor.

6 COURT: Okay, all right. And can we get that
7 arraignment date, please?

8 CLERK: September 20th at 1:30.

9 COURT: One-thirty. Is that fine with you?

10 MS. THOENE: Yes, Your Honor.

11 MS. BRANNOCK: Yes, Your Honor.

12 COURT: Okay, all right. Okay, so if there's nothing
13 further, then you're excused. Court's adjourned on that.

14 MS. MACE: What's the September?

15 COURT: 20th...

16 [END OF INITIAL HEARING]

17 [Transcriber's Certification Follows:]
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I certify that, to the best of my ability, the foregoing is a true and accurate transcription of the original tape-recorded conversation in the case referenced on page 1 above.

Transcription Completed: October 26, 2021

**CHRISTINE McGARVEY
LEGAL TRANSCRIPTION SERVICES PLUS
TRANSCRIBED BY: Michael McKenzie**

**SIGNED BY: Christine McGarvey
Christine McGARVEY**

**Attachment B: Transcript of Arraignment Hearing
conducted in CR-21-239 on Sept. 20, 2021.**

IN THE PASCUA YAQUI COURT
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

PASCUA YAQUI TRIBE,) NO. CR-21-239
)
Plaintiff,)
) **ARRAIGNMENT**
vs.)
)
JOSE JUAN MONTANA,) **September 20, 2021**
) **Tucson, Arizona**
)
Defendant.)

BEFORE: THE HONORABLE _____, JUDGE OF THE PASCUA YAQUI
TRIBAL COURT

APPEARANCES:

COLEEN THOENE, ESQ.
Appearing for Plaintiff

GLAUCIA BRANNOCK, ESQ.
Appearing for Defendant

1 COURT: All right. Okay, so we'll go on the record.

2 This is in the matter of *Jose Juan Montana*, case number CR
3 dash 21 dash 239. Will the parties please state your name for
4 the record?

5 MS. THOENE: Good afternoon, Your Honor. Coleen Thoene on
6 behalf of the Tribe and I will note for the record that the
7 listed adult victim is present in the courtroom today.

8 COURT: Okay, thank you.

9 MS. BRANNOCK: Good afternoon, Your Honor. Glaucia
10 Brannock representing Jose Montana, who is present, seated to
11 my left.

12 COURT: Okay, thank you. Okay, sir, can you go ahead
13 and state your full name, please?

14 MR. MONTANA: Jose Juan Montana.

15 COURT: Okay, thank you. All right. Okay, so I know
16 we've got some motions and things. We can get into that, but

1 let me go ahead and go through my usual spiel before we get
2 into that. Or maybe I'll get into that now because I know
3 we're going to be asking for a plea. Do you want me to read
4 the rights though, or?

5 MS. BRANNOCK: No, Your Honor, I'll waive at this time.

6 COURT: Okay. And waive the charges as well, reading
7 the charges?

8 MS. BRANNOCK: Yes, Your Honor.

9 COURT: Okay. And your client understands the charges
10 and his rights?

11 MS. BRANNOCK: Yes. We have met and spoke about it.

12 COURT: Okay, perfect, thank you. All right, okay. And
13 so we had some motions, I know we had some discussions last
14 time about the probable cause as to count three. And so after
15 reading through the pleadings that have been filed, and thank
16 you so much for filing those in a timely manner and also for

1 your responses on that. I know you guys are working really
2 hard on this case.

3 And so I did want to go ahead and make a ruling on that
4 now. I'm going to go ahead and dismiss without prejudice count
5 3. And for the reasons I'm saying that is because being that
6 probable cause is a case by case basis when we look at it, you
7 know, each individual circumstance. In this particular case
8 when I'm looking at what was said at the last hearing. I know,
9 Ms. Thoene, you're very good at illustrating your-, you know,
10 examples and things like that.

11 Being that one of those examples kind of struck me and
12 reminded me that, you know, your example of, say I think it
13 was like a child sexual abuse case or something like that
14 where possibly a child couldn't remember certain details of
15 the case. Here, it seems like there-, there should have been a
16 memory maybe a little bit tighter of a timeline to where the

1 person can remember. It was-, it was I think it was over a
2 month of a timeline. And it's not just kind of within a day or
3 two of when this happened, and I would think that, you know,
4 being an adult victim, that it would be that the person could
5 remember, unless it just wasn't written in the P.C. statement,
6 to a little bit more of a certain degree when somebody, you
7 know, put a big hole in the wall.

8 So I'm going to dismiss that without prejudice and what
9 that means is that it could be re-filed if they go ahead and-,
10 if they do some more investigating, maybe some more
11 supplemental reports or statements from other folks. It could
12 come back, but for now what we're going to deal with in your
13 pleadings is just to the counts that remain, okay.

14 And so I know Ms. Thoene, you're very diligent in your-,
15 in your filings and you as well, Ms. Brannock. And the reason
16 I'm denying that request for a briefing is because, just

1 because I think that we can dispose of that right now and I
2 would just like to see a little bit more certainty with the
3 dates. And so that way, that you can say, "Well, I was here or
4 I was there," just know a little more specifically. And go
5 ahead.

6 MS. THOENE: Thank you, Your Honor. And just to clarify,
7 the Court is dismissing because the Court feels that the date
8 range, the fact that it's not pinned down enough, is an
9 element of probable cause?

10 COURT: Um, in this case, yes, because of the type of
11 the charge.

12 MS. THOENE: Understood. Thank you.

13 COURT: Ah-ah, okay. So all right. And okay, so we have
14 the remaining charges are 1, 2 and 4. And so Ms. Brannock, are
15 you ready to have your client plead?

1 MS. BRANNOCK: Yes, Your Honor. We plead not guilty to all
2 counts.

3 COURT: Okay. And at this time you're requesting a
4 bench trial?

5 MS. BRANNOCK: Yes, Your Honor.

6 COURT: Okay. Okay, can we get a date for that, please?

7 CLERK: December 6th at two o'clock.

8 MS. THOENE: I'm sorry, I didn't quite hear the date.

9 COURT: December 6th at-, what time?

10 CLERK: Two p.m.

11 COURT: Two.

12 MS. THOENE: December 6th or 5th?

13 COURT: Six.

14 MS. THOENE: Thank you.

15 COURT: Thanks. Okay, and to the parties, are you okay
16 with that date?

1 MS. BRANNOCK: Yes, Your Honor.

2 MS. THOENE: That works for the Tribe, Your Honor.

3 COURT: Okay, all right. And if something should arise
4 in-, in between there, we'll go ahead and take a look at any
5 motions for a continuance. And so, and you didn't want to set
6 a pre-trial conference at this time?

7 MS. BRANNOCK: No, Your Honor.

8 COURT: Okay.

9 MS. BRANNOCK: We just want to revisit the conditions of
10 release, if possible.

11 COURT: Okay. Okay.

12 MS. BRANNOCK: Thank you, Your Honor. I'm actually happy
13 to speak today about this situation. Miss Concepcion visited
14 me on Thursday afternoon and we spoke. I had a really good
15 conversation with my client and the alleged victim. There is
16 no doubt there's so much love between the two of them.

1 (Inaudible) and that was one of the reasons I was very
2 resistant arguing facts on that day. But Ms. Conception is
3 here, she can correct me if I'm wrong or if she has changed
4 her mind. But on Thursday it was her wishes that my client
5 comes back home and she said he's her only family, she loves
6 her-, she loves him. They have a son and they have to
7 coordinate, my understanding is Miss Concepcion works
8 nightshift, my client will watch the kid.

9 It has been a little bit of a burden for them, but since
10 the Court's order. Sh-, both of them want-, asked me if he
11 could come back home. She didn't want it at that point and I
12 will respect that she has changed her mind today. I just want
13 to say she is more than welcome to correct me if I'm
14 misstating anything that she told me on that day as well.

15 COURT: Okay.

1 MS. BRANNOCK: So for those reasons today, I would ask the
2 Court to honor the victim's request and allow my client to go
3 back home. I specifically asked her if she was afraid of my
4 client and at that day she said no. Thank you.

5 COURT: Okay. And he was there at that time when you
6 asked her?

7 MS. BRANNOCK: I'm sorry?

8 COURT: And he was there at the time when you asked her
9 that?

10 MS. BRANNOCK: No. They came by themselves.

11 COURT: Okay.

12 MS. BRANNOCK: He came earlier, she came afterward-, later
13 in the day by herself. I asked her if it was voluntary, all of
14 that.

15 COURT: Ah-ah.

1 MS. BRANNOCK: Gave her all of the victim's disclosure and
2 everything, and tried my best, I did not do any interview, did
3 not push her, that's because I understand I need to ask the
4 prosecutor for that.

5 COURT: Okay.

6 MS. BRANNOCK: Thank you.

7 COURT: Okay, thank you. Okay, so there already was the
8 No Harm or Harass but then there was also...

9 MS. BRANNOCK: No return to the home.

10 COURT: ...no return to the home, okay. All right. And
11 I know at that time Ms. Thoene, it seemed like there was-,
12 there already was good communication between you and the
13 victim and we were talking about, you know, what was best for
14 the safety of the victim and all that. So what is your take on
15 this?

1 MS. THOENE: And Your Honor, this is one of those
2 situations where I have to convey to the Court what the victim
3 wants. The victim has a right to be heard, and the victim-,
4 the adult victim wants contact and wants him to return.
5 However, I also have to remind the Court that contact is not
6 just based on a victim's wishes, it's also based on the
7 Court's interpretation of safety and things like that.

8 And I have a meeting set with the victim tomorrow, I've
9 spoken with her this afternoon with our victim advocate, who I
10 believe is also in the courtroom. And there-, she expressed
11 that there was concerns around the drinking and that the
12 drinking can lead to-, although she did not put a word to
13 describe what the incidents are, I'm going to say disruptive,
14 violent and/or concerning, at the very least, concerning
15 episodes that happen two to three times a week.

1 And the fact that there is a child in the home, this
2 makes me very, very concerned about Mr. Montano returning to
3 the home at this time. So what I'm asking the Court to do is
4 hold this particular issue in abeyance for two weeks so I have
5 a chance to meet with the victim and get a better read on the
6 situation. I'm happy to file a motion, I'm happy to work with
7 Miss Brannock if I do file a motion, detailing her-, her
8 wishes and concerns more specifically.

9 But as of today as a prosecutor, and the Court has all
10 the information, I do have concerns. If we have a victim who
11 at some point said that they were afraid of them, this was the
12 night of the incident when everything had happened, even
13 though she said that she did not want an order of protection,
14 she said, and this is in the affidavit, "I am afraid," or
15 words to that effect. It's in the affidavit.

1 That's something we have to take notice of. I'm urging
2 the Court to take caution and to exercise its-, its discretion
3 and jurisdiction to allow us a little bit more time. And I
4 understand that the victim is, is-, this is not-, this is
5 going against the victim's wishes. I know it's also going
6 against the defendant's wishes. I absolutely understand that.
7 But in this situation if we have any allegation that domestic
8 violence is going on in a repeated pattern, and again, that
9 information is in the affidavit, we have to be cautious and
10 I'm asking the Court to be cautious and give us two weeks.

11 COURT: Okay. Before...

12 MS. BRANNOCK: (Inaudible)

13 COURT: I know that you'll have the next-, you know,
14 the word on that because it's your motion to modify release
15 conditions, but I wanted to know what the parties would, if
16 the parties would be willing to step out while I speak with

1 the victim, just to kind of ease my mind or, you know, ask any
2 questions?

3 MS. BRANNOCK: Yes.

4 MS. THOENE: I would be fine with it, Your Honor, as long
5 as everybody's out of the courtroom.

6 COURT: Okay.

7 MS. BRANNOCK: Yes, Your Honor. Would I have an
8 opportunity to reply afterwards?

9 COURT: Sure.

10 MS. BRANNOCK: Or now, or?

11 COURT: You can do it now, ah-ah.

12 MS. BRANNOCK: Okay. Because I specifically asked her if
13 there was-, if it was happening every week or twice a week or
14 twice a month, that's what it was (inaudible) specific in the
15 (inaudible) indicated that, you know. I'm not going to try the
16 case on the facts because he's going to have his day in court,

1 but there was (inaudible) on that date for some statements
2 from the alleged victim. And possibly, I think you can speak
3 to her and she can possibly tell this, but she did, indicated
4 to me she may have past, you know, some traumas from a past
5 relationship and that's how things happened. But we are more
6 than happy to step outside, Your Honor...

7 COURT: Okay.

8 MS. BRANNOCK: ...and we actually ask you to hear the-,
9 the victim in this case.

10 COURT: Okay. Okay, so all right, so is that okay with
11 you, ma'am? I mean, you're the-, the one that needs to, I want
12 to hear from you the most. If you're comfortable with, you
13 know, having everybody step out, we'll-, we'll-, it'll still
14 be recorded in case the case was appealed but just basically,
15 I just want to talk to you. Is that fine?

16 MS. MOLINA: That's fine.

1 COURT: Okay. All right. So we'll go ahead and excuse
2 everybody and then we'll call you back in in just a few
3 minutes.

4 MS. BRANNOCK: Thank you, Your Honor.

5 COURT: Thank you.

6 MS. THOENE: Thank you, Your Honor.

7 UNKNOWN MALE: You can sit here or wherever.

8 MS. MOLINA: Okay.

9 COURT: All right. Well, thank you for agreeing to talk
10 with me. I know it's-, it's hard to do all this, you know,
11 stuff in the public and everything. But I just wanted to make
12 sure that, that you're not, you know, being pressured, not
13 that they would do that, but just either way, you know. How do
14 you feel about him coming home?

15 MS. MOLINA: This happened-, this first happened back in
16 April.

1 COURT: Ah-ah.

2 MS. MOLINA: And that was the first time it ever happened.
3 And he's-, he-, he doesn't drink very often, you know, maybe
4 two or three times a week, if that. And he's fine with-, with
5 beer, he's fine.

6 COURT: Ah-ah.

7 MS. MOLINA: Once he starts taking the shots, then he
8 turns into this mean person, you know, aggressive, and that's
9 where my concern is. It happened in April and then it happened
10 again last month and then again this month. So this month was
11 the last straw. I was like, "I'm not going to go through this
12 over and over again," you know, so that's when I decided to
13 put my foot down.

14 COURT: Okay. So it sounds like, like there is some,
15 you know, there is still some concerns about, you know, what
16 happens when he actually does that. So let me ask you this.

1 She mentioned that it's-, it's been a little bit hard because
2 well, first of all, all of a sudden your guys' schedules are,
3 you know, have to be accommodated or your locations and so.

4 MS. MOLINA: Ah-ah.

5 COURT: Is that part of the reason why you want him
6 back mainly or is it, I mean, just tell me what you feel.

7 MS. MOLINA: My family doesn't speak to me. My parents are
8 gone. My sister, she has a really serious drug problem and
9 he's the only family I have. (Crying) Him and my son and my
10 step-kids are my family. And it just-, and it's affecting our
11 son, too, you know, our eight-year-old. He's already asking
12 Mommy, "Can Daddy come back home? I miss him." You know, and I
13 just, I want things to be normal again but I don't want him
14 drinking. Like I said-, I...

15 COURT: Ah-ah.

1 MS. MOLINA: ...and he's promised not to drink hard
2 liquor anymore, but I just need-, I-, I want him to get help.
3 Something's bothering him and it's coming out when he's drunk
4 and he has so much anger and, you know, and I don't understand
5 why. He needs to speak to somebody and get it out, whatever is
6 bothering him. He has a lot of frustrations, he has no job.
7 He-, it's hard for him to get a job and I'm just, I just want
8 to do the right thing and, and have my family back together
9 again.

10 COURT: So when she was-, when his attorney was talking
11 about the past traumas, is he-, was she talking about your
12 past trauma or his past trauma?

13 MS. MOLINA: Mine.

14 COURT: Okay.

15 MS. MOLINA: I had-, I was in a bad relationship for ten
16 years, yeah.

1 COURT: Oh, okay. Okay, so being that this is, you
2 stated that the last time this happened in, was August, right?

3 MS. MOLINA: Yes.

4 COURT: So I mean, it's still kind of, kind of fresh.
5 Are you-, are you-, you feel that it's, he's ready to-, oh,
6 okay, so actually September 9th was the last time, so.

7 MS. MOLINA: Yeah.

8 COURT: He-, do you feel that this is enough time that
9 he would have, you know, started to change, do the turn-
10 around?

11 MS. MOLINA: I think so. Like him, too, he-, we've been
12 together nine years. It's a long time. And he's never acted
13 like this before, you know, that's why I'm concerned that
14 there's something bothering him because he's never acted like
15 this before. And the first time was in April he started acting
16 like this. And something-, something triggers him, I don't

1 know. And then he doesn't remember the next day, he doesn't
2 remember what he does.

3 COURT: Okay. So I want you to be as honest as you can
4 and not thinking about how things could change or not or how
5 he's going to feel or not. But do you feel safe if he was with
6 you?

7 MS. MOLINA: Yes, ah-ah.

8 COURT: Okay.

9 MS. MOLINA: Yeah.

10 COURT: And you don't feel pressured by anybody to say
11 that?

12 MS. MOLINA: No.

13 COURT: Okay, all right. So I know she said that it's a
14 consideration but I'm-, for the Court it's a huge
15 consideration what you want and what you feel and why you feel
16 that way, so.

1 MS. MOLINA: Yes.

2 COURT: You have-, do you feel like you have sort of a
3 plan if things don't go as you would like them if he comes
4 back?

5 MS. MOLINA: Um...

6 COURT: Because you know you can always, the No Harm or
7 Harass, the way I usually say it to the defendants is that you
8 can still talk to the person, you just can't fight with them.
9 So if he does, you know, start a fight with you, you know what
10 to do. It's-, just because it doesn't say no contact doesn't
11 mean that he can do whatever, you know, whatever he wants, so.

12 MS. MOLINA: Yeah.

13 COURT: And that is your home or is that his home?

14 MS. MOLINA: That's my home.

15 COURT: Okay.

16 MS. MOLINA: Yeah.

1 COURT: Okay, all right. So I'm going to go ahead and
2 we'll let the parties back in and we'll just, you know, talk
3 in general terms about how to go forward and I won't say, you
4 know, everything that you said, but I'll just kind of say...

5 MS. MOLINA: Okay.

6 COURT: ...how that helped me guide me to the decision.
7 Okay?

8 MS. MOLINA: Okay.

9 COURT: Okay, thank you.

10 MS. MOLINA: Thank you, Your Honor.

11 UNKNOWN MALE: So if you want to stay there, you can, or
12 if you want to go back there, that's fine, too.

13 MS. MOLINA: Okay, I'll go back there.

14 UNKNOWN MALE: (Inaudible) just in case?

15 MS. MOLINA: Yeah, thank you.

1 COURT: Okay, thank you so much for your patience.
2 We're back on the record. This is in the matter of *Jose Juan*
3 *Montana*, case number CR dash 21 dash 239. And I do appreciate
4 the opportunity to talk to the victim. I think the main thing
5 that I just wanted to know was does she feel safe. And so, and
6 her indicating to me that, that she does, and we talked a
7 little bit about, you know, what would happen if, you know, if
8 things got, you know, if things weren't, not ideally when he
9 comes home. But the other thing I wanted to mention to
10 (inaudible) is that even, no matter what I say here in this
11 hearing, it can always-, you can always let, let the
12 prosecutor's office, let the Victim Witness know if your
13 feelings change for any reason. We can come back and address
14 it again, okay?

15 MS. MOLINA: Okay.

1 COURT: So don't hesitate on that. But I am going to
2 find good cause to modify it to where defendant can return
3 home just based on the statements of the victim. I don't
4 believe it's just for the convenience of having, you know,
5 dealing with their son, but, but I do feel that, you know,
6 that she feels-, she feels comfortable with that and that's
7 what she wants.

8 Okay, so we'll go ahead and modify that to be able to
9 return home. It's still going to have the No Harm or Harass,
10 so just be very careful with that. And let's see.

11 MS. BRANNOCK: And Your Honor, correct me if I'm wrong,
12 but he was ordered Pre-Trial as well.

13 COURT: Let's see, I believe so. Wait, I'm sorry, what
14 did you say? If it was ordered Pre-Trial?

15 MS. BRANNOCK: He was ordered to be on Pre-Trial's
16 supervision as well.

1 COURT: Oh.

2 MS. THOENE: He was, Your Honor.

3 COURT: Let's see.

4 MS. THOENE: I would ask that that remain in effect, Your
5 Honor.

6 COURT: Okay. And any objection?

7 MS. BRANNOCK: No objection.

8 COURT: Okay.

9 MS. BRANNOCK: And just to update the Court, he already
10 has an assessment (inaudible) scheduled for tomorrow.

11 COURT: Great. Okay, great. Okay. Okay, so I'm just
12 going to put in here that the Pre-Trial Services monitoring is
13 affirmed. And Ms. Thoene, anything else we need to do?

14 MS. THOENE: No, Your Honor, not at this time.

15 MS. BRANNOCK: No, Your Honor. Thank you.

1 COURT: Okay, thank you. All right. Okay, and so if
2 there's nothing else, we have our trial date and you're
3 excused. Court's adjourned. Thank you.

4 MS. BRANNOCK: Thank you, Your Honor.

5 MS. THOENE: Thank you, Your Honor.

6 [END OF ARRAIGNMENT]

7 [Transcriber's Certification Follows:]
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I certify that, to the best of my ability, the foregoing is a true and accurate transcription of the original tape-recorded conversation in the case referenced on page 1 above.

Transcription Completed: November 4, 2021

**CHRISTINE McGARVEY
LEGAL TRANSCRIPTION SERVICES PLUS
TRANSCRIBED BY: Michael McKenzie**

**SIGNED BY: Christine McGarvey
Christine McGARVEY**

**Attachment C: Motion to Dismiss without Prejudice
for the Purposes of Appeal (Sept. 24, 2021).**

1 ~~PASCUA YAQUI TRIBE~~
2 Office of the Prosecutor
3 7777 S. Cmo. Huivisim
4 Bldg. A, 2nd floor
5 Tucson, AZ 85757

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME

21 SEP 24 PM 2:04

DOCKET NO. _____

CLERK

6 IN THE PASCUA YAQUI TRIBAL COURT

7 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

8 PASCUA YAQUI TRIBE,
9 Plaintiff,

Case No: CR-21-239

10 vs.

Motion to Dismiss without Prejudice for the
Purposes of Appeal

11 Jose Juan Montana

12 Defendant
13

14
15 Comes now the Pascua Yaqui Tribe, by and through counsel undersigned, to respectfully
16 request that Counts One, Two, and Four of this matter be dismissed *without* prejudice for the
17 purposes of appeal. The Tribe further requests that the bench trial set for December 6, 2021, be
18 vacated. A Notice of Appeal has been filed with the Pascua Yaqui Court of Appeals this date,
19 with copies routed to the Defendant and this Court. Counsel for the Defendant has been contacted
20 regarding this motion and has indicated via email that she has no objection. The listed victims
21 have also been contacted and have indicated concurrence with the motion.

22 Respectfully submitted this 24th day of September, 2021,

23
24 

25 Coleen Thoene
26 Deputy Prosecutor
27 Pascua Yaqui Office of the Prosecutor
28 Coleen.Thoene@pascuayaqui-nsn.gov

24 SEP 2021 PM 4:35

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**ORIGINAL of the forgoing filed/e-filed
this 24th day of September, 2021 with:**

**Clerk of the Court
Pascua Yaqui Tribal Court**

**Copy of the foregoing
delivered/mailed/emailed provided to:**

**Glaucia Brannock, Esq.
Pascua Yaqui Office of the Public Defender
Attorney for the Defendant**

**Attachment D: *PYT v. Montana*, CR-21-239,
Complaint and Affidavit**

21 SEP 10 AM 11:12

SECRET NO. CRJ-239
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IN THE PASCUA YAQUI TRIBAL COURT
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

Pascua Yaqui Tribe,
Plaintiff,

vs.

MONTANA, JOSE JUAN

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 § 1-300(A) ~ Disorderly Conduct / 3-10(A) ~ Domestic Violence

On or about September 09, 2021, at approximately 8:01 p.m., at or near 7651 S. Camino Benem, Tucson AZ 85757, Defendant, with the intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, engaged in fighting, violent or seriously disruptive behavior, to wit: *Defendant yelled and/or hit items in the presence of Concepcion Molina, a person with whom shared a romantic relationship with and/or with whom he had a child in common.*

COUNT 2: 4 PYTC § 1-300(A) ~ Disorderly Conduct / 3-10(B) ~ Family Violence

On or about September 09, 2021, at approximately 8:01 p.m., at or near 7651 S. Camino Benem, Tucson AZ 85757, Defendant, with the intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, engaged in fighting, violent or seriously disruptive behavior, to wit: *Defendant yelled and/or hit items in the presence of A.M., his child.*

COUNT 3: 4 PYTC § 1-400 ~ Malicious Mischief / 3-10(A) ~ Domestic Violence

On or about August 01, 2021 through September 9, 2021, at or near 7651 S. Camino Benem, Tucson AZ 85757, Defendant maliciously disturbed, injured, or destroyed any livestock or other domestic animal or other property, to wit: *Defendant caused damage to a wall of a house owned and/or occupied by Concepcion Molina, a person with whom shared a romantic relationship with and/or with whom he had a child in common.*

COUNT 4: 4 PYTC § 3-90 ~ Endangering Welfare of Minor / 3-10(B) ~ Family Violence

On or about September 09, 2021 at approximately 8:01 p.m., at or near 7651 S. Camino Benem, Tucson AZ 85757, knowingly committed a crime of domestic or family violence in the presence of an unmarried person under eighteen years of age, to wit: *Defendant committed any act of domestic violence in the presence of his minor child, A.M.*

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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 September, 2021.


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: Jose Juan Montana
ADDRESS: 7651 S. Camino Benem, Tucson, AZ 85757
DOB: 11/16/1980 SSN: 600-14-6694 ORIGIN: Pascua Yaqui Tribe #2694U07536
SEX: Male HT: 5'9" WT: 200 EYES: Brown HAIR: Brown

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]

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME

21 SEP 10 AM 11:12

DOCKET NO. CR 21-239

CLERK lml

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

Plaintiff: The Pascua Yaqui Tribe vs. Defendant: Jose Juan Montana	
	Court Use Only Case Number P21090937
PROBABLE CAUSE STATEMENT	

AFFIRMATION

1. I Officer Frank Romero #3L60 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 Mark Machado.

2. Suspected Party (Defendant)

Name: Jose Juan Montana

Driver's license number: D00131913

Tribal Enrollment number: 2694U07536

Date of Birth: 11/16/1980

Jose Juan Montana

- is an enrolled member of the Pascua Yaqui Tribe.
- is an Indian subject to the jurisdiction of the Pascua Yaqui Tribe.
- is a non-Indian subject to the Jurisdiction of the Pascua Yaqui Tribe under the V.A.W.A of 1994.

3. The defendant was arrested on 09/09/2021 at 20:15 hours.
4. I have probable cause to believe that the defendant committed the following offense(s) at or near 7651 S. Camino Benem which is within the external boundaries of the Pascua Yaqui Indian Reservation.

PYTC Disorderly Conduct/Domestic Violence 4-1-300/3.10A

PYTC Injury to public property/Domestic Violence 4-1-630/3.10A

PYTC Contributing to the Delinquency of a minor/Family Violence 4-1-80/3.10B

PYTC

PYTC

5. Statement of Probable Cause:

Case Officer: Machado
Additional Officers: Lisacki, Baker, Adame
Arrestee Name: Jose Montana
Miranda Time: NA
Miranda Officer: NA
Victim Name: Concepcion Molina, Augustine Montana
Additional suspects: NA
Evidence Items/ Officer: MM1 CD with pic

On 09/09/2021 at approximately 20:01 hours, I was dispatched to the address of 7651 S. Camino Benem. The reporting party Concepcion Molina stated that she needed officers asap because Jay is angry and is hitting things and yelling. Concepcion did not want anyone to know that she was calling police.

I arrived at the front door and knocked. The front door opened and I recognized Jose Montana (11/16/1980-Tribal Enrolled). I asked Jose to step out so that I could speak with him. I advised him that neighbors had called because they heard yelling. Jose began arguing and yelling with myself and other officers. I advised Jose that he would be detained. I placed him in a set of handcuffs behind his back that I double-locked after checking for tightness and fit. I asked Jose if I could search his person and he stated that I could. I did not find any contraband on him and I requested that he sit in one of our patrol vehicles for the moment. I noted that Jose was unsteady on his feet. His eyes were red, watery, and bloodshot. I could also smell the overwhelming odor of intoxicating liquors on his breath as he yelled.

I then made contact with the homeowner Concepcion Molina (10/02/1979-Tribal Enrolled). Concepcion was crying. I asked her if she was hurt and if she needed medical attention. Concepcion stated that she was not physically hurt. I asked her what had happened. Concepcion said that her boyfriend "Jay" (Jose Montana) gets violent when he drinks hard liquor. Concepcion said that tonight he was watching a football game and he began yelling and screaming at her and their child for no

reason as she was cooking dinner. I asked Concepcion if she was afraid of Jose at this time and she stated that yes she was.

I then spoke with Augustine Montana (8 year old child). I could see that he was breathing hard and he still had tears streaming down his face. After Augustine calmed a bit I asked him if he was scared and he replied yes. I asked him what he was afraid of. Augustine answered he was afraid of his dad (Jose Montana). I asked Augustine why he was afraid of his dad. Augustine said he was afraid of his dad when he yells. Augustine said that his dad also made a hole in the wall. I then followed Augustine to the bathroom where he pointed to a hole in the wall. Augustine said that his dad did this when he was mad. Concepcion said that Jay (Jose Montana) had punched the wall in anger about a month ago and made the hole with his fist. I asked to speak to Concepcion in private.

Augustine was sent to his room and I spoke with Concepcion in the kitchen area. I asked Concepcion if this happens often where Jay (Jose Montana) becomes violent with her. Concepcion replied that Jay (Jose Montana) only gets violent with her when he drinks hard liquor but it does not happen often. I asked her how many times does this happen. Concepcion answered that it only happens about twice per month. I stated to Concepcion that that seems extremely excessive and dangerous for her and the child. I also pointed out that her son (Augustine) was crying and afraid and Jay's (Jose Montana) decisions are now affecting him.

I asked Concepcion how she is involved with Jay (Jose Montana). She answered that he is her boyfriend and the father of her child (Augustine Montana) and lives with her at her home and has for the past 9 years.

I asked Concepcion if she wanted to speak with victim services and if she required assistance in seeking an order of protection. Concepcion answered that she did not want an order of protection against Jay (Jose Montana).

I provided Concepcion with my card which included the police report number. I ensured I had her current phone number (520) 278-6290 and advised her that Victim services would contact her. I ensured that she had no further questions or complaints and I left the residence. I then placed Jose Montana under arrest. He was transported to the Pascua Yaqui Detention Center where he was booked for Disorderly Conduct/Domestic Violence, Injury to Public Property/Domestic Violence, and Contributing to the Delinquency of a Minor/Domestic Violence. I also made contact and notified Pascua Yaqui Victim Services and CPS of the events.

NFI

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

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

OFF. F. ROMANO #31100
Signature of Officer

Executed On: 9/10/21
Date

10 SEP 2021 04:11:19

**Attachment E: *PYT v. Montana*, CR-21-239, Order:
Initial Appearance**

1 with the probable cause statement, the Court found probable cause exists to believe that the
2 Defendant may have committed the other offenses charged in the complaint (Counts 1, 2, and 4).

3
4 The Court requested motions from the parties on the conditions of release. Pretrial
5 Services recommended a bond due to the Defendant's failures to appear. Ms. Mace also
6 recommended that the Defendant be released on a suspended bond and to report to Pretrial
7 Services within 24 hours of his release. Ms. Mace also recommended that the Defendant
8 consume no alcohol or drugs and be subject to random testing. Pretrial also recommended a no
9 Harm or Harass regarding the alleged victims, Concepcion Molina (DOB: 10-02-79) and minor
10 child, A.M. Lastly, Pretrial requested that the Defendant complete a Centered Spirit Program
11 ("CSP") evaluation. The Tribe stated that they largely echo the recommendations of Pretrial
12 Services, and added that she spoke with the victim. Though the victim requested a No Harm or
13 Harass, the Tribe feels it is better to have a no contact for the safety of the community. The
14 Tribe also stated that victim informed that she does not want the Defendant to return to the home
15 at this time. The Tribe recommended a cash or suspended bond and a substance abuse
16 evaluation.
17
18

19 The Defense concurred with Pretrial Service's recommendations.

20
21 The Court imposed the following release conditions:

- 22 1. \$50.00 suspended bond;
- 23 2. Report to Pretrial Services by the end of the day on Monday, September 13, 2021;
- 24 3. **NO HARM OR HARSSMENT OF ALLEGED VICTIMS, CONCEPCION MOLINA AND MINOR CHILD A.M. OR THE RESIDENCE LOCATED AT 7651 S. CAMINO BENEM, TUCSON, ARIZONA;**
- 25 4. **DEFENDANT SHALL ONLY RETURN TO THE HOME TO RETRIEVE NECESSARY BELONGINGS WITH THE ESCORT OF LAW ENFORCEMENT (DATE AND TIME WILL DEPEND UPON THE AVAILABILITY OF LAW ENFORCEMENT'S SCHEDULE);**
- 26 5. No alcohol/drugs subject to random testing by Law Enforcement or Pretrial
27 Services;
- 28 6. Complete a substance abuse evaluation through the CSP;

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- 7. Obey all laws and follow the orders of the Court in this case;
- 8. Appear for all hearings scheduled.

IT IS ORDERED that an Arraignment is set in this matter on Monday, September 20, 2021 at 1:30 p.m.

IT IS ORDERED that the Defendant, Jose Montana, shall appear at all future hearings.
THIS IS THE ONLY NOTICE OF HEARING YOU SHALL RECEIVE.

SO ORDERED ON THE 10TH OF SEPTEMBER, 2021 WITH A WRITTEN ORDER ISSUED ON SEPTEMBER 20, 2021.

Vernita A. Danwell
 Judge, Pascua Yaqui Tribal Court



Cc:

Date: 09.20.21

Tribe / Defendant/Counsel / Pre-trial/Probation / Detention / Victim Advocate

Clerk: *[Signature]*

**Attachment F: *PYT v. Montana*, CR-21-239, Order:
Arraignment**

1 spoke with alleged victim, Concepcion Molina, who conveyed to her that she wants the
2 Defendant to return home. The Tribe objected. The Tribe stated that Ms. Thoene also spoke
3 with Ms. Molina, and Ms. Molina relayed the same to her, that she wishes for the Defendant to
4 return to the home. However, the Tribe asked the Court to be cautious for the safety of the
5 victim. The Court held an in camera interview with the victim, and found good cause to modify
6 the release conditions. The Court also informed the victim that if at any time, she feels unsafe,
7 she may reach out to the Tribe to inform them of her wishes.
8


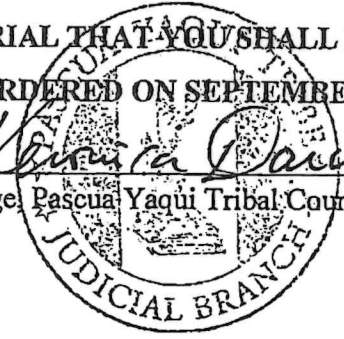
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10 **IT IS ORDERED** that a Bench Trial is set in this matter on **Monday, December 6, 2021**
11 **at 2:00 p.m.**

12 **IT IS ORDERED** that the Defendant, Jose Montana, shall appear at all future hearings.

13 **IT IS ORDERED** that the Defendant's release conditions are modified so that he may
14 return home. All other release conditions are affirmed.

15 **THIS IS THE ONLY NOTICE OF THE TRIAL THAT YOU SHALL RECEIVE.**

16 **SO ORDERED ON SEPTEMBER 20, 2021.**

17 
18 Judge, Pascua Yaqui Tribal Court
19 

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25 Cc:

26 Date: 09.21.20

27 Tribe Defendant/Counsel Pre-trial/Probation Detention Victim Advocate
28

Clerk: 

21 OCT -4 PM 2:11

DOCKET NO. 21-008

CLERK KK

1 PASCUA YAQUI PUBLIC DEFENDER
4725 W. Calle Tetakusim, Bldg. B
2 Tucson, AZ 85757
(520) 883-5013
3 Glaucia B. Brannock
PYT Bar No.: 10348
4 DC Bar No.: 888314451

5 THE PASCUA YAQUI TRIBAL COURT

6 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

Case No.: CR-21-239

8 PASCUA YAQUI TRIBE,)

9 Plaintiff,)

10 vs.)

11 MONTANA, JOSE,)

12 Defendant.)

OBJECTION TO NOTICE OF APPEAL

13 Defendant, Jose Montana, through undersigned counsel, hereby respectfully objects to the
14 Tribe's Notice of Appeal in this matter and urges the Court of Appeals to deny jurisdiction of the
15 Tribe's petition for Special Action.

16 On September 9, 2021, defense counsel moved the Trial Court to dismiss count 3 of the
17 criminal complaint due to the lack of probable cause. The Trial Court granted defense counsel's
18 motion on September 20, 2021. In its order, the Trial Court dismissed count 3 without prejudice to refiling
19 due to the lack of probable cause in the affidavit for count 3. The Tribe was granted leave to refile the
20 criminal complaint for that count. After this, the Tribe moved the Trial Court to dismiss the entire
21 case against Mr. Montana without prejudice to refile, on the ground of prosecutorial discretion.

22 In its special action petition, the Tribe argues that the Trial Court "abused its discretion in
23 finding lack of probable cause for Count Three of the complaint."

24 The Pascua Yaqui Tribe Court of Appeals has ruled that Special Action by the prosecutor is
25 permitted. *PYT v. Stoof, et. Rel. Lopez*, CA-18-001. However, the Court of Appeals has limited such
appeals for when the "Tribe has no plain, adequate, or speedy remedy available by appeal because
3 PYTC § 2-3-90(D) prohibits governmental appeals after acquittal, and thus an interlocutory appeal

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

PYT ODA *21/09/24 PM02:04

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.

Jose J. Montana,

Appellee

CA- 21-002

TRIBAL COURT CASE NO: CR-21-239

Notice of Appeal (Oral Argument Requested)

Notice is hereby given that the Tribe appeals to the Appellate Court of the Pascua Yaqui Tribe from the judgment entered orally in this action by the Pascua Yaqui Tribal Court on September 20, 2021, and by written order of Judge Veronica Darnell issued on September 21, 2021. *See* Attachment A, *PYT v. Montana*, CR-21-239, Copy of Written Arraignment Order. The reason for said appeal is as follows:

The Trial Court abused its discretion in finding a lack of probable cause for Count Three of the complaint based upon the fact that that the charging document listed a range of dates for the offense. *Id.*; *see also* Attachment B, *PYT v. Montana*, CR-21-239, Copy of Complaint and Affidavit. The ruling was issued in violation of established Pascua Yaqui Tribal Appellate Court precedent, and which contravenes existing Federal and Arizona law upon which the Pascua Yaqui Court of Appeals has relied.

The Tribe further notes that it has moved that the remaining counts listed in the Complaint — specifically, Counts One, Two, and Four — be dismissed for the purposes of appeal and out of a desire to preserve judicial economy and avoid witnesses having to testify multiple times in what

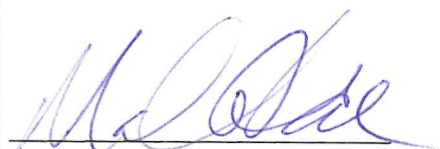
OFFICE OF THE PROSECUTOR
PASCUA YAQUI TRIBE
7777 S. CMO. HUIVISIM
TUCSON, ARIZONA 85757
(520) 879-6251

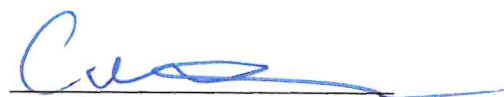
1 would amount to piecemeal litigation.¹ See Attachment C, *PYT v. Montana*, CR-21-239, Copy of
2 Tribe's Motion to Dismiss for Purposes of Appeal. To be clear, the Tribe is only appealing the
3 Court's decision regarding the dismissal of Count Three of the Complaint.

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

8
9 **RESPECTFULLY** submitted this 24th day of September, 2021.

10 PASCUA YAQUI TRIBE
11 OFFICE OF THE PROSECUTOR

12 
13
14
15
16 Malena Acosta
17 CHIEF PROSECUTOR
18 Malena.Acosta@pascuayaqui-nsn.gov

19 
20
COLEEN THOENE
DEPUTY PROSECUTOR
Coleen.Thoene@pascuayaqui-nsn.gov

¹ The concerns over piecemeal litigation in this particular case include, but were not limited to, the fact that a minor aged witness would be required to testify twice if the remaining counts of the complaint were not dismissed for the purposes of appeal. Additionally, it would result in multiple trial dates for a court system that is already burdened with numerous cases that were delayed by and/or filed during the COVID-19 pandemic. As of the time of this Notice's filing, the trial court had not yet ruled upon the Motion to Dismiss.

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

1 **ORIGINAL** of the forgoing filed
2 this 24th day of September, 2021.

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

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

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

10
11 Hon. Veronica Darnell,
12 Judge, Pascua Yaqui Tribal Court

13
14 Clerk of the Court (x1)
15 Pascua Yaqui Tribal Court

16
17 Clerk of the Court (x4)
18 Pascua Yaqui Tribal Court of Appeals

19 By: _____
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Attachment A, PYT v. Montana, CR-21-239, Order [from]
Arrestment, (Sept. 21, 2021)

1 spoke with alleged victim, Concepcion Molina, who conveyed to her that she wants the
2 Defendant to return home. The Tribe objected. The Tribe stated that Ms. Thoene also spoke
3 with Ms. Molina, and Ms. Molina relayed the same to her, that she wishes for the Defendant to
4 return to the home. However, the Tribe asked the Court to be cautious for the safety of the
5 victim. The Court held an in camera interview with the victim, and found good cause to modify
6 the release conditions. The Court also informed the victim that if at any time, she feels unsafe,
7 she may reach out to the Tribe to inform them of her wishes.
8


9
10 **IT IS ORDERED** that a Bench Trial is set in this matter on Monday, December 6, 2021
11 at 2:00 p.m.

12 **IT IS ORDERED** that the Defendant, Jose Montana, shall appear at all future hearings.

13 **IT IS ORDERED** that the Defendant's release conditions are modified so that he may
14 return home. All other release conditions are affirmed.

15 **THIS IS THE ONLY NOTICE OF THE TRIAL THAT YOU SHALL RECEIVE.**

16 **SO ORDERED ON SEPTEMBER 20, 2021.**

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18 Judge, Pascua Yaqui Tribal Court
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Cc:

Date: 09.21.20

Tribe Defendant/Counsel Pre-trial/Probation Detention Victim Advocate

Clerk: D. Harau

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Attachment B, PYT v. Montana, CR-21-239, Complaint and Affidavit

21 SEP 10 AM 11:12

BOOKET NO. CR-21-239
CLERK MM

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

Pascua Yaqui Tribe,
Plaintiff,

vs.

MONTANA, JOSE JUAN

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 § 1-300(A) ~ Disorderly Conduct / 3-10(A) ~ Domestic Violence

On or about September 09, 2021, at approximately 8:01 p.m., at or near 7651 S. Camino Benem, Tucson AZ 85757, Defendant, with the intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, engaged in fighting, violent or seriously disruptive behavior, to wit: *Defendant yelled and/or hit items in the presence of Concepcion Molina, a person with whom shared a romantic relationship with and/or with whom he had a child in common.*

COUNT 2: 4 PYTC § 1-300(A) ~ Disorderly Conduct / 3-10(B) ~ Family Violence

On or about September 09, 2021, at approximately 8:01 p.m., at or near 7651 S. Camino Benem, Tucson AZ 85757, Defendant, with the intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, engaged in fighting, violent or seriously disruptive behavior, to wit: *Defendant yelled and/or hit items in the presence of A.M., his child.*

COUNT 3: 4 PYTC § 1-400 ~ Malicious Mischief / 3-10(A) ~ Domestic Violence

On or about August 01, 2021 through September 9, 2021, at or near 7651 S. Camino Benem, Tucson AZ 85757, Defendant maliciously disturbed, injured, or destroyed any livestock or other domestic animal or other property, to wit: *Defendant caused damage to a wall of a house owned and/or occupied by Concepcion Molina, a person with whom shared a romantic relationship with and/or with whom he had a child in common.*

COUNT 4: 4 PYTC § 3-90 ~ Endangering Welfare of Minor / 3-10(B) ~ Family Violence

On or about September 09, 2021 at approximately 8:01 p.m., at or near 7651 S. Camino Benem, Tucson AZ 85757, knowingly committed a crime of domestic or family violence in the presence of an unmarried person under eighteen years of age, to wit: *Defendant committed any act of domestic violence in the presence of his minor child, A.M.*

1
2 And such violations, upon conviction, are punishable under the Pascua Yaqui Tribal
3 Codes. The undersigned hereby swears or affirms that this complaint is based upon
4 information and belief, and the attached Affidavit and Verification, or signed statement.

5
6
7 DATED this 10th day of September, 2021.

8
9
10 
11 Complainant/Attorney

12 Pursuant to Article I, § 1(g) of the Pascua Yaqui Constitution, 4 PYTC § 4-20, and 25 U.S.C. §
13 1302(a)(b), If found guilty at sentencing or plea agreement, the Pascua Yaqui Tribe will seek
14 punishment that includes imprisonment.

15 DEFENDANT: Jose Juan Montana

16 ADDRESS: 7651 S. Camino Benem, Tucson, AZ 85757

17 DOB: 11/16/1980 SSN: 600-14-6694 ORIGIN: Pascua Yaqui Tribe #2694U07536

18 SEX: Male HT: 5'9" WT: 200 EYES: Brown HAIR: Brown

19 Note: Accused persons may obtain disclosure information about their case ten days after arraignment by contacting
20 the Prosecutor's Office at 7777 S. Camino Huivisim, Bldg A, 2nd Floor, Tucson AZ 85757. [3 PYT R.Crim.P. Rule
21 38]

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

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME
21 SEP 10 AM 11:12
DOCKET NO. CR-21-239
CLERK lml

Plaintiff: The Pascua Yaqui Tribe	
vs.	
Defendant: Jose Juan Montana	
	Court Use Only
	Case Number P21090937
PROBABLE CAUSE STATEMENT	

AFFIRMATION

1. I Officer Frank Romero #3L60 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 Mark Machado.

2. Suspected Party (Defendant)

Name: Jose Juan Montana
Driver's license number: D00131913
Tribal Enrollment number: 2694U07536
Date of Birth: 11/16/1980

Jose Juan Montana

- is an enrolled member of the Pascua Yaqui Tribe.
- is an Indian subject to the jurisdiction of the Pascua Yaqui Tribe.
- is a non-Indian subject to the Jurisdiction of the Pascua Yaqui Tribe under the V.A.W.A of 1994.

3. The defendant was arrested on 09/09/2021 at 20:15 hours.
4. I have probable cause to believe that the defendant committed the following offense(s) at or near 7651 S. Camino Benem which is within the external boundaries of the Pascua Yaqui Indian Reservation.

PYTC Disorderly Conduct/Domestic Violence 4-1-300/3.10A

PYTC Injury to public property/Domestic Violence 4-1-630/3.10A

PYTC Contributing to the Delinquency of a minor/Family Violence 4-1-80/3.10B

PYTC

PYTC

5. Statement of Probable Cause:

Case Officer: Machado
Additional Officers: Lisacki, Baker, Adame
Arrestee Name: Jose Montana
Miranda Time: NA
Miranda Officer: NA
Victim Name: Concepcion Molina, Augustine Montana
Additional suspects: NA
Evidence Items/ Officer: MM1 CD with pic

On 09/09/2021 at approximately 20:01 hours, I was dispatched to the address of 7651 S. Camino Benem. The reporting party Concepcion Molina stated that she needed officers asap because Jay is angry and is hitting things and yelling. Concepcion did not want anyone to know that she was calling police.

I arrived at the front door and knocked. The front door opened and I recognized Jose Montana (11/16/1980-Tribal Enrolled). I asked Jose to step out so that I could speak with him. I advised him that neighbors had called because they heard yelling. Jose began arguing and yelling with myself and other officers. I advised Jose that he would be detained. I placed him in a set of handcuffs behind his back that I double-locked after checking for tightness and fit. I asked Jose if I could search his person and he stated that I could. I did not find any contraband on him and I requested that he sit in one of our patrol vehicles for the moment. I noted that Jose was unsteady on his feet. His eyes were red, watery, and bloodshot. I could also smell the overwhelming odor of intoxicating liquors on his breath as he yelled.

I then made contact with the homeowner Concepcion Molina (10/02/1979-Tribal Enrolled). Concepcion was crying. I asked her if she was hurt and if she needed medical attention. Concepcion stated that she was not physically hurt. I asked her what had happened. Concepcion said that her boyfriend "Jay" (Jose Montana) gets violent when he drinks hard liquor. Concepcion said that tonight he was watching a football game and he began yelling and screaming at her and their child for no

reason as she was cooking dinner. I asked Concepcion if she was afraid of Jose at this time and she stated that yes she was.

I then spoke with Augustine Montana (8 year old child). I could see that he was breathing hard and he still had tears streaming down his face. After Augustine calmed a bit I asked him if he was scared and he replied yes. I asked him what he was afraid of. Augustine answered he was afraid of his dad (Jose Montana). I asked Augustine why he was afraid of his dad. Augustine said he was afraid of his dad when he yells. Augustine said that his dad also made a hole in the wall. I then followed Augustine to the bathroom where he pointed to a hole in the wall. Augustine said that his dad did this when he was mad. Concepcion said that Jay (Jose Montana) had punched the wall in anger about a month ago and made the hole with his fist. I asked to speak to Concepcion in private.

Augustine was sent to his room and I spoke with Concepcion in the kitchen area. I asked Concepcion if this happens often where Jay (Jose Montana) becomes violent with her. Concepcion replied that Jay (Jose Montana) only gets violent with her when he drinks hard liquor but it does not happen often. I asked her how many times does this happen. Concepcion answered that it only happens about twice per month. I stated to Concepcion that that seems extremely excessive and dangerous for her and the child. I also pointed out that her son (Augustine) was crying and afraid and Jay's (Jose Montana) decisions are now affecting him.

I asked Concepcion how she is involved with Jay (Jose Montana). She answered that he is her boyfriend and the father of her child (Augustine Montana) and lives with her at her home and has for the past 9 years.

I asked Concepcion if she wanted to speak with victim services and if she required assistance in seeking an order of protection. Concepcion answered that she did not want an order of protection against Jay (Jose Montana).

I provided Concepcion with my card which included the police report number. I ensured I had her current phone number (520) 278-6290 and advised her that Victim services would contact her. I ensured that she had no further questions or complaints and I left the residence. I then placed Jose Montana under arrest. He was transported to the Pascua Yaqui Detention Center where he was booked for Disorderly Conduct/Domestic Violence, Injury to Public Property/Domestic Violence, and Contributing to the Delinquency of a Minor/Domestic Violence. I also made contact and notified Pascua Yaqui Victim Services and CPS of the events.

NFI

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

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

OFF. F. ROMANO #3160
Signature of Officer

Executed On: 9/10/21
Date

10 SEP 2021 AM11:19

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**Attachment C, PYT v. Montana, CR-21-239, Copy of Tribe's
Motion to Dismiss for the Purposes of Appeal**

1 PASCUA YAQUI TRIBE
2 Office of the Prosecutor
3 7777 S. Cmo. Huivisim
4 Bldg. A, 2nd floor
5 Tucson, AZ 85757

6 **IN THE PASCUA YAQUI TRIBAL COURT**

7 **IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA**

8 **PASCUA YAQUI TRIBE,**
9 **Plaintiff,**

Case No: CR-21-239

10 **vs.**

Motion to Dismiss without Prejudice for the
Purposes of Appeal

11 Jose Juan Montana

12
13 Defendant

14
15 Comes now the Pascua Yaqui Tribe, by and through counsel undersigned, to respectfully
16 request that Counts One, Two, and Four of this matter be dismissed *without* prejudice for the
17 purposes of appeal. The Tribe further requests that the bench trial set for December 6, 2021, be
18 vacated. A Notice of Appeal has been filed with the Pascua Yaqui Court of Appeals this date,
19 with copies routed to the Defendant and this Court. Counsel for the Defendant has been contacted
20 regarding this motion and has indicated via email that she has no objection. The listed victims
21 have also been contacted and have indicated concurrence with the motion.

22 **Respectfully submitted this 24th day of September, 2021,**

23
24 

25 _____
26 Coleen Thoene
27 Deputy Prosecutor
28 Pascua Yaqui Office of the Prosecutor
Coleen.Thoene@pascuayaqui-nsn.gov

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**ORIGINAL of the forgoing filed/e-filed
this 24th day of September, 2021 with:**

**Clerk of the Court
Pascua Yaqui Tribal Court**

**Copy of the foregoing
delivered/mailed/emailed provided to:**

Glaucia Brannock, Esq.
Pascua Yaqui Office of the Public Defender
Attorney for the Defendant