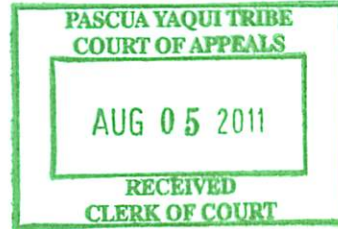


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5
6 IN THE PASCUA YAQUI COURT OF APPEALS
7 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

8 PASCUA YAQUI TRIBE,

9 Appellee,

10 vs.

11 VALENZUELA, Stella, et al,

12 Appellant.
13

) Case No(s). CA-11-004, CA-11-005, CA-11-006

) Tribal Court No(s). CR-11-123, CR-11-108,
CR-11-143

) **NOTICE OF FILING OF TRANSCRIPT**

14 Appellants Stella Valenzuela, et al, through counsel and pursuant to section 110(F), Pascua
15 Yaqui Rules of Appellate Procedure, respectfully files the transcript of all proceedings before the lower
16 court.
17

18 DATED this 5th day of August, 2011.

19 PASCUA YAQUI PUBLIC DEFENDER

20

21 Patricia Leon-Enriquez
22 Assistant Public Defender

23 ORIGINAL delivered this date to
24 PYT Court of Appeals:

25 COPY of the foregoing hand-delivered this date
26 PY Prosecutor's In-Box by:
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IN THE PASQUA YAQUI TRIBAL COURT
COUNTY OF PIMA, STATE OF ARIZONA

PASQUA YAQUI TRIBE,) NO. CR-11-123
)
 Plaintiff,)
)
 vs.)
)
 STELLA VALENZUELA,)
)
 Defendant.) Tucson, Arizona
)
 _____)

BEFORE: THE HONORABLE MELVIN STOOF, JUDGE OF
THE PASQUA YAQUI TRIBAL COURT

APPEARANCES: REBECCA FIGUEROA, ESQ.
GUADALUPE GUTIERREZ, ESQ.
appearing for Plaintiff

PATRICIA LEON-ENRIQUEZ, ESQ.
appearing for Defendant

RE: HEARING

Christine McGarvey
Legal Transcription Services Plus, Inc.

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COURT CLERK: (Inaudible- background noise),
everybody?

THE COURT: This is CR-11-123, Pasqua Yaqui Tribe
versus Stella Valenzuela. (Inaudible- background noise.)

THE STATE: Yes, Your Honor.

THE COURT: (Inaudible- background noise.)

THE STATE: Thank you. Uhm, Your Honor, on May 5th,
uh, defense counsel filed a motion to dismiss for, (inaudible-
background), lack of probable cause, (inaudible- background).
Uhm, I don't know at this point whether the Court, (inaudible-
background), in the motions, or if, uhm, the Court will be
proceeding based on what's in the briefs.

THE COURT: (Inaudible- background noise.)

THE STATE: Your Honor, at this point, the,
(inaudible- background), is, uhm, asking for, was hoping to get an
opening, to have the defense give an opening, (inaudible-
background). The motion named probable cause, (inaudible-
background), for dismissal, but didn't really develop that idea,

1 and the Tribe was, (inaudible- background), probable cause hearing
2 here to, to sustain the liability of the complaint. As well as in
3 terms of vagueness, there are some constitutional issues that
4 would have to be discussed with, uhm, of course the Court having
5 appropriate questions.
6

7 THE DEFENSE: Your Honor, with regards to the
8 probable cause, I believe we stated in the motion, (inaudible-
9 background), on the fact that, uh, if the statute is vague then
10 there, (inaudible- background), no probable cause. It's a very
11 simple, (inaudible- background), issue of the case was the
12 vagueness with the law.
13

14 THE STATE: Your Honor, the, the Tribe is ready to
15 proceed with the argument regarding the unconstitutionality issue,
16 or the constitutional issue. Uhm, however, procedurally if,
17 (inaudible- background), was all ready found with the original
18 complaint, then, uhm, the issue of PC sort does need to be
19 resolved in order to then determine whether we even have a case,
20 or whether this is a mood issue under, (inaudible- background),
21 vagueness.
22

23 THE COURT: (Inaudible- background noise.)
24

25 THE STATE: (Inaudible- background noise), that's
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1 basically it, (inaudible- background), issue to the vagueness.
2 Uhm, I believe that we did make all the arguments in the briefs as
3 well as the, uh, as the Tribe had the opportunity to respond to
4 respond any of those briefs also. With regards to the probable
5 cause, (inaudible- background), uh, that issue can, (inaudible-
6 background), another stage.
7

8 THE COURT: (Inaudible- background noise.)

9 THE STATE: The Tribe, (inaudible- background),
10 argument now. I don't know if, if, --

11 THE DEFENSE: (Inaudible- talking at the same
12 time), --
13

14 THE STATE: -- (inaudible- talking at the same
15 time)... Would you like to go first since it was your motion?
16

17 THE DEFENSE: Sure.

18 THE STATE: All right.

19 THE DEFENSE: Your Honor, as, uhm, as we stated in the
20 briefs, uh, there were a few issues, uhm, some of these,
21 (inaudible- background), that were unconstitutionally vague,
22 (inaudible- background). Uh, the other issue was no probable
23 cause, and, uh, the unconstitutionally vague provisions would be,
24 uh, a due process violation, (inaudible- background). Uhm, under
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1 | due process, before an individual is, (inaudible- background),
2 | violation of a criminal statute, the statute itself must,
3 | (inaudible- background), of the precise conduct, (inaudible-
4 | background), rights act, and the other being the United States
5 | Constitution. (Inaudible- background noise), there, there are,
6 | (inaudible- background), one of those is fair warning, and the
7 | other is if the statute, (inaudible- background), arbitrary or
8 | discriminatory enforcement. Under the fair warning, there must be
9 | sufficient, (inaudible- background), in the statute that it gives
10 | a common person, uh, the ability to understand what, (inaudible-
11 | background). Uh, under the truancy provision, that doesn't,
12 | (inaudible- background), because one, (inaudible- background),
13 | opted to keep the provision in the civil code, uhm, and repealed
14 | the provisions on the, the criminal code. Now, (inaudible-
15 | background), have the option of keeping, (inaudible- background),
16 | criminal code, but the, (inaudible- background), opted to keep
17 | the, the civil code and repeal the, (inaudible- background),
18 | criminal code. Uhm, So, under that a person would be more likely
19 | to think that this was a civil infraction versus a criminal infra-
20 | -, uh, offence. Now, the word offence, uh, as in indicated in
21 | the, in the motions, uh, that does not imply criminality as it is
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1 used with the, (inaudible- background). Uhm, and I believe we did
2 examples of that, and, (inaudible- background), in other sections,
3 and the other sections are, (inaudible- background), regulatory
4 code which one of the codes that the Tribe had brought up. Under,
5 (inaudible- background), 6130-F, it says a person, uhm, any person
6 who, (inaudible- background), fifteen days after getting
7 notification, (inaudible- background), control officer to obtain
8 registration, (inaudible- background), dog tag, replacing a dog
9 tag upon, (inaudible- background), is guilty of a civil offence.
10 In this case they're using an offence, uhm, as, uh, a civil
11 liability. Uhm, now, in the areas where the, where the Tribe
12 wanted to insure that a person, (inaudible- background), clearly
13 written, criminal offence was a civil offence, but the word
14 offence is used interchangeably. Now, in the, (inaudible-
15 background), code, there is no, (inaudible- background), it
16 doesn't say, (inaudible- background), criminal offence, ,
17 (inaudible- background), civil code. Uhm, with regards to the
18 second policy or the, (inaudible- background), due process of, uh,
19 the vagueness statute, is that, (inaudible- background),
20 arbitrarily discriminative, (inaudible- background), enforcement.
21 (Inaudible- background noise), a clear definition, (inaudible-
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1 background), prohibited activity, (inaudible- background), not the
2 Courts, (inaudible- background), legislature, (inaudible-
3 background), what the, what the activity is otherwise prohibited.
4
5 In this case a truancy provision was not clear, one, because it
6 would cause the Court to go beyond the knowledge of that statute
7 as you can see based on the arguments, uh, the, the Court has to,
8 (inaudible- background), statutes in order to come up with the,
9 (inaudible- background), with the, with the truancy code being a
10 criminal one, as argued by the Tribe. The other problem with the
11 truancy code, uhm, is that it allows for arbitrary enforcement
12 because it doesn't state the type or number of, of absences it
13 requires for the violation. So, in fact, a, a person that doesn't
14 send a child to school one couldn't really be, be found liable
15 under the, under the statute, (inaudible- background). It doesn't
16 say how many times, uh, (inaudible- background), child is absent
17 one time versus a child that's absent ninety percent of the time,
18 it doesn't state, (inaudible- background), there's no provision
19 for that. Uhm, also, as we stated in the motion, (inaudible-
20 background), states that all, (inaudible- background), the
21 constitutionality, (inaudible- background), religious statute,
22 (inaudible- background), favor of the accused. Uhm, now, uh, I
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1 know that the Tribe made an issue with the fact that, uh,
2 (inaudible- background), under the, the, there was four, under the
3 penalty, (inaudible- background), uhm, Title Four, which is,
4 (inaudible- background), after the other, (inaudible- background),
5 appeared. Uhm, and, and that is the only section that,
6 (inaudible- background), uh, (inaudible- background), section of
7 the code, uhm, and under that if the, if it was an error, then all
8 that means that, is that, (inaudible- background), criminal
9 statute then there would have to have been additional finding of
10 this, (inaudible- background), charged as, uh, a criminal charge.
11 Uhm, now, in the, in the Tribe's response, uhm, (inaudible-
12 background), the provision, the provision was criminal rather than
13 civil, and it, (inaudible- background), right to, (inaudible-
14 background), both of which, (inaudible- background), repealed
15 statutes, (inaudible- background), purpose, (inaudible-
16 background), Tribal code. Uhm, also, that the use of the word
17 offence under Title Four, and the definition in Black's
18 Dictionary, uhm, provided, provides that a person's, uh,
19 (inaudible- background), uhm, is also, as we stated, (inaudible-
20 background), because, (inaudible- background), which is a criminal
21 code, not Title Five under which this, this, uh, provision is
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1 found. Also that the Tribe fails to state why the word offence is
2 used throughout the city, (inaudible- background), you're not
3 implying any criminality to the statute. And finally, Your Honor,
4 with regards to notice, uhm, the notice that we spoke of was not,
5 (inaudible- background), statute, (inaudible- background), become
6 law, but the notice that the statute itself gives to a person to
7 let them know that what the, (inaudible- background), violation
8 and that they can be prosecuted criminally. Uhm, (inaudible-
9 background), ask that the Court find that the statute be found
10 constitutionally vague, and, uh, that there was no probable cause.
11
12

13 Thank you.

14
15 THE COURT: (Inaudible) --

16 THE STATE: Thank you, Your Honor. (Inaudible-
17 background noise), several notes, and it's harder for me write
18 them standing up. Uhm, thank you. Uhm, Your Honor, we've got to
19 take this slowly through each, uh, out of respect for each of the
20 arguments that's being presented. In terms of the first,
21 (inaudible- background), argument, of, of, uhm, vagueness, uhm,
22 Mrs. Gutierrez-Leon refers their warning and that the statute
23 presents itself as arbitrary and discriminatory. Under fair
24 warning, the idea that this, uhm, particular co--, piece of code,
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1 | this particular offence is defined under a civil code rather than
2 | a criminal code is not unusual for this kind of situation when
3 | you're talking about juveniles, or children who aren't under the
4 | custody and care of an adult. In fact, other jurisdictions, many
5 | State jurisdiction, if not all State jurisdictions, but most
6 | particularly Arizona and California, uhm, have educational codes
7 | in which they specifically address the issue of truancy, and then
8 | you have specific, uhm, language indicating that if a parent or
9 | guardian fails to send a child to school it is a criminal offence.
10 | It's either defined within a misdemeanor, (inaudible- background),
11 | or general criminality. (Inaudible- background noise), placement
12 | of this kind of code provision under, (inaudible- background),
13 | civil code is not unusual.

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17 | THE COURT: (Inaudible- background noise.)

18 | THE STATE: Uh, my apology, Your Honor. I do not
19 | have any history here present. I only received this case this
20 | morning. Uhm, all I can say is that my apologies, I don't know if
21 | Ms. Figueroa might have more on that. Uhm, in terms of the word
22 | offence, Your Honor, uh, well, before we go there. In terms of,
23 | of this idea of fair warning, (inaudible- background), phase, uhm,
24 | 5-PYTC § 757, the failure to send a child to school is on,
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1 (inaudible- background), very clear. It's not vague at all, it's
2 very clear what this State, uh, what, uh, the Tribe has to prove
3 in what kind of offence that has been committed, that a child has
4 not been sent to school, and, uh, this child is under the care and
5 custody of an adult that is responsible for that child. Uhm, the
6 word offence as it's used in this particular section is, uhm, not
7 arbitrary in that the only definition that the Tribe, (inaudible-
8 background), of offence is under the criminal code. And
9
10 throughout that code the word is used generally just as offence,
11 there's no reputation of it having to be, have the criminal in
12 front of it. Nevertheless, in the defense's motion it
13 specifically referred to the civil code, and the provision of the
14 civil code that calls, or, (inaudible- background), or puts in the
15 word civil before any, any sort of infraction that is to be
16 civilly considered. Thus, for the purposes of this Court, and
17 it's interpretation of this particular provision, failure to send
18 a child to school, uh, the, it is fair for the word offence to be
19 interpreted as criminal. Furthermore, this Court in a very
20 recent, previous case made a finding, and in CR-11-108, uh, which
21 is in reference to a different defendant that indeed the Court,
22 (inaudible- background), as that would refer to a criminal
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1 offence. Uhm, in terms of this particular provision between
2 arbitrary or discriminatory, uhm, the, the defense proposes that
3 it, uh, this provision is arbitrary or discriminatory because it,
4 it goes, it, it goes beyond the language of the statute, that it's
5 interpretation requires the Court to go beyond the language of the
6 statute. Uhm, for the, and proposes that because one must go to
7 the repealed statutes that, (inaudible- background), having
8 interpretation that is beyond the scope, or beyond the perimeters
9 necessary to read this, uhm, provision plainly. Uhm, the, the
10 Tribe would put forth that those prior repealed provisions
11 actually have no, uh, (inaudible- background), in this fight, they
12 were repealed. Uhm, the one that matters is the one before the
13 Court, the current reading of that, that provision. Uhm, and
14 furthermore, taking the, taking this case, and the application of
15 the facts of this case, it was not applied, the application of
16 this case was not arbitrary or discriminatory. In this case we
17 have facts which, if probable cause is met, which it was prone to
18 be met initially under the affidavit that one child hasn't been in
19 school for two years. And the other child has missed thirty
20 percent of the school year. So, it's not an arbitrary or
21 discriminatory application, this, (inaudible- background), the
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1 Tribe feels that it has sufficiently matched the, uhm, the
2 factors, or the elements that are required under why, uhm, 5-PYTC
3 7570 to, uhm, uphold the finding that this provision is on its,
4 (inaudible- background), in the plain language and plain meaning
5 of it, uhm, an appropriate and not vague, uhm, provision, and that
6 the, the Tribe, (inaudible- background), probable cause and can
7 meet its probable cause requirement.
8

9
10 THE COURT: (Inaudible- background noise.)

11 THE DEFENSE: Yes, Your Honor. Uhm, just to touch on
12 some of the things were stated, uhm, by the Tribe regarding the
13 vagueness. Uhm, the Tribe indicated that it's not unusual for
14 other jurisdictions. The problem is that we're not talking about
15 other jurisdictions, what we're talking about is what the Tribe
16 intended when the, uhm, when they made the statute. Uhm, the
17 other issue is that there's nothing, there's nothing, (inaudible-
18 background), stated in the motions with regards to those other
19 jurisdictions anyways, (inaudible- background), jurisdictions.
20 Uhm, with regards to the statute being clear, basically as it was,
21 (inaudible- background), as it was in the Tribe's response, uh,
22 (inaudible- background), assertion as we showed in our,
23 (inaudible- background), motion and in our reply. Our issues that
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1 were brought up were actually supported by other areas in the
2 Tribal Code. Uhm, with regards to the word offence not being
3 arbitrary, uhm, because of the fact that we used the word civil
4 code to, to, in the motion to state that we are talking about a
5 civil code, basically that's just for clarity so that the Court
6 understands, you know, this is the case that we're talking about.
7 We're ta--, we're separating the civil code from the criminal
8 code. Uhm, in, uhm, the Tribe's, (inaudible- background),
9 arbitrary and discriminatory, and the fact that, uh, (inaudible-
10 background), issue with the fact that the Tribe uses repealed, uh,
11 codes or repealed statutes to support the, the, (inaudible-
12 background), that this is a, uhm, criminal offence, uhm, but
13 that's exactly what, (inaudible- background), point that we're
14 making, but we're talking about the statute, we're not,
15 (inaudible- background), repealed. We're not supporting our
16 argument, (inaudible- background), offence does not mean criminal
17 offence, (inaudible- background), various, (inaudible-
18 background), Tribal Code. (Inaudible- background noise), uhm, the
19 Tribe has used the repealed statute to find support for the fact,
20 for the case that this is a criminal offence. Uhm, finally, the
21 Tribe makes issue, uh, of, uh, the facts in the case, but that's
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1 not what we're talking about here, Your Honor. What we're talking
2 about is the actual, (inaudible- background), within the statute,
3 whether it gives the person notice that what they are doing is in
4 fact a, an offence. As Ms. Gutierrez indicated there's, uh,
5 (inaudible- background), percentage of days the person was absent.
6 There nothing in the code that says this is what a person, uh,
7 doesn't send a child to school, say, for fifty percent of the
8 time, or thirty percent, or another percent, there's nothing in
9 that. That basically leaves it up to, to, uh, Enforcement or,
10 uhm, the Police Department to make that determination. Thank you.

11
12
13 THE COURT: (Inaudible- background noise.) The
14 question is, uh, is it of such a nature, (inaudible- background),
15 is a criminal statute. Uh, the argument's also made, (inaudible-
16 background), the Tribe, (inaudible- background), civil,
17 (inaudible- background), civil offence. In other words,
18 (inaudible- background), criminal, (inaudible- background), and
19 then it goes on, any person who, (inaudible- background).
20 (Inaudible- background noise), and it talks about, (inaudible-
21 background), civil offence. (Inaudible- background noise), some
22 examples in which the Tribe has, (inaudible- background). So,
23 that is, basically an example of the Tribe simply, (inaudible-
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1 background), nature of it, (inaudible- background), criminal,
2 obviously not. But the fact that, uh, this is under a civil code,
3 uh, does not necessarily make it a civil offence. (Inaudible-
4 background noise), statutes, (inaudible- background), that
5 statute, (inaudible- background), criminal offence. (Inaudible-
6 background noise.) (Inaudible- background noise), and that's
7 four, five, six, (inaudible- background). Now, the defense has
8 argued, (inaudible- background), criminal, (inaudible-
9 background), civil offence. (Inaudible- background noise), or
10 excuse me, April, it was found that the statute, (inaudible-
11 background). (Inaudible- background noise), and, uh, it also,
12 (inaudible- background), ordinances, (inaudible- background).
13 (Inaudible- background noise), valid because, (inaudible-
14 background), civil code, (inaudible- background).

18 THE STATE: I just have one question with regards to
19 a comment regarding the, (inaudible- background), appeals. Uhm,
20 since I haven't been here too long with regards to, (inaudible-
21 background), appeal this issue, uhm, , (inaudible- background)?

23 THE COURT: I, I don't know if there's, (inaudible-
24 background).
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COURT CLERK: All rise.

[END OF HEARING]

[Transcriber's Certification Follows:]

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C E R T I F I C A T E

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

Transcription Completed: July 31, 2011

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CHRISTINE McGARVEY