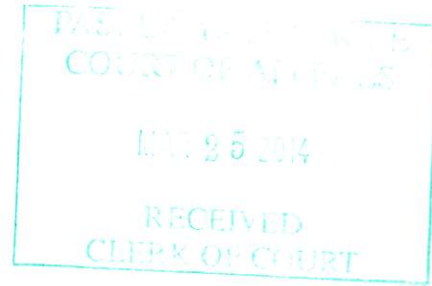


Office of the Tribal Prosecutor
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By G. Allen Osburn, and
Frederick Lomayesva
Deputy Prosecutors

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,)	App. Case No. CA-14-001
)	(CR-14-144 Below)
Plaintiff,)	
)	AMENDED
v.)	NOTICE OF APPEAL
)	(INTERLOCUTORY)
ESCAMILLA, MANUEL,)	
)	
<u>Defendant.</u>)	Assigned to J. Stoof

COMES NOW the Plaintiff and gives notice of its filing an *Interlocutory Appeal* of a tribal court order filed on March 12, 2014, pursuant to *Rules of Appellate Procedure* (3 PYTC §2-3-10 *et.seq.*) and *In Re. Pascua Yaqui Tribe*, CA-13-005 (2014).

The Plaintiff below is designated as the “Appellant” and the Defendant below is designated as the “Appellee.”

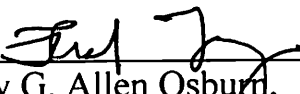
The order appealed from is the tribal court's *Order Granting Motion to Compel Disclosure* signed March 12, 2014. A copy of the order is attached to this notice and by this reference is made a part of this notice.

The Plaintiff (Appellant) designates the following parts of the order as being appealed:

1. The part of the order compelling the disclosure of the fire department report.
2. The part of the order sanctioning the tribe \$100 suspended.

This matter is set for a trial on April 07, 2014, it is respectfully requested that an accelerated briefing schedule be set.

RESPECTFULLY SUBMITTED this 25 day of March, 2014.


By G. Allen Osburn,
Deputy Prosecutor

CERTIFICATE OF SERVICE

A copy of the foregoing was delivered this 25 day of March, 2014, to:

Melissa Acosta, Esq.
Office of the Tribal Public Defender
Attorneys for the Defendant
Clerk of the Tribal Court

By: 

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

PASCUA YAQUI TRIBE,) CASE NO. CR-14-144
PLAINTIFF,)
vs.) ORDER GRANTING MOTION TO
ESCAMILLA, MANUEL,) COMPEL DISCLOSURE
DEFENDANT.)
_____)

On March 12, 2014, the defendant's counsel, Melissa Acosta, made a request for a ruling on disclosure request. G. Allen Osburn appeared for the Tribe.

The Tribe provided its disclosure to the defendant on January 23, 2014, and on January 30, 2014, the defendant requested copies of any and all reports by officers Tapia. On February 1, 2014, the Tribe filed its response:

(1) The police report(s) of Ofc. Eutemio Molina and Kevin Wells has/have been previously disclosed; upon information and belief, no other reports exists.

Tribe's Response to Disclosure Request, page 1, par. 2.

The Tribe's response is a responsive one to the defendant's request, because it does include a specific response to the specific request for officer Tapia's report, that it does not exist.

The Tribe also answered the defendant's request for 911 tapes and evidence that the Tribe intends to introduce at trial, with the response:

The requested 911/dispatch recordings do not exist.

Pat Ramirez, for the Pascua Yaqui Police department testified that the 911 recording system was down for a period from December 26, 2013 through February 20, 2014, and that the department could not retrieve any recordings for that time frame because there were none. The court finds that the Tribe's failure to produce a 911 tape was not caused by any intentional act on behalf of the police, but rather, it was due to a defect in the recording system.

As to retrieval of Fire Department records of the incident, the court finds that the Tribe is under an obligation to provide the names of the responders and any investigative report in their possession, in light of the defense counsel's comment that there were photographs showing injuries to the defendant from the alleged victim, who has been named as a defendant

1 in case no. CR-14-143, and that such reports may provide exculpatory information. The Tribe
2 objected that they have no control over the fire department in its investigative role in criminal
3 matters. Under Pascua Yaqui law, the Tribe's prosecutor, as an officer of the court, is subject
4 to the American Bar Association (ABA) standards of conduct:

5 **Dignity & ethics. Any attorney practicing in the Pascua Yaqui Courts shall**
6 **conform to the usual standards and conduct of the American Bar Association in**
7 **the performance of their duties. 3 PYTC § 1-4-40. (emphasis added).**

8 Although the "standards" of the ABA are rules of practice that have been developed to assist
9 practitioners who specialize in certain areas of practice, the Court has interpreted the above
10 provision to include a lawyer's duty to follow both the ABA Model Rules of **Professional**
11 **Conduct.** (emphasis added), and the "standards," also formerly, in prior ABA drafts, referred
12 to as "guidelines." The American Bar Association, Criminal Justice Section Standards,
13 **Prosecution Function**, Standard 3-1.1, the Function of the Standards, provides in pertinent
14 part, as follows:

15 **These standards are intended to be used as a guide to professional conduct and**
16 **performance.** (emphasis added).

17 The ABA Model Rules of Professional Conduct provides:

18 **A lawyer shall act with reasonable diligence and promptness** in representing a
19 client. Rule 1.3 Diligence.

20 As to a prosecutor's duties, the ABA provides for standards of practice, including a rule for
21 Prompt Disposition of Criminal Charges:

22 (a) A prosecutor should avoid unnecessary delay in the disposition of cases.

23 **A prosecutor should not fail to act with reasonable diligence and promptness**
24 **in prosecuting an accused.**

25 (b) A prosecutor should not intentionally use procedural devices for delay for which
26 there is no legitimate basis.

27 (c) The prosecution function should be so organized and supported with staff and
28 facilities to enable it to dispose of all criminal charges promptly. The prosecutor
should be punctual in attendance in court and in the submission of all motions,
briefs, and other papers. The prosecutor should emphasize to all witness the
importance of punctuality in court.

(d) A prosecutor should not intentionally misrepresent facts or otherwise mislead the
court in order to obtain a continuance.

ABA Standard 3-2.9 Prompt Disposition of Criminal Charges, ABA Criminal Justice Section.

1 The ABA Standards for Criminal Justice call generally for prosecutorial disclosures of any
2 evidence tending to exculpate or mitigate. See ABA Standards for Criminal Justice,
3 Prosecution Function and Defense Function, Sec. 3-3.11(a) (3rd Ed. 1993) (“A prosecutor
4 should not intentionally fail to make timely disclosure to the defense, at the earliest feasible
5 opportunity, of the existence of all evidence or information which tends to negate the guilt of
6 the accused or mitigate the offense charged or which would tend to reduce the punishment of
7 the accused.”); ABA Model Rules of Conduct 3.8(d) (1984) (“The prosecutor in a criminal
8 case shall . . . make timely disclosure to the defense of all evidence or information known to
9 the prosecutor that tends to negate the guilt of the accused or mitigates the offense.”). A
10 recent formal ABA opinion defines a Prosecutor’s Duty to Disclose Evidence and Information
11 Favorable to the Defense. American Bar Association Formal Opinion 09-454, July 8, 2009.
12 The ABA formal opinion notes, that under Model Rule of Conduct Rule 3.8(d) above, “the
13 ethical duty”:

14 . . . is separate from disclosure obligations imposed under the Constitution, statutes,
15 procedural rules, court rules, or court orders. Rule 8(d) requires a prosecutor who
16 knows of evidence and information favorable to the defense to disclose it as soon as
17 reasonably practicable so that the defense can make a meaningful use of it in making
18 such decisions as to whether to plead guilty and how to conduct its investigation.
19 . . . [y]et despite the importance of prosecutors fully understanding the extent of the
20 separate obligations imposed by Rule 3.8(d), few judicial opinions or state or local
21 ethics opinions, provide guidance in interpreting the various analogs to the rule. See
22 Az. State Bar, Comm. On Rules of Prof’l Conduct, Op. 2001-03 (2001); Arizona State
23 Bar Comm. On Rules of Prof’l Conduct, Op. 94-07 (1994).

24 Id., at p. 1.

25 The ABA opinion states the scope of the pretrial disclosure obligation: a disclosure obligation
26 under Rule 8(d) is more extensive than the constitutional obligation of disclosure. Id., as p. 2.
27 The ABA has interpreted the rule above to require “prosecutors to disclose favorable evidence
28 so that the defense can decide on its utility.” The ABA opinion continues to define the role of
public prosecutors:

. . . lawyers who serve as public prosecutors have special obligations as representatives
“not of an ordinary party to a controversy, but of a sovereign whose obligation to
govern impartiality is as compelling as its obligation to govern at all; and whose
interests, therefore, in a criminal prosecution is not that it shall win a case, but that

1 justice shall be done.” Citing affirmatively to *Berger v. U.S.* 295 U.S. 78, 88 (1935)
2 (role of U.S. Attorney).
3 Id., at 2-3.

4 The opinion continues with a prosecutor’s ethical duty to disclose:

5 Similarly, Comment [1] to Model Rule 3.8 states that:

6 “A prosecutor has the responsibility of a minister of justice and not simply that
7 of an advocate. This responsibility carries with it specific obligations to see if
8 the defendant is accorded procedural justice, that guilt is decided upon the
9 basis of sufficient evidence, and that special precautions are taken to prevent
10 and to rectify the conviction of innocent persons.”

11 Id, at p. 3.

12 The prosecutor acts on behalf of the Tribe in all criminal matters, and can obtain
13 access to documents related to criminal defendants, and because the fire department records,
14 including any possible photographs, in addition to the police photographs provided to the
15 defendant today, may have been part of the basis of the officer’s probable cause statement,
16 and the reports may contain information that is exculpatory, it is improper for the prosecutor
17 to fail to disclose such possibly exculpatory evidence. An accused has a “constitutionally
18 guaranteed access to evidence.” *California v. Trombetta*, 467 U.S. 479, 485 (1984); U.S.
19 Const., Amends V,VI, XIV; Ariz. Const., Art 2, §§4 & 24. The purpose of this guarantee is to
20 deliver “exculpatory evidence in the hands of the accused, thereby protecting the innocent
21 from erroneous conviction and ensuring the integrity of our criminal justice system.” 467 U.S.
22 at 485. In *U.S. v. Agurs*, the Supreme court held that a prosecutor has a constitutional duty to
23 disclose exculpatory evidence to the defense, even without a defense request. 427 U.S. 97,
24 107-13 (1976); accord *State v. Fowler*, 101 Ariz. 561, 564, 422 P.2d 125, 128 (1967). Failing
25 to disclose this type of evidence is a constitutional violation, even in the absence of bad faith.
26 *Agurs*, 427 U.S. at 110; see also Rule 15.1 ARCP. The court should order that the Tribe
27 produce the fire department reports by March 19, 2014.

28 The defendant requested a list of all prior convictions of the alleged victim in this case,
who is a named defendant in a case arising out of the same incident, CR-14-143. The
prosecutor is obligated to obtain information from persons who have investigated the case and
are under the prosecution’s control. Rule 15.1(f) ARCP; *State v. Crone*, 182 Ariz. 319, 321
n.3, (1995). The Prosecution has a duty to keep itself apprized of the evidence related to the

1 case, and it may be held accountable for the negligence of its investigators. *State v. Towery*,
2 186 Ariz. 168, 186-87 (1996); accord *Kyles*, 514 U.S. at 437. The Tribe's prosecutor can
3 obtain such documents requested by the defendant by using due diligence to do so. The Tribe
4 shall use all due diligence to obtain the information requested. This order is not subjecting the
5 Tribe to any "fishing expedition" or requiring it to perform the defendant's investigation, but
6 rather, it is merely requiring the Tribe to access information to which it has easy access and
7 may obtain from persons who have investigated the case. Under *Brady v. Maryland*, 373 U.S.
8 83, (1963), *U.S. v. Augurs*, 427 U.S. 97 (1976), *U.S. Bagley*, 473 U.S. 667 (1985), the Tribe
9 has a duty to produce such disclosure, whether such request for police reports are made as a
10 specific request, or as a general or no request, if there is a reasonable probability that had the
11 evidence not been disclosed to the defense, the result of the proceeding would have been
12 different:

13 . . . **the individual prosecutor has a duty to learn of any favorable evidence known**
14 **to the others acting on the government's behalf in the case, including the police.**
15 But whether the prosecutor succeeds or falls in meeting this obligation, . . . the
16 prosecution's failure to disclose known, favorable evidence rising to a material level of
17 importance is inescapable.

18 *Kyles v. Whitley*, 514 U.S. 419 (1995). (emphasis added).

19 The Court, for good cause shown, should grant the defendant's motion to compel
20 production of the criminal history of the defendant named in CR-14-143, who is the named
21 victim in this case, involving the defendant in this case, no later than March 19, 2014.

22 As to the last item that had been requested by the defendant, but which was produced
23 today, several photographs of the defendant evidencing his alleged injuries, the court finds
24 that the Tribe failed to comply with the statutory provisions of the criminal code, as well as
25 standards established by the Court of Appeals for disclosure of evidence because the tribe on
26 January 23, 2014 disclosed that it may be using photographs at the time of trial, the
27 photographs were available on January 1, 2014, and in its February 10, 2014 response stated:

- 28 4) The requested photos are in the process and will be disclosed in due course
upon receipt; the tribe objects to requests for unspecified "other evidence" as
vague and overly broad.

The Court finds that a delay in producing the known photographs on March 12, 2014, nearly 2
½ months after the date of the alleged crime, is not a timely production of disclosure

1 materials, does not comport with the statutory requirements for disclosure, or with the court of
2 appeals cases, or any of the other written materials that have previously been sent by the court
3 to the prosecutor and defense counsel in prior hearings in other cases involving disclosure
4 including the following:

5 copies of 3 PYTC § 2-2-380, **DISCOVERY, Disclosure by Tribe**, ABA Criminal
6 Justice Standards for prosecutors, ABA Opinion 09-054, Prosecutor's Duty to
7 Disclose Evidence and Information Favorable to the Defense, Memorandum for
8 Department Prosecutors, Jan, 4, 2010, from David Ogden, Deputy Attorney General,
9 Re: Guidance for Prosecutors Regarding Criminal Discovery, US Attorney's Manual,
10 9-5.00, Issues Related to Trials and Other Court Proceedings, Policies regarding
11 Exculpatory and Impeachment Information and Policy Regarding the Disclosure to
Prosecutors of Potential Impeachment Information Concerning Law Enforcement
Agency Witnesses ("Giglio Policy"), and Federal Rules of Criminal Procedure as to
Producing a Witness's Statement and Discovery and Inspection.

12 Although the court is not unsympathetic with the Tribe's dilemma that it requests disclosure
13 from the police department, and that department fails to respond timely, then the prosecutor
14 can advise the department that evidence may be excluded, or the Tribe can dismiss the action
15 if the police do not want to cooperate. Once a prosecutor undertakes prosecution, they must
16 do so with due diligence, and based on a delay of nearly two months in producing the
17 photographs, that may be exculpatory because they may indicate injuries to the defendant
18 caused by the alleged victim, the court should fine the prosecutor \$100.00, such fine
19 suspended, so long as there are no other failures to comply with the court orders in this matter.

20 **IT IS ORDERED** that the court grants the defendant's motion to compel for good
21 cause shown, and the prosecutor shall provide a copy of fire department investigative reports,
22 and copies of the criminal history of the named defendant in CR-14-143, who is the alleged
victim in this case, no later than 5:00 p.m. on March 19, 2014.

23 **IT IS FURTHER ORDERED** that the court shall sanction the Tribe for producing
24 photographs nearly two months after such photos should have been disclosed, fines the
25 prosecutor \$100.00, such fine suspended, so long as there are no other failures to comply with
26 the court orders in this matter.

27 **IT IS FURTHER ORDERED** that the attorneys for the parties have been previously
28 been provided with copies of 3 PYTC § 2-2-380, **DISCOVERY, Disclosure by Tribe**, ABA
Criminal Justice Standards for prosecutors, ABA Opinion 09-054, Prosecutor's Duty to

1 Disclose Evidence and Information Favorable to the Defense, Memorandum for Department
2 Prosecutors, Jan, 4, 2010, from David Ogden, Deputy Attorney General, Re: Guidance for
3 Prosecutors Regarding Criminal Discovery, US Attorney's Manual, 9-5.00, Issues Related to
4 Trials and Other Court Proceedings, Policies regarding Exculpatory and Impeachment
5 Information and Policy Regarding the Disclosure to Prosecutors of Potential Impeachment
6 Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy"), and Federal
7 Rules of Criminal Procedure as to Producing a Witness's Statement and Discovery and
8 Inspection. It is hoped that all of the attorneys will share the attached documents made part
9 of this order, with their co-workers to alleviate future motions to compel and to ensure
10 compliance with disclosure standards for both prosecution and defense.

11 SO ORDERED THIS 12th DAY OF MARCH, 2014.

12 
13 Associate Judge, Pascua Yaqui Tribal Court

13 Date 03/14/14
14 cc: Tribe Defendant Counsel
15 Celina [unclear]
16 Clerk

