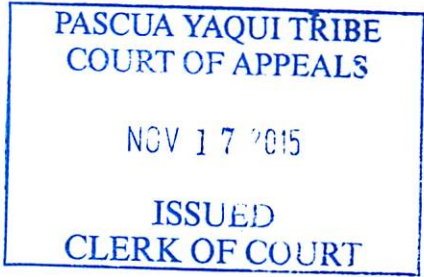


No. CA-15-003  
Pascua Yaqui Court of Appeals



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Pascua Yaqui Tribe, Petitioner

vs.

Angela Coleman, Respondent

**ORDER**

Special Action petition of an order precluding deputy prosecutor Guadalupe Gutierrez from prosecuting case No. CR-15-272 in Pascua Yaqui Trial Court, the Honorable Margaret Flores presiding.

Kendrick Wilson, Office of the Prosecutor, 7777 Camino Huivisim, Building A, Tucson, AZ 85757 for Petitioner.

Lourdes Molina, Lay Advocate, 4140 S. Avenida don Felipe, Tucson, AZ 85746 for Respondent.

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**Summary**

There are three main issues before this Court. The first issue is whether Tribal Court Judge Flores abused her discretion in precluding prosecutor Gutierrez from proceeding in the case at bar. This Court holds that the Tribal Judge acted within her discretion in disqualifying the prosecutor. The second and third issues concern whether Judge Flores erred in not determining whether the Pima County Consolidated Justice Court documents and audio are admissible and relevant and whether the audio should be disclosed prior to trial. This Court remands the issues of admissibility and disclosure to the Tribal Court for final determination.

## **I. Standard of review**

The standard of review for disqualification of the prosecutor by the lower court is whether the court abused its discretion. *State v. Williams*, 136 Ariz. 52, 57, 664 P.2d 202, 207 (1983) (citing *State v. Bishop*, 118 Ariz. 263, 266, 576 P.2d 122, 125, *sentence vacated on other grounds*, 439 U.S. 810, 99 S.Ct. 69, 58 L.Ed.2d 103 (1978)). “The court abuses its discretion when it makes an error of law in reaching a discretionary conclusion or ‘when the record, viewed in the light most favorable to upholding the trial court’s decision, is devoid of competent evidence to support the decision.’” *Michaelson v. Garr*, 234 Ariz. 542, 544, 323 P.3d 1193, 1195 (Ariz. App. 2014).

## **II. Preclusion of the Prosecutor**

Trial prosecutors should avoid interviewing victims or other witnesses in the absence of a third person “[u]nless the prosecutor is prepared to forego impeachment of a witness by the prosecutor’s own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present his impeaching testimony ... .” American Bar Association Rule 3-3.1(g). The presence of a third person avoids the prosecutor risking disqualification during trial in the event a dispute arises concerning what the witness said in a pretrial interview. The third person can testify concerning what occurred during the interview. See *U.S. v. Watson*, 87 F.3d 927, 932 (7<sup>th</sup> Cir. 1996) citing *U.S. v. Johnston*, 690 F.2d 638, 645 (1982)(en banc). Four policies served by the advocate-witness rule are as follows:

First, the rule eliminates the risk that a testifying prosecutor will not be a fully objective witness given his position as an advocate for the government. Second, there is fear that the prestige or prominence of a government prosecutor’s office will artificially enhance his credibility as a witness. Third, the performance of dual roles by a prosecutor might create confusion on the part of the trier of fact as to whether the prosecutor is speaking in the capacity of an advocate or of a witness, thus raising the possibility of the trier of fact according testimonial credit to the prosecutor’s closing argument. Fourth, the rule reflects a broader concern for public confidence in the administration of justice,

and implements the maxim that “justice must satisfy the appearance of justice.” This concern is especially significant where the testifying attorney represents the prosecuting arm of the federal government.

*See Johnston*, 690 F.2d at 643 (citing *United States v. Birdman*, 602 F.2d 547, 553-55 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980)).

Although substitution of prosecutors is not a per se mandatory requirement when the prosecutor is to be called as a witness in the case, substitution is ordinarily to be preferred. *Johnston*, 690 F.2d at 645.

In this case, defense counsel filed the first supplemental disclosure on October 6<sup>th</sup> indicating that it planned on introducing into evidence the victims’ petition for injunction filed in Pima County Consolidated Justice Court regarding the July 30<sup>th</sup> incident at issue in Tribal Court. Nothing in the record indicates that the Tribe filed a motion to preclude disclosure.

During the October 19<sup>th</sup> hearing in Tribal Court, defense counsel alleged that the prosecutor’s statement regarding the PCCJC case being dismissed based on “jurisdiction” originated from the victim. The Tribe noted that the victim did not use the word “jurisdictional” but stated the acts did not happen at her home or in Pima County. The acts occurred at the victim’s place of employment. The prosecutor was on the phone with the victim when defense counsel emailed the PCCJC papers and asked the victim about the PCCJC proceeding.

The Tribe states that, “other than a brief telephone conversation regarding the existence of the application for injunction and its subsequent dismissal, the prosecutor did not have any conversation with the victim about the injunction outside the presence of another person.” (Tribe’s petition, p. 7)

According the Prosecutor’s own words, a statement was made by the victim to the Prosecutor concerning why the PCCJC case was dismissed. Defense counsel notes that she has possession of the PCCJC documents and audio of the proceedings, which indicate that jurisdiction was not the reason for the dismissal of the injunction filed against Defendant. Therefore, according to defense counsel, the victim was being untruthful and could be impeached using the prosecutor’s

testimony concerning what the victim told her about the reason for the dismissal in PCCJC.

Although the Tribe states that it will forego impeachment, this remedy does not seem viable. Allowing the prosecutor to be a witness while taking on her adversarial role of working on the victim's behalf would not promote justice. Use of the prosecutor's statements to potentially impeach the victim could create confusion and the appearance of bias against the victim. At the time the Tribal judge issued the order precluding the prosecutor she had defense counsel's disclosure to introduce the PCCJC documents, there was no pending motion to preclude the aforementioned documents, the prosecutor's admission of the conversation with the victim regarding the dismissal of the PCCJC injunction was in the record, and defense counsel stated an intention to introduce other evidence to impeach the victim based on the statements made to the prosecutor. When considering a violation of ABA Rule 3-3.1(g), one of the remedies a judge can impart includes precluding the prosecutor from continuing their role in the case. This remedy falls within her discretion. This Court will not disturb it.

#### **IV. Relevance of PCCJC Proceeding**

The Tribal Court judge granted the motion to preclude the prosecutor from trying the case based upon making herself a possible witness to the discussion between herself and the victim, but there is no indication the Tribal Court considered whether the proceeding in Pima County was relevant.

Although there was extensive argument between the Tribe and defense counsel during the hearing concerning the relevancy of the PCCJC documents, there is no motion in the appellate record indicating that a motion was filed concerning this issue prior to the hearing. Therefore, this case is remanded for the Tribal Court to determine whether the motion was properly raised before the Tribal Court. If so, the Tribal Court is ordered to determine whether the Pima County Consolidated Justice Court documents are relevant and admissible during trial.

## V. Disclosure of Audio

There is no ruling in the record or in the written order from the Tribal Court judge expressing a ruling on the matter of disclosure of the audio. The disclosure of the PCCJC audio was also discussed between the parties during the hearing, but there is no indication that a motion was filed seeking disclosure of the audio prior to the hearing. Therefore, this matter is remanded to the Tribal Court to determine whether the issue was properly raised before the tribal Court. If so, the Tribal Court is ordered to determine whether the PCCJC audio is relevant and should be disclosed.

Defense counsel gave a copy of the audio to this Court, which has not been reviewed. There is no indication that the Tribal Court listened to and examined the actual audio in its decision, and this Court will not review evidence that has not been submitted to and considered by the Tribal Court. Appellate courts hearing criminal matters will not consider evidence that was not before the lower court. *See U.S. v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990). It was inappropriate for defense counsel to bring forth evidence on appeal that has not been considered by the Tribal Court.

## VI. Conclusion

For the foregoing reasons, the Tribal Court's judgment is affirmed. The matter of the relevance of the PCCJ documents and disclosure of audio is remanded for final determination.

So **ORDERED** this 17<sup>th</sup> day of November 2015.



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Chief Justice James Hopkins