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

8 SARDINA, SYLVERIO,)
9 Appellant,) Case No.: CA-98-002
10 vs.) APPELLANT'S BRIEF
11 PASCUA YAQUI TRIBE,)
12 Appellee)
13

14 COMES NOW Appellant, Sylverio Sardina, by and through
15 counsel undersigned, to hereby submit Appellant's Brief in the
16 above matter.

17 STATEMENT OF THE CASE

18 Initial Appearance was held in this matter on September 11,
19 1997. The lower court found probable cause on Count 1, Domestic
20 Violence/Threatening or Intimidating, and Count 2, Disobedience
21 to Lawful Order of Court. Defendant moved to proceed to
22 Arraignment and entered pleas of Not Guilty to each Count.
23 Defendant was released pending trial with a \$500.00 suspended
24 bond and an order of No Contact with the alleged victim and her
25 residence. The trial was set for December 8, 1997.

26 On October 14, 1997, Defendant requested a jury trial. On
27 October 24, 1997, this Court continued the jury trial hearing to
28 December 10, 1997. In the court's Order, the court noted that

1 Defendant did not waive time limits for speedy trial. Further,
2 the court determined that time limits would not expire until
3 December 10, 1997. On December 10, 1997 the parties attempted to
4 impanel a jury. After jury selection proceedings, a full jury
5 panel could not be seated and the court declared a mistrial *sua*
6 *sponte*.¹ Simultaneously, the court ordered a new trial, again,
7 *sua sponte*. Defendant objected and moved for dismissal because
8 speedy trial time limits would be violated, and, that since jury
9 selection proceedings are pre-trial in nature, declaration of
10 mistrial would be premature. The court denied Defendant's
11 motion. The Court then held that a new trial hearing would be
12 stayed pending a ruling from the Court of Appeals on this
13 matter. Defendant motioned for reconsideration on December 24,
14 1997. Further, Defendant filed a Notice of Appeal along with an
15 Application for Fee Waiver and a Motion to Stay Appeal on
16 January 8, 1998. The court denied the Motion for Reconsideration
17 on January 26, 1998. Defendant then filed a Notice of
18 Reinstatement of Appeal.

19
20 **ISSUES PRESENTED**

- 21 1. Whether the lower court erred in denying Defendant's
22 Motion to Dismiss after the court determined that speedy
23 trial time limits would expire on December 10, 1997.
24 2. Whether the lower court erred in declaring a *sua sponte*
25 mistrial and ordered a new trial *sua sponte* when a jury
26 could not be impaneled.

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¹ See lower court's Order dated December 10, 1997.

1 ARGUMENT I

2 RULE 4.4 OF THE PASCUA YAQUI RULES OF CRIMINAL PROCEDURE
3 MANDATES DISMISSAL WHEN THE COURT DETERMINES THAT SPEEDY
4 TRIAL TIME LIMITS HAVE BEEN VIOLATED

5 Rule 4.4 clearly mandates that:

6 "If the Court determines that a speedy trial time
7 limit established by these Rules has been violated, it
8 shall, on a motion of defendant or on its own
9 initiative, dismiss the prosecution, with or without
10 prejudice, as justice requires." Emphasis mine.

11 This mandate is explicitly spelled-out for us in the PY
12 Tribal Code. However, the Code is silent on whether speedy trial
13 time limits may be stayed, held in abeyance, or avoided by a sua
14 sponte declaration of mistrial. This silence clearly implies
15 that these tactics are not acceptable solutions to a violation
16 of speedy trial time limits. In fact, the ONLY solution in the
17 Code is dismissal pursuant to Rule 4.4.

18 Further, Article I, Section 1(f) of the PY Constitution
19 provides that the PY Tribe shall not "...deny to any person in a
20 criminal proceeding the right to a speedy and public trial..." Id.
21 The lower court determined that speedy trial time limits would
22 expire on December 10, 1997.² The court, therefore, erred in
23 denying Defendant's oral Motion to Dismiss for violation of
24 speedy trial time limits.

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² See Tribal Court's Order dated October 24, 1977.

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ARGUMENT II

THE COURT ERRED IN DECLARING A SUA SPONTE MISTRIAL
AND ORDERING A NEW TRIAL SUA SPONTE WHEN
A JURY COULD NOT BE IMPANELED

This Court has erred in a determination of the law. After a jury could not be impaneled, the court sua sponte declared a mistrial and ordered a new trial. There was no verdict by a jury as required in 1 P.Y.T.C. §1.88.³ There was no application for a new trial by the defendant or by his attorney as further required in 1 P.Y.T.C. §1.88. There was no 'hung jury' which would have allowed the court to dismiss the jury and order a new trial.⁴ Rule 33 of the Federal Rules of Criminal Procedure provides that

"The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment..."⁵

Further, the words in the first two sentences of Rule 33 of the Federal Rules of Criminal Procedure "...make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant. Problems of double jeopardy arise when the court acts on its own motion."⁶

³ 1 P.Y.T.C. §1.88 NEW TRIAL: "After a verdict has been given an application for a new trial may be made only by the defendant or his attorney and must be made before the completion of the sentence." Emphasis mine.

⁴ 1 P.Y.T.C. §1.86.

⁵ Id. Emphasis mine.

⁶ Citing to the history following Rule 33.

1 Black's Law Dictionary, 6th Edition defines 'new trial' as,
2 "A re-examination in the same court of an issue of fact, or some
3 part or portions thereof, after the verdict by a jury ... or a
4 decision by the court."⁷ In this matter, there was no verdict by
5 a jury or a decision by the court. Furthermore, there was no
6 initial examination of an issue of fact, and so a re-examination
7 is premature. Thus, even if the court were to ignore the
8 requirement that a defendant or his counsel must make the
9 request for a new trial, a new trial cannot take place where a
10 verdict was not issued in the first place.

11 Courts have granted defendants new trials on various
12 grounds.⁸ However, granting a new trial before there has been a
13 trial or verdict at all is premature. The Tribe itself conceded
14 that the trial begins once the jurors have been impaneled. In
15 Pascua Yaqui Tribe v. Nasario Alvarez⁹ the Tribe submitted jury
16 instructions that included a preliminary instruction as follows:

17 "TRIBE'S JURY INSTRUCTION # ____

18 PRELIMINARY INSTRUCTIONS

19 (To be given once the jurors have been empaneled and again
20 after closing arguments)

21 Outline of Trial

22 The trial will now begin...." Emphasis mine. Thus, the
23 issue of when trial commences is conceded by the Tribe as being
24 'once the jurors have been empaneled' unless our courts are to
25 have different rules that vary on the whim of the Tribe.

26 Black's Law Dictionary, 6th Edition defines 'mistrial' as
27

28 ⁷ Page 1504.

⁸ See Rule 33 Federal Rules of Criminal Procedure, notes 10 - 90.

1 "An erroneous, invalid or nugatory trial. A trial of
2 an action which cannot stand in law because of want of
3 jurisdiction, or a wrong drawing of jurors, or
4 disregard of some other fundamental requisite before
5 or during trial. Trial which has been terminated prior
6 to its normal conclusion. A device used to halt trial
7 proceedings when error is so prejudicial and
8 fundamental that expenditure of further time and
9 expense would be wasteful if not futile.¹⁰ The judge
10 may declare a mistrial because of some extraordinary
11 event (e.g. death of juror, or attorney), for
12 prejudicial error that cannot be corrected at trial,
13 or because of a deadlocked jury.

14 'Mistrial' is equivalent to no trial and is a nugatory
15 trial while 'new trial' recognizes a completed trial"
16 which for sufficient reasons has been set aside so
17 that the issues may be tried de novo."¹¹

18 Other jurisdictions have granted mistrials for various
19 reasons, including where a jury is discharged without a
20 verdict¹²; where a trial cannot stand in law because of want of
21 jurisdiction, or a wrong drawing of jurors, or disregard of some
22 other fundamental requisite¹³; where the trial court concludes,
23 before a trial is completed (i.e., but it has begun), that there
24 is some error or irregularity that prevents a proper judgment
25 being rendered.¹⁴ Mistrial is a device used when necessary to
26 terminate a trial before it is completed. Additional reasons
27 requiring mistrial are the inability of the jury to arrive at a
28 verdict after a suitable period of deliberation (i.e., a hung or
deadlocked jury); the illness or other incapacity of a juror, a

⁹ Docket number CR-98-042.

¹⁰ Citation omitted.

¹¹ Citation omitted. *Id.*, at page 1002. Emphasis mine.

¹² State ex rel. Sullivan v. Patterson, 165 P.2d 300, 312; Fisk v. Henarie, 32 F. 425, 427.

¹³ Illinois Oil Co. v. Grandstaff, 246 P. 832, 833.

1 party, the judge, or counsel; the admission of evidence or other
2 occurrence in the courtroom that is so prejudicial to one of the
3 parties as to deprive him of a fair trial. The court in State v.
4 Hallman¹⁵ held that "In deciding whether a mistrial is warranted,
5 we consider (1) whether the jury has heard what it should not
6 hear, and (2) the probability that what it heard influenced
7 them."¹⁶ In this matter, a jury was never impaneled; therefore it
8 never heard anything that might have influenced them. The
9 obvious conclusion, then, is that a mistrial is not warranted in
10 this case.

11 The charges should have been dismissed, with or without
12 prejudice at the court's discretion. If dismissed without
13 prejudice, the Tribe would still be allowed to re-file the
14 charges within the statute of limitations. In United States v.
15 Marion¹⁷ the United States Supreme Court held that the
16 constitutional right to speedy trial is triggered by either
17 formal indictment, information, or actual restraint of arrest.¹⁸
18 The Arizona court in State v. Soto¹⁹ expanded upon that ruling
19 and held that a new indictment gives rise to new limits. Thus,
20 the Tribe's interests in prosecuting Mr. Sardina would not be
21 prejudiced by being required to re-file the charges within the
22 statute of limitations if the lower court were ordered to
23 dismiss this matter without prejudice.

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26 ¹⁴ Vilander v. Hawkinson, 326 P.2d 273, 276.

27 ¹⁵ 668 P.2d 874, 880 (1983).

28 ¹⁶ Id.

¹⁷ 404 U.S. 307 (1971).

¹⁸ Id.

¹⁹ 117 Ariz. 345, 572 P.2d 1183 (1977).

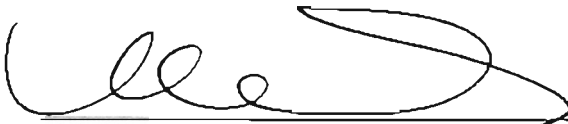
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CONCLUSION

The lower court erred when it denied Defendant's request for dismissal for violation of speedy trial time limits. The court further erred by ordering a new trial *sua sponte*, thereby doing beyond the dictate in 1 P.Y.T.C. §1.88. Further, the order for a new trial is premature where a trial has yet to take place. Declaring a mistrial prior to the beginning of the trial is premature and creates the misperception that a jury had been impaneled. The court should have dismissed this matter.

Defendant therefore asks that this Court enter its order directing the lower court to dismiss this matter. Defendant further asks that this Court reverse the lower court's ruling and find that declaring a *sua sponte* mistrial and ordering a new trial *sua sponte* when a jury is not impaneled were inappropriate remedies.

RESPECTFULLY SUBMITTED this 23rd day of March, 1998.



Maria M. Avilez
Chief Public Defender

COPY of the foregoing delivered this date to
Prosecutor's Office by: 