No. CA-07-008
Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribe, Plaintiff,

v.

Anthony Shirley, Defendant,

and
Concerning Patricia Castro, Prosecutor, Appellant.

ORDER

Appeal of a contempt order of the Pascua Yaqui Tribal Court in Case No. CR-07-126, the Honorable Melvin R. Stoof presiding.
Yancy A. Jencsok, Esq., Pascua Yaqui Tribe Office of the Prosecutor, Tucson, Arizona for the Appellant.

After hearing oral arguments on July 24, 2007 and after review of the record, this Court finds that the trial court held Prosecutor Patricia Castro in contempt for failing to request a transport order for the Defendant and fined her $25.00, which would be suspended if she requested transport orders without failure for the next six months. Order dated April 24, 2007. We find that the prosecutor's office has the duty to ensure that defendants are brought to court for their scheduled hearings and this includes requesting transport orders and advising the trial court if a defendant is incarcerated. We further find that the $25.00 fine is minimal and allows for suspension if the Appellant satisfies her duties within the next six months of the trial court's order. Accordingly, the trial court's finding of contempt and fine of $25.00 (suspended) are affirmed.

So Ordered this 9th day of October, 2007.

Acting Chief Justice

Raymond D. Austin
Associate Justice Pro Tem

Associate Justice

Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribe, Plaintiff,

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So Ordered this 8th day of October, 2007.

Jerry Derrick, Acting Chief Justice

Veronica Geronimo, Associate Justice

Raymond D. Austin
Associate Justice, Pro Tempore

No. CA-07-008

Pascua Yaqui Court of Appeals

Pascua Yaqui Tribe, Plaintiff,

v.

Anthony Shirley, Defendant,
and
concerning Patricia Castro, Prosecutor, Appellee

Order

Appeal of a contempt order of the Pascua Yaqui Tribal Court in Case No. CR-07-126, the Honorable Melvin R. Stoof presiding.

Yancy A- Jencsok, Esq., Pascua Yaqui Tribe Office of the Prosecutor, Tucson, Arizona for the Appellant.

To: Ben Casey, Solicitor

The Court invites you to present arguments on behalf of Judge Melvin Stoof in the above captioned case. You will have 15 minutes to argue. The Court hearing begins at 1:00 p.m., Tuesday, July 24, 2007, at the Pascua Yaqui Tribe Court building.

So Ordered this 24 day of July 2007.

Acting Chief Justice

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE Plaintiff/Appellant, VS. SHIRLEY, ANTHONY, Defendant/Appellee, and concerning PATRICIA CASTRO, Prosecutor/Appellant.	TRIAL COURT CASE NO. CR-07-126 CASE NO. CA-07-008 NOTICE OF APPELLEE'S BRIEF

COMES NOW, Melvin R. Stoof, Associate Judge, who files the Appellee's brief, attached hereto, pursuant to 3 PYTRAP 11(B).

RESPECTFULLY SUBMITTED THIS 18th DAY OF JULY, 2007.

By Appellee, Melvin R. Stoof
Associate Judge
Pascua Yaqui Court
7474 S. Camino de Oeste
Tucson, AZ. 85757
(520) 879-6289
fax (520) 879-6277

I certify that a copy of the foregoing Notice of Appeal and attachments was Hand delivered to the Appellant, Pascua Yaqui Prosecutors, copies were filed with the Court of Appeals, and I mailed a copy to David Oliver, attorney for the defendant.

Melvin R. Stoof
Appellee

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IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

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The court, by and through Associate Judge, Melvin R. Stoof, files its response to the Tribe's appeal, because the court does not have a Solicitor of the Court with authority to do so, and who may file or argue before the Appellate court on behalf of the trial court. Because the contempt was based on the court's own motion, the Court must respond to the prosecutor's appeal. The Court's Administrative Attorney, Mr. Casey, shall file a separate response, if the Court of Appeals finds that he may do so, in support of the Court's position. Pursuant to 3 PYTRAP 11(B), the Court files its response to the Tribe's "Appellant's Opening Brief."

THE TRIBE'S APPEAL IS WITHOUT LEGAL MERIT AND SHOULD BE DENIED BECAUSE THE COURT HAD AUTHORITY TO HOLD A PROSECUTOR IN CONTEMPT OF COURT WHERE HER OMISSIONS CAUSED A DELAY OF PROCEEDINGS AND AFFECTED A DEFENDANT'S SPEEDY TRIAL RIGHTS.

The court did not err when it held the Tribe's prosecutor in contempt of court for its 1) failure to provide a valid address for service to the court clerk when the prosecutor knew the defendant was in detention, for 2) failure to request that the defendant be transported for hearing when the Tribe knew the defendant was detained, and for 3) its failure to ensure the defendant was present that caused a delay in the court's proceedings and affected the defendant's speedy trial rights.

THE COURT HAS GENERAL AUTHORITY TO DIRECT PROSECUTORS TO CARRY OUT THEIR DUTY TO PROVIDE DEFENDANT'S ADDRESSES AND TO ENSURE DEFENDANTS IN CUSTODY ARE TRANSPORTED FOR THEIR HEARINGS.

As to the court's general authority to require its ministerial officers to carry out their duties, the Pascua Yaqui Constitution Art. VIII provides that "the Judicial powers of the Pascua

Yaqui Tribe shall be vested in such tribal courts as the tribal council may establish but shall include a trial and appellate court." PYConst. Art. VIII, Sec. 1.

The duties and procedures of the tribal courts shall be established by ordinance of the tribal council. Id. At Sec. 3. The court has the authority to provide for the orderly conduct of proceedings before it or its officers, 3 PYTC § 1-2-50(C), the court must compel the obedience to its judgments, order, and process, 3 PYTC § 1-2-50(D), and it must control in furtherance of its ministerial officers and all other persons in any matter connected with a judicial proceeding before it in every matter pertaining thereto. Id. At (E). The court has the power to compel the attendance of persons to testify in any action or proceeding pending therein, in the cases and manner provided by law. Id. At (F). The court has the power to amend and control its processes and orders so as to make them conformable to law and justice, Id. At (H), and it has the power to devise and make new process and form of proceedings consistent with the law, necessary to carry out the effect of the powers and jurisdiction possessed by it. Id. At (I). The last provision allows the court to adopt procedures for which there is no specific statutory provision. It allows the court discretion to tailor remedies to address issues of what court procedures should be followed. Although listed under the Pascua Yaqui Civil Code, the code provides that where there is no specific tribal code provision, that the court may adopt state and federal law, and that the court has the exclusive jurisdiction to construe the meaning of Tribal laws and to determine the legality under the Constitution and laws of the Pascua Yaqui Tribe and the Indian Civil Rights Act.

The purpose and construction section of the rules of criminal procedure provides in pertinent part, as follows:

> **These rules are intended to provide for the just, speedy determination of every criminal proceeding. They shall be construed 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 PYT R.Crim.P. Rule 2.

In carrying out the overarching criminal procedure principles of Rule 2, to promote speedy trials, avoid unnecessary delays, and protect individual rights, the court must rely on the advice of the

prosecutor to set criminal cases on a priority docket and to ensure detainees are brought before the court.

THE PROSECUTOR'S ROLE IS TO ADVISE THE COURT AS TO A DEFENDANT'S WHEREABOUTS SO THE COURT MAY ISSUE APPROPRIATE ORDERS TO APPEAR.

There is no written court rule that states "the prosecutor shall provide an accurate and or correct address of the defendant to the court," but rather, it is an implied responsibility based on the procedural rule below, that the prosecutor has a duty to provide the court with an address where the defendant may be found. The role of the prosecutor is to file motions in all criminal cases. 3 PYTC § 1-4-30. The prosecutor files its complaints with the court and has the responsibility of providing a person's address for issuance of a criminal summons. 3 PYT R.Crim.P. Rule 8. The prosecutor has the responsibility to provide the location to be searched when it requests search warrants, 3 PYT R.Crim.P. Rule 4, and it has a responsibility to provide the court with an address of the defendant for arrest warrants, 3 PYT R.Crim.P. Rule 11(1), and for bench warrants, 3 PYT R.Crim. P. Rule 9, see also 3 PYT R.Juv.P. Rule 30. The court presumes that the prosecutor uses all due diligence in providing such an address, even in the absence of a written rule establishing the prosecutor's duty to do so. This is one of many unwritten rules not found in the Pascua Yaqui Code, but nonetheless, one that the Court presumes the prosecutor as officer of the court has undertaken before it files its motions with the court. The prosecutor provides a physical address so that the court clerk may issue a summons to be served on the defendant notifying him to appear for court. 3 R.Crim.P.Rule 9(D), and the court's process server shall serve the person in a criminal matter according to the rules of civil procedure rule 7 at the place of residence or work of the defendant, 3 PYT R.Crim.P. Rule 13, 3 PYT R.Civ.P.Rule 7. The prosecutor can achieve its legal duty to provide such an address through its own investigation, or if the prosecutor seeks the assistance of the police or tribal enrollment records to locate a defendant's address.

In other sections of the tribal code, it is the prosecutor's role to request detention orders for persons who fail to appear in criminal cases, 3 PYT R.Crim.P.9, and the prosecutor makes requests to detain under custody warrants in juvenile cases, 3 PYT R.Juv.P.Rule 30, and it must provide for a minor and parent's address, 3 PYT R.Juv. P.Rule 50.

The prosecutor makes motions to detain defendants on a regular basis, at time of initial hearing, for release prior to trial, 3 PYT R.Crim.P. Rule 19 and 20, and the prosecutor may make verified motions to modify release conditions. 3 PYT R.Crim.P. Rule 21. Additionally, the prosecutor advises the court whether a defendant should be detained in extradition request matters. 3 PYT R.Crim.P. Rule 52. Even under state of Arizona law, a prosecutor must provide actual notice to the court that a defendant has been detained in any criminal action filed. Az.R.Crim.Pro. Rules 37.1 & 37.2. Appendix Nos. 1-1 to 1-3.

Prosecutors, as officers of the court are subject to the American Bar Association (ABA) standards of conduct:

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

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

> **These standards are intended to be used as a guide to professional conduct and performance.** (emphasis added).
>
> The ABA Model Rules of Professional Conduct provides:
>
> **A lawyer shall act with reasonable diligence and promptness** in representing a client. Rule 1.3 Diligence. Appendix 2.

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

> (a) A prosecutor should avoid unnecessary delay in the disposition of cases. **A prosecutor should not fail to act with reasonable diligence and promptness in prosecuting an accused.**
> (b) A prosecutor should not intentionally use procedural devices for delay for which there is no legitimate basis.

(c) The prosecution function should be so organized and supported with staff and 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. Appendix 3.

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

The Pascua Yaqui Code does not address what the standard of "due diligence" is as to locating a defendant. However, the court has provided an example in the form of an affidavit of due diligence required by many courts so that the government's attorney may certify to a court that a reasonable search has been made through due diligence prior to a court issuing a substitute service order on a third party and through publication. Appendix No.4-1 to 4-3.

In this case, the prosecutor's office knew from its presence in court in Case No. CR-07-112, when the court held a hearing on February 8, 2007, for the same defendant in this case, Anthony Shirley, that he was being held in custody. Appendix 5. Even though the Tribe had actual knowledge that the defendant was in detention, the prosecutor filed false information in its new criminal complaint with the court on February 13, 2007, as to where he may be served. The Tribe breached its duty to exercise reasonable diligence in trying to locate a defendant prior to filing its complaint. As a result of the inaccurate information provided, to which the prosecutor had signed a verified pleading stating all information contained in the complaint therein was true and correct, the clerk issued a summons with an incorrect address where the defendant may be found, and the process server was sent on a wild goose chase in attempting to serve the defendant at an invalid address where the Tribe knew the defendant would not be residing. The Tribe's omission resulted in a waste of the court's valuable resources and it delayed service on the defendant who could have been easily served at detention had the Tribe fulfilled its duty of providing accurate information as to Mr. Shirley's whereabouts.

THE COURT HAS AUTHORITY TO SANCTION ITS OFFICERS FOR OMISSIONS TO ACT IN FURTHERANCE OF COURT ADMINSTRATION.

The court has not acted arbitrarily or capriciously, because in this case, it had rendered its contempt order based on well-founded practices in both state and federal courts that require the

government's attorneys to monitor detainees to ensure that they are brought before the court for their hearings. The court may fine attorneys and lay advocates for contempt of court up to $200.00, 3 PYTC § 1-4-40, and if the a court officer fails to pay, then they shall be disqualified to practice, Id. at sec. (D).

THE PROSECUTOR BREACHED A DUTY OF ENSURING A DEFENDANT IS BROUGHT TO THE COURT IN A TIMELY FASHION.

This appeal arises from an indirect contempt of court order against the prosecutor's lay advocate, Patricia Castro, based on the prosecutor's continued and ongoing failure to ensure defendants are transported from detention facilities to the court and the continued omission to act by failing to check court files and determine whether defendants have been served with summons to appear at their last known address in cases where the Tribe knows the defendants are in jail.

The court has on several occasions in the past several months had to continue hearings, because the Tribe has not requested that defendants be transported from detention to court for their hearings. This has had a negative impact on the administration of justice due to delays in the court's proceedings in having to re-set initial hearing, arraignments and pre-trials, as well as potential violations of defendant's speedy trial rights under the criminal code. 3 PYT R. Crim.P. Rule 32, and if a person is not brought before the court from detention within 24 hours of arrest, the court shall release the defendant immediately. 3 PYT R.Crim.P. Rule 17.

THE TRIBE HAS ON NUMEROUS OCCASIONS FAILED TO ENSURE THAT DEFENDANTS ARE TRANSPORTED TO COURT FOR A SCHEDULED HEARING.

As an example, the court has attached as appendix 6-1, a February 5, 2007 order in the Madril case, where the Court had to reschedule an initial hearing where a defendant, who the previous week was detained in a separate case filed by the prosecutor's, was cited to appear for hearing in a new separately filed case. In the second Madril case, although the Tribe knew from Court's orders issued the prior week that the defendant was incarcerated and pending an appearance for another hearing, the prosecutors filed new charges and provided the court with the defendant's last known address where the defendant may be served, rather than asking the defendant be served with notice in jail. There have been at least four cases in the past several months where a defendant in custody was served at his home address by serving a family

member who resided at the home, based on the address provided to the clerk by the prosecutor's office even though the Tribe knew the defendant was in detention and could have been served there. Appendix 6-2.

Although the prosecutor's office receives a daily log from the chief detention officer as to detainees and their status, i.e. whether they are serving days and whether they are pending hearings in court, it would seem that the prosecutor does not coordinate with detention as to the defendants' whereabouts. The detention office and law enforcement contract with several detention facilities, and detention provides the prosecutor's office with the locations of where defendants are to be housed, on a daily basis. Attached to this response are examples of orders issued on March 6, 2007 and March 7, 2007, Appendix Nos. 7-1, 7-1, & 7-3, and the transport orders read that defendants shall be transport to various facilities that may, include, but are not limited to CCA, CADC Florence, McKinley County Detention, Yavapai County Jail, and Pima County detention. The Court does not track the defendants' whereabouts after they are taken from the court, because the prosecutor and detention coordinate where defendants are to be detained.

There are many provisions not written in the Pascua Yaqui code for which the Court must tailor a remedy. Under the Pascua Yaqui Speedy Trial Act, "the trial of criminal cases are given priority over the trial of civil cases," 3 PYT R.Crim.P. Rule 32(A), and "[t]he trial of defendants in custody whose pretrial liberty may present unusual risks shall be given preference over other criminal matters." 3 PYT R.Crim.P. Rule 32(B). In the May 14, 2007 order attached, from the Avelisto Moreno, Jr. case, the court responded to the prosecutor's assertion that transport of prisoners was a "matter between the court and detention." Appendix 8. In response, the court provided the Pascua Yaqui code authority under which the Tribe's prosecutor has a duty to ensure the prosecutor coordinates the order of cases on the court's docketing calendar:

> To address the issue of whose primary responsibility it is to assure that matters are timely docketed and that defendants in custody are transported to appear at court, the Court notes that the Pascua Yaqui Rules of Criminal Procedure places the affirmative duty on the prosecutor to ensure matters are properly docketed:
>
> **The prosecutor shall advise the court of facts relevant to determining the order of cases on the calendar.** 3 PYT R.Crim.P. Rule 32(C). **Speedy Trial; Priorities** (emphasis added).

A PROSECUTOR HAS A LEGAL DUTY TO FILE WRITS WITH COURT TO ENSURE ATTENDANCE OF PARTIES AND WITNESSES FOR COURT HEARINGS.

Under the Pascua Yaqui Speedy Trial Act, the prosecutor's duty to advise the court of facts relevant to determining the order of the cases on the calendar and to advise the court if a defendant is in custody, and if so, whether the matter should be set on a priority docket. A concomitant duty is that the prosecutor ensures that a defendant is transported to the court for hearing to ensure the tribe complies with the Pascua Yaqui speedy trial act and with the Indian Civil Rights act, 25 U.S.C. §1302(6), and with the Pascua Yaqui Bill of Rights, PYConst. Art. I, Sec. 1(f).

In Moreno, the court articulated the authority of prosecutors to make requests to the court through writs of habeas corpus:

> Additionally, it is the responsibility for the Tribe's prosecutor to ensure that defendants are properly brought before the court, by way of requesting a transport order, or if the defendant is in custody in an outside detention facility to file for extradition, or to file writs of habeas corpus ad prosequendum to prosecute a defendant in custody, or writs of habeas corpus ad testificandum, to bring a witness in custody to testify, or writs of habeas corpus ad subjiciendum, where a defendant challenges his imprisonment.

THERE IS FEDERAL AUTHORITY THAT DEFINES THE DUTY AND ROLE OF THE GOVERNMENT'S ATTORNEY TO ENSURE WITNESSES IN DETENTION ARE TRANSPORTED TO COURT.

The prosecutor asserts that the court acted in the Shirley case without any statutory authority. The court in the Moreno case has provided such a legal duty of the government's attorney, under former Federal Rules of Criminal Procedure 36 (g):

> (g) Supervision of Detention Pending Trial. . . .**The attorney for the government** shall make a bi-weekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment or trial for a period in excess of ten days. As to each witness so listed **the attorney for the government** shall make a statement of the reasons why such witness should not be released with or without the taking of a deposition pursuant to rule 15(a). As to each defendant so listed **the attorney for the government** shall make a statement of the reasons why the defendant is still in custody. F.R.Crim.Pro. 36 (g) (as amended 1991). (emphasis added)

> Federal and state courts have placed the primary responsibility on the office of prosecuting attorneys to ensure defendants who are detained are brought before the court,

> rather than imposing a duty on the court or the court's clerk to supervise detention officers. The Court merely acts as the supervisor over detention insofar as the prosecutor requests detention orders and transport orders to eliminate unnecessary delays in proceeding, and the court sends the order to detention.

Former Federal Criminal Procedure Rule 36(g) was replaced by rule 36(h) in 2004. The revised provision no longer provides that an attorney for the government provide bi-weekly reports, but the government's attorney must still provide a list of witnesses who are detained. The drafting committee for the Federal Rules believed that the requirement was no longer necessary in the rules in light of the Speedy Trial Act Provisions, 18 U.S.C. § 3161, that now requires the government's attorney to request a detainer so that a person in custody may be brought to court:

> (j) **(1) If the attorney for the government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly –**
>
> (A) **undertake to obtain the presence of the prisoner for trial** ; or,
> **(B) cause a detainer to be filed with the person having custody of the prisoner of his right to demand trial.**
>
> (2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent to the attorney for the government who caused the detained to be filed.
>
> (3) Upon receipt of such notice, **the attorney for the Government shall promptly obtain the presence of the prisoner for trial.**
>
> (4) **When the person having custody of the prisoner receives from the attorney for the government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to the attorney for the Government . . .**

18 U.S.C. § 3361(j), Federal Speedy Trial Act, Time Limits and Exclusions (emphasis added), see appendix 9 for complete statute.

Contrasted with the duties of the prosecutor to provide addresses and to request orders to bring defendants to the court is the court clerk's duties:

> The clerk shall keep a calendar of all criminal actions pending in the Court, enumerating them according to the date of the filing of the complaint, specifying the offense charged and whether the defendant is in custody or on bail. 3 PYTC § 1-4-60.

The court clerk lists such information based on information provided to it by the prosecutor's office. More importantly, the court in the Moreno case provided a practical reason for why the prosecutor's office should assume primary responsibility to ensure defendants are transported to court rather than the clerk, i.e. prosecutors have the a large staff and resources to do so:

> As a practical matter, **the prosecutor's office with six prosecutors has substantially more resources to make contact with a detention officer to ensure the court order for transport is carried out, rather than the court's one overburdened criminal court clerk, who has overwhelming duties of setting the court's calendar, issuing orders, summons, subpoenas, notices to appear, jury selection panels, distributing court orders, and numerous other court documents in literally hundreds of court cases.** It should not be the one criminal court clerk's duty or responsibility to call detention daily to ensure detainees are transported. It is the Tribal prosecutor's primary responsibility, and the responsibility of the five other attorneys and advocates he supervises, to supervise detention pending hearings and trials. **The court's expectation is that the Tribe's Chief Prosecutor and his five attorneys and advocates should have a direct line of communication with the Chief Detention Officer to review a daily and weekly list of detainees to eliminate unnecessary detention, and to promote defendant's appearance for hearings, particularly in tribal cases under the Indian Civil Rights act, where tribal defendants, who are often times not represented by counsel and who may not know they can challenge their detention or bond conditions, are not unduly imprisoned pending their hearings.** (Emphasis added).

THE COURT MAY REGULATE PROCEDURES WHEN THERE IS NO CONTROLLING LAW SO LONG AS IT PROVIDES NOTICE OF SUCH PROCEDURES.

The prosecutor has asserted in its appeal that the court in this case made its decisions without authority and without specific statutory authority cited in its order. Given time constraints, and the court's crowded docket, judges, as a practical matter, cannot issue each and every finding of its orders with complete citations to each and every rule of procedure it follows in making its determinations. Federal law allows district courts to provide for procedures when there is not controlling law, and the Federal Rules of Criminal Procedure provide:

> A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or local district rules unless the alleged violator was furnished with actual notice of the requirements before the noncompliance. F.R.Crim.Pro. Rule 57(b) **Procedure When There is No Controlling Law.** See appendix 10.

An example of a typical transport order is attached as appendix 11, and dated March 19, 2007 in the Gastelem case, in which the defendant's counsel made a request in open court, so that the detention office would arrange to transport the defendant to undergo a mental health assessment. The defendant's counsel, Mr. Fontana, made arrangements in advance to ensure there would be a transport officer available to transport the defendant for his assessment. This is and has been the accepted practice for transport orders. The court also provides as appendix 12 an order dated April 23, 2007, for transport issued after Mr. Osburn requested in open court, in the Valenzuela case. This was an order issued the day before the contempt of court issued in this case, on April 24, 2007 against Ms. Castro. Prior to its contempt order of April 24, 2007 in this case, the Tribe had notice of the procedures for transport and understood that failure to comply with court rules could result in contempt.

THE AMERICAN BAR ASSOCIATION STANDARDS OF CONDUCT FOR PROSECUTORS PROVIDES THAT A PROSECUTOR HAS A DUTY TO ENSURE DETAINEES ARE TRANSPORTED TO HEARINGS.

The Pascua Yaqui Legislature adopted Title 3, Courts and Rules of Court, Part I - Courts, Chapter 1-4, Court Staff, and the section sets out the legal duties of attorneys appearing before the court. 3 PYTC § 1-4-40(C) provides in pertinent part, as follows:

> Dignity and Ethics. **Any attorney practicing in the Pascua Yaqui Courts shall conform to the usual standards of conduct of the American Bar Association in the performance of their duties.** (emphasis added).

The American Bar Association "standards" of conduct establish the general duties, responsibilities, and practices to be followed by various legal practitioners, including but not limited to civil law practitioners, criminal defense lawyers, and also prosecutors. A generally accepted definition of "standard" is "Stability, general recognition, and conformity to established practice." Black's Law Dictionary, 1990 ed., at p.1404.

The American Bar Association's standards related to a prosecutor's duty to ensure persons in detention are transported to appear for court hearings provides:

> **Standard 12-2.4 Special procedures applicable to persons serving terms of imprisonment**
>
> To protect the right to a speedy trial of a person serving a term of imprisonment either within or without the jurisdiction, it should be provided by rule or statute that:

(a) if the prosecuting attorney knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he should promptly –

(i) undertake to obtain the presence of the prisoner for trial;

(ii) cause a detainer to be filed with the person having custody of the prisoner of the prisoner's right to demand trial.

(b) If an official having custody of such a prisoner receives a detainer, the official should promptly advise the prisoner of the charge and the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent to the prosecuting attorney who caused the detained to be filed.

(c) Upon receipt of such notice, **the prosecuting attorney should promptly obtain the presence of the prisoner for trial; and,**

(d) **When the official having custody of the prisoner receives from the prosecuting attorney a properly supported request for temporary custody of such prisoner for trial, the prisoner should be made available to the prosecuting attorney . . .**

See Appendix 13.

ABA Criminal Justice Section Standards, Speedy Trial. See also provisions at 18 U.S.C. § 3361(j), Federal Speedy Trial Act, Time Limits and Exclusions, in which the identical provisions above are found, with the exception that the federal statute replaces "prosecuting attorney" to read "attorney for government" and replaces "should" to read "shall."

Based on the Pascua Yaqui Speedy Trial Act, the Federal Speedy Trial Act, Pascua Yaqui statues related to service of process and duties and standards of the American Bar Association, it is the primary duty of a prosecutor to provide accurate addresses to the court for service of process and it is a prosecutor's primary duty to ensure that prisoners in detention are properly transported to court for hearing, where a prosecutor knows a defendant is in detention. The court has explicit statutory authority to hold a prosecutor in contempt where such failure to follow a legal duty results in the delay of court proceedings or adversely affects a defendant's right to a speedy trial.

THE COURT HAS INHERENT AUTHORITY TO DISCIPLINE ATTORNEYS WHO CAUSE DELAY IN COURT PROCEEDINGS TO PROTECT THE INTEGRITY AND FAIR ADMINISTRATION OF THE CRIMINAL JUSTICE PROCESS.

The American Bar Association Criminal Justice section standards provides under "special Functions of the Trial Judge, " in pertinent part, as follows:

Standard 6-4-1. Power to Impose Sanctions.

The court has inherent power to protect the integrity and fair administration of the criminal justice process by imposing sanctions. The trial judge has the power to cite and if necessary punish summarily anyone who, in the judge's presence in open court, willfully obstructs the course of criminal proceedings.

Standard 6-4-2. Imposition of Sanctions.

If the judge determines to impose sanctions for misconduct affecting the trial, the judge should ordinarily impose the lease severe sanction appropriate to correct the abuse and deter repetition and should do so outside the presence of the jury, if possible, in weighing the severity of possible sanction for disruptive courtroom conduct to be applied during the trial, the judge should consider the risk of further disruption, delay, or prejudice that might result from the character of the sanction at the time of its imposition.

Standard 6-4-3. The Sanction of contempt.

The sanction of contempt should not be imposed by the trial judge unless:

(a) It is clear from the identity of the offender and the character of his or her acts that the disruptive conduct was willfully contemptuous;
(b) the conduct warranting the sanction was preceded by a clear warning that such conduct was impermissible and that specified sanctions might be imposed for its repetition.

Standard 6-4-4. Notice of Intent to Use contempt power; postponement of adjudication.

(a) The trial judge should, as soon as practicable after he or she is satisfied that courtroom misconduct requires contempt proceedings, inform the alleged offender of the judge's intentions to institute such proceedings.
(b) The trial judge should consider deferring adjudication of contempt for courtroom misconduct of a defendant, an attorney, or a witness until after the trial, and should defer such a proceeding unless prompt punishment is imperative.

Standard 6-4-5. Notice of nature of conduct and opportunity to be heard.

Before imposing any punishment for criminal contempt, the judge should give the offender notice of the nature of the conduct and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment. See Appendix 14.

The prosecutor's office has been provided prior notice of the problems encountered in court scheduling due to the prosecutor's failure to ask for detention and transport orders. In his memo to the Court's attorney, Mr. Casey, the Chief prosecutor acknowledged the court's position well in advance of Ms. Castro's contempt order, based on her failure to ask for a transport order. See appendix 15. Instead of complying with the court's directive to make requests for detention orders, the prosecutor responded to the court's attorney that issuance of a custody order was not his responsibility, but rather, it was the duty of the court's clerk. The chief prosecutor's response was a conscious disregard of a court notice and directive that he comply with the ABA standards of conduct for court practice in criminal cases, a standard that he was to follow under 3 PYTC § 1-4-40(C). He was provided adequate notice that he should have shared with his staff but may have failed to do so. He should have perceived a risk of sanction as to non-compliance but he failed to do so.

THE APPELLATE COURT SHOULD SANCTION THE PROSECUTOR FOR FILING A FRIVOLOUS APPEAL AND FOR ITS FRUITLESS, TIME CONSUMING LITIGATION THAT CONSUMED SEVERAL HOURS OF COURT TIME TO RESPOND TO THE PROSECUTOR'S CHALLENGE TO THE COURT'S EXPLICIT AND INHERENT AUTHORITY TO IMPOSE SANCTIONS, THEREBY PREVENTING THE TRIAL COURT JUDGE FROM ADDRESSING IMPORTANT PENDING COURT CASES.

3 PYTRAP Rule 31 provides:

> Where the appeal is frivolous or taken solely for the purpose of delay, or where a motion is frivolous or filed solely for the purpose of delay, or where the party has been guilty of an unreasonable infraction of these rules, the appellate court may impose upon the offending attorney or party or both, such penalties or damages, (including contempt, withholding or imposing costs, or imposing attorney's fees) as the circumstance of the case and the discouragement of like conduct in the future may require. . . .

The prosecutor's appeal in this case has been a waste of precious resources of the Tribal court, and of the Pascua Yaqui Court of Appeals, and the appellant should be sanctioned because it should be aware that the Pascua Yaqui code provisions establish a standard of conduct, i.e. the American Bar Association "standards" and ABA Model Professional Rules of "Conduct," and it should have comported its conduct with such standards of practice. The prosecutor's assertion

that a trial court cannot sanction an attorney for delay of trial procedures, that is, for a delay under the statutorily required time frames of the speedy trial act, and where the prosecutor's delay results in deprivation of a defendant's statutory rights, is again, a frivolous argument without merit. The Court requests that it sanction the appellant for his unsupported appeal, and that this Court of Appeals order the prosecutor's office to compensate the Court for the nine hours time at the salaried rate of the associate judge of $35.28 per hour, for a total of $317.52 fees to be paid into Court's salaries budget, and the Appellee also respectfully requests that this court order that the appellant pay costs of $0.10 per page for photocopying of the Appellee's brief with this Court, and for copies sent to interest parties, for total costs of $41.40, to be paid into the Court's operating budget, pursuant to 3 PYTRAP Rule 31. Such an award to the Appellee of costs and attorney fees would discourage future like conduct of filing frivolous appeals by the Appellant.

Based on the foregoing authorities, the Court of Appeals should dismiss the Tribe's appeal as one without merit and it should affirm the trial court's contempt of court order and uphold the sanction of a suspended fine.

SUBMITTED THIS 18th DAY OF JULY, 2007.

Melvin R Stoof

Respectfully Submitted
Associate Judge, Pascua Yaqui Tribal Court
7474 S. Camino de Oeste
Tucson, AZ. 85757
(520) 879-6289
Fax: (520) 879-6277

I certify that a true and correct copy of the foregoing was sent by
Hand delivery and certified mail, return receipt requested
To the Appellant, Pascua Yaqui Prosecutor's office.

Melvin R. Stoof

Melvin R. Stoof, Appellee

Date 7/18/07

APPENDIX

TABLE OF CONTENTS

TEXT

17 A.R.S. Rules Crim.Proc., Rule 37.1

I256C40D0C3-D911D79B009-1A1D60DFEFE
Arizona Revised Statutes Annotated Currentness
RULES OF CRIMINAL PROCEDURE
Rules of Criminal Procedure
IX. POWERS OF COURT
IX. Powers of Court
RULE 37. REPORT OF COURT DISPOSITIONS
Rule 37. Report of Court Dispositions
Rule 37.1. Scope

Rule 37.1. Scope

TEXT a

a. In every criminal case filed in any court, the final disposition of the case shall be reported to the criminal identification section of the Department of Public Safety if the defendant was incarcerated or fingerprinted as a result of the charge. The disposition shall be reported in a form approved by the Supreme Court. The disposition shall be sent to the criminal identification section within 10 days of the final disposition.

TEXT b

b. A final disposition is the information disclosing that criminal proceedings have concluded and the nature of the termination.

CREDIT

CREDIT(S)

Added Sept. 14, 1976, effective Nov. 1, 1976. Amended and effective Oct. 16, 2001, on emergency basis. Adopted on a permanent basis effective Oct. 16, 2001.

HISTORICAL NOTES -- COMMENT

Current with amendments received through 5/14/07.

AZ ST RCRP Rule 37.1
END OF DOCUMENT

TEXT

17 A.R.S. Rules Crim.Proc., Rule 37.2

I64EFDDC0C3-D911D79B009-1A1D60DFEFE
Arizona Revised Statutes Annotated Currentness
RULES OF CRIMINAL PROCEDURE
Rules of Criminal Procedure
IX. POWERS OF COURT
IX. Powers of Court
RULE 37. REPORT OF COURT DISPOSITIONS
Rule 37. Report of Court Dispositions
Rule 37.2. Initiation of report

Rule 37.2. Initiation of report

TEXT a

a. At the time of the filing of a criminal charge against a defendant who was incarcerated or fingerprinted, the prosecutor shall also file with the court the disposition form containing the information required to be submitted by the prosecutor or law enforcement officer.

TEXT b

b. If the action is commenced by complaint, the prosecutor shall attach the disposition form to the complaint. If the defendant is held to answer before the superior court, the magistrate shall forward the disposition form with the file to the superior court.

TEXT c

c. If the action is commenced by indictment or an information filed directly in superior court, the prosecutor shall file the disposition form at the time of the filing of the indictment or information.

TEXT d

d. If the defendant is fingerprinted pursuant to Rule 3.2(b) and (c) after the filing of the complaint, information, or indictment, the prosecutor shall file the disposition form in the court where the charges are pending within 5 days after the taking of the fingerprints.

APP.NO 1-2

CREDIT

CREDIT(S)

Added Sept. 14, 1976, effective Nov. 1, 1976. Amended Jan. 6, 2000, effective

CREDIT

June 1, 2000.

Current with amendments received through 5/14/07.

APP. NO. 1-3

Model Rules of Professional Conduct

Client-Lawyer Relationship
Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

APP.NO. 2

Standard 3-2.9 Prompt Disposition of Criminal Charges

(a) A prosecutor should avoid unnecessary delay in the disposition of cases. A prosecutor should not fail to act with reasonable diligence and promptness in prosecuting an accused.

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

(c) The prosecution function should be so organized and supported with staff and facilities as 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 witnesses the importance of punctuality in attendance in court.

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

(e) A prosecutor, without attempting to get more funding for additional staff, should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the interests of justice in the speedy disposition of charges, or may lead to the breach of professional obligations.

APP.NO.3

FILED

2002 NOV -5 AM 8:19

KERN COUNTY
DEPARTMENT OF HUMAN SERVICES
By: Ruth Brunt (RCB)
Word Processing Tech II
100 East California Avenue
P. O. Box 511
Bakersfield, California 93302
Telephone: (661) 633-7141

SUPERIOR COURT OF CALIFORNIA, COUNTY OF KERN

METROPOLITAN DIVISION — JUVENILE JUSTICE CENTER

In the Matter of

[redacted]

A Child

No. 96162

DECLARATION OF RUTH BRUNT IN SUPPORT OF DILIGENT SEARCH FOR [redacted], ALLEGED FATHER [redacted], 8 A.M., DD

The undersigned, Ruth Brunt, declare as follows:

The undersigned is employed by the Kern County Department of Human Services as a Word Processing Tech II and this declaration is made during the course and scope of her official duties.

At the request of Daniel R. Maher, Deputy County Counsel, State Bar No. 135390, Attorney for Petitioner, Kern County Department of Human Services, an attempt to ascertain the whereabouts of [redacted], the child's alleged father, and/or unknown, paternal grandparent(s) was conducted.

The alleged father of the child, [redacted] according to Kern County Department of Human Services records, is [redacted] DOB: 1[redacted], SSN: [redacted]

I have searched, or caused to be searched, the following records: Criminal Information Index (CII); Federal Bureau of Investigation (FBI); Department of Motor Vehicles (DMV); Criminal Justice Information System (CJIS); Medical Eligibility Data System (MEDS); The Local Telephone Directory; The United States Post Office; The Department of Corrections Identification and Location Telephone Number; The Kern County Probation Department (Adult

Division); Records, reports and files of the Kern County Department of Human Services; Kern County Lerdo Facility; FBI Federal Prison System Telephone Line; Directory Assistance.

On July 24, 2002, the undersigned searched the Kern County Department of Human Services records, reports, and files in an attempt to locate information on [redacted]. The undersigned was unable to locate any information on him.

On July 24, 2002, the undersigned caused to run CJIS on [redacted]. The undersigned was unable to match any of the (10) records listed.

On July 24, 2002, the undersigned caused to run CII, FBI, and DMV files and records, however, was unable to match any of the information.

On July 24, 2002, the undersigned searched the MEDS files and records for current information on [redacted]z. The undersigned was unable to match any of the (150) records listed.

On July 24, 2002, the undersigned searched the SBC Pacific Bell Yellow Pages and Bakersfield area white pages and found no listing for a [redacted]z.

On July 24, 2002, the undersigned searched in SAWS for [redacted]. There was no match found for him.

On July 24 2002, the undersigned contacted the Kern County Lerdo Facility at 661-391-7901. Shawna informed the undersigned there were no records for [redacted].

On July 24, 2002, the undersigned was unable to send correspondence to [redacted]z or to the U.S. Postal Service due to lack of previous address information.

On July 25, 2002, the undersigned contacted the Department of Corrections Identification and Location, 916-445-6713 and Mary advised there were no records listed for an [redacted].

On July 25, 2002, the undersigned searched the Kern County Probation records in CJIS and found that [redacted] was not listed.

On July 25 2002, the undersigned contacted Directory Assistance and was advised there were no listings in Delano, Bakersfield, or surrounding areas for [redacted]z.

On July 25, 2002, the undersigned searched the FBI-Federal Bureau of Prisons web site, www.BOP.com, and found there was no [redacted] listed.

I was unable to locate the child's alleged father, [redacted]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed Wednesday, July 31, 2002 at Bakersfield, California.

Ruth Brunt

RUTH BRUNT
Word Processing Tech II

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE Plaintiff, VS. SHIRLEY, ANTHONY RAY, Defendant.	CASE NO. CR-07-112 ORDER SETTING PRE-TRIAL CONFERENCE

On February 8, 2007, the defendant, Anthony Ray Shirley, appeared without legal counsel, for arraignment, and appearing for the Tribe was G. Allen Osburn, for Patricia Castro.

The defendant was read his rights, he waived reading of the criminal complaint, and he entered a plea of not guilty to Count One, Breaking and Entry, and to Count Five, Narcotics and Dangerous Drugs, and he attempted to enter a guilty plea to Count Two, Burglary, Count Three, Malicious Mischief, and Count Four Theft, but he could not provide enough factual basis for the court to accept the guilty pleas. Based on his testimony he was unable to fully remember all of the details of the event, the Court asked if he wished to withdraw his guilty plea to Count One and Five also, he said yes, and the Court should enter a not guilty plea to all counts for the defendant. The Tribe recommends Mr. Shirley be released on a $800.00 cash bond, based on prior failures to appear, and under prior conditions ordered by the court, and the defendant does object. The court should deny the defendant's request for a reduction of the bond, based on lack of good cause shown. The matter should be set for a pre-trial conference.

IT IS ORDERED that the Court denies the request for a reduced bond and for release for lack of good cause shown, and based on prior failures to appear, and the Defendant, Anthony Shirley, shall be released on a $800.00 cash bond, to be posted, pending his pre-trial hearing. The defendant shall appear at all future scheduled hearings and obey all laws. He shall be restrained from any contact with the alleged victim, Josephine Garcia, and he shall not go near the residence at 7643 South Camino Benem. He shall not consume nor possess any narcotics or dangerous drugs, or drug paraphernalia, and he shall be subject to random urinalysis testing by law enforcement.

A PRE-TRIAL CONFERENCE is scheduled for March 19, 2007 at 9:30 a.m..

THIS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

SO ORDERED THIS 8th DAY OF FEBRUARY, 2007.

Associate Judge, Pascua Yaqui Tribal Court

Date: 020807

✓ Tribe ✓ Defendant/Counsel ✓ Other Deft ccs

Clerk:

APP. NO. 5

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE Plaintiff, Vs. Madril, Francisco, Defendant.	)	CASE NO. CR-07-091 ORDER FOR CONTINUANCE DUE TO FAILURE TO TRANSPORT

On February 5, 2007 this matter came before the court on an initial hearing, and the prosecutor, G. Allen Osburn, moved to change the time for the scheduled initial hearing due to a the Tribe's failure to request that the defendant who is in detention be transported to appear for hearing today. The Tribe is incorrect in assuming the Court or its clerk is responsible to ensure a defendant is transported to the court house, particularly when the Tribe provided information to the court that the defendant may be served at his residence address if 7751 S. Maala Mecha Voo'o, on the reservation, when the Tribe knew that the defendant was being held in custody, based on a cash bond requested by the Tribe in another case involving the defendant. The court should re-set the time for the initial hearing, for good cause shown, and it should order that the Tribe be required to file an appropriate request to transfer and transport the defendant to ensure that he may appear for his hearing.

IT IS ORDERED that the court shall re-set the initial hearing, for good cause shown, due to the Tribe's failure to request a transport order, and the hearing shall be continued from its current date and time, and it shall be re-set for February 12, 2007, at 9:30 a.m.. The Tribe shall file an appropriate written request to the court to ensure that the defendant may be transported from his current detention to the court house for his hearing.

THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

SO ORDERED THIS 5th DAY OF FEBRUARY, 2007.

_____

JUDGE, PASCUA YAQUI TRIBAL COURT

Cc: Date _____

_____ Tribe ____ Defendant

_____

Clerk

APP. NO. 6-1

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE Plaintiff, Vs. GARCIA, CHRISTINA, Defendant.	)	CASE NO. CR-07-163 ORDER GRANTING CONTINUANCE OF INITIAL HEARING

On April 3, 2007, the court held an initial hearing. The defendant was not served with a criminal complaint and summons to appear for her initial hearing, because she is incarcerated at Pima County Detention facility. Yancy Jencsok appeared for the Tribe, and he requested that this matter be re-scheduled, and for good cause shown, the matter should be re-set for a initial hearing.

IT IS ORDERED that a continuance shall be granted, for good cause shown, and **this matter shall be re-set for an initial hearing on April 30, 2007 at 10:00 a.m.**.

THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

SO ORDERED THIS 3rd DAY OF APRIL, 2007.

_____

JUDGE, PASCUA YAQUI TRIBAL COURT

cc: Date _____

_____Tribe _____Defendant

_____

Clerk

APP. NO. 6-2

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, PLAINTIFF, vs. VALENZUELA, ANTONIO, DEFENDANT.	))))))	CASE NO. CR-06-247 ORDER FOR TRANSPORT TO COMPLETE DETENTION DAYS

On January 28, 2007, the defendant was ordered to serve out a jail term with a release date of June 5, 2007. On March 6, 2007, Milissa Mace, Pascua Yaqui Police Department, has requested that the court grant an order for transport, so that the defendant may be transported from his current detention at CADC Florence, AZ. to McKinley County Detention Center where he should remain, until thirty days prior to the end of his sentence, at which time he would be transferred to Yavapai County Jail, Camp Verde, AZ to serve out his term.

The court should order that the defendant, Antonio Valenzuela, DOB: 01/22/75, be transported by Pascua Yaqui Detention Officers or Bureau of Indian Affairs Corrections Officers from CADC, Florence, AZ. To the CCA McKinley County detention center where he should remain until 30 days prior to the end of his sentence, and then he should be transported to Yavapai County Jail, 3505 W. Hwy 260, Suite 105, Camp Verde, AZ. 86322, until the defendant completes his detention term.

IT IS ORDERED that either Pascua Yaqui Detention staff or Bureau of Indian Affairs Corrections' officers shall transport Antonio Valenzuela, DOB: 01/22/75, from the CADC Florence, AZ., to McKinley County detention facility, 255 South Boardman Drive, Gallup, NM 87301, on March 8, 2006 at 12:00 a.m., where he shall remain until 30 days prior to the end of his jail term, and then transported from McKinley County Detention to the Yavapai County Jail, 3505 W. Hwy 260, Suite 105, Camp Verde, AZ. 86322, to serve out the last thirty days of his sentence, until he shall be released on June 5, 2007 at noon.

SO ORDERED THIS 6th DAY OF MARCH, 2007.

_____

Associate Judge, Pascua Yaqui Tribal Court

Cc: Date_____

____Tribe ____ Defendant ___ PY Detention ___ Yavapai County Detention

____ CCA McKINLEY

_____

Clerk

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, PLAINTIFF, vs. GARCIA, BRUCE, DEFENDANT.	))))))	CASE NOS. CR-05-210, CR-06-041 ORDER FOR TRANSPORT TO COMPLETE DETENTION DAYS

On May 18, 2006, the defendant was ordered to serve out a jail term with a release date of November 9, 2007. On March 6, 2007, Milissa Mace, Pascua Yaqui Police Department, has requested that the court grant an order for transport, so that the defendant may be transported from his current detention at CADC Florence to McKinley County Detention Center where he should remain, until thirty days prior to the end of his sentence, at which time he would be transferred to Yavapai County Jail, Camp Verde, AZ to serve out his term. The court should order that the defendant, Bruce Garcia, DOB: 07/20/75, be transported on March 8, 2007, at 12:00 p.m., when he shall be transported by either Pascua Yaqui Detention Staff or Bureau of Indian Affairs Corrections Officers from CADC, Florence, AZ. to the CCA McKinley County detention center where he should remain until 30 days prior to the end of his sentence, and then he should be transported to Yavapai County Jail, 3505 W. Hwy 260, Suite 105, Camp Verde, AZ. 86322, until the defendant completes his detention term.

IT IS ORDERED that either Pascua Yaqui Detention staff or Bureau of Indian Affairs Corrections' officers shall transport Bruce Garcia, DOB: 07/20/75, from CADC Florence, AZ., on March 8, 2007, at 12:00 pm to McKinley County detention facility, 255 South Boardman Drive, Gallup, NM 87301, where he shall remain until 30 days prior to the end of his jail term, and then transported from McKinley County Detention to the Yavapai County Jail, 3505 W. Hwy 260, Suite 105, Camp Verde, AZ. 86322, to serve out the last thirty days of his sentence, until he shall be released on November 9, 2007 at noon.

SO ORDERED THIS 6th DAY OF MARCH, 2007.

_____

Associate Judge, Pascua Yaqui Tribal Court

Cc: Date_____

____Tribe ____ Defendant ___ PY Detention ___ Yavapai County Detention

____ CCA McKINLEY ____ CADC Florence

_____

Clerk

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, PLAINTIFF, vs. ANDRADE, ISMAEL, DEFENDANT.	))))))	CASE NO. CW-05-006 ORDER FOR TRANSPORT TO COMPLETE DETENTION DAYS

On January 6, 2007, the defendant was ordered to serve a jail term with a release date of April 6, 2007. On March 6, 2007, Milissa Mace, Pascua Yaqui Police Department, has requested that the court grant an order for transport, so that the defendant may be transported from his current detention at CADC Florence to McKinley County Detention Center where he should remain, until thirty days prior to the end of his sentence, at which time he would be transferred to Yavapai County Jail, Camp Verde, AZ to serve out his term. The court should order that the defendant, Ismael Andrade, DOB: 10/24/77, be transported on March 8, 2007, at 12:00 p.m., when he shall be transported by either Pascua Yaqui Detention Staff or Bureau of Indian Affairs Corrections Officers from CADC, Florence, AZ. to the CCA McKinley County detention center where he should remain until 30 days prior to the end of his sentence, and then he should be transported to Yavapai County Jail, 3505 W. Hwy 260, Suite 105, Camp Verde, AZ. 86322, until the defendant completes his detention term.

IT IS ORDERED that either Pascua Yaqui Detention staff or Bureau of Indian Affairs Corrections' officers shall transport Ismael Andrade, DOB: 10/24/77, from CADC Florence, AZ., on March 8, 2007, at 12:00 pm to McKinley County detention facility, 255 South Boardman Drive, Gallup, NM 87301, where he shall remain until 30 days prior to the end of his jail term, and then transported from McKinley County Detention to the Yavapai County Jail, 3505 W. Hwy 260, Suite 105, Camp Verde, AZ. 86322, to serve out the last thirty days of his sentence, until he shall be released on April 6, 2007 at noon.

SO ORDERED THIS 7th DAY OF MARCH, 2007.

_____

Associate Judge, Pascua Yaqui Tribal Court

Cc: Date_____

____Tribe ____ Defendant ___ PY Detention ___ Yavapai County Detention

____ CCA McKINLEY ____ CADC Florence

_____

Clerk

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, PLAINTIFF, vs. MORENO, JR., AVELISTO, DEFENDANT.	))))))	CASE NO. CR-07-119 ORDER DENYING DEFENDANT'S MOTION TO DISMISS

On May 14, 2007, the court held a hearing on defendant's motion to dismiss. Appearing was the defendant without an attorney, and Yancy Jencsok appeared for the Tribe. The defendant objected, requested a dismissal with prejudice to re-filing, based on a violation of speedy trial rights, because he had not been brought before the court by detention by his scheduled morning hearing at 11:30 a.m. on February 15, 2007, but instead was delivered to the court after 3:00 p.m..

The Tribe argued that the court should not allow the dismissal because the Court was to hold the arraignment within ten days of the initial hearing.

Although the criminal procedure rules provide that a defendant must be brought before the court "within 24 hours after arrest" and if he is not then "the defendant shall be released immediately, " 3 PYT R.Crim.P. Rule 17(A), and "[I]f a complaint is not filed within 48 hours from the time of the initial appearance before the judge. . . the defendant shall be released from jail. . ." 3 PYT R.Crim.P. Rule 17(B) there is no "hourly" time frame to bring a defendant before the court for an arraignment. The court agrees with the Tribe's argument that the code does not read "within 240 hours," but instead reads the "[a]rraignment. . . shall take place within ten days after initial appearance.

The defendant's initial hearing was held on February 5, 2007, and the arraignment was held on February 15, 2007, and the arraignment was therefore held within the legal time permitted. Because there was no statutory violation of the defendant's right to be brought before the court, the Court should deny the defendant's motion to dismiss for lack of good cause shown.

The Tribe's prosecutor has argued that any failure of a detention officer to not transport a defendant in detention to court for a hearing "is a matter between the court and

detention." Such an assertion by the Tribe is premised on a mistaken belief that the Court has the sole responsibility of ensuring defendants in custody are brought to the court. To address the issue of whose primary responsibility it is to assure that matters are timely docketed and that defendants in custody are transported to appear at court, the Court notes that the Pascua Yaqui Rules of Criminal Procedure places the affirmative duty on the prosecutor to ensure matters are properly docketed:

> **The prosecutor shall advise the court of facts relevant to determining the order of cases on the calendar.** 3 PYT R.Crim.P. Rule 32(C). (emphasis added).

Additionally, it is the responsibility for the Tribe's prosecutor to ensure that defendants are properly brought before the court, by way of requesting a transport order, or if the defendant is in custody in an outside detention facility to file for extradition, or to file writs of habeas corpus ad prosequendum to prosecute a defendant in custody, or writs of habeas corpus ad testificandum, to bring a witness in custody to testify, or writs of habeas corpus ad subjiciendum, where a defendant challenges his imprisonment. The former Rules of Federal Criminal Procedure set out an example of the prosecutor's duty to exercise control over detainees being brought to the court for hearings:

> (g) Supervision of Detention Pending Trial. . . .**The attorney for the government** shall make a bi-weekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment or trial for a period in excess of ten days. As to each witness so listed **the attorney for the government** shall make a statement of the reasons why such witness should not be released with or without the taking of a deposition pursuant to rule 15(a). As to each defendant so listed **the attorney for the government** shall make a statement of the reasons why the defendant is still in custody. F.R.Crim.Pro. 36 (g) (as amended 1991). (emphasis added)

Federal and state courts have placed the primary responsibility on the office of prosecuting attorneys to ensure defendants who are detained are brought before the court, rather than imposing a duty on the court or the court's clerk to supervise detention officers. The court merely acts as the supervisor over detention insofar as the prosecutor requests detention orders and transport orders to eliminate unnecessary delays in proceeding.

As a practical matter, the prosecutor's office with six prosecutors has substantially more resources to make contact with a detention officer to ensure the court order for transport is carried out, rather than the court's one overburdened criminal court clerk, who has

overwhelming duties of setting the court's calendar, issuing orders, summons, subpoenas, notices to appear, jury selection panels, distributing court orders, and numerous other court documents in literally hundreds of court cases. It should not be the one criminal court clerk's duty or responsibility to call detention daily to ensure detainees are transported. It is the Tribal prosecutor's primary responsibility, and the responsibility of the five other attorneys and advocates he supervises, to supervise detention pending hearings and trials. The court's expectation is that the Tribe's Chief Prosecutor and his five attorneys and advocates should have a direct line of communication with the Chief Detention Officer to review a daily and weekly list of detainees to eliminate unnecessary detention, and to promote defendant's appearance for hearings, particularly in tribal cases under the Indian Civil Rights act, where tribal defendants, who are often times not represented by counsel and who may not know they can challenge their detention or bond conditions, are not unduly imprisoned pending their hearings.

IT IS ORDERED that the Court denies the defendant's motion to dismiss with prejudice, for lack of good cause shown.

SO ORDERED THIS 15th DAY OF MAY, 2007.

_____
Associate Judge, Pascua Yaqui Tribal Court

cc: Date _____
____Tribe ___ Defendant

_____
Clerk

3161. Time limits and exclusions

How Current is This?

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)

(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)

(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161 (h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161 (h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163 (a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and

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for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163 (b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 [1] of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 [1] of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)

(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 [1] of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)

(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161 (b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein

contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)

(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)

(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

Federal Rules of Criminal Procedure

Notes

Law About ... Criminal Procedure

Rule 57. District Court Rules

(a) In General.

(1) *Adopting Local Rules.*

Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule must be consistent with -- but not duplicative of -- federal statutes and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(2) *Limiting Enforcement.*

A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of an unintentional failure to comply with the requirement.

(b) Procedure When There Is No Controlling Law.

A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance.

(c) Effective Date and Notice.

A local rule adopted under this rule takes effect on the date specified by the district court and remains in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of local rules and their amendments, when promulgated, must be furnished to the judicial council and the Administrative Office of the United States Courts and must be made available to the public.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Dec. 4, 1967, eff. July 1, 1968; Apr. 29, 1985, eff. Aug. 1, 1985; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 29, 2002, eff. Dec. 1, 2002.)

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, PLAINTIFF, vs. GASTELEM, JOHN, DEFENDANT.	CASE NO. CR-06-397 ORDER TO TRANSPORT FOR ASSESSMENT

On March 19, 2007, prosecutor G. Allen Osburn, Probation officer Gloria Alvarez, the defendant, and his attorney, Nicholas Fontana, appeared for a hearing on the motion to revoke probation.

Because the defendant's probation has been revoked and the matter has been set for a sentencing hearing, the court should grant the defendant's unopposed motion for transport so that that he may undergo an assessment with Centered Spirit program on March 20, 2007 at 10:30 a.m., prior to his sentencing hearing.

IT IS ORDERED that Pascua Yaqui Detention Services shall transfer and transport John Gastlem, from the Detention Center, to the Centered Spirit Program on March 20, 2007 at 10:00 a.m.. After his assessment, the defendant shall be returned to his detention facility, where he shall remain until he posts his $1,000.00 cash bond and so that he may appear for his sentencing hearing on April 2, 2007, at 10:30 a.m..

SO ORDERED THIS 19th DAY OF MARCH, 2007.

_____
Associate Judge, Pascua Yaqui Tribal Court

Cc: Date_____
___Tribe _____ Defendant _____ Counsel _____ PY Detention ___ CCA

_____
Clerk

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, PLAINTIFF, vs. VALENZUELA, ROSENDO, DEFENDANT.	)	CASE NOS. CR-07-094, TR-07-010 ORDER FOR TRANSPORT TO ATTEND HEARING

On April 23, 2007, the Tribe by and through G. Allen Osburn requested that the court issue an order to transport the defendant to appear for the scheduled pre-trial hearings for April 30, 2007, at 9:30 a.m. from the Central Arizona Detention Center to the Court. The court should grant the motion to issue a transport order.

IT IS ORDERED Pascua Yaqui Detention staff shall transport Rosendo Valenzuela, DOB: 05/17/83, from the Central Arizona Detention Center, **so that he may appear for his pre-trials at the Pascua Yaqui Court, on April 30, 2007, at 9:30 a.m..** The Pascua Yaqui detention staff shall return the defendant to the detention facility, upon completion of his hearings.

SO ORDERED THIS 23rd DAY OF APRIL, 2007.

_____

Associate Judge, Pascua Yaqui Tribal Court

Cc: Date_____

____Tribe ____ Defendant ____ Counsel _____ PY Detention _____ CADC

_____

Clerk

APP. NO. 12

Criminal Justice Section Standards

Speedy Trial

Speedy Trial

PART I.

GENERAL PRINCIPLES

Standard 12-1.1 Purposes of the Standards on Speedy Trial and Timely Resolution of Criminal Cases

(a) The Standards on Speedy Trial and Timely Resolution of Criminal Cases have three main purposes: (1) to effectuate the right of the accused to a speedy trial; (2) to further the interests of the public, including victims and witnesses, in the fair, accurate, and timely resolution of criminal cases; and (3) to ensure the effective utilization of resources.
(b) These standards should be read in conjunction with other ABA Standards of Criminal Justice, and with recognition that fairness and accuracy are essential components of the criminal justice process. The standards are not intended to emphasize speedy disposition of cases to the detriment of the interests of the parties and the public, including victims and witnesses, in the fair, accurate and timely resolution of cases. In implementing these standards in individual cases and in developing policies for overall management of caseloads, jurisdictions should seek to ensure that both prosecutors and defense counsel have adequate opportunity to investigate their cases, consult with witnesses, review documents, make appropriate motions, and conduct other essential aspects of case preparation.

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Standard 12-1.2 Importance of establishing both speedy trial rules and standards for timely resolution of criminal cases

(a) The right of an accused to a speedy trial is fundamental. It should be effectuated and protected by rule or statute that:
(i) sets specific limits on the time within which either the defendant must be brought to trial or the case must be resolved through a non-trial disposition;
(ii) provides guidelines for computing the time within which the trial must be commenced or the case otherwise resolved; and
(iii) establishes appropriate consequences in the event that the accused's right to a speedy trial is denied.
(b) The public, including victims and witnesses has an interest in the timely resolution of criminal cases. From the commencement of a criminal case to its conclusion, any elapsed time other than reasonably needed for preparation and court events should be minimized. The public's interest should be expressed in formally adopted policies and

standards that:
(i) establish goals for the timely resolution of criminal cases from commencement to disposition and for specific stages, taking into account the seriousness and complexity of different types of cases;
(ii) require monitoring of the performance of the courts and other organizational entities with respect to the goals; and
(iii) provide for public dissemination of data concerning organizational performance in relation to the goals.

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Standard 12-1.3 Case differentiation

In establishing statutes or rules for speedy trial and goals and practices for timely resolution of criminal cases, jurisdictions should:
(a) take account of the relative seriousness and complexity of different types of cases; and
(b) distinguish between defendants in detention and defendants on pretrial release. The time limits concerning speedy trial for detained defendants should ordinarily be shorter than the limits applicable to defendants on pretrial release.

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Standard 12-1.4 Systems approach

(a) These standards approach the issues of speedy trial and timely case resolution from a systemic perspective, recognizing that many different institutions, agencies, and individuals play key roles in criminal cases. In order for the purposes of the standards to be achieved, the interests and perspectives of the following should be taken into account:
(i) defendants;
(ii) the public, including victims and witnesses;
(iii) courts;
(iv) prosecutors and defense counsel; and
(v) law enforcement agencies, officials responsible for local detention facilities, pretrial services agencies, probation departments, and other organizations involved in or affected by the prosecution and adjudication of criminal cases.
(b) Jurisdictions should provide adequate resources to the institutions and agencies involved in criminal justice processes, in order to enable the purposes of these standards to be achieved.

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Standard 12-1.5 Caseflow systems that will enable timely resolution of all criminal cases

These standards focus on the timely resolution of all criminal cases, including the large proportion of cases not resolved by trial. In order to utilize limited resources effectively, jurisdictions should design caseflow systems that enable an early assessment of the complexity and prospects for non-trial resolution of cases, and seek to facilitate the early resolution of cases not likely to be tried. Such caseflow systems should ensure that many cases are resolved rapidly, that trial continuances are minimized, that case scheduling functions with a high degree of certainty and predictability concerning case scheduling, and that the jurisdiction's speedy trial requirements and standards for timely resolution can be met.

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PART II.

DEFENDANT'S RIGHT TO A SPEEDY TRIAL

Standard 12-2.1 Speedy trial time limits

(a) A defendant's right to a speedy trial should be formally recognized and protected by rule or by statute that establishes outside limits on the amount of time that may elapse from the date of a specific event until the commencement of the trial or other disposition of the case. The time limits should be expressed in days or months.
(b) The presumptive speedy trial time limit for persons held in pretrial detention should be [90] days from the date of the defendant's first appearance in court after the filing of a charging instrument. The presumptive limit for persons who are on pretrial release should be [180] days from the date of the defendant's first appearance in court after either either the filing of any charging instrument or the issuance of a citation or summons. Shorter presumptive speedy trial time limits should be set for persons charged with minor offenses.
(c) Certain periods of time should be excluded from the computation of time allowed under the rule or statute, as set forth below in Standard 12-2.3.
(d) Provision should be made for the court to determine, on motion of the prosecution or the defense or on its own motion, that a case is of such complexity that the presumptive speedy trial time limit should be extended in order to enable the parties to make adequate preparations for pretrial proceedings or for the trial itself. The court should give substantial weight to a motion for extension of the speedy trial limit on these grounds that is made, with good cause shown, by either the prosecution or the defense. In the event that a determination of complexity is made, the judge should establish a revised time limit and should state on the record the reasons for extending the time. A motion to extend the speedy trial time limit because of the complexity of the case should be made as soon as practicable.

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Standard 12-2.2 Commencement and setting of speedy trial time limit

The speedy trial time limit should commence, without demand by the defendant, from the date of the defendant's first appearance in court after either a charge is filed or a citation or summons is issued, except that:

(a) If the charge is dismissed and thereafter the defendant is charged with the same offense or one arising out of the same criminal episode, or if a superseding charging instrument is filed by the prosecution in place of the original charge, then:
(i) the court should set a new speedy trial limit as set forth in Standard 12-2.1 or a shorter period. The new limit should commence at the defendant's first appearance before the court on the new charge; and
(ii) in setting the new limit, the court should consider:
(A) the degree to which the new charge is different from the original charge;
(B) in the case of a superseding charging instrument, the extent to which the superseding instrument alleges offenses or material facts that were known to the prosecution at the time the original charge was filed;
(C) the period of time that has elapsed between the defendant's appearance on the first charge and the defendant's appearance on the second charge;
(D) the reason for the dismissal or the filing of the superseding instrument; provided, however, that if the court finds that the charge was dismissed to avoid the effect of the

speedy trial time limit, the new charge should ordinarily be dismissed with prejudice;
(E) any other factor which, in the interests of justice, affects the time in which the defendant should be tried on the new charge;
(b) If the defendant is to be tried again following a mistrial, then a new reasonable speedy trial time limit should be set. The new speedy trial time limit period generally should be shorter than that applicable to the original charge and should commence from the date of the mistrial.
(c) If the defendant is to be tried again following a successful appeal or collateral attack on the conviction, then the speedy trial time limit should be that set forth in Standard 12-2.1 and should commence running from the date the order occasioning the retrial becomes final.

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Standard 12-2.3 Excluded periods

The following periods should be excluded in computing allowable time under the speedy trial rule or statute:

(a) The following periods should be excluded in computing allowable time under the speedy trial rule or statute:
(i) time that elapses during other proceedings in the case against the defendant, including but not limited to an examination and hearing on competency, a period during which the defendant is incompetent to stand trial, and any interlocutory appeals;
(ii) time that elapses during a period when the defendant is on trial or engaged in proceedings in a different case in the same or a different court and was therefore physically unavailable;
(iii) time that elapses as a result of a continuance of the trial date granted at the request or with the consent of the defendant or the defendant's counsel. A defendant who has waived the right to counsel and is proceeding pro se should not be deemed to have consented to a continuance unless the defendant has been advised by the court of the right to a speedy trial and the effect of the defendant's consent;
(iv) time that elapses during any delay caused by the defendant's failure to appear for scheduled court proceedings;
(v) time when the defendant is joined for trial with a codefendant as to whom the speedy trial time limit has not run, if the court finds that, for reasons stated on the record, the interests of justice served by the joinder outweigh the defendant's right to have the trial held within the originally prescribed time limits; and
(vi) other reasonable periods of time when circumstances warrant exclusion of the time upon good cause shown or upon a determination by the court that the interests of justice served by excluding a period of time from the speedy trial time limit outweigh the defendant's right to have the trial held within the originally prescribed time limits. No period of delay resulting from a continuance granted by the court in accordance with this paragraph should be excludable unless the court sets forth, in the record of the case, its reasons for finding that the interests of justice served by the granting of the continuance outweigh the defendant's right to have the trial held within the originally prescribed time limits.
(b) Time required for the consideration and disposition of pretrial motions should not be automatically excluded in computing allowable time under the speedy trial rule or statute. Such time may be excluded by the court upon request or on its own motion pursuant to Standard 12-2.3(a)(vi).
(c) If the court sets a case for trial on a date that is outside the speedy trial time limit, and the defendant is on notice of the scheduled date, the defendant's failure to object to the trial date on speedy trial grounds should be deemed consent to an extension of the time allowed under the speedy trial rule or statute to the scheduled date. Time that elapses during such an extended period should be excluded in computing time under the speedy trial rule or statute.

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Standard 12-2.4 Special procedures applicable to persons serving terms of imprisonment

To protect the right to speedy trial of a person serving a term of imprisonment either within or without the jurisdiction, it should be provided by rule or statute that:
(a) if the prosecuting attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a penal institution of that or another jurisdiction, the prosecuting attorney should promptly:
(i) undertake to obtain the presence of the prisoner for trial; or
(ii) cause a detainer to be filed with the official having custody of the prisoner and request the official to so advise the prisoner and to advise the prisoner of the prisoner's right to demand trial;
(b) if an official having custody of such a prisoner receives a detainer, the official should promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs such official that the prisoner does demand trial, the official shall cause a certificate to that effect to be sent promptly to the prosecuting attorney who caused the detainer to be filed;
(c) upon receipt of such certificate, the prosecuting attorney should promptly seek to obtain the presence of the prisoner for trial; and
(d) when the official having custody of the prisoner receives from the prosecuting attorney a properly supported request for temporary custody of such prisoner for trial, the prisoner should be made available to that prosecuting attorney (subject, in cases of interjurisdictional transfer, to the traditional right of the executive to refuse transfer and the right of the prisoner to contest the legality of the delivery).

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Standard 12-2.5 Computation of time for persons serving terms of imprisonment

The time for purposes of the right to a speedy trial in the case of a prisoner whose presence has been obtained while the prisoner is serving a term of imprisonment should commence running from the time the prisoner's presence for trial has been obtained. If the prosecuting attorney has unreasonably delayed causing a detainer to be filed with the custodial official or delayed seeking to obtain the prisoner's presence for trial in lieu of filing a detainer or upon receipt of a certificate of demand, such periods of unreasonable delay should also be counted in ascertaining whether the time has run.

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Standard 12-2.6 Implementation of speedy trial time limits

In adopting a rule or statute that establishes speedy trial time limits, jurisdictions should provide that:
(a) an indictment, information, or other formal charging instrument should be filed within [30] days after the defendant's first appearance in court after either an arrest or issuance of a citation or summons, so that defendants receive prompt notice of the charges on which they will be held to answer and have adequate opportunity to prepare for pretrial motions and for trial within the speedy trial time limit period;
(b) at the time of the defendant's first appearance in court after either the filing of a charging instrument or the issuance of a citation or summons, the court should advise the defendant of the right to a speedy trial and of the presumptive speedy trial time

limit, and should inform the defendant that the granting of a continuance requested or consented to by the defense will have the effect of lengthening the speedy trial time limit period; and
(c) at any time that action is taken that has the effect of extending the time otherwise allowed under the speedy trial rule or statute, the court should set forth its reasons on the record and should confirm, with the prosecution and the defense, the date by which a trial must be held or the case otherwise resolved. The new date should be noted on the record.

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Standard 12-2.7. Effects of exceeding the speedy trial time limit period

(a) If a defendant who is in pretrial detention is not brought to trial and the case is not otherwise resolved before the expiration of time allowed under the speedy trial rule or statute, as extended by periods excluded in accordance with Standard 12-2.3 or extended by the court pursuant to Standard 12-2.1(d), the court should:
(i) order that the defendant be released from detention under conditions set in accordance with the ABA Criminal Justice Standards on Pretrial Release that best minimize the risk of flight and the risk of danger to the community or any person, and set the trial to begin on a date within the speedy trial time limit period for defendants on pretrial release, provided, however, that
(ii) if no condition or combination of conditions of release will reasonably protect the safety of the community or any person:
(A) the court should not order the defendant's release, and should set the trial to begin as expeditiously as possible, receiving the highest possible priority on the court's trial docket and in any event to begin within [15] days, unless the defendant requests a longer period not to exceed [45] days; and
(B) if the trial does not begin within the time set pursuant to subdivision (A), the court should order that the defendant be released from detention under conditions that, to whatever extent reasonably possible, minimize the risk of flight and the risk of danger to the community or any person, and reset the defendant's trial to begin on a date within the speedy trial time limit period for defendants on pretrial release.
(b) If a defendant who is on pretrial release is not brought to trial or the case is not otherwise resolved before the expiration of the time allowed under the speedy trial rule or statute, as extended by periods excluded in accordance with Standard 12-2.3 or extended by the court pursuant to Standard 12-2.1(d), the court should ordinarily dismiss the charges with prejudice, provided, however, that:
(i) after affording the parties an opportunity to be heard, the court may in the interests of justice extend the time limit for a period not to exceed [30] days beyond the date on which the expiration of time is determined by the court, unless the defendant requests a longer period not to exceed [75] days.
(ii) In determining whether and for what period to order such an extension, the court should consider the totality of the circumstances, including:
(A) the gravity of the offense;
(B) the reasons for the failure to bring the defendant to trial within the previously-established time limit;
(C) the extent to which the prosecution or the defense is responsible for the delay; and
(D) the extent of the prejudice to the interests of the defense, the prosecution, or the public that may result from the extension of time or the dismissal of the charges.
(iii) If the court sets an extended period of time pursuant to this paragraph but the trial does not commence within the extended period, the charges should be dismissed with prejudice.
(c) In making a determination concerning actions taken with respect to detention, dismissal, or fixing a date for the commencement of trial pursuant to this standard, the court should set forth, on the record, the reasons for its ruling.
(d) Dismissal of the charge(s) with prejudice pursuant to this standard should forever bar prosecution for the offenses charged and for any other offense required to be

joined with that offense.

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PART III.

STANDARDS FOR TIMELY RESOLUTION OF CRIMINAL CASES

Standard 12-3.1 The public's interest in timely case resolution

The interest of the public, including victims and witnesses, in timely resolution of criminal cases is different from the defendant's right to a speedy trial. This interest should be recognized through formal adoption of policies and standards that are designed to achieve timely disposition of criminal cases regardless of whether the defendant demands a speedy trial. Reasons for developing effective policies and standards aimed at timely resolution of criminal cases include:
(a) preserving the means of proving the charge(s) against the defendant;
(b) maximizing the deterrent effects of prosecution and conviction;
(c) increasing the likelihood that rehabilitative purposes of a sentence imposed if the defendant is convicted will be achieved;
(d) minimizing the length of the periods of anxiety for victims, witnesses and defendants, and their families;
(e) avoiding extended periods of pretrial freedom for defendants who pose risks of public safety or risks of flight;
(f) reducing repetitious handling and review of files by police officers, prosecutors, defense counsel, judges, court staff, and others involved in cases;
(g) reducing costs for jail operation (and avoiding or minimizing the costs of new jail construction) as the length of pretrial detention is minimized for defendants held in custody;
(h) reducing the caseload pressures on pretrial services agencies, as the length of time on supervised release is minimized for released defendants;
(i) better utilizing limited resources, and enhancing the opportunity for all of the institutions, agencies, and practitioners involved in criminal case processing to address high priority cases and issues; and
(j) increasing public trust and confidence in the justice system.

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Standard 12-3.2 Goals for timely case resolution

(a) Each jurisdiction should develop and adopt goals and policies that provide a framework for assuring that all criminal cases are resolved within a time period that is appropriate for the seriousness and complexity of the case.
(b) Each jurisdiction should establish goals for timely resolution of cases that address (i) the period from the commencement of the case (by arrest, issuance of citation, or direct filing of indictment or information) to disposition; and (ii) the time periods between major case events. In establishing these goals, jurisdictions should take account of the seriousness and complexity of cases of different types.
(c) Goals for timely resolution of criminal cases should be developed collaboratively, with involvement of all of the institutions and agencies that have roles in criminal case processing in the jurisdiction, and with the participation of members of the public. Leaders of all of the institutions and agencies involved should participate in the process, should support the standards that are developed, and should seek to establish policies and procedures within their own organizations that will help achieve the standards. The jurisdiction's goals for timely resolution should address at least the

following time periods:
(i) arrest to first appearance;
(ii) citation to first appearance;
(iii) first appearance to filing of an indictment, information or other formal charging document in the court in which the charge is to be adjudicated;
(iv) first appearance or filing of the formal charging document to completion of pretrial processes (i.e., completion of all discovery, motions, pretrial conferences, and plea, dismissal, or other disposition in cases that will not go to trial);
(v) completion of pretrial processes to commencement of trial or to non-trial disposition of the case;
(vi) verdict or plea of guilty to imposition of sentence; and
(vii) arrest or issuance of citation to disposition, defined for this purpose as plea of guilty, entry into a diversion program, dismissal, or commencement of trial.
(d) Goals for timely resolution of criminal cases are intended to provide guidance for judges, counsel, court staff, officials in criminal justice agencies, defendants, witnesses, general government, and the public concerning the scheduling of criminal cases and management of criminal caseloads. The establishment of such goals should not create any rights for defendants or others.

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Standard 12-3.3. Monitoring and accountability

(a) Each jurisdiction should establish procedures to monitor the performance of the system (and of each of the organizational entities that have responsibility for particular aspects of case processing) in relation to the goals for timely case resolution. Feedback should be provided to the leaders of the courts, the prosecutor's office, the defense bar, law enforcement agencies, other criminal justice agencies, and general government.
(b) Information about the performance of the system in relation to the goals for timely case resolution should be made available to the public on a regular basis.

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Standard 12-3.4. Consistency of timely resolution standards with other justice system policy objectives

In adopting and implementing standards for timely resolution of criminal cases, jurisdictions should ensure that the standards and the policies used to implement them are consistent with the public's interests in the fair and effective prosecution and defense of criminal cases. The system should be structured to enable expeditious resolution of minor cases and of cases that are not complex, while allowing sufficient time for those that will involve relatively complex pretrial processes or extensive trial preparation.

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PART IV.

ORGANIZING JUSTICE SYSTEM RESOURCES TO ACHIEVE TIMELY RESOLUTION OF CRIMINAL CASES

Standard 12-4.1 Operational goals to guide criminal caseflow

Each jurisdiction should develop and adopt operational goals, for the system as a whole and for the organizational entities involved in the processing of criminal cases, to guide overall caseflow management and case scheduling and to help assure fairness and due process of law. Goals should be established in at least the following areas:
(a) timely resolution of cases, as described in Standard 12-3.2;
(b) firmness/reliability of case scheduling, focused on establishing an expectation that court events will take place when scheduled; and
(c) timeliness, accuracy, and completeness of the information entered into court records and into automated management information systems that support case scheduling and caseflow management.

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Standard 12-4.2 Caseflow management practices and procedures

Each jurisdiction should develop caseflow management practices and procedures that will enable it to meet case processing time standards and speedy trial requirements. The policies and procedures should be set forth in an overall plan for the jurisdiction. Portions of the plan that are directly relevant to the operations of a court or other organizational entity involved in criminal case processing should be incorporated into operations manuals or similar guides for use by practitioners.

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Standard 12-4.3 Jurisdictional plans for effective criminal caseflow management: essential elements

Elements of a plan for effective overall criminal caseflow management in a local jurisdiction should include:
(a) rapid preparation and transmission, to the prosecutor, of good quality police incident/arrest reports;
(b) rapid retrieval of prior record information about the arrested person, using speedy and reliable identification and record retrieval technology;
(c) rapid preparation of pretrial investigation reports on arrested defendants by a pretrial services agency, and utilization of these reports by judicial officers in promptly setting release conditions for arrested persons;
(d) rapid turnaround of forensic laboratory test results, especially for the testing of suspected drugs seized pursuant to an arrest;
(e) effective early case screening and realistic charging by prosecutors;
(f) early appointment of defense counsel for eligible defendants; for other cases, court procedures that ensure prompt participation by counsel for the defendant;
(g) early provision of discovery, consistent with the provisions governing discovery set forth in the ABA Criminal Justice Standards on Discovery;
(h) early discussions between the prosecutor and the defense counsel concerning possible non-trial disposition of the case;
(i) early case scheduling conference conducted by the assigned judicial officer to:
(1) review the status of discovery and negotiations concerning possible non-trial disposition;
(2) schedule motions; and

(3) make any orders needed;
(j) case scheduling practices that use techniques of differentiated case management to facilitate expeditious disposition of simple cases, enable rapid identification of cases likely to require more attorney time and judge attention, and make good use of limited courtroom and lawyer preparation time;
(k) case timetables addressing the time periods allowed for completion of discovery, filing of motions, and other case events that are set at an early stage of the case by the judge in consultation with the prosecutor and defense counsel;
(l) early filing and disposition of motions, including motions requiring evidentiary hearings;
(m) close monitoring of the size and age of pending caseloads, by the court and the prosecutor's office, to ensure that case processing times in individual cases do not exceed the requirements of the speedy trial rule and that case processing time standards are being met for the overall caseload;
(o) a policy of granting continuances of trials and other court events only upon a showing of good cause and only for so long as is necessary, taking into account not only the request of the prosecution or defense, but also the public interest in prompt disposition of the cases;
(p) procedures enabling resolution of all charges pending against a defendant, whether in the same case or in different cases and whether in the same court or a different court of the state, provided that defense counsel and the prosecutor(s) who filed the charges agree to the consolidation of the cases; and
(q) elimination of existing case backlogs (i.e., cases pending longer than the established case processing time standards), following a backlog reduction plan developed collaboratively by the court, the prosecutor's office, the defense bar, and law enforcement and other criminal justice agencies involved in and affected by criminal case processing.

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Standard 12-4.4 Acquisition and use of information for case processing

Jurisdictions should seek to use modern information technology to enable the courts and all of the other organizations involved in the criminal caseflow process to rapidly gather, store, disseminate, and retrieve information about cases, and should structure the flow of information to:
(a) enable the prosecution and defense to obtain reliable information about the charge, the evidence, and the defendant as rapidly as possible for purposes of case preparation, negotiation, and trial; and
(b) enable the court to have reliable information upon which to make decisions concerning the pretrial custody or release status of the defendant at the time of initial appearance and, thereafter, to make informed decisions concerning possible diversion, sentence, or other disposition.

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Standard 12-4.5 Court responsibility for management of calendars and caseloads

(a) Control over the trial calendar, and over all other calendars on which a case may be placed, should be vested in the court. The court should exercise responsibility for case scheduling and for the expeditious resolution of all cases beginning at the time of first appearance, taking account of information relevant to case scheduling that may be provided by both the prosecutor and defense counsel. Continuances should be granted only by a judicial officer, on the record. The court should grant a continuance only upon a showing of good cause and only for so long as is necessary. In ruling on

requests for continuances, the court should take into account not only the request or consent of the prosecution or defense, but also the public interest in timely resolution of cases. If a ruling on the request for a continuance will have the effect of extending the time within which the defendant must be brought to trial, the judge should state on the record the new speedy trial time limit date and should seek confirmation of this date by the prosecution and the defense.
(b) The court should establish mechanisms and procedures to promote the resolution of all cases within the time periods established by applicable management goals and without exceeding the time limits of the speedy trial rule or statute. Reports on the age and status of pending cases should be prepared regularly for the chief judge of the court and made available to leaders of other organizational entities involved in criminal case processing.

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For More Information

Criminal Justice Standards Committee

For more information concerning the Criminal Justice Standards, please contact Susan Hillenbrand, Standards Project Director either through e-mail, or telephone at (202) 662-1503.

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Criminal Justice Section Standards

Special Functions of the Trial Judge (Contents)

Special Functions of the Trial Judge

In February 1999, the ABA House of Delegates approved these "black letter" standards that have been published with commentary in *ABA Standards for Criminal Justice: Special Functions of the Trial Judge*, 3d ed., © 2000 American Bar Association. For the text of the publication, click here. To go directly to individual "black letter" standards (without commentary), click on the links below. For information about purchasing the printed volume, please click here

PART I. BASIC DUTIES

PART II. GENERAL RELATIONS WITH COUNSEL AND WITNESSES

PART III. MAINTAINING THE DECORUM OF THE COURTROOM

Special Functions of the Trial Judge (Standards)

PART I.

BASIC DUTIES

Standard 6-1.1. General responsibility of the trial judge

(a) The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial. The purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose.

(b) The trial judge should require that every proceeding before him or her be conducted with unhurried and quiet dignity and should aim to establish such physical surroundings as are appropriate to the administration of justice. The trial judge should give each case individual treatment; and the judge's decisions should be based on the particular facts of that case. The trial judge should conduct the proceedings in clear and easily understandable language, using interpreters when necessary.

(c) The trial judge should be sensitive to the functions of the prosecutor, defense counsel, witnesses, and jury, and the interests of the defendant, victim and public; and the judge's conduct toward them should manifest professional respect, courtesy, and fairness.

Standard 6-1.2. Community relations

(a) The trial judge may promote efforts to educate the community on the operation of the criminal justice system. However, in endeavoring to educate the community, the judge should avoid activity which would give the appearance of impropriety or bias.

(b) The trial judge should not discuss pending or impending cases, and should

avoid responding to personal criticism or complaints about particular decisions, other than to correct a factual misrepresentation in the reporting of the ruling.

Standard 6-1.3. Adherence to standards

The trial judge should be familiar with and adhere to the canons and codes applicable to the judiciary, the ethical rules effective in the particular jurisdiction applicable to the legal profession, and standards concerning the proper administration of criminal justice.

Standard 6-1.4. Appearance, demeanor, and statements of the judge

The trial judge's appearance, demeanor, and statements should reflect the dignity of the judicial office and enhance public confidence in the administration of justice. The wearing of the judicial robe in the courtroom will contribute to these goals.

Standard 6-1.5. Obligation to use court time effectively and fairly

(a) The trial judge has the obligation to avoid delays, continuances, and extended recesses, except for good cause. In the matter of punctuality, the observance of scheduled court hours, and the use of working time, the trial judge should be an exemplar for all other persons engaged in the criminal case. The judge should require punctuality and optimum use of working time from all such persons.

(b) The trial judge should respect the personal and professional demands on the lives of counsel, the defendant, jurors, witnesses, and victims, and should schedule and utilize court time remaining sensitive to these needs.

Standard 6-1.6. Duty to maintain impartiality

(a) The trial judge should avoid impropriety and the appearance of impropriety in all activities, and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The judge should not allow family, social, political or other relationships to influence judicial conduct or judgment.

(b) During the course of official proceedings, the trial judge should avoid contact or familiarity with the defendant, victims, witnesses, counsel, or members of the families of such persons which might give the appearance of bias or partiality.

(c) A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, disability, age, or sexual orientation.

(d) It is the responsibility of the trial judge to attempt to eliminate, both in chambers and in the courtroom, bias or prejudice due to race, sex, religion, national origin, disability, age, or sexual orientation. The judge should also avoid bias in hiring, and strive to achieve diversity in his or her staff.

(e) A judge should not be influenced by actual or anticipated public criticism in his or her actions, rulings, or decisions.

Standard 6-1.7 Judge's duty concerning record of judicial proceedings

The trial judge has a duty to see that the reporter makes a true, complete, and accurate record of all proceedings. The judge should at all times respect the professional independence of the reporter, but may challenge the accuracy of the reporter's record of the proceedings. The trial judge should not change the transcript without notice to the prosecution, the defense, and the reporter, with opportunity to be heard. The trial judge should take steps to ensure that the reporter's obligation to

furnish transcripts of court proceedings is promptly met.

Standard 6-1.8. Proceedings in and outside of the courtroom

(a) The trial judge should maintain a preference for live public proceedings in the courtroom with all parties physically present.

(b) All significant proceedings, whether or not public, should be on the record. Relevant decisions in proceedings not on the record should be reflected in the record.

(c) The trial judge should place or permit counsel to place any germane matter on the record which has not been previously recorded.

(d) When electronic procedures for transmission or recording are used, the proceedings transmitted or recorded should reflect the decorum of the courtroom. When the right to counsel applies, such procedures should not result in a situation where only the prosecution or defense counsel is physically present before the judge.

Standard 6-1.9. Obligation to perform and circumstances requiring recusal

(a) The trial judge should recuse himself or herself whenever the judge has any doubt as to his or her ability to preside impartially or whenever his or her impartiality reasonably might be questioned.

(b) Trial judges have an obligation to perform their judicial function and avoid recusal when not warranted.

Standard 6-1.10. Issuance or review of warrants or other ex parte orders

Whenever a trial judge is called upon to issue a warrant for arrest or search, to review the issuance of such a warrant or the execution thereof, or to issue or review other ex parte orders, the judge should carefully observe constitutional and statutory requirements and not permit these procedures to become mechanical or perfunctory. Where the trial court has supervisory jurisdiction over other judicial officers who perform these functions, the court should ensure that this standard is observed.

Standard 6-1.11. Communications concerning prisoner status

(a) The trial judge should seek to ensure that the status of persons held in jail awaiting formal charge, trial, or sentence is monitored. The judge should take appropriate corrective action when required.

(b) The trial judge should respond promptly to specific inquiries from persons held in custody and, if warranted, should make inquiries or take other action.

PART II.
GENERAL RELATIONS WITH COUNSEL AND WITNESSES

Standard 6-2.1. Ex parte discussions of a pending case

The trial judge should insist that neither the prosecutor nor the defense counsel nor any other person discuss a pending case with the judge ex parte, except after adequate notice to all other parties or when authorized by law or in accordance with approved practice. The judge should ensure that all such ex parte communications are

subsequently noted on the record.

Standard 6-2.2. Duty to witnesses

The trial judge should permit full and proper examination and cross-examination of witnesses, but should require the interrogation to be conducted fairly and objectively and with due regard for the dignity and legitimate privacy of the witnesses.

Standard 6-2.3. Duty to control length and scope of examination

The trial judge should permit reasonable latitude to counsel in the examination and cross-examination of witnesses, but should not permit unreasonable repetition or permit counsel to pursue clearly irrelevant or improper lines of inquiry.

Standard 6-2.4. Duty of judge on counsel's objections and requests for rulings

The trial judge should respect the obligation of counsel to present objections to procedures and to admissibility of evidence, to request rulings on motions, to make offers of proof, and to have the record show adverse rulings and reflect conduct of the judge which counsel considers prejudicial. Counsel should be permitted to state succinctly the grounds of his or her objections or requests; but the judge should nevertheless control the length, manner and timing of argument.

Standard 6-2.5. Duty of judge to respect privileges

The trial judge should respect the obligation of counsel to refrain from speaking on privileged matters, and should avoid putting counsel in a position where counsel's adherence to the obligation, such as by a refusal to answer, may tend to prejudice the client. Unless the privilege is waived or is otherwise inapplicable, the trial judge should not request counsel to comment on evidence or other matters where counsel's knowledge is likely to be gained from privileged communications.

Standard 6-2.6. Duty to juries

(a) The trial judge has the responsibility to treat the jury with dignity. This includes the responsibility both to inform the jury of anticipated scheduling and to assure that the jury has an opportunity to deliberate on a reasonable schedule. The trial judge should also endeavor to assure that the jury has comfortable surroundings.

(b) The trial judge should conduct the trial in such a way as to enhance the jury's ability to understand the proceedings and to perform its fact-finding function.

PART III.
MAINTAINING THE DECORUM OF THE COURTROOM

Standard 6-3.1. Special rules for order in the courtroom

The trial judge, preferably before a criminal trial or at its beginning, should prescribe and make known the ground rules relating to conduct which the parties, the prosecutor, the defense counsel, the witnesses, and others will be expected to follow in the courtroom, and which are not set forth in the code of criminal procedure or in the published rules of court.

Standard 6-3.2. Security in court facilities

The trial judge should endeavor to maintain secure court facilities. In order to protect

the dignity and decorum of the courtroom, this should be accomplished in the least obtrusive and disruptive manner, with an effort made to minimize any adverse impact.

Standard 6-3.3. Colloquy between counsel

The trial judge should make known before trial that, when court is in session, no colloquy, argument, or discussion directly between opposing counsel in the presence of the judge or jury will be permitted on matters relating to the case, except that, if a brief conference between counsel might tend to expedite the trial, the judge will grant them leave to confer.

Standard 6-3.4. Courtroom demeanor

(a) The trial judge should be a model of dignity and impartiality. The judge should exercise restraint over his or her conduct and utterances. The judge should remain neutral regarding the proceedings at all times, suppress personal predilections, control his or her temper and emotions, and be patient, respectful, and courteous to defendants, jurors, witnesses, victims, lawyers, and others with whom the judge deals in an official capacity. The judge should not permit any person in the courtroom to embroil him or her in conflict, and should otherwise avoid personal conduct which tends to demean the proceedings or to undermine judicial authority in the courtroom.

(b) The trial judge should require similar conduct of staff, court officials and others subject to the judge's direction and control.

Standard 6-3.5. Judge's use of powers to maintain order

(a) A trial judge should maintain order and decorum in judicial proceedings. The trial judge has the obligation to use his or her judicial power to prevent distractions from and disruptions of the trial.

(b) When it becomes necessary during the trial for the judge to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, the judge should do so outside the presence of the jury, if possible. Any such comment should be in a firm, dignified, and restrained manner, avoiding repartee, limiting comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.

Standard 6-3.6. The defendant's election to represent himself or herself at trial

(a) A defendant should be permitted at the defendant's election to proceed in the trial of his or her case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

(i) has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when the defendant is so entitled;

(ii) is capable of understanding the proceedings; and

(iii) has made an intelligent and voluntary waiver of the right to counsel.

(b) When a defendant undertakes to represent himself or herself, the court should take whatever measures may be reasonable and necessary to ensure a fair trial.

Standard 6-3.7. Standby counsel for pro se defendant

(a) When a defendant has been permitted to proceed without the assistance of

counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon. Standby counsel should always be appointed in capital cases and in cases when the maximum penalty is life without the possibility of parole. Standby counsel should ordinarily be appointed in trials expected to be long or complicated or in which there are multiple defendants, and in any case in which a severe sentence might be imposed.

(b) The trial judge should clearly notify both the defendant and standby counsel of their respective roles and duties.

(c) When standby counsel is appointed to provide assistance to the pro se accused only when requested, the trial judge should ensure that counsel not actively participate in the conduct of the defense unless requested by the accused or directed to do so by the court. When standby counsel is appointed to actively assist the pro se accused, the trial judge should ensure that the accused is permitted to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.

Standard 6-3.8. The disruptive defendant

A defendant may be removed from the courtroom during trial when the defendant's conduct is so disruptive that the trial cannot proceed in an orderly manner. Removal is preferable to gagging or shackling the disruptive defendant. The removed defendant ordinarily should be required to be present in the court building while the trial is in progress. The removed defendant should be afforded an opportunity to hear the proceedings and, at appropriate intervals, be offered on the record an opportunity to return to the courtroom upon assurance of good behavior. The offer to return need not be repeated in open court each time. A removed defendant who does not hear the proceedings should be given the opportunity to learn of the proceedings from defense counsel at reasonable intervals.

Standard 6-3.9. Misconduct of pro se defendant

If a defendant who is permitted to proceed without the assistance of counsel engages in conduct which is so disruptive, including disobeying or failing to respond to judicial orders or rulings, that the trial cannot proceed in an orderly manner, the court should, after appropriate warnings, revoke the permission and require representation by counsel. If standby counsel has previously been appointed, the counsel should be asked to represent the defendant. When appropriate, the trial should be recessed to allow counsel to make the necessary preparations to go forward with the trial.

Standard 6-3.10. Misconduct of spectators and others

(a) Any person who engages in conduct which disturbs the orderly process of the trial may be admonished or excluded, and, if such conduct is intentional, may be punished for contempt. Any person whose conduct in a criminal proceeding tends to menace a defendant, an attorney, a victim, a witness, a juror, a court officer, the judge, or a member of the defendant's or victim's family may be removed from the courtroom.

(b) When a victim or a member of a victim's or a defendant's family is removed from the courtroom during trial, he or she should ordinarily be allowed to return upon assurance of good behavior.

Standard 6-3.11. Attorneys from other jurisdictions

If an attorney who is not admitted to practice in the jurisdiction of the court petitions for permission to represent a defendant, the trial judge should grant such permission if the attorney is admitted to practice and in good standing in another jurisdiction. The judge may:

(a) grant such permission on condition that:

(i) the petitioning attorney associate with him or her as cocounsel a local attorney admitted to practice in the jurisdiction;

(ii) the local attorney will assume full responsibility for the defense if the petitioning attorney becomes unable or unwilling to perform his or her duties; and

(iii) the defendant consents to the foregoing conditions; or

(b) deny such permission if the attorney has been held in contempt of court or otherwise formally disciplined for courtroom misconduct, or if it appears by reliable evidence that the attorney has engaged in courtroom misconduct sufficient to warrant disciplinary action.

PART IV.
USE OF SANCTIONS

Standard 6-4.1. Power to impose sanctions

The court has the inherent power to protect the integrity and fair administration of the criminal justice process by imposing sanctions. The trial judge has the power to cite and, if necessary, punish summarily anyone who, in the judge's presence in open court, willfully obstructs the course of criminal proceedings.

Standard 6-4.2. Imposition of sanctions

If the judge determines to impose sanctions for misconduct affecting the trial, the judge should ordinarily impose the least severe sanction appropriate to correct the abuse and deter repetition and should do so outside the presence of the jury, if possible. In weighing the severity of a possible sanction for disruptive courtroom conduct to be applied during the trial, the judge should consider the risk of further disruption, delay, or prejudice that might result from the character of the sanction or the time of its imposition.

Standard 6-4.3. The sanction of contempt

The sanction of contempt should not be imposed by the trial judge unless:

(a) it is clear from the identity of the offender and the character of his or her acts that the disruptive conduct was willfully contemptuous; or

(b) the conduct warranting the sanction was preceded by a clear warning that such conduct was impermissible and that specified sanctions might be imposed for its repetition.

Standard 6-4.4. Notice of intent to use contempt power; postponement of adjudication

(a) The trial judge should, as soon as practicable after he or she is satisfied that courtroom misconduct requires contempt proceedings, inform the alleged offender of the judge's intention to institute such proceedings.

(b) The trial judge should consider deferring adjudication of contempt for courtroom misconduct of a defendant, an attorney, or a witness until after the trial, and should defer such a proceeding unless prompt punishment is imperative.

Standard 6-4.5. Notice of nature of the conduct and opportunity to be heard

Before imposing any punishment for criminal contempt, the judge should give the offender notice of the nature of the conduct and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.

Standard 6-4.6. Imposition of sanctions and referral to another judge

The judge before whom courtroom misconduct occurs may impose appropriate sanctions, including punishment for contempt, but should refer the matter to another judge whenever the presiding judge has any doubt about his or her ability to preside over the matter impartially, or if the presiding judge's objectivity can reasonably be questioned.

For more information concerning the Criminal Justice Standards, please contact Susan Hillenbrand, Standards Project Director either through e-mail, or telephone at (202) 662-1503.

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TOPICS A-Z WEB STORE ABA CALENDAR CONTACT ABA

Micah Schmit

04/18/2007 03:07 PM

To: Ben Casey
cc:
Subject: Motions for Transport....

Hey, we talked about this last month -- just before your "vacation" to Thailand -- just wondering if you've made any progress with the judges?

To refresh, last month you warned that there were some defendants who weren't ordered transported because the assigned prosecutor/advocate didn't file a motion requesting that the Deft be transported from jail (Florence, etc.) for his next hearing. Those cases then got dismissed and/or there was an OSC for the prosecutor.

In our discussions, I lobbied how impractical that was for us to do for a number of reasons, but principle among them was that most offenders are already IN custody when this issue would apply. In other words, if the Deft was booked into jail upon his arrest and he's brought in shackles to court for his next hearing, the court ALREADY knows (sees!) that transport will be required for his next hearing! The court simply needs to insert stock language on that day's order to have the D transported to his next hearing. If he should bond-out, then the transport order is moot (and detention would already know this because the inmate is no longer register as in-custody that day).

However, the second most compelling argument I raised is just as important and that is only the court is in position to know who/when bond gets posted. If that happens, then again the original transport order simply becomes moot because the dude wouldn't be on the prison's in-custody list.

However, to make us pro-actively responsible is an enormous challenge and expenditure of time (given that the court HAS the info already and automatically).
We would have to call every day on most of our jailed-defendants to see if, on that day, they were still in-custody or if they'd bonded out. If they were still in-custody, we'd now have to draft and file an additional document asking the court for transport and then await the court's drafting of an additional order (for transport) and finally distribution to the parties and detention staff of the order. All that takes extra work, extra paper and time for everything to circulate, when all that could easily be done right at the previous hearing!

I also pointed out how in EVERY other jurisdiction these impractical circumstances have resulted in courts every where else ordering transports themselves (based on the previous hearing where the Deft was plainly seen in shackles). Indeed, in my experiences at all levels of court systems, the only time the prosecutor gets involved in transport orders is when a Witness (i.e., not the deft, but a civilian) happens to be in custody somewhere and needs to be brought in to court -- for the trial or an evidentiary hearing.

I haven't heard back yet on what if any head-way you've made on this, but my staff is really puzzled.. and feeling very burdened by this. And I share that with a sincere interest in exploring a better path to this. You know I have always adopted changes that logically we can.. or should.. assume. But, as you already know from our sheer filing-volume our weekly motions demands are very high (thanks to Nick and/or the criminal code's obligations for prosecutors generally) and are already testing our performance limits.

But UNLIKE those obligations, transport orders really are something that (1) the court is in the best position to make (again, first and easiest, because the D was plainly seen in-custody when brought to court for his first hearing). But (2) because posting bond is something the we do NOT routinely get notice. The efforts (and risks of missing it) to initiate transport on every in-custody case is SUBSTANTIALLY greater than for a judge who simply has to observe what is obvious in the court room and add stock language to have the in-custody defendant re-transported.

Please help us with this!!
Many thanks Ben,

Micah Schmit

APP. NO.!5

Chief Prosecutor, PYT
520-879-6253

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff/Appellant,	)	Trial Court case no.: CR-07-126
vs.	)	Appeals Court case no: CA-07-008
ANTHONY SHIRLEY, Defendant/Appellee,	)	
and concerning	)	
PATRICIA CASTRO Prosecutor/Appellant.	)	

ON APPEAL FROM THE PASCUA YAQUI TRIBAL COURT

APPELLANT'S OPENING BRIEF

MICAH SCHMIT
CHIEF PROSECUTOR

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COUNSEL FOR APPELLANT

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STATEMENT OF CASE

This is an appeal from an order finding Lay Advocate Patricia Castro of the Pascua Yaqui Tribe Office of the Prosecutor in contempt of court. Ms. Castro was held in contempt by Judge Melvin Stoof, in an order dated April 24, 2007. The reason given was that Ms. Castro had not completed a certain obligation, first created, then enforced by that Judge. A notice of appeal was timely filed on May 24, 2007. This Court has jurisdiction to hear the appeal pursuant to 3 PYTRAP §§ 2 & 3.

STATEMENT OF PROCEEDINGS AND FACTS

Appellee/Defendant is Pascua Yaqui enrolled Anthony Shirley. An initial hearing was first scheduled for March 26, 2007. Defendant was not present because he had not been served. Service had been attempted approximately one month prior to the hearing. The process server (who is a staff member of the Pascua Yaqui Tribal Court) had been told that Defendant was in custody by the authority of the Tribal Court on another matter. As a result, further attempts at service were apparently not made. Tribal Court Judge Melvin Stoof found Advocate Castro in contempt of court for not notifying the court of the address at which Defendant could be served and for not requesting an order to have him transported to attend the initial hearing.

In making his contempt order, Judge Stoof made findings regarding the duties of the office of the prosecutor. According to Judge Stoof, the office of the prosecutor had the following duties: (1) Check the court's file or check with the process server as to whether service of process had been made. (2) Advise the court clerk that a defendant could be served in custody. (3) More generally, advise the court clerk where and how a defendant may found and/or served. (4) Ask the court to issue a transport order every time a defendant is in, or may be in, custody.

DISPOSITION

Lay Advocate Patricia Castro was held in contempt by Order dated April 24, 2007.

STATEMENT OF ISSUES

(1) Does the tribal court have the authority to define the duties of the office of the prosecutor or is this an administrative function of the Executive and Legislative Branches?

(2) Whose duty is it to arrange for the transport of in-custody defendants?

(3) Is contempt a required, or even appropriate, remedy for an administrative oversight?

ARGUMENT

(1) Does the tribal court have the authority to define the duties of the office of the prosecutor? No.

The Tribal Court's authority is set out in the Pascua Yaqui Tribal Constitution and in the Tribal Code. The code enumerates the powers of the court at 3 PYTC § 1-2-50. In summary, the court has the power to regulate its own processes and the behavior of those who appear for it. The code specifically provides that the judicial branch is separate and apart from the legislative and executive branches of government. 3 PYTC § 1-2-20.

Conversely, the Office of the Prosecutor is within the executive branch. Its authority is specifically set out at 3 PYTC § 1-4-30. Section 1-4-30(B) states that the Prosecutor shall have the power and authority "to sign, file and present any and all complaints, subpoenas, affidavit, motions, processes, and papers of any kind and appear before all courts, in any criminal proceedings of the Pascua Yaqui Tribe." There is no enabling legislation for the Office of the Prosecutor defining the prosecutor's duties or powers. The Pascua Yaqui Constitution does not define the duties of the office of the Prosecutor. In other words, the only Tribal authority (1-4-30) discussing the Office of the Prosecutor, addresses its *authority*. There is no discussion regarding its specific *duties*.

Duties of attorneys appearing before tribal court are set out in a general way at 3 PYTC § 1-4-20 (certification) and §40 (appearance by attorneys). The duties of Juvenile Presenting Officers (a function performed by a prosecutor) are set out at 3 PYTC § 1-4-70(A)(2). The Tribal Code does require that attorneys adhere to the "standards of practice of the American Bar Association."[1] *See* 3 PYTC § 1-4-40(C). However, there is no specific reference to special requirements of either prosecution or defense attorneys.

By contrast, Judge Stoof fails to provide any case authority buttressing his assertions that the duty of the prosecutor includes those created in his contempt order.

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[1] Note: this is actually a distinct document from the ABA's Model Rules of Professional Conduct.

(2) Whose duty is it to arrange for transport of in-custody defendants? The Court's.

Judge Stoof ruled that Ms. Castro should have provided the trial court clerk with the information that Defendant was in custody and could be served there. But the trial court already had that information. Judge Stoof specifically stated in his order that the process server was told that Defendant was in custody on another matter. If Ms. Castro were to have given the clerk this information, how would it have altered what the Court already knew – and knew more directly – via its own process server? After Ms. Castro would have advised the court clerk, the clerk would simply have communicated that information right back to the court's process server. Therefore, even if this fabricated duty to notify did somehow belong with the prosecutor (and the Office of the Prosecutor strenuously objects to that interpretation) the tribal court clerk already had the same information that the process server had and, much more importantly, always will be in the better position to have that information at or before the time that any prosecutor becomes aware of it.

In the past, the tribal court did issue transport orders for defendants who were in custody. Without warning, however, approximately five or six months ago Judge Stoof began to change this practice. The first stage of this change was to require that the Office of the Prosecutor ask for transport orders for initial hearings for defendants who were in custody on another matter. The second stage of this change was to require that the Office of the Prosecutor ask for transport orders in *all* cases for defendants that were in custody. For example, if a release condition for an arrested defendant was that s/he post a bond, the court would not issue a transport order for the next hearing unless it was specifically asked for by the prosecutor. This makes no practical sense. If a defendant already is in custody, why (as in other jurisdictions) is the court not in the best posture to simply order that, pro forma? Very easily, boilerplate language may be included in every hearing-order indicating that "Detention shall transport a defendant, unless and until, s/he posts bond." This makes further sense when one also realizes that the prosecutor is never the first one privy to a defendant posting bond… the trial court staff is. Sadly, the fabrication of this new obligation not only fails to make logical or practical sense, but it has created another minefield for tribal prosecutors to navigate.

So, who should be responsible for notice regarding transport of defendants in custody? A compelling argument can be made that the responsibility should rest with the defendant or his

attorney. After all, the reason that a defendant must remain in custody in the first place (thereby needing transport to his/her next hearing) is because a judge has reviewed the offender's prior convictions, prior release performance and current charges and determined that release was not appropriate without a bond. In other words, the defendant created the circumstances that militated his own heightened restrictions of release. Rationally, the defendant should be the one tasked with ensuring his own attendance, whether in-custody or not. If that circumstance changes (because the defendant posts bond) the defendant himself knows of such a change first, followed by his attorney and then the trial court staff. Once again, the prosecutor is behind the defendant and his attorney, in terms of (1) knowing his court attendance obligations and (2) knowing his current custodial status.

An equally compelling argument can be made that it ought to be the court who is responsible for notice regarding transport of in-custody defendants. The Office of the Prosecutor does not control who is in custody. It only makes recommendations regarding release conditions, or recommendations regarding sentencing. The court is the entity that actually imposes conditions of release or jail sentences. Moreover, it takes a trial court order before the Detention Department[2] may transport a defendant. The trial court is the only entity that can issue such an order. Since the court must issue the order and since it has access to the custodial information regarding every tribally-detained defendant substantially sooner and more immediately than the prosecutor, once again logic suggests that the court should harmoniously operate to issue such orders whenever it is reasonably evident.[3]

That being said, it is not the aim of this appeal to have this Honorable Court assign particular duties to the Tribal Court, defense counsel or to the Office of the Prosecutor. Rather, the purpose is to point out that these duties are (1) not clearly set out and (2) certainly don't justify findings of contempt. Having a trial judge suddenly create such a duty and then begin to impose contempt orders forthwith, based upon violation of a duty that was established by his own order, however, begs relief. The petitioner submits that it would be more appropriate for the Tribal Court and the Office of the Prosecutor to communicate and work together to resolve this issue. That, where a defendant appears in-custody, the trial court should reasonably and very

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[2] The division of the Police Department that transports defendants.

[3] Regarding the address at which the defendant may be served, Rule 7 of the Rules of Procedure (by reference in the Rules of Criminal Procedure) allows service upon a defendant at his regular place of residence upon anyone over the age of 14 residing there. Therefore, service upon the Defendant's mother would have been proper in this case.

simply include routine language in those orders requiring Detention to transport that defendant if he hasn't posted bond. On the other hand, in the less common circumstance where the prosecutor has reason to know that an offender is in custody, but the trial court does not, the prosecutor should make diligent effort to advise of such a transport need. Where ordinary clerical oversight or lack of knowledge causes a missed transport, the Tribe submits that the appropriate remedy should be an expedited service/notice or an expedited transport order and reset hearing. In the worst case scenario, if there is a culpable breach for transport oversight against the Tribe, the Tribe urges this Court to accept what is commonly the practice in other jurisdictions under those circumstances and that is the inclusion (rather exclusion) of applicable time limits. After all, no individual or department can be perfect. To operate in such an environment is stifling.

The Tribe would propose that the speedy trial time limits – which contemplate all the hurdles embodied in a high volume practice in imposing a resolution deadline – serves to govern transport situations. Such rules are specifically in place to ensure that prosecutions are done within appropriate (i.e., constitutionally tolerated) time limits. Finally, to reiterate, to find otherwise would inappropriately enable one branch of government to actually and *substantively* regulate the administration of another, in spite of a Constitution and/or Rules of Procedure. The Tribe was given short notice, and an unusually short timeline to complete its opening brief, in the interest of meeting this Court's next date of convening. This was a valuable goal, and unless objected to by this Court, the Tribe would simply and respectfully reserve the right to supplement with outside case-law if further research should yield any on point.

(3) Is contempt ever an appropriate sanction for an administrative failing? No.

Assuming for the sake of argument that it is the Prosecutor's duty to inform the trial court of a transport need when a defendant is in custody, is contempt the proper sanction if a member of the prosecutor's staff over looks that task?

The Tribal Court undeniably has the power of contempt. Contempt is mentioned throughout the Code. Most notably (for the purposes of this case) at 3 PYTC § 1-4-40(D) which indicates that attorneys appearing before the court can be held in contempt and fined up to $200. Contempt itself is not clearly defined in the code. The closest thing to a definition is found in the

Criminal Code at 4 PYTC § 4-160 et seq. The gist of the actions described as contemptuous are that they are insolent or disruptive of the authority and dignity of the court. This comports with the general definition of contempt as "Conduct that defies the authority or dignity of a court." ***Black's Law Dictionary***. Implied in both is some malice intent on the part of the actor. In other words, a simple error or mistake would not be considered contempt.

In this case, Judge Stoof did not make any findings that place Ms. Castro's behavior within a category that could be described as contemptuous. Judge Stoof found only that Ms. Castro had not done a thing that he thought she should have done, and that therefore she had committed contempt. An error or mistake is not contemptuous behavior and should not be punished as such. The staff of the Prosecutor has made mistakes in the past, and will undoubtedly make mistakes in the future – 'tis the unfortunate essence of being human, to paraphrase Alexander Pope. But there are more appropriate ways of addressing such mistakes than contempt, the most appropriate of which is simply minding the overall speedy trial clock in each particular case.

CONCLUSION

Lay Advocate Patricia Castro should not have been held in contempt. The duties enumerated by Judge Stoof are administrative in nature and as such are not within his authority as a Tribal Court Judge to impose. In addition, mistakes in general should not be punished through the contempt powers of the court.

RESPECTFULLY SUBMITTED this 16th day of July, 2007.

Yancy A. Jenesok
Deputy Prosecutor

Original and five copies delivered to:

Pascua Yaqui Appellate Court

Additional copies mailed to:

Ben Casey, Administrative Attorney
Pascua Yaqui Tribal Court

David Oliver
Attorney for Defendant

On July 16, 2007 by: 

No. CA-07-008
Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribe, Plaintiff,

v.

Anthony Shirley, Defendant,

and
Concerning Patricia Castro, Prosecutor, Appellant.

ORDER

Appeal of a contempt order of the Pascua Yaqui Tribal Court in Case No. CR-07-126, the Honorable Melvin R. Stoof presiding.

Yancy A. Jencsok, Esq., Pascua Yaqui Tribe Office of the Prosecutor, Tucson, Arizona for the Appellant.

The court reviewed this matter and finds that it should grant a twenty-one day extension for the Appellant Prosecutor's request for a sixty-day extension of time and oral argument. The Appellant shall file its brief no later than July 16, 2007 and serve it on the trial court solicitor on the same day it is filed with the court. The trial court solicitor shall either file a response brief on behalf of the trial judge or a letter stating that no response brief will be filed no later than July 20, 2007. No further briefing shall be allowed.

Oral argument on this case shall be heard on Tuesday, July 24, 2007, at the time of 1:00 p.m., at the Pascua Yaqui Tribe court building. The Appellant shall have 15 minutes to argue to the court. The trial court solicitor shall not present argument.

So ordered this 9th day of July, 2007.

Chief Justice

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Yancy A. Jencsok
Deputy Prosecutor

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff/Appellant, vs. ANTHONY SHIRLEY, Defendant/Appellee.	Trial Court Case No. CR-07-126 Appeals Court Case No. CA-07-008 **TRIBE'S MOTION FOR EXTENSION OF TIME TO FILE BRIEF**

The Tribe motions the court for an extension of time to file its opening brief pursuant to 3 PYTRAP Rule 5(B). The tribal court recently transmitted the records for this and several other appeals altogether, causing a number of briefs to come due at once. The Tribe is unable to timely prepare the briefs that are due. The Tribe asks for a 60 day extension.

RESPECTFULLY SUBMITTED this 25th day of June, 2007.

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR

Yancy A. Jencsok
Deputy Prosecutor

Copy mailed/delivered on June 25, 2007, to:

Ben Casey, Administrative Attorney
Pascua Yaqui Tribal Court

David Oliver
Tohono O'odham Advocate Program
P.O. Box 890
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By _____

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Deputy Prosecutor

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff/Appellant, vs. SHIRLEY, ANTHONY, Defendant/Appellee.	Trial Court Case No. CR-07-126 Appeals Court Case No. **NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that the Pascua Yaqui Tribe appeals from the pretrial ***Order of Contempt*** by the trial court, dated April 24, 2007 (copy attached). This appeal is made pursuant to PYTRAP Rules 2(C), 3 and 7. The Tribe requests oral argument before a three Justice panel.

Specifically, the Tribe appeals from the finding and $25.00 order of contempt against Lay Advocate Patricia Castro of the Office of the Prosecutor. In holding Ms. Castro in contempt, the trial court judge, Melvin Stoof, discussed at length (and without Code-authority) the duties he feels lie with the Prosecutor's office regarding depth of duties to locate, serve, and even transport, defendants. Judge Stoof then found that Ms. Castro had violated some or all of these duties and held her in contempt.

The duties imposed by Judge Stoof upon the Office of the Prosecutor have no authority under Pascua Yaqui law and far exceed the duties, practices and responsibilities for prosecutors in other jurisdictions. Furthermore, the facts upon which the contempt was based do not warrant such a holding, or at the very least, the imposition of such an onerous and *personal* penalty.

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RESPECTFULLY SUBMITTED this 24th day of May, 2007.

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR

Yancy A. Jenesok
Deputy Prosecutor

ORIGINAL and 5 copies delivered to:

Clerk of the Court
Pascua Yaqui Tribe Court of Appeals

Copies delivered/mailed to:

Clerk of the Court
Pascua Yaqui Tribal Court

Attorney General
Pascua Yaqui Tribe

David Oliver
Attorney for Defendant

On May 24, 2007 by:

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE Plaintiff, VS. SHIRLEY, ANTHONY, Defendant.	CASE NO. CR-07-126 ORDER OF CONTEMPT ORDER SETTING PRE-TRIAL CONFERENCE

On April 24, 2007, the defendant, Anthony Shirley, in custody, appeared before the Court with his legal counsel, David Oliver, for an arraignment, and Patricia Castro, appeared for the Tribe. Ms. Castro showed good cause for her failure to appear for a show cause hearing on April 10, 2007, due to illness of a close family member, and she should not be held in contempt of court for her failure to appear that day.

On February 8, 2007 in case no. CR-07-112, the court set a $800.00 cash bond for the defendant, who is in detention pending a trial on April 14, 2007 in CR-07-112. Although the prosecutor's office knew that the defendant was incarcerated, based on the detention order issued in CR-07-112, when it filed the complaint in this case on February 13, 2007, the prosecutor failed to advise the court clerk of Mr. Shirley's whereabouts, so that the court clerk could issue a summons to be served at his detention facility. Instead, the prosecutor filed the complaint listing the defendant's address as 7635 S. Camino Benem. The clerk issued a summons based on the address the Tribe provided for service of process.

On February 26, 2007, the process server attempted to serve the defendant at the Camino Benem address provided by the prosecutor, but the defendant's mother advised the process server that the defendant was "in jail on different charges through Pascua Courts." Although a month had passed from the unsuccessfully attempt at service on February 26, 2007 until the hearing of March 26, 2007, the Tribe's prosecutor apparently failed to check the court's file or check with the process server as to whether service of process had been effectuated, as such is the prosecutor's duty, and then the prosecutor failed to advise the court clerk to both ask that the defendant be served in custody, and the Tribe failed to ask for issuance of a transport order. This is not the first time the Tribe has failed to notify the court of a defendant's whereabouts to effectuate service or failed to request a transport order, when the Tribe knows a defendant is in detention on a tribal court order.

The court notes that it is a prosecutor's duty to provide the court clerk with a proper address where a defendant may be served, after a due diligent inquiry as to a defendant's whereabouts, and it is the prosecutor's duty to check with a process server to ensure that service has been effectuated. It is also a prosecutor's duty to ensure defendant's who are incarcerated are brought to the court to appear. It is not the court's duty, it is not the court clerk's duty, but the prosecutor's duty to advise where a defendant may be served, how he may be served, whether a warrant should be issued, or whether a transport order should be issued. It is also the Tribe's duty to coordinate with the detention office in advance to arrange for such transports, particularly in cases such as this one, where the Tribe knows the defendant is in detention based on their request to place him there in a different case.

As a result of the Tribe's failure to ask for a transport order, the defendant's attorney whose office is located in Sells, AZ. was inconvenienced, and although he did not request that any show cause order by issued, the Court, on its own motion, set an order to show cause hearing for today as to why the prosecutor should not be held in contempt of court for failure to provide a proper address where the defendant may be served with his criminal summons and for the Tribe's failure to request a transport order to ensure the defendant appeared for his hearing. Ms. Castro should be held in contempt of court for her failure to ensure that the defendant was transported from detention to attend his hearing on March 26, 2007, when the prosecutor's office knew of his whereabouts, because such failure delayed the defendant's initial hearing, and it impede the administration of justice by delaying the court's proceedings.

The court should fine Ms. Castro $25.00, but suspend such fine for the next six months, so long as she does not fail to ensure a defendant in custody is transported to the court by means of a proper transport order.

The defendant waived reading of his rights, waived reading of the criminal complaint, and he entered a plea of not guilty to the charge of Count One, Narcotics and Dangerous Drugs, and Counts Two, Possession of Drug Paraphernalia. The Tribe recommends the defendant be released on a $100.00 cash bond, to be posted, that he be ordered to appear at all future hearings and obey all laws, not possess nor consume narcotics and dangerous drugs, nor possess drug paraphernalia, and be subject to random urinalysis testing by the police department. The court should grant the Tribe's unopposed recommendations as to release conditions and bond. The defendant's counsel indicated there are ongoing plea negotiations, and his request to set this matter for the same date and time as case no. CR-07-112 should be granted for good cause shown.

IT IS ORDERED that the Defendant, Anthony Shirley, shall be released on a $100.00 cash bond, to be posted, and the defendant shall appear at all future scheduled hearings and obey all laws. He shall not consume nor possess narcotics or dangerous drugs, nor possess drug paraphernalia, and he shall be subject to random urinalysis testing by the police department. In the event the defendant cannot post bond, the court shall issue a transport order.

A PRE-TRIAL CONFERENCE shall be scheduled for May 16, 2007 at 9:30 a.m..

THIS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

IT IS FURTHER ORDERED that Patricia Castro shall be held in contempt for her Failure to request a transport order, she shall be fined $25.00, such fine suspended, for the next six months, so long as she makes proper requests to transport defendants in custody at future hearings.

SO ORDERED THIS 24th DAY OF APRIL, 2007.

Melvin R. Hall
Associate Judge, Pascua Yaqui Tribal Court

Date: 4-24-07
Tribe / Defendant/Counsel ____ Other ____
Clerk: ____