

IN THE SAN CARLOS APACHE TRIBAL COURT

ADMINISTRATIVE ORDER 2020-0.1

IN RE: Court Policies and Protocols in Response to Resolution No. MR-20-033 (Declaring State of Emergency Over Incidence of COVID-19)

The purpose of this Order is to establish and initiate temporary policies and protocols of the San Carlos Apache Tribal Court (the “Court”) in response to **Resolution No. MR-20-033 (Declaring State of Emergency Over Incidence of COVID-19)** approved by the Council of the San Carlos Apache Tribe (the “Tribe”) on March 14, 2020. The Court, in response to the Resolution, recognizes the importance of instituting reasonable measures to effectively reduce and limit contact exposures in mitigating the spread of pandemic disease. Because of exigent circumstances, the temporary policies and procedures promulgated under this Order are necessary to protect the health, welfare and safety of Court personnel, employees of the Tribe and, most critically, San Carlos Apache community members.

Therefore, it is ORDERED AND ADJUDGED that:

1. The Court shall continue for a 30-day period following the adoption of Resolution No. MR-20-033 all juvenile matters, except for hearings and other Court proceedings involving juvenile detention and sheltering.
2. The Court shall continue for a 30-day period following the adoption of Resolution No. MR-20-033 all civil matters, except for matters involving a/an: (1) Order of protection; (2) Civil commitment; (3) Writ of Habeas Corpus; and (4) Temporary or permanent injunction, restraining order, or writ of mandamus.
3. The Court shall continue all jury trials scheduled within the 30-day period following the adoption of Resolution No. MR-20-033 and reschedule all affected jury trials as soon as practicable following the conclusion of the 30-day period following the adoption of Resolution No. MR-20-033. Because of exigent circumstances and the responsibility placed upon the Court—as a governmental entity of the Tribe—to protect the health, welfare and safety of the San Carlos Apache community, this Policy shall act as an exemption from the speedy trial requirement. In the event the Tribe prohibits public gatherings of 25 people or less, the Court shall further continue all criminal proceedings on its own written motion, except for two-way video conferencing arraignment, for the remainder of the 30-day period following the adoption of Resolution No. MR-20-033 or until further notice pursuant to San Carlos Apache Tribe R. Crim. P. 8(4)(a)-(b).
4. The Court shall authorize the San Carlos Apache Tribe Department of Justice (the “DOJ”) to fax Court filings. The fax transmission copy received by the Court shall serve as the original copy of the filing for the purposes of this Policy. The Court shall stamp receipt on the original copy and maintain the original copy for Court record. A copy of the stamped original copy shall be produced by the Court and submitted to the DOJ via inter-departmental mail, unless otherwise arranged by the Court and DOJ.
5. The Court shall establish and initiate policies and procedures for the use of two-way video-conferencing to facilitate arraignment proceedings for persons charged with a criminal offense or offenses and currently detained by the Tribe.

- A. Applicability. Because of exigent circumstances and the responsibility placed upon the Court—as a governmental entity of the Tribe—to protect the health, welfare and safety of the San Carlos Apache community, two-way video conferencing technology shall be used to arraign a defendant provided the defendant consents.¹
- B. Requirements. If two-way video technology is employed by the Court for arraignment proceedings:
1. The system shall operate reliably so the Court and all parties can view and converse with each other simultaneously without technical interruption;
 2. A full record of the proceeding shall be made consistent with the requirements of applicable laws and rules of the Tribe;
 3. Provisions shall be made to allow for²:
 - a. Defendants to be arraigned separately;
 - b. Confidential communication between the defendant and defendant’s counsel before, during and immediately after the proceeding, if applicable;
 - c. The use of interpreter services when necessary and, if an interpreter is required, the interpreter shall be present with the defendant absent compelling circumstances;

¹ This policy is consistent with Fed. R. Crim. P. 10 and 43.

² In *Jones v. San Carlos Apache Tribe*, A-CR-2014-1894 (2016) the Court of Appeals of the San Carlos Apache Tribe (the “Court of Appeals”) specifically held that “closed circuit video arraignments do not comply with the ‘open court’ requirement of the San Carlos Tribal Court Rules of Criminal Procedure” (emphasis provided). See *Jones*, 5 ¶ 10. Further, the Court of Appeals in dicta noted “[T]he phrase ‘in open court’ does not describe a procedure in which the judge and the defendant are forced to communicate electronically, while separately in *non-public* places at a distance from each other” (emphasis provided). *Id.*, 4-5 ¶8. In explaining its reasoning, the Court of Appeals cites *Valenzuela-Gonzalez v. U.S. Dist. Ct. for Dist. of Ariz.*, 915 F. 2d 1276, 1280 (9th Cir. 1990). In *Valenzuela-Gonzalez*, the 9th Cir. expressed specific concerns related to Fed. R. Crim. P. 10 (Arraignment) and 43 (Defendant’s Appearance).

Fed. R. Crim. P. 10, however, was amended following *Valenzuela-Gonzalez* to allow for video conferencing during arraignment. Further, Rule 43 is not an absolute. To this point, because of public health and safety concerns related to COVID-19, the Court asserts the use of two-way videoconferencing technology for arraignment proceedings is necessary to abate the potential spread of pandemic disease, as opposed to a convenient measure. See *Valenzuela-Gonzalez*, 1281 (citing *U.S. v. Washington*, 705 F.2d 489, 497 n. 4 (D.C.Cir.1983) (per curiam) in noting that “[T]he District of Columbia Circuit has held that under certain circumstances, closed circuit television may satisfy the presence requirement of Rule 43, if the procedure is considered necessary by the court.”). Additionally, it should be noted that “close circuit” video (or TV to be more precise) is a relic of the *Valenzuela-Gonzalez* era, issued 30 years ago. The Court recognizes that much has changed relative to the capabilities of videoconferencing technology in the 30 years since the *Valenzuela-Gonzalez* decision was rendered. To this point, two way-video conferencing implemented by the Court consistent with this policy “allows for the judge and defendant to communicate vital information to each other, at which the Judge must make a determination about whether the defendant truly understands what the Judge is saying, and at which the Judge must decide whether defendant’s decisions about how to plead and about whether to waive fundamental constitutional and statutory rights are truly voluntary.” See *Jones*, 5 ¶9. Thus, from a technical perspective, the video conferencing technology implemented by the Court consistent with this policy does not constitute “close circuit” video technology as conceived by the 9th Cir. in *Valenzuela-Gonzalez*.

- d. The Court to provide a copy of the complaint to defendant, read the complaint or state the substance of each charge in the complaint to defendant, advise the defendant of the maximum penalty imposed if convicted of the criminal offense or offenses charged and inform defendant of the defendant's individual rights consistent with the requirements of applicable laws and rules of the Tribe;
 - e. The Court to advise the defendant of the defendant's rights before accepting a plea consistent with the requirements of applicable laws and rules of the Tribe;
 - f. The Court to address the defendant personally to determine if a plea was entered voluntarily by defendant;
 - g. The Court to conduct two-way videoconferencing arraignment proceedings in a courtroom open to the public;
- C. **No Consent.** At the Court's discretion, the Court may require a defendant's appearance by use of two-way videoconferencing technology without the defendant's consent at the arraignment proceeding if: (1) The Tribe, through duly adopted Resolution, prohibits public "gatherings" of 25 persons or less; or (2) The Court is unable to implement social distancing practices (e.g., separating individual persons by a distance of six (6) feet or greater) as recommended by the Center for Disease Control (CDC), the Arizona Department of Health Services (ADHS), or the Health Departments of Graham, Gila, or Pinal Counties.
6. The Court, to mitigate crowding conditions within the Tribal detention facility, shall implement review of all defendants currently awaiting trial for non-violent criminal offenses³ detained by the Tribe and unable to make cash bail or post signature bond.
- A. **Chief Detention Officer.** Within five (5) business days of the execution of this Order, the Chief Detention Officer, or assigned designee, shall prepare and submit to the Chief Prosecutor and the Chief Judge a list of defendants currently awaiting trial for non-violent criminal offenses detained by the Tribe and unable to make cash bail or post signature bond.
 - B. **Chief Prosecutor.** Within three (3) calendar days of receipt of the list prepared and submitted by the Chief Probation Officer, or assigned designee, the Chief Prosecutor, or assigned designee, shall make and submit to the Chief Judge a written recommendation for each individual provided on the list to:
 - 1. Release the defendant from custody while awaiting trial on the defendant's own recognizance;
 - 2. Release the defendant from custody while awaiting trial with amended condition(s) for release; or
 - 3. Not release the defendant.

³ For the purposes of this Order, non-violent offenses shall include those criminal offenses not defined as a "violent crime" pursuant to Resolution No. NV-19-169a. "[A] violent crime is defined as a violation of the Tribe's Law & Order Code, Chapter 6, Sections 6.3, 6.5, 6.6., 6.8, 6.11, 6.13, 6.14, 6.16, 7.12-7.16, 8.5, 9.15, 9.16, 13.2, 13.4, 13.7, 14.2, 18.2-18.4 and federal crimes defined under federal law." See Resolution No. NV-19-169a(3).

For individual defendants the Chief Prosecutor or designee recommends for pre-trial release with amended conditions, the Chief Prosecutor or designee shall provide the Court with suggested conditions.

C. The Court. On its own motion, the Court shall review the matter of each individual provided on the list prepared and submitted by the Chief Detention Officer or designee. The Court shall treat review pursuant to this Policy as a supplemental bond matter. After reviewing the recommendation of the Chief Prosecutor, or designee, for each individual provided on the list, the Court shall make a decision to:

- Release the individual from custody while awaiting trial without condition(s) for release;
- Release the individual from custody while awaiting trial with amended conditions for release; or
- Not release the individual from custody.
- Modify the inmate's sentence to time served; or
- Not modify the inmate's sentence.

Provided the Court decides to: (1) Release the defendant on the defendant's own recognizance; or (2) Release the defendant upon satisfaction of amended condition(s), the Court shall write and issue an order of release for the individual defendant.

7. The Court shall suspend all Drug Court proceedings and activities for a 30-day period following the adoption of Resolution No. MR-20-033.
8. The Court shall direct Probation Officers to conduct contacts with probationers via phone, if feasible, to limit congregation in the Courthouse for a 30-day period following the adoption of Resolution No. MR-20-033. Probation Officers shall be responsible for documenting all probationer contacts made by phone. If the probationer cannot be contacted via phone, the Probation Officer shall conduct field contact or schedule a contact appoint with the probationer at the Probation Office. Under no circumstance shall a Probation Officer make personal contact with a probationer exhibiting symptoms associated with COVID-19 infection.
9. The Court shall, to mitigate risk of contact infections of COVID-19, excuse a probationer exhibiting or complaining of symptoms associated with COVID-19 infection from an announced or unannounced drug screening as required for conditions of release for a 30-day period following adoption Resolution No. MR-20-033. If a probationer is exhibiting symptoms of COVID-19 infection or complaining of symptoms of COVID-19 infection, the Probation Officer shall immediately refer the probationer to Health Services.
10. The Court, in an effort to mitigate overcrowding conditions in the Tribal detention facility, encourages the San Carlos Apache Police Department (SACPD) to initiate cite and release protocols for individuals contacted and detained for a non-violent criminal offense or offenses.⁴ Citations shall set appearance of the defendant no less than 30 days following the adoption of Resolution No. MR-20-033.

⁴ For the purposes of this Order, non-violent offenses shall include those criminal offenses not defined as a "violent crime" pursuant to Resolution No. NV-19-169a. "[A] violent crime is defined as a violation of the Tribe's

11. The Court shall prepare and submit a workforce plan for Court personnel pursuant to Resolution MR-20-033(3). In constructing its plan, the Court shall account for reduction in workforce capacity due to potential COVID-19 infections, measures for limiting contact exposures, and potential closure of other Tribal and local institutions and business (e.g., schools). See **Exhibit A**—Administrative Order 2020-0.2 “Workforce Plan for the San Carlos Apache Tribal Court in Response to Resolution No. MR-20-033 (Declaring State of Emergency Over Incidence of COVID-19).”
12. This Order shall remain valid until 30 days following the adoption of Resolution No. MR-20-033 or otherwise noticed by the Court or directed by the Tribe.

DONE AND SO ORDERED in Chambers in San Carlos, AZ, this 17th day of March, 2020.



Hon. Karla Comanche
Chief Judge
San Carlos Apache Tribal Court

Original to:
Court Clerk, San Carlos Apache Tribal Court

Copies to:
San Carlos Apache Tribe Department of Justice (DOJ—Civil Division)
San Carlos Apache Tribe Department of Justice (DOJ—Criminal Division)
San Carlos Apache Tribe Office of Public Defender (Public Defender)
San Carlos Apache Police Department (SCAPD)
San Carlos Apache Tribal Bar Association (SCATBA)
San Carlos Apache Social Services
Published Source (if directed by Chief Judge)

Law & Order Code, Chapter 6, Sections 6.3, 6.5, 6.6., 6.8, 6.11, 6.13, 6.14, 6.16, 7.12-7.16, 8.5, 9.15, 9.16, 13.2, 13.4, 13.7, 14.2, 18.2-18.4 and federal crimes defined under federal law.” See Resolution No. NV-19-169a(3).