

TOHONO O'ODHAM RULES OF COURT

Section 3: Rules of Criminal Procedure

Rule 1. Complaints.

(a) Long Form Complaint.

- (1) The long form complaint is required in all criminal cases filed under the Tohono O'odham Criminal Code where incarceration over 60 days is a possible punishment.
- (2) The long form complaint must conform with 2 T.O. R. Civ. Pro. §§ 4.1-4.2, and be signed, in blue or black ink, by a prosecutor of the Tohono O'odham Nation.
- (3) The long form complaint does not need to be sworn before a judge.
- (4) The long form complaint must be filed with the signed, original probable cause statement.

(b) **Short Form Complaint.** The short form complaint may be used for cases filed under the Tohono O'odham Traffic Code. The short form complaint may be used for cases filed under the Tohono O'odham Criminal Code where the maximum possible punishment is 60 days of incarceration.

Rule 2. Service of Process in Criminal and Traffic Matters.

Rule 2.1. Issuance of Summons and Warrant.

- (a) **Filing.** If the Nation files charges, the Nation must also file a prepared summons for the defendant if the defendant is not in custody. The Nation may also file a motion requesting a warrant.
- (b) **Preference for Summons; Contents of Motion.** Unless good cause exists for issuing a warrant, a summons must be issued if the defendant is not in custody. If a warrant is requested, the Nation must state in the motion the reasons why a warrant should be issued.
- (c) **Arrest Warrant.** Before issuing an arrest warrant, the judge must determine that probable cause exists that the defendant committed the offense or that such a determination has previously been made. An arrest warrant must be issued to secure the defendant's appearance if:
- (1) a defendant who has been summoned fails to appear;
 - (2) there is good cause to believe that the defendant will fail to appear; or
 - (3) the summons cannot readily be served or delivered.
- (d) **In Custody.** If the defendant is in custody, the Nation may file a complaint and include a motion requesting that the Court set an initial appearance. If necessary, the Nation

may request that the Court hold the defendant until the scheduled initial appearance.

Rule 2.2. Content of Warrant or Summons.

(a) **Warrant.** The warrant must be signed by the issuing judge and must have the name and any additional identifying information of the defendant. If the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. The warrant must state the offense with which the defendant is charged. And it must command that the defendant be arrested and brought before the criminal or traffic court.

(b) **Summons.**

(1) *Contents.* The summons must have the name and address of the defendant and must command the defendant to appear at an arraignment at the Tohono O'odham Justice Center. If no warrant is requested, a court clerk must fill in the time and date of the arraignment at the time of filing and must sign and date the summons.

(2) *Additional Requests.* At the request of the prosecutor, the summons may also command the defendant to report to a designated place to be photographed and fingerprinted before the defendant's court appearance in response to the summons. Failure to report will result in the defendant's arrest. If good cause for the failure is shown, the judge will then direct the defendant to report immediately for such photographing and fingerprinting.

Rule 2.3. Execution and Return of Warrant.

(a) **By Whom.** The warrant must be directed to, and may be executed by, all Tohono O'odham police officers or other officials as may be recognized by law.

(b) **Manner of Execution.** A warrant must be executed by arrest of the defendant. The arresting officer need not have the warrant in possession at the time of the arrest, but the officer must show the warrant to the defendant as soon as possible upon request.

(c) **Return.** Return of the warrant must be made to the judge before whom the defendant will make his or her initial appearance.

Rule 2.4. Service of Summons.

The summons must be served under the Rules of Civil Procedure 3.1(f), except that service may not be by publication or posting. Proof of service must be the same as in a civil action.

Rule 2.5. Defective Warrant.

The Court will not invalidate an arrest warrant or release a person in custody because of a defect in the warrant's form. The Court may amend the warrant to remedy such defect.

Rule 3. Appointment of Attorney; Notice of Appearance; Withdrawal and Substitution; Duty of Continuing Representation; Duty Upon Withdrawal.

(a) Appointment of Attorney.

(1) *Procedure.*

- (A) Financial Affidavit and Request for Attorney; Notary Not Required. Upon notification that the Nation will seek more than one year of imprisonment in a criminal proceeding, a defendant may file a sworn financial affidavit. The affidavit must indicate the defendant's income and debts to certify he or she is financially unable to retain private counsel and a request to appoint a state-licensed attorney to represent him or her. The Financial Affidavit and Request for Attorney must substantially comply with the form in these Rules. Despite Rule 6 of the Tohono O'odham General Rules of Procedure, the financial affidavit does not need to be notarized.
 - (B) Hearing. The Court may set the request for a hearing to obtain more information, or find cause based upon the affidavit to appoint a state-licensed attorney.
 - (C) Notice of Conflict. Any program or attorney appointed under this Rule must, within 10 business days of receiving notice of the appointment, file a notice of conflict. The Notice must set forth the program or attorney's justification. The Court may set the matter for a hearing.
 - (D) Appointment. If a defendant is entitled to a state-licensed attorney, the Court must appoint attorneys in the following order: the Advocate Program or another of the Nation's programs designated to provide criminal defense services; conflict attorneys contracted by the Nation to provide criminal defense service; then, on a rotating basis, any attorney admitted to practice law in the Tohono O'odham Judicial Court who is not employed by the Nation, who can be paid by the Nation, and who is qualified to handle the matter(s) before the Court.
- (2) *Waiver by Defendant.* An indigent defendant who is subject to a potential term of imprisonment of more than one year may waive his or her right to counsel. The waiver must be in writing, and the Court must find that the waiver is made knowingly, intelligently, and voluntarily.

(b) Notice of Appearance.

- (1) Counsel may not appear in any action or file anything in any action without first filing a Notice of Appearance, as counsel of record.
- (2) Counsel from the same office may participate in hearings for counsel of record on counsel of record's behalf and is expected to communicate the events, deadlines, schedules, and all other outcomes from the hearing to counsel of record.
- (3) Counsel of record will be responsible in all matters before and after judgment until the time for appeal from a judgment has ended, a judgment has become final after appeal, or until there has been a formal withdrawal or substitution of counsel.

- (4) Where the Nation seeks more than one year of incarceration, and an attorney is appointed, only a licensed attorney may participate on counsel of record's behalf.
- (c) **Withdrawal and Substitution.** No counsel may withdraw, or be substituted, as counsel of record in any pending action except by a written order. A motion to withdraw must be written and give the reasons withdrawal or substitution should be granted, with the name, mailing address, and telephone number of the defendant, and:
- (1) Where the motion bears the written approval of the defendant, a proposed written order must be included and may be presented to the court without notice to the other involved parties. The withdrawing counsel must give prompt notice of the entry of such order to all other parties or their counsel.
 - (2) Where the motion does not bear the written approval of the defendant, it must be served upon the defendant and all other parties or their counsel. The motion must have a certificate of the counsel making the motion that:
 - (A) the defendant has been notified in writing of the status of the case, including the dates and times of any court hearings, pending compliance with any existing court orders, and the possibility of sanction; or
 - (B) the defendant cannot be found or cannot be notified about the pending motion and the status of the case.
 - (3) No counsel may withdraw as counsel of record after an action has been set for trial, unless:
 - (A) substitute counsel signs the motion and states that counsel is advised of the trial date and will be prepared for trial or the defendant signs the motion stating the defendant is advised of the trial date and has arranged to be prepared for trial; or
 - (B) the Court is satisfied for good cause shown that counsel should be allowed to withdraw.
- (d) **Duty of Continuing Representation.** Counsel representing a defendant must continue to represent the defendant in all proceedings in the trial court, including filing of a notice of appeal, unless the Court permits such counsel to withdraw, or a limitation of representation was stated in the notice of appearance.
- (e) **Presumption.** Until such time as a Notice of Appearance has been filed on a defendant's behalf, the defendant is considered to be a self-represented litigant. In the event the Court makes an interest of justice referral for a legal practitioner, the presumption is that the defendant is represented.

Rule 4. Initial Appearance; Arraignment; Victims' Rights; Pleas.

Rule 4.1. Procedure Upon Arrest.

- (a) **Timeliness of Appearance.** An arrested person must be brought before a judge without unnecessary delay. A detained person's initial appearance must be held within 36 hours of arrest unless the Court issues an order extending temporary detention. The extension

must not exceed 72 hours from the time of arrest. If the initial appearance is not held within 36 hours of the arrest, or 72 hours if the detention time is extended, then the defendant must be released.

(b) Setting of a Time for Initial Appearance. The Chief Judge will ensure that a judge is available every day of the week to hold initial appearances as required by Section (a). The Chief Judge will also set the schedule for conducting initial appearances and notify the Tohono O’odham Police Department and Prosecutors’ Office of the schedule and any changes.

Rule 4.2. Initial Appearance; Waiver of Separate Arraignment Date; Obligation of Nation to Inform the Court of Sentencing Intentions; Third-party Signer.

(a) In General. At the defendant’s initial appearance, the judge must:

- (1) determine there is probable cause that a crime has been committed and that the defendant is the one who likely committed that crime;
- (2) obtain the defendant’s true name, mailing address, and upon motion, amend the formal charges to reflect any corrections;
- (3) instruct the defendant to notify the Court promptly in writing of any change in address;
- (4) determine that the defendant has a copy of the complaint and has the opportunity to review the complaint;
- (5) inform the defendant of the right to counsel and the right to remain silent;
- (6) set the conditions of release, if any, including third-party release, release on the person’s own signature, or bond;
- (7) set a date and time for the defendant to appear for his or her arraignment on the charges; and
- (8) set dates and times for any additional hearings requested by the parties or in the interests of justice.

(b) Waiver of Separate Arraignment Date. Upon a defendant’s request to waive a separate arraignment date, the Court may arraign the defendant at the initial appearance in accordance with Rule 4.3.

(c) Obligation of the Nation to Inform the Court of Sentencing Intentions. The Court requests that the Nation declare its intention to seek more than one year at or before the arraignment. The Nation must notify the Court of this intention no later than 30 days before trial.

(d) Third-party Signer.

- (1) **Applications.** Third-party signer applications are accepted by the Court Monday through Friday, 8 a.m. to 3 p.m., excluding holidays. Defendants will not be released until the review process is completed by the Court.
- (2) **Duties And Responsibilities.**

A third-party signer:

- (A) Agrees to be responsible for ensuring the defendant appears, on time, for all court hearings;
- (B) Is required to appear at all of the defendant's hearings—even if the third-party signer believes the defendant will not be present, the signer must attend; and,
- (C) Is responsible for supervising the defendant's whereabouts and making any arrangements needed so that the defendant will appear at all court hearings.

(3) **Qualifications for Third-party Signers.**

- (A) Must be 18 years of age or older;
- (B) Must be a member of a federally recognized Tribe;
- (C) Must present an official tribal enrollment photo identification card; or, in the alternative, other photo identification with other proof of enrollment;
- (D) Must be able to fulfill all third-party signer duties and responsibilities; and
- (E) Must be approved through an internal screening process with the Court.

(4) **Review Process.** Once an application passes the initial screening, a judge meets with the applicant to complete the review process. This will cover:

- (A) An overview of the defendant's release conditions;
- (B) The third-party signer's duties and responsibilities over the defendant;
- (C) The third-party signer's duties and responsibilities to the Court; and,
- (D) The penalties involved if a third-party signer fails to enforce the defendant's release conditions and the Court's Order to the third-party signer.

(5) **Penalties.** If a third-party signer or defendant fails to appear in Court, or if the defendant violates the Conditions of Release, the third-party signer will be brought before the Court to respond to an Order to Show Cause. A third-party signer found guilty of contempt of court (Title 7, Chap. 1, § 2.2 of the Tohono O'odham Nation Criminal Code) may be fined up to \$500, be sentenced up to 180 days in corrections, or both.

Rule 4.3. Arraignment.

(a) **In General.** At the defendant's arraignment, the judge must verify the defendant's true name, mailing and physical addresses, and date of birth. The judge must advise the defendant of his or her rights, determine the defendant's plea to each charge, decide release conditions, and set subsequent court dates.

(b) **Amending a Complaint.** The Court may grant a motion to amend a complaint so that its factual allegations conform to the evidence. The Court must not hold the defendant to answer for crimes different than those charged in the original complaint.

- (c) **Altering Charges; Amending to Conform to the Evidence.** An arraignment limits a trial to the specific charge or charges stated in the initial complaint. Unless the defendant consents, a charge may be amended only to correct mistakes of fact or remedy formal or technical defects. The charging document is considered amended to conform to the evidence admitted during any court proceeding. The parties may agree to amend or add a charge as part of a plea agreement.
- (d) **Rights of the Accused.** Before a defendant can plead to any charge, the judge must advise the defendant of the defendant's rights.
- (e) **Pleas.**
 - (1) *Reading of the Complaint; Waiver.* Before hearing the defendant's plea, the judge must read to the defendant the complaint and the section(s) of the Tohono O'odham Code which the defendant is charged with violating. The judge must read the maximum penalty for each charge. The judge must determine that the defendant understands the charge(s) and penalty(ies). The defendant may request to waive reading the charge(s).
 - (2) *Pleas.* The defendant may enter a plea of not guilty, guilty, or no contest (if permitted by law and in the best interests of justice) to each charge. If the defendant fails to enter a plea, the judge must enter a plea of not guilty on the defendant's behalf

Rule 4.4. Victims' Rights.

At the commencement of any proceeding the judge must:

- (a) Ask the prosecutor or otherwise determine if the victim has requested notice and/or has been notified of the proceeding.
- (b) Determine if the victim is present and wishes to address the Court.
- (c) Determine if the victim has been advised of his or her rights and received a written copy of the victim's rights. If needed, the Court may recess the hearing to permit the Nation to notify the victim of his or her rights and provide a written copy.
- (d) Determine if the victim has been notified about the hearing. If the victim has not been notified and a party requests a continuance, the judge may reschedule the hearing so long as it does not violate the law or public policy.

Rule 4.5. Plea of Guilty or No Contest.

- (a) A defendant may make a plea of guilty or no contest only in open court. The Court must reject a no contest plea when such a plea is not allowed by a law of the Nation.
- (b) Before accepting a plea of guilty or no contest the judge must determine that:
 - (1) there is a factual basis for the plea;

- (2) the defendant has been advised of his or her rights and wishes to waive those rights;
 - (3) the plea is voluntary and not the result of force, threats, or promises (other than a plea agreement); and
 - (4) if there is a victim, that the Nation has conferred with the victim or that the victim has waived his or her rights.
- (c) A plea of no contest may be accepted only after the Court considers the parties' views, public interests. The Tohono O'odham Code may prevent pleas of no contest with certain types of charges.
- (d) A defendant placed on probation will constructively begin that term of probation when the Court accepts and enters the defendant's plea. The defendant is considered to have received constructive notice of the imposition of probation at that hearing. The defendant must then report to the Probation Department to sign probation documents as ordered by the Court.
- (e) The Court may schedule a sentencing hearing to occur no more than 30 days following the defendant's guilty or no contest plea when made without a plea agreement. The Court may request a presentence report from the probation department.

Rule 5. Speedy Trial; Excluded Periods; Continuances.

- (a) **Speedy Trial.** Every person against whom a complaint is filed must be tried within 120 days from the person's arraignment, except for those excluded periods in Subsection (b) of this Rule.
- (b) **Excluded Periods.** These periods will be excluded from the computations of the time limit in Subsection (a).
- (1) Delays occasioned by or on behalf of the defendant, including delays caused by an examination and hearing to determine competency or mental fitness, the defendant's absence or incompetence, or his or her inability to be arrested or taken into custody within the Tohono O'odham Nation.
 - (2) Delays resulting from requesting a new probable cause determination.
 - (3) Delays resulting from extension of the time for disclosure.
 - (4) Delays required by congestion of the trial calendar, but only when the congestion is attributable to extraordinary circumstances, in which the Chief Judge suspends any of the Rules of Criminal Procedure.
 - (5) Delays resulting from continuances.
 - (6) Delays resulting from joinder for trial with another defendant for whom the time limits have not expired when there is good cause for denying severance. In all other cases, severance should be granted to preserve the applicable time limits.
- (c) **Continuances of Trial Dates.**
- (1) *Form of Motion.* A continuance of a trial may be granted on the motion of a party. Any such motion must be in writing and specify the reason(s) justifying the continuance.

- (2) *Grounds for Motion.* A continuance of any trial date will be granted if it is shown that extraordinary circumstances exist and that the delay is indispensable to the interests of justice. In ruling on a motion for continuance, the Court must consider the rights of the defendant and any victim to a speedy disposition. If the continuance is granted, the Court must state the specific reasons for the continuance on the record.

Rule 6. Setting of Hearings.

- (a) Arraignment Date.** The arraignment in criminal and traffic cases will be set as closely as possible to the time frames stated below:

- (1) *Defendant Out of Custody.* The arraignment for defendants out of custody will be set within 45 days after the complaint was filed.
- (2) *Defendant In Custody.* The arraignment for defendants held in custody must be set for the next regularly scheduled arraignment date. If at the Initial Appearance the defendant is released from custody or permitted release by third-party signature or bond, the arraignment date will be set for two weeks after the initial appearance.

- (b) Hearings Set At Arraignment.** At criminal and traffic arraignments these dates will be set as closely as possible to the time frames stated below upon a plea of not guilty:

- (1) *Pretrial Conference.* The pretrial conference date will be set two weeks after the arraignment on a date proposed by the Nation.
- (2) *Pretrial Hearing.* The pretrial hearing date will be set two weeks after the pretrial conference.

(c) Trial Date.

- (1) The trial date will be set at the pretrial hearing, or at any subsequent hearing where it is determined that the matter will go to trial.
- (2) The defendant must request either a jury trial or a bench trial at the pretrial hearing and such request is considered final.
- (3) The Court must inform a defendant who requests a trial by jury that the defendant will waive the right to a jury trial if the defendant fails to appear at the trial.
- (4) Trial dates may only be continued upon showing extraordinary circumstances under Rule 5(c).

Rule 7. Pretrial Conference; Disclosure by the Nation; Pretrial Conference Case Status Report.

Rule 7.1. Pretrial Conference.

Although the pretrial conference date and time is set in court based on the Nation's availability, the parties may agree to meet on a different date, before the pretrial hearing, without the Court's approval. The Nation must file a Case Status Report pursuant to Rule 7.3.

Rule 7.2. Disclosure by the Nation.

- (a) **Disclosure; Scope.** Unless otherwise ordered by the Court, or restricted by law or rule (i.e., the Victims' Rights Law, 7 T.O.C. Ch. 4), the prosecutor must provide to the defendant the following within the prosecutor's possession or control:
- (1) the names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief together with their relevant written or recorded statements;
 - (2) all statements of the defendant and of any person who will be tried with the defendant;
 - (3) all existing original and supplemental reports prepared by any law enforcement agency concerning the offense with which the defendant is charged;
 - (4) the names and addresses of any experts who have personally examined a defendant or any evidence, with the results of any physical examinations, scientific tests, experiments, or comparisons that have been completed;
 - (5) a list of all papers, documents, photographs or other tangible objects that the prosecutor intends to use at trial or which were purportedly obtained from or belong to the defendant;
 - (6) a list of all prior convictions of the defendant which the prosecutor intends to use at trial;
 - (7) a list of all prior acts of the defendant which the prosecutor intends to use to prove motive, intent, knowledge, or otherwise use at trial;
 - (8) all existing material or information which mitigates or negates the defendant's guilt as to the offense charged, or which could reduce the defendant's punishment;
 - (9) whether there has been any electronic surveillance of any conversations to which the defendant was a party, or of the defendant's business or residence;
 - (10) whether a search warrant has been executed;
 - (11) whether the case has involved an informant, and if so, the informant's identity, unless the informant will not be called to testify or where disclosure would result in substantial risk to the information or to the informant's operational effectiveness, provided failing to disclose will not infringe upon the rights of the accused; and
 - (12) a list of the prior convictions of witnesses whom the prosecutor intends to call at trial.
- (b) **Time for Disclosure.** Unless otherwise ordered by the Court, the prosecutor must disclose the materials and information in Subsection (a) by the initial date set for the pretrial conference. *See* Rule 7.3(c). If the Defendant is awaiting appointment of counsel, the prosecutor must disclose the materials and information to the defendant until a Notice of Appearance is filed.
- (c) **Prior Convictions.** The prosecutor must provide to the defendant a list of the prior convictions that the prosecutor intends to use to impeach a disclosed defense witness at trial, at least 10 days before the trial.

(d) Additional Disclosure upon Request and Specification.

- (1) *Additional Disclosure.* Unless otherwise ordered by the Court, the prosecutor must, within 30 days of a written request, provide to the defendant for examination, testing, and reproduction:
 - (A) Any specified items contained in the list submitted under Subsection (a) of this Rule.
 - (B) Any 911 call records existing at the time of the request that can reasonably be determined by the custodian of the record to be related to the case.
 - (C) Any completed written reports, statements and examination notes made by experts listed in Subsection (a)(1) and (a)(4).
- (2) *Reasonable Conditions.* The prosecutor may impose reasonable conditions, including an appropriate stipulation about the chain of custody to protect physical evidence produced under this section or to give time to complete any examination of such items.

(e) Disclosure by Prosecutor. The prosecutor's duty under this Rule extends to material and information in the possession or control of the following:

- (1) the prosecutor, or members of the prosecutor's staff;
- (2) any law enforcement agency which has participated in the investigation and that is under the prosecutor's direction or control; or
- (3) any other person who has participated in the investigation or evaluation and who is under the prosecutor's direction or control.

(f) Disclosure by Order of the Court. Upon a showing that the defendant has substantial need for material or information not otherwise covered by Rule 7.2 and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, the Court may order additional disclosure. The Court may, upon the request of any person affected by the order, vacate or modify the order if the Court finds that compliance would be unreasonable or oppressive.

(g) Disclosure of Rebuttal Evidence. Upon receipt of the notice of defenses required from the defendant, the Nation must disclose the names and addresses of all persons whom the prosecutor intends to call as rebuttal witnesses. The notice must include rebuttal witnesses' relevant written or recorded statements.

Rule 7.3. Case Status Report.

The Nation must file a case status report with the Court after any scheduled, or rescheduled, pretrial conference at least three days before the pretrial hearing.

(a) Case Status Report. The case status report must state:

- (1) Whether the pretrial conference took place.
- (2) If the pretrial conference took place, the case status report must identify the reports, other documents, and any other evidence, including any witnesses, disclosed to the defendant.

- (3) If the scheduled pretrial conference did not take place, the case status report must state the reason why the pretrial conference did not occur. The case status report must state any rescheduled date, and whether information under Rule 7.2 was delivered or sent to the defendant or the defendant's counsel on the original scheduled date.

(b) Failure to Disclose a Police Report. Upon motion of a party, the Court may dismiss the case without prejudice if the primary police report, the investigative report, or a comparable report was not provided to the defendant at the pretrial conference.

Rule 8. Disclosure by Defendant.

Rule 8.1. Physical Evidence.

(a) After the filing of the complaint, or upon the written request of the prosecutor, a defendant charged with a crime must:

- (1) appear in a line-up;
- (2) speak for identification by witnesses;
- (3) be fingerprinted, palm-printed, foot-printed, or voice printed;
- (4) pose for photographs not involving re-enactment of an event;
- (5) try on clothing;
- (6) permit taking samples of his or her hair, blood, saliva, urine, or other specified materials that involves no unreasonable intrusions of his or her body; and
- (7) submit to a reasonable physical or medical inspection of his or her body, provided such inspection does not include psychiatric or psychological examination.

(b) The defendant is entitled to the presence of counsel while taking such evidence. This Rule may supplement, but not limit, any other procedures established by law.

Rule 8.2. Notice of Defenses.

Within the time specified in Rule 8.4, the defendant must provide written notice to the prosecutor specifying all defenses to which the defendant intends to introduce evidence at trial, including, by not limited to, alibi, insanity, self-defense, defense of others, entrapment, impotency, marriage, insufficiency of a prior conviction, mistaken identity, and good character. The notice must specify for each listed defense the persons, including the defendant, whom the defendant intends to call as a witness at trial. Either the defendant or defendant's counsel may sign the notice, and it must be filed.

Rule 8.3. Disclosure by Defendant; Scope.

Simultaneously with the notice of defenses submitted under Rule 8.2, the defendant must disclose to the prosecutor the following material and information in the possession or control of the defendant:

- (a)** The names and addresses of all persons, other than that of the defendant, whom the defendant intends to call as a witness at trial, with their relevant written or recorded

statements;

- (b) The names and addresses of any experts whom the defendant intends to call at trial, together with the results of the defendant's physical examinations and of scientific tests, experiments, or comparisons that have been completed; and
- (c) A list of all papers, documents, photographs, and other tangible objects that the defendant intends to use at trial.

Rule 8.4. Time for Disclosure.

Unless otherwise ordered by the Court, the defendant must disclose the materials and information in Rules 8.2 and 8.3 no later than 15 days after the prosecutor's disclosure under Rule 7.2(b).

Rule 8.5. Additional Disclosure upon Request and Specification.

- (a) Unless otherwise ordered by the Court, the defendant, within 30 days of a written request, must provide to the prosecutor for examination, testing, and reproduction:
 - (1) Any specified items in the list submitted under Rule 8.3(c).
 - (2) Any completed written reports, statements, and examination notes made by experts in Rule 8.3(a) and (b).
- (b) The defendant may impose reasonable conditions, including a stipulation about the chain of custody, to protect the physical evidence produced, or to allow time to complete any examination or testing of such items.

Rule 8.6. Scope of Disclosure.

The defendant's duty under these Rules extends to material and information within the possession or control of the defendant, the defendant's attorneys, staff, agents, investigators, or any other persons who have participated in the investigation or evaluation and who are under the defendant's direction or control.

Rule 8.7. Disclosure by Order of the Court.

The prosecutor may file a motion asking for additional disclosure not otherwise covered by Rule 8.

- (a) **Motion Contents.** The prosecutor must show:
 - (1) the prosecutor has substantial need for the material or information;
 - (2) the prosecutor is unable, without undue hardship, to obtain the substantial equivalent by other means; and
 - (3) that disclosure of it will not violate the defendant's constitutional rights.
- (b) **Challenges to the Order.** The Court may, upon request of any person affected by the

order, vacate or modify the order if compliance would be unreasonable or oppressive.

Rule 9. General Standards of Disclosure; Continuing Duty to Disclose; Final Deadline; Sanctions.

Rule 9.1. General Standards of Disclosure.

In all disclosure under this Rule, the following will apply:

(a) Statements.

- (1) *Definition.* The term “statement” when it appears in a criminal rule about disclosure will mean:
 - (A) a writing signed or otherwise adopted or approved by a person;
 - (B) a mechanical, electronic, or other recording of a person’s oral communications or a transcript of it, and
 - (C) a writing containing a verbatim record or a summary of a person’s oral communications.
- (2) *Superseded Notes.* Handwritten notes that have been substantially incorporated into a document or report within 20 working days of the notes being created, or that have been otherwise preserved electronically, mechanically, or by verbatim dictation, will no longer themselves be considered a statement.

(b) Work Product. Disclosure will not be required of legal research or of records, correspondence, reports, or memoranda if they have the opinions, theories, or conclusions of the prosecutor, members of the prosecutor’s legal or investigative staff, law enforcement officers, or of defense counsel or defense counsel’s legal or investigative staff.

(c) Excision and Protective Orders.

- (1) *Discretion of the Court to Deny, Defer, or Regulate Disclosure.* Upon motion of any party, the Court may order that disclosure of the identity of any witness be deferred for any reasonable period not to extend beyond five days before the date set for trial, or that any other disclosures required be denied, deferred, or regulated when the Court finds:
 - (A) that the disclosure would result in a risk or harm outweighing any usefulness of the disclosure to any party; and
 - (B) that the risk cannot be eliminated by a less substantial restriction of discovery rights.
- (2) *Discretion of the Court to Authorize Excision.* Whenever the Court finds, on motion of any party, that only a part of a document, material, or other information is subject to disclosure under these Rules, it may allow the party disclosing it to excise the part of the material that is not subject to disclosure and to disclose the remainder.
- (3) *Protective and Excision Order Proceedings.* On motion of the party seeking a protective or excision order, or submitting to the Court for a determination as to whether any document, material, or other information is subject to disclosure, the

Court may permit the party to present the material or information for the inspection of the judge alone. Counsel for all other parties may be present when such presentation is made.

- (4) *Preservation of Record.* If the Court enters an order that any material, or portion of it, is not subject to disclosure under this Rule, the entire text of the material must be sealed and preserved in the record to be provided to the appellate court.
- (d) Failure to Call a Witness or Raise a Defense.** The fact that a witness' name is on a disclosure list, or that a matter in the notice of defenses is not raised, must not be commented upon at the trial, unless the Court on motion of a party, allows such comment after finding that inclusion of the witness' name or defense was an abuse of the applicable disclosure rule.
- (e) Use of Materials.** Any materials given to counsel under a disclosure rule must not be disclosed to the public, but Counsel may disclose the materials to others to the extent necessary for the proper conduct of the case.
- (f) Requests for Disclosure.** All requests for disclosure under Rules 7.2 and 8 must be made to the opposing party.

Rule 9.2. Continuing Duty to Disclose; Final Deadline.

- (a) Continuing Duties.** The duties prescribed in the disclosure rules are continuing duties and each party must make more disclosure, reasonably, whenever new or different information subject to disclosure is discovered. This duty continues even if another party fails to make required disclosure under these Rules.
- (b) Additional Disclosure.** Any party that determines more disclosure may be forthcoming within 30 days of trial must immediately notify both the Court and the other parties of the circumstances and when the disclosure will be available.
- (c) Final Deadline for Disclosure.** Unless otherwise permitted, all required disclosure must be completed at least seven days before trial.
- (d) Disclosure After the Final Deadline.** A party seeking to use material or information not disclosed at least seven days before trial must file a motion with the Court asking to extend the time for disclosure and to use the material or information. If the Court finds that the material or information could not have been discovered or disclosed earlier with due diligence and the material or information was disclosed right after its discovery, the Court must grant a reasonable extension to complete the disclosure and grant leave to use the material or information. Absent such a finding, the Court may either deny leave or grant a reasonable extension to complete the disclosure and to use the material or information. If granted, the Court may impose any sanction other than preclusion or dismissal in Rule 9.3.
- (e) Extension of Time for Scientific Evidence.** Upon a motion filed before the final deadline for disclosure under Subsection (c) of this Rule, supported by affidavit from a crime laboratory representative or other scientific expert that more time is needed to

complete scientific or other testing, or reports based thereon, and specifying the additional time needed, the Court must, unless it finds that the request for extension resulted from dilatory conduct, neglect, or other improper reason by the moving party or person in Rule 7.2(e) or 8.6, grant a reasonable extension in which to complete disclosure. The period of the extension is excluded from all periods otherwise prescribed in the disclosure rules.

Rule 9.3. Sanctions.

(a) **Failure to Make Disclosure.** If a party fails to make a required disclosure, any other party may move to compel disclosure and for appropriate sanctions. The Court must order disclosure and may impose any sanction it finds appropriate, unless the Court finds that failing to comply was harmless or that the information could not have been disclosed earlier even with due diligence, and the information was disclosed right after its discovery. All orders imposing sanctions must consider the significance of the information not timely disclosed, the impact of the sanction on the party and the victim, and the stage of the proceedings at which the disclosure is ultimately made. Available sanctions include, but are not limited to:

- (1) precluding or limiting the calling of a witness, use of evidence or argument in support of or in opposition to a charge or defense;
- (2) dismissing the case with or without prejudice;
- (3) granting a continuance or declaring a mistrial when necessary in the interests of justice;
- (4) holding a witness, party, person acting under the direction or control of a party, or counsel in contempt;
- (5) imposing costs of continuing the proceedings; or
- (6) any other appropriate sanction.

(b) **Statement of Good Faith Efforts.** No motion brought under Subsection (a) above will be considered or scheduled unless a separate statement of moving counsel is attached certifying that, after personal consultation and good faith efforts to do so, counsel cannot satisfactorily resolve the matter.

Rule 10. Pretrial Hearings; Purpose; Attendance.

(a) **Purpose.** The purpose of the pretrial hearing includes, but is not limited to, allowing the defendant to confirm or waive his or her request for a jury trial; to provide a forum for changes of plea; to provide a forum for the parties to inform the Court of disclosure and discovery problems; to verify readiness to go to trial; and setting a trial date.

(b) **Attendance.** The attendance of the defendant, defense counsel (if any), and the prosecutor are mandatory.

Rule 11. Subpoenas.

Subpoenas in criminal cases must substantially comply with the form in these Rules and are subject to the rules governing subpoenas in a civil action.

Rule 12. Extradition.

Rule 12.1. Applicability.

These Rules apply to adults and persons under the age of eighteen who are under the jurisdiction of the Adult Criminal Division of the Tohono O’odham Courts at the time of filing any petition or warrant allowed under these Rules. No person under the age of eighteen will be subject to extradition based upon any proceedings in the demanding jurisdiction for juvenile delinquency, truancy, dependency, or any other action or proceeding that is not criminal. *See* 7 T.O.C. Ch. 2.

Rule 12.2. Requirement of Certified Documents.

When, under these Rules, a certified document from a foreign jurisdiction is required, the document must bear an original seal or electronic stamp from the foreign jurisdiction.

Rule 12.3. Domestication of Foreign Warrant.

(a) **Motion.** The Nation may file a motion for domestication of an arrest warrant issued by a foreign jurisdiction, as defined by Rule 2.1 of the Tohono O’odham Recognition and Enforcement of Foreign Judgments, by attaching a copy of the demanding jurisdiction’s arrest warrant. The motion must state:

- (1) if probable cause exists to believe that the person is within the exterior boundaries of the Tohono O’odham Nation or is subject to the Nation’s jurisdiction; and
- (2) if the person is charged with a crime in the demanding jurisdiction; or
- (3) if the person was convicted of a crime in the demanding jurisdiction and has either escaped from custody or violated any term of bail, probation, parole, or an order arising out of a criminal proceeding in the demanding jurisdiction.

(b) **Order.** The Court must recognize the arrest warrant of the foreign jurisdiction if it determines that the Nation has established probable cause on the allegations in its motion, and will issue an arrest warrant to obtain the appearance of the person.

Rule 12.4. Petition for Extradition and Warrant.

(a) **Petition.** The Nation may file a petition for the extradition of a person if probable cause exists to believe that the person is within the exterior boundaries of the Tohono O’odham Nation or is subject to the Nation’s jurisdiction, and is charged with a crime in the demanding jurisdiction, or has been convicted of a crime in the demanding jurisdiction and has:

- (1) escaped from confinement; or
- (2) violated any term of bail, probation, parole, or an order arising out of a criminal proceeding in the demanding jurisdiction.

(b) **Contents.** The petition must allege the requirements of Subsection (a) of this Rule, the name of the demanding jurisdiction, the crime charged or other basis for the demand, a copy of any applicable waiver of an extradition hearing signed by the defendant, and

a certified copy of an arrest warrant, and provide one of these supporting documents:

- (1) a statement by the issuing authority that the arrest warrant was issued after a determination of probable cause to believe that a crime has been committed and the demanded person committed the crime, together with a copy of the provision of law defining the crime;
- (2) a certified copy of the charging instrument upon which the arrest warrant is based;
- (3) a statement by the issuing authority that the arrest warrant was issued after a determination of probable cause to believe that the demanded person has violated any term of bail, probation, or an order arising out of a criminal proceeding; or
- (4) a certified copy of a judgment of conviction or a sentencing order accompanied by a statement by the issuing authority that the demanded person has escaped from confinement or violated any term of parole.

(c) Additional Requests. If a demanded person is being prosecuted, is in custody, is on parole or probation, or is subject to an order arising out of a criminal proceeding on the Tohono O’odham Nation, the Nation may request:

- (1) extradition upon conditions, including a provision that the demanded person must be returned to the Tohono O’odham Nation immediately after completion of the demanding jurisdiction’s prosecution;
- (2) delay of the pending action on the Tohono O’odham Nation; or
- (3) the extradition, but waive the demanded person’s immediate return to the Nation. The waiver must be filed with the Court before an order to transfer custody is issued.

(d) Warrant. The Nation’s warrant must have the name of the demanding jurisdiction and the crime charged or other basis for the demand. The warrant will only become valid upon the signature of a judge of the Tohono O’odham Court.

Rule 12.5. Initial Appearance.

(a) Initial Appearance. A person arrested under these Rules must be brought before a judge of the Tohono O’odham Courts within 36 hours for an initial appearance.

(b) Rights. The defendant must be informed of:

- (1) the name of the jurisdiction demanding extradition;
- (2) the crime charged or other basis for the demand;
- (3) the right to the assistance of counsel at the person’s expense; and
- (4) the right to an extradition hearing before a transfer of custody to the demanding jurisdiction, which may be waived if the defendant consents to the extradition or if the defendant signed a waiver in the demanding jurisdiction.

(c) Setting Extradition Hearing. If the defendant does not waive the extradition hearing, the hearing must be set within 10 days after the initial appearance and the defendant, counsel, if any, and the Nation must be given notice in open court of the time and place of the hearing.

- (d) Release Pending Hearing.** The defendant will be held in custody pending the extradition hearing unless the arrest was made under Rule 12.3 and the Nation does not attach a supporting document as required under Rule 12.3(b). If arrested under Rule 12.3 and a Rule 12.4(b) supporting document is missing, the Court may set release conditions that will reasonably assure availability of the defendant for the extradition hearing. If ordered, any conditions of release must also include posting a bond not less than any bond set in the demanding jurisdiction. An order setting release conditions under this subsection must not affect any custody or conditions of release ordered in a criminal action brought by the Nation.

Rule 12.6. Waiver.

- (a) Prior Waiver.** If the defendant has previously executed a waiver of extradition hearing as a condition of probation, parole, or otherwise, the Court will issue an order to transfer custody under Rule 12.8, or with the consent of the executive authority of the demanding jurisdiction, allow the voluntary return of the defendant. No previously executed waiver of extradition will be recognized unless the copy of the waiver filed with the Court has the defendant's signature.
- (b) Waiver at Initial Appearance.** If, after being informed of the right to an extradition hearing, the defendant waives the right to a hearing, the defendant must sign a written waiver in the presence of the judge. Upon signing the waiver the Court must issue an order to transfer custody under Rule 12.8, or with the consent of the executive authority of the demanding jurisdiction, allow the voluntary return of the defendant.

Rule 12.7. Extradition Hearing.

- (a) Transfer Order; Defense.** Upon a finding that a petition and warrant are supported by the documentation required by Rule 12.4, the Court must issue an order to transfer custody under Rule 12.8 unless the defendant establishes by clear and convincing evidence that defendant is not the demanded person.
- (b) No Inquiry Into Guilt.** The Court must not ask about the guilt or innocence of the accused except as may be necessary in identifying the defendant as the person demanded.
- (c) Voluntary Return.** The Court may allow the voluntary return of the defendant if the Nation consents.
- (d) No Appeal.** Neither an order to transfer custody nor an order to deny transfer is open to appeal.

Rule 12.8. Transfer of Custody.

- (a) Order to Transfer.** The Court's order to transfer custody must direct a law enforcement officer to take or keep the defendant in custody until an agent of the demanding jurisdiction is available to take custody. *See* 7 T.O.C. Ch. 2 § 4.1(A).

- (b) **Time Limits.** If the demanding jurisdiction has not taken custody of the defendant within five business days, the Nation may file a written motion requesting an extension of time for the transfer. The motion must be filed before the close of business on the fifth business day following the Court's original transfer order. The Court may extend the original order for an additional 10 days upon showing good cause by the Nation for the failure of the demanding jurisdiction to take custody.
- (c) **Release.** If the defendant has not been taken into custody by the demanding jurisdiction within the time specified in the order, the defendant must be released. No order to transfer custody may be entered unless a new arrest warrant to obtain the appearance of the defendant is issued as a result of a new demand for extradition.
- (d) **Effect on Tribal Proceedings.** An order releasing the defendant from custody under these Rules will not affect any custody or conditions of release ordered in a separate criminal action brought by the Nation. Any criminal proceeding pending in the Court will be stayed pending a hearing in the Court after the defendant's return to the Tohono O'odham Nation.
- (e) **Financial Liability.** A defendant who is returned to the Nation may file a written petition, with notice to the Nation, requesting that the Nation pay for the cost of the defendant's subsistence and transportation to the place of the defendant's initial arrest or the person's residence if the defendant is acquitted of the charge that constituted the basis of the defendant's return. The Nation will have 10 days to respond, and the Court must schedule a hearing on the merits of the petition.

Rule 13. Federal Habeas Corpus.

Rule 13.1. Applicability.

These Rules apply to adults and persons under the age of eighteen who are under the jurisdiction of the Adult Criminal Division of the Tohono O'odham Courts at the time of filing a motion to grant comity. No person under the age of eighteen will be subject to transfer based upon any proceedings in the demanding jurisdiction for juvenile delinquency, truancy, dependency, or any other action or proceeding that is not criminal. *See* 7 T.O.C. Ch. 2.

Rule 13.2. Requirement of Certified Documents.

When, under these Rules, a certified document from a foreign jurisdiction is required, the document must bear an original seal or electronic stamp from the demanding jurisdiction.

Rule 13.3. Motion to Grant Comity.

The Nation's motion to grant comity must include the federal writ of habeas corpus and a certified arrest warrant.

Rule 13.4. Transfer Order.

- (a) **No Pending Tohono O'odham Criminal Matters.** If a defendant does not have

pending Tohono O’odham criminal matters, the Court will grant comity and issue a transfer order, directing that the defendant be held in custody until transferred to an agent of the United States within five days.

(b) Pending Tohono O’odham Criminal Matters. If a defendant has pending Tohono O’odham criminal matters the Court will only grant comity and issue a transfer order directing that the defendant be held in custody until transferred to an agent of the United States within five days upon finding that:

- (1) the federal writ requires the defendant to be returned to the custody of the Tohono O’odham Nation right after completion of the federal prosecution, or
- (2) the Nation files a written waiver of the defendant’s immediate return with the Court.

Rule 13.5. Time Limits.

If an agent of the United States has not taken custody within five days of issuing the transfer order, the Nation may file a written motion requesting an extension of time for the transfer. The party must file the motion before the close of business on the fifth business day following the Court’s original transfer order. The Court may extend the original order for an additional 10 days upon showing good cause by the Nation for the failure of the United States to take custody.

Rule 13.6. Release.

If the defendant has not been taken into custody by the United States within the time specified in the order, the defendant must be released. No order to transfer custody may be entered unless a new arrest warrant is issued as a result of a new writ of habeas corpus.

Rule 13.7. Effect on Tribal Proceedings.

If the Court grants comity to the federal writ, the Court will stay the Nation’s proceedings pending a hearing in the Court after the defendant’s return to the Tohono O’odham Nation.

Rule 14. Imposition of Incarceration.

(a) Presumption of Consecutive Sentences. Any time the Court imposes a sentence for two or more offenses, the sentence is presumed that the defendant will serve the sentences consecutively. The Court may order concurrent sentences at the discretion of a judge.

(b) Credit for Time Served. Any time the Court orders credit for time served, the credit for time served is presumed that it follows the consecutive or concurrent designation of the underlying sentence and that the credit will be calculated consecutively or concurrently based on the designation of the underlying sentence. If the Court does not specifically order credit for time served, it is presumed that the sentence does not include credit for time served.

Rule 15. Restitution.

Rule 15.1. Information Provided to Defendants and Victims.

- (a) **Defendants.** The Nation must provide a copy of the Defendant Restitution Information and Instructions sheet in substantial compliance with the form in these Rules to defendants at their pretrial conference as part of disclosure when restitution is a potential penalty.
- (b) **Victims.** Before any request for restitution as part of sentencing or a plea agreement, the Nation must provide a copy of the Victim Restitution Information and Instructions sheet in substantial compliance with the form in these Rules to the victim.

Rule 15.2. Restitution Form; Redaction; Payment Plan.

- (a) Whenever possible, the Prosecutors' Office should file a completed Restitution Form with any plea agreement that includes a request for restitution or before any sentencing or disposition hearing in which restitution will be requested.
- (b) A victim may file a completed Restitution Form with the Court, independent of the Prosecutors' Office, if the Court has ordered restitution.
- (c) The Prosecutors' Office must provide a conformed copy to the defendant with all attachments.
- (d) If the victim has opted to keep his or her contact information confidential, the Prosecutors' Office must redact all contact information from the form, except for the victim's name, on the copy delivered to the defendant and must file both the redacted copy and a full copy with the Court.
- (e) If the defendant cannot immediately pay restitution in full, the Court will set a payment plan at the restitution hearing. The parties may submit a proposed payment plan with the plea agreement or at the restitution hearing.
- (f) A victim must complete a new Restitution Form when the victim's contact information changes.

Rule 15.3. Restitution Orders.

- (a) When ordering restitution, the Court must specify in the order the amount of restitution due to each victim for each case or charge, set a due date for payment or order a payment schedule.
- (b) If a restitution amount is not submitted before the sentencing/plea hearing, the Court may waive restitution or, upon showing good cause, order restitution with an upper cap and set a restitution hearing within 30 days of the sentencing/plea hearing to set an exact amount and payment plan.

- (c) If a restitution amount is not provided at the restitution hearing, the Court may waive the payment of restitution in the criminal proceeding, or, upon showing good cause, reschedule the restitution hearing.

Rule 15.4. Restitution Payment Form.

A defendant making a restitution payment must submit a Restitution Payment Form in compliance with the form in these Rules for each restitution payment made.

Rule 16. Work Credit.

Rule 16.1. Purpose; Conversion; Restrictions.

The intention of the work credit conversion is to shorten an imposed sentence of incarceration. Except as otherwise prohibited, and at the Court's discretion, the defendant may be granted conversion of supervised, certified hours worked to benefit the corrections facility or community and not otherwise credited as payment for any fines, restitution, or as community service hours required as part of any sentence. If granted, the defendant will receive two hours of jail time credit for every one hour worked.

Rule 16.2. Petition.

Defendant must file a signed petition that substantially complies with these Rules for work credit and attach:

- (a) A written record of all hours completed, providing:
 - (1) the job or activity performed by the defendant on each date. The description must have enough information to readily identify what work was completed. If the nature of the work cannot be identified, then that time will not be used in the calculation. If multiple jobs or activities are performed on a specific date, then each job or activity must be listed and endorsed separately;
 - (2) the hours completed for each job or activity; and
 - (3) endorsement by a Corrections Officer, who must include his or her badge number, for each recorded entry.
- (b) A list of all programs, counseling, education, treatment, or other services defendant has participated in while in custody; and
- (c) A Corrections Certification of Defendant's Petition to Convert Work Hours to Credit for Detention Days Served in substantial compliance with the form in these Rules signed by a Corrections Officer certifying that the Corrections Officer has reviewed the petition and that the defendant:
 - (1) is eligible for work credit;
 - (2) has performed the jobs or activities listed;
 - (3) has participated in the services listed; and
 - (4) has had no disciplinary action or write-ups taken against him/her while in custody.

Rule 17. Conversion of Fines to Community Service.

The Court will convert all community service imposed in lieu of a fine based on the applicable federal minimum wage at the time the community service is ordered.

Rule 18. Habeas Corpus.

A petition for habeas corpus to inquire into the cause of a defendant's detention or imprisonment may be filed under the Rules of Procedure for Extraordinary Writs.

Section History

Adopted by Administrative Order 01-96 on March 1, 1996. Adopted February 17, 2000 by Administrative Order 02-00. Adopted by Administrative Order 03-03 on April 28, 2003. Amended October 12, 2007 by Administrative Order 04-07. Amended, reorganized and renumbered to combine all prior Administrative Orders into the Tohono O'odham Rules of Court on November 1, 2011. Amended on October 25, 2013 by Administrative Order 2013-04 to ensure compliance with the amendments of Section 1108 of Title 6, Chapter 1 of the Tohono O'odham Code. Amended by 2023 Tohono O'odham Rules of Court. Amended by 2024 Tohono O'odham Rules of Court.