

TO: Judge Dailey, Criminal Rules Committee
FROM: Sheryl Uhlmann, on behalf of the Rule 24 and 48 subcommittee
DATE: 10/11/21

Our subcommittee, Judge Grohs, Judge Malone, Karen Taylor, Matt Holman, and myself, considered whether Rules 48 and 24 should be amended in light of the recent COVID-related changes to the speedy trial statute. A majority of the subcommittee members believed that Rule 24 should not be substantially amended. Subcommittee members were generally neutral on amending Rule 48 to include a provision tracking the new COVID changes to the speedy trial statute.

18-1-405(6)(j), C.R.S.

Section 18-1-405(6)(j), C.R.S. excludes a “period of delay for any continuance due to the backlog of jury trials directly resulting from a restriction, procedure, or protocol implemented during the 2020 and 2021 health emergency related to the COVID-19 pandemic” from the speedy trial calculation. Under the statute only one continuance may be granted due to a COVID related trial backlog. The speedy trial exclusion cannot exceed six months for people out of custody or three months for people in custody. There are also mandatory bond hearing requirements for people who remain in custody if their cases are continued under the statute. Such continuances may not be granted on or after 5:01 p.m. on April 29, 2022.

Rule 24

Prior to the passage of 18-1-405(6)(j), C.R.S., our Committee was asked to consider allowing a court to declare a mistrial in situations where a jury pool could not be safely convened due to a public health crisis. As a result, the Committee proposed, and the supreme court adopted Crim.P. 24(c)(4), which currently provides:

At any time before trial, upon motion by a party or on its own motion, the court may declare a mistrial in a case on the ground that a fair jury pool cannot be safely assembled in that particular case due to a public health crisis or limitations brought about by such crisis. A declaration of a mistrial under this paragraph must be supported by specific findings.

This rule change effectively extends speedy trial deadlines because the period of delay caused by a mistrial, not to exceed three months, is excluded from the speedy trial calculation. Crim.P. 48(6)(V). Crim.P. 24(c)(4) does not contain a limit to the number of mistrials that can be granted.

Members of our subcommittee felt that Crim.P. 24(c)(4) remains useful because it addresses a different situation than does the speedy trial statute. The Rule deals with situations where a jury panel cannot be safely assembled while the statute focuses on trial backlogs resulting from the pandemic.

A majority (3) of subcommittee members felt that the Rule should remain substantially in its current form with one of the majority suggesting deleting the phrase “or limitations brought on by such a crisis.” The majority supported using the language “public health crisis” so that the Rule would apply beyond the COVID pandemic. It was noted that courts can always entertain bond arguments when mistrials are granted.

A minority (2) of the subcommittee members felt that, consistent with the statutory changes to speedy trial, the number of mistrials which can be granted under the Rule should be limited. Other limitations supported by the minority included changing the language of the rule from “public health crisis” to “health emergency related to the COVID-19 pandemic” to be consistent with the language of the speedy trial statute.

Members of the subcommittee considered but did not reach any conclusions about whether the Rule should be limited to situations in which the chief judge of a district suspends jury trials due to a public health crisis. Subcommittee members believed that although the statutory speedy trial COVID provision is limited to continuances granted by the court, the parties as well as the court should be able to request a mistrial under the Rule.

Rule 48

The subcommittee also considered whether Rule 48, which otherwise tracks the speedy trial statute should be amended to include a provision tracking the new COVID backlog provision by adding a new subsection:

(6)(X) The period of delay for any continuance due to the backlog of jury trials directly resulting from a restriction, procedure, or protocol implemented during the 2020 and 2021 health emergency related to the COVI-19 pandemic as provided in C.R.S. 18-1-405(6)(j). Such a continuance shall not be granted on or after 5:01 p.m. on April 29, 2022.

One subcommittee member favored amending the Rule, one was not convinced an amendment was needed. Several members thought that including the time limitation from the speedy trial statute was awkward but necessary if an amendment were adopted. One member questioned adopting a rule that was temporary in nature and wondered whether it would later need to be repealed. In sum, there was no consensus on whether Rule 48 should be amended.

Rule 48. Dismissal

(a) By the State. No criminal case pending in any court shall be dismissed or a nolle prosequi therein entered by any prosecuting attorney or his deputy, unless upon a motion in open court, and with the court's consent and approval. Such a motion shall be supported or accompanied by a written statement concisely stating the reasons for the action. The statement shall be filed with the record of the particular case and be open to public inspection. Such a dismissal may not be filed during the trial without the defendant's consent.

(b) By the Court.

(1) If, after the filing of a complaint, there is unnecessary delay in finding an indictment or filing an information against a defendant who has been held to answer in a district court, the court may dismiss the prosecution. Except as otherwise provided in this Rule, if a defendant is not brought to trial on the issues raised by the complaint, information, or indictment within six months from the entry of a plea of not guilty, he shall be discharged from custody if he has not been admitted to bail, the pending charges shall be dismissed, whether he is in custody or on bail, and the defendant shall not again be indicted, informed against, or committed for the same offense, or for another offense based upon the same act or series of acts arising out of the same criminal episode.

(2) If trial results in conviction which is reversed on appeal, any new trial must be commenced within six months after the date of the receipt by the trial court of the mandate from the appellate court.

(3) If a trial date has been fixed by the court, and thereafter the defendant requests and is granted a continuance for trial, the period within which the trial shall be had is extended for an additional six months period from the date upon which the continuance was granted.

(3.5) If a trial date has been fixed by the court and the defendant fails to make an appearance in person on the trial date, the period in which the trial shall be had is extended for an additional six months' period from the date of the defendant's next appearance.

(4) If a trial date has been fixed by the court, and thereafter the prosecuting attorney requests and is granted a continuance, the time is not thereby extended within which the trial shall be had, as is provided in subsection (b)(1) of this Rule, unless the defendant in person or by his counsel in open court of record expressly agrees to the continuance. The time for trial, in the event of such agreement, is then extended by the number of days intervening between the granting of such continuance and the date to which trial is continued.

(5) To be entitled to a dismissal under subsection (b)(1) of this Rule, the defendant must move for dismissal prior to the commencement of his trial or the entry of a plea of guilty to the charge or an included offense. Failure so to move is a waiver of the defendant's rights under this section.

(5.1) If a trial date is offered by the court to a defendant who is represented by counsel and neither the defendant nor his counsel expressly objects to the offered date as beyond the time within which the trial shall be had pursuant to this rule, then the period within which the trial shall be had is extended until such trial date and may be extended further pursuant to any other applicable provision of this rule.

(6) In computing the time within which a defendant shall be brought to trial as provided in subsection (b)(1) of this Rule, the following periods of time shall be excluded:

(I) Any period during which the defendant is incompetent to stand trial or is unable to appear by reason of illness or physical disability or is under observation or examination at any time after the issue of insanity, incompetency or impaired mental condition is raised;

(II) The period of delay caused by an interlocutory appeal, an appeal from an order that dismisses one or more counts of a charging document prior to trial, or after issuance of a rule to show cause in an original action brought under [Colorado Appellate Rule 21](#), whether commenced by the defendant or by the prosecution;

(III) 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 there is good cause for not granting a severance;

(IV) The period of delay resulting from the voluntary absence or unavailability of the defendant; however, a defendant shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained, or he resists being returned to the state for trial;

(V) The period of delay caused by any mistrial, not to exceed three months for each mistrial;

(VI) The period of delay caused at the instance of the defendant;

(VII) The period of delay not exceeding six months resulting from a continuance granted at the request of the prosecuting attorney, without the consent of the defendant, if:

(A) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date; or

(B) The continuance is granted to allow the prosecuting attorney additional time in felony cases to prepare the state's case and additional time is justified because of exceptional circumstances of the case and the court entered specific findings with respect to the justification.

(VIII) The period of delay between the new date set for trial following the expiration of the time periods excluded by paragraphs (I), (II), (III), (IV), and (V) of this subsection (6), not to exceed three months.

(IX) The period of delay between the filing of a motion pursuant to [section 18-1-202\(11\)](#) and any decision by the court regarding such motion, and if such decision by the court transfers the case to another county, the period of delay until the first appearance of all the parties in a court of appropriate jurisdiction in the county to which the case has been transferred, and in such event the provisions of subsection (7) of this section shall apply.

[\(X\) The period of delay for any continuance due to the backlog of jury trials directly resulting from a restriction, procedure, or protocol implemented during the 2020 and 2021 health emergency related to the COVI-19 pandemic as provided in C.R.S. 18-1-405\(6\)\(j\). Such a continuance shall not be granted on or after 5:01 p.m. on April 29, 2022.](#)

(7) If a trial date has been fixed by the court and the case is subsequently transferred to a court in another county, the period within which trial must be had is extended for an additional three months from the date of the first appearance of all of the parties in a court of appropriate jurisdiction in the county to which the case has been transferred.

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