



**STATE OF CONNECTICUT
JUDICIAL BRANCH
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February 7, 2020

MEMO TO: The Rules Committee of the Superior Court

SUBJECT: Subcommittee recommendation in response to Open File Criminal
Discovery Request No. 1

In their August 29, 2019 letter to the Rules Committee, Senators Martin M. Looney and Gary Winfield and Representative Steve Stafstrom requested the Rules Committee to amend the Practice Book to adopt the following policy:

1. Whereas Section 40-11 requires the prosecutor to disclose certain materials within 45 days of request, a Defense request for a continuance upon the prosecutor's failure to meet the deadline should not count against the defendant for calculation of speedy trial purposes.

The Rules Committee tasked a Subcommittee, consisting of Judges Alexander, Cradle, and Truglia, Jr., with reviewing this request, and recommending appropriate Practice Book amendments. The Subcommittee fielded input from Criminal practitioners, including the Division of Public Defender Services, the Office of the Chief State's Attorney, the Connecticut Criminal Defense Lawyers Association, the Connecticut Bar Association's Criminal Justice Section, the Office of Victim Services, and myself, as a representative of Judicial Legal Services.

The Subcommittee and the Criminal practitioners met on January 9, 2020, and agreed to recommend that the Rules Committee address this Request at this time. The Prosecutors asked, however, and the group agreed, that the recommended Practice Book amendments provide that any delay because of the prosecutors' inability to obtain discovery items from third parties (e.g., police or forensic reports) despite the prosecutors' due diligence not be held against the State. The group also suggested adding authority for the Court to subpoena third parties who have failed to turn over discovery materials in their possession despite the Prosecutors' due diligence to obtain those materials into the recommended Practice Book amendments.

The group ultimately agreed on a “basic concept” to address this Request, and a draft of the Basic Concept, with proposed amendments to Practice Book §§ 40-2 and 43-40 and a new Practice Book § 43-40A, was circulated to the Subcommittee and the Criminal practitioners. Although some of the comments to this draft were minor, uncontroversial, and easily incorporated, both the Defense practitioners and the Prosecutors also responded with alternative wording/approaches that the Rules Committee could take to address this Request. Given the limited timeframe between the January 9th meeting and the Rules Committee meeting scheduled for February 10, 2020, however, there was not sufficient time for the Subcommittee and the Criminal Practitioners to meet again to consolidate and incorporate these suggested alternative approaches into a single recommendation acceptable to the entire group.

Therefore, Judge Alexander suggested presenting both the recommended Practice Book amendments in the Basic Concept and the suggested alternative approaches for your consideration. Accordingly, I have included the following in this recommendation:

1. The Basic Concept

This embodies the concepts discussed by the Subcommittee and the Criminal practitioners to address the concerns presented in Request No.1, and incorporates the minor comments that were easily incorporated. The Basic Concept now includes recommendations for:

- a. A minor amendment to Practice Book § 40-2, which allows the court to subpoena documents or objects subject to discovery on its own motion;
- b. A minor amendment to Practice Book § 43-40 (7), to provide for an exception to the exclusion of time periods resulting from defense-requested continuances from the speedy trial calculation, as provided in the proposed new Practice Book § 43-40A (and a minor, unrelated, but necessary, amendment to § 43-40 (1) (F), to bring that provision up to date with the currently available diversionary programs); and
- c. A new Practice Book § 43-40A, which provides that a continuance granted at the request of the defendant because of the prosecutor’s willful failure to meet discovery deadlines shall not count against the defendant for the purpose of the speedy trial calculation, and authorizes the court to exercise its newly amended subpoena power to assist in the timely completion of discovery.

2. The Defense practitioners’ suggested alternative approach.

The Defense practitioners agreed with the amendments to Practice Book §§ 40-2 and 43-40 (7) proposed in the recommended Basic Concept, so I have not repeated those proposed amendments in this section. The Defense practitioners, however, proposed alternative language for the recommended new Practice Book § 43-40A, and a new sentence at the end of the corresponding Commentary. This section, therefore, presents this proposed

alternative language and proposed revision to the corresponding Commentary.

*At Judge Alexander's request, I have also included additional comments and concerns with various aspects of this proposed alternative language in Comment bubbles, along with some suggested edits to this language for your consideration, should the Rules Committee decide to take this approach to Request No. 1.

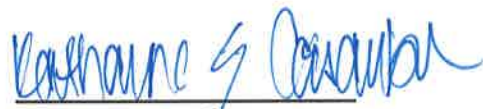
3. The Prosecutor's suggested alternative approach.

The Prosecutors agreed with the amendments to Practice Book § 40-2 proposed in the recommended Basic Concept, so I have not repeated those proposed revisions in this section. The Prosecutors suggested, however, that Practice Book § 43-40 (7) be more substantially revised to except defense-requested continuances for prosecutors' willful failure to comply with Chapter 40 from the periods of time excluded from the speedy trial calculation rather than creating a new Practice Book § 43-40A to specifically include those time periods in the speedy trial calculation, however. The Prosecutors also suggested that any language authorizing the court to issue subpoenas be split off from any exception to the periods of time excluded from the speedy trial calculation. This section, therefore, presents the proposed alternative amendment to Practice Book § 43-40 (7), which would obviate the need for a new Practice Book § 43-40A.

*At Judge Alexander's request, I have also included additional comments and concerns with this proposed alternative approach in Comment bubbles. I have also drafted proposed alternative Commentary to fit this alternative approach, should the Rules Committee decide to take this approach to address Request No. 1

The Subcommittee submits the attached recommendation for the Rules Committee's consideration to determine whether the proposed amendments to Practice Book §§ 40-2 and 43-40, and the creation of a new Practice Book § 43-40A in the Basic Concept and/or any of the proposed language in the suggested alternative approaches should be adopted to address Request No. 1.

Thank you for your consideration in this matter.



Katharine E. Casaubon
Counsel, Legal Services

Subcommittee's recommendation in response to Open File Criminal Discovery Request No. 1

1. The Basic Concept

Sec. 40-2. –Good Faith Efforts and Subpoenas

When documents or objects are the subject of discovery orders, good faith efforts shall be made by the party to whom any such order is directed to secure their possession. If the efforts of such party are unsuccessful the judicial authority shall, upon written request or upon its own motion, issue a subpoena or order directing that such documents or objects be delivered to the clerk of the court within a specified time. The clerk shall give a receipt for them and be responsible for their safekeeping. Such documents and tangible objects shall be sealed and shall be open to inspection to the parties to the action and their attorneys only upon an order of the judicial authority.

COMMENTARY: The changes to this Section provide the court with the authority to issue subpoenas and orders directing documents and objects subject to discovery orders to the clerk upon its own motion, and that such documents and object be open to inspection only to the parties and their attorneys as the court deems appropriate.

Sec. 43-40. –Excluded Time Periods in Determining Speedy Trial

The following periods of time shall be excluded in computing the time within which the trial of a defendant charged by information with a criminal offense must commence pursuant to Section 43-39:

(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 trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

(D) the time between the commencement of the hearing on any pretrial motion and the issuance of a ruling on such motion;

(E) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the judicial authority;

(F) delay resulting from any proceeding under General Statutes §§ 17a-685, 17a-693, et seq., 53a-39c, 54-56e, 54-56g, 54-56i, 54-56l, 54-56m, 54-56p, or any other pretrial diversion program authorized by statute.

(2) Any period of delay resulting from the absence or unavailability of the defendant, counsel for the defendant, or any essential witness for the prosecution or defense. For purposes of this subdivision, a defendant or any essential witness shall be considered absent when such person's whereabouts are unknown and cannot be determined by due diligence. For purposes of this subdivision, a defendant or any essential witness shall be considered unavailable whenever such person's whereabouts are known but his or her presence for trial cannot be obtained by due diligence or he or she resists appearing at or being returned for trial.

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

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

(5) Any period of time between the date on which a defendant or counsel for the defendant and the prosecuting authority agree that the defendant will plead guilty or nolo contendere to the charge and the date the judicial authority accepts or rejects the plea agreement.

(6) Any period of time between the date on which the defendant enters a plea of guilty or nolo contendere and the date an order of the judicial authority permitting the withdrawal of the plea becomes final.

(7) Except as provided in Section 43-40A, [T]the period of delay resulting from a continuance granted by the judicial authority at the personal request of the defendant.

(8) The period of delay resulting from a continuance granted by the judicial authority at the request of the prosecuting authority, if:

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

(B) the continuance is granted to allow the prosecuting authority additional time to prepare the state's case and additional time is justified because of the exceptional circumstances of the case.

(9) With respect to a defendant incarcerated in another jurisdiction, the period of time until the defendant's presence for trial has been obtained, provided the prosecuting authority has exercised reasonable diligence (A) in seeking to obtain the defendant's presence for trial upon receipt of a demand from the defendant for trial, and (B) if the defendant has not theretofore demanded trial, in filing a detainer with the official having custody of the defendant requesting that official to advise the defendant of the defendant's right to demand trial.

(10) Other periods of delay occasioned by exceptional circumstances.

COMMENTARY: The change to subdivision (F) of Subsection (1) of this Section makes that provision consistent with the current available diversionary programs. The change to Subsection (7) of this Section provides for an exception to the time periods excluded from the speedy trial calculation when a defendant requests a continuance.

(NEW) Sec. 43-40A. —Included Time Period in Determining Speedy Trial; Failure to Comply with Disclosure by Prosecuting Authority

Unless the prosecuting authority is unable, after the exercise of due diligence, to comply with the disclosure of discovery within any applicable required time period, the time for trial set forth in Section 43-39 shall continue to run during any period of delay resulting from a continuance granted by the judicial authority at the request of the defendant on the basis of the prosecuting authority's failure to comply with disclosure of

discovery pursuant to Chapter 40. During any such continuance, the judicial authority may issue subpoenas, pursuant to Sections 40-2 and 40-20, to assist in the timely completion of discovery.

COMMENTARY: This new Section allows the speedy trial calculation to run during any continuance granted on the basis of the prosecutor's willful failure to comply with disclosure of discovery, as required by Chapter 40, consistent with Open File Criminal Discovery. This Section also authorizes the judicial authority to exercise its existing subpoena power to assist in the timely completion of discovery.

2. The Defense practitioners' suggested alternative approach

(NEW) Sec. 43-40A. —Included Time Period in Determining Speedy Trial; Failure to Comply with Disclosure by Prosecuting Authority

The judicial authority shall issue a continuance at the request of the defendant in the event the prosecuting authority has not complied with the disclosure of discovery within any applicable required time period.

Notwithstanding the provisions of Section 43-40(7), The time for trial set forth in Section 43-39 shall continue to run during any such period of delay resulting from a continuance granted by the judicial authority unless the Prosecuting authority demonstrates due diligence to comply with the disclosure of discovery pursuant to Chapter 40. The due diligence of the prosecuting authority includes disclosure of discovery materials pursuant to Chapter 40.

Commented [CK1]: **Judge Alexander suggests that the Rules Committee change this to "may," should it adopt this alternative language.

Commented [CK2]: **Since the Basic Concept proposes amending Practice Book § 40-43 (7) to say "except as provided in Section 43-40A," and the Defense practitioners have not suggested not making that change, saying "Notwithstanding the provisions of Section 43-40 (7)" here would render the following language essentially inoperative.

Therefore, should the Rules Committee adopt this alternative language, I suggest removing "Notwithstanding the provisions of Section 43-40 (7)."

Commented [CK3]: **This alternative language hasn't referenced any "period of delay" yet.

Therefore, should the Rules Committee adopt this alternative language, I suggest removing "such," and adding "pursuant to this Section" after "judicial authority" on the next line.

Commented [CK4]: **Section 40-2 already imposes a duty of "good faith" to obtain documents and objects subject to discovery orders. Worded like this, this sentence makes it sound like there can only be due diligence if the prosecutor has complied with the time requirements of Chapter 40. In that case, a continuance granted because the prosecutor hasn't complied with the requirements of chapter 40 would always be without "due diligence."

The Prosecutors expressly asked, and the Subcommittee and Defense practitioners agreed, that the exception to the exclusion of time periods for speedy trial calculations for defense-requested continuances when the prosecutors have failed to meet the time requirements in Chapter 40 only apply when the delay is the result of the prosecutors' willful failure to comply. The Subcommittee and the Criminal practitioners agreed that this exception should not apply when the prosecutors have tried with due diligence to comply with Chapter 40, but have simply been unable to do so.

Therefore, should the Rules Committee adopt this alternative language, I suggest removing this sentence altogether.

Any order by the judicial authority made pursuant to this Section shall be stated on the record in open court. During any such continuance, the judicial authority shall issue subpoenas consistent with Sections 40-2 and 40-20. The time for trial set forth in Section 43-39 shall continue to run during any such period of delay resulting from a continuance granted by the judicial authority.

Commented [CK5]: **This language repeats the proposed new language in the first and second paragraphs.

COMMENTARY: This new Section allows the speedy trial calculation to run during any continuance granted on the basis of the prosecutor's [inability] willful failure to comply with disclosure of discovery, as required by Chapter 40, consistent with Open File Criminal Discovery. This Section also authorizes the judicial authority to exercise its existing subpoena power to assist in the timely completion of discovery. If the prosecuting authority is unable to obtain and disclose discovery, resulting in a continuance under this Section, the prosecuting authority should seek to exercise its authority under Section 40-2 and 40-20.

Commented [CK6]: **As noted above, the group agreed that it should be the prosecutors' willful failure to comply with the time requirements in Chapter 40, not just their inability to do so that continues the speeding trial calculation.

Therefore, should the Rules Committee adopt this alternative language, I suggest replacing "inability" with "willful failure."

3. The Prosecutors' suggested alternative approach

Sec. 43-40. –Excluded Time Periods in Determining Speedy Trial

... (7) The period of delay resulting from a continuance granted by the judicial authority at the personal request of the defendant except a continuance granted because the prosecuting authority has failed to comply with a request for discovery within the time period required by these rules unless the prosecuting authority is able to establish that he or she is unable to comply with the request despite the exercise of due diligence.

Commented [CK7]: **Including this exception in the rule for "excluded" time periods for the speedy trial calculation, when there is an exception to the exception (for when the prosecutor is unable to comply despite due diligence), results in a rule containing a triple negative. This is likely less clear than stating in a new rule that periods of delay because of a prosecutor's failure to comply with discovery time requirements affirmatively count toward the speedy trial calculation, with a single negative (unless the delay is despite due diligence).

Commented [CK8]: **Should the Rules Committee adopt this alternative approach, for ease of reference, I suggest directly specifying the discovery rules: "Chapter 40," instead of using this generic "these rules"

COMMENTARY: The changes to this Section provide an exception to the exclusion of time periods resulting from defense-requested continuances from the speedy trial calculation for when the continuance is granted on the basis of a prosecutor's failure to comply with the time periods required in Chapter 40, but only if the prosecutor's failure is willful.

Commented [CK9]: **1 drafted this potential Commentary to go with the Prosecutors' suggested alternative approach to have something ready in the event that the Rules Committee decides adopt this alternative approach to address Request No. 1.