

O'Donnell, Shanna

From: Casaubon, Katharine
Sent: Wednesday, March 4, 2020 9:11 AM
To: Del Ciampo, Joseph
Cc: Alexander, Joan; Cradle, Melanie L.; Truglia, Anthony D., Jr.
Subject: Criminal Open File Discovery Rules Committee Proposal
Attachments: Subcommittee Final Recommendations for Criminal Open File Discovery.pdf

Good morning Joe,

The Subcommittee handling the Criminal Open File Discovery issue asked me to send you the attached proposal, which includes revisions to the proposed amendments that the Subcommittee initially proposed at the February 10, 2020 meeting. These revisions incorporate and address the alternative approaches of the defense practitioners and the State's Attorneys that were included in the initial proposal, and embody the final recommendations of the Subcommittee for amending the Practice Book Rules to address the Open File Discovery requests from Senators Looney and Winfield and Representative Stafstrom in their August 29, 2019 letter to the Rules Committee.

The Subcommittee asks that this proposal be sent to the Rules Committee for consideration and that it be circulated to interested entities, including the State's Attorneys, the Public Defenders, the CCDLA, the CBA's Criminal Justice Section, and OVS as soon as possible. When circulating the proposal to the interested entities, the Subcommittee also requests that those entities be instructed to direct any further comments on the proposal to the Rules Committee directly, rather than to the Subcommittee.

Please let me know if you have any questions or need anything else on this.

Thanks,
Kate

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

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] may, 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 objects 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, including any period of delay resulting from a continuance requested because the prosecuting authority has failed to disclose discovery materials within any applicable time period prescribed in Chapter 40 if the prosecuting authority's failure is because of the unavailability of such discovery materials and the prosecuting authority has exercised due diligence to obtain such discovery materials.

(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 as provided in new Section 43-40A. This change also makes clear that the delay from continuances requested by the defendant because the prosecuting authority has failed to disclose discovery materials by the applicable deadline will still be excluded from the speedy trial calculation if the prosecuting authority is unable, despite the exercise of due diligence, to meet the applicable deadline because the discovery material is unavailable.

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

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 willful failure to disclose discovery materials within any applicable time period prescribed in 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 prosecuting authority's willful failure to disclose discovery materials, as required by Chapter 40, consistent with Open File Criminal Discovery. The willful failure described in this new section, which allows the speedy trial calculation to continue to run, contrasts with the prosecuting authority's inability to disclose discovery materials despite the exercise of due diligence described in Section 43-40 (7), which does not allow the speedy trial calculation to continue to run. This section also authorizes the judicial authority to exercise its existing subpoena power to assist in the timely completion of discovery.

Subcommittee's final recommendation in response to Open File Criminal Discovery Request No. 2

Sec. 39-7. –Notice of Plea Agreement

If a plea agreement has been reached by the parties, which contemplates the entry of a plea of guilty or nolo contendere, the judicial authority shall require the disclosure of the agreement in open court or, on a showing of good cause, in camera at the time the plea is offered. Thereupon, the judicial authority may accept the plea agreement in accordance with Section 39-18, or reject the plea agreement[, or may defer his or her decision on acceptance or rejection until there has been an opportunity to consider the presentence report, or may defer it for other reasons].

COMMENTARY: The change to this section clarifies that the judicial authority may only accept a plea agreement in accordance with Section 39-18.

Sec. 39-18. Plea of Guilty or Nolo Contendere; Entering

(a) In the discretion of the judicial authority, the defendant may enter a plea of guilty or nolo contendere to the information or complaint at arraignment[. At] or any later time [the defendant also may enter any such plea.], provided that the judicial authority confirms in open court that the defendant has received all discovery materials that he or she requested in writing pursuant to Chapter 40 that are within the possession of the prosecuting authority. If the defendant has not received all requested discovery, the judicial authority shall confirm that the defendant and his or her counsel agree to waive

any right to receive further disclosure, with the exception of any exculpatory information or materials, before allowing the defendant to enter the plea.

(b) A plea of nolo contendere shall be in writing, shall be signed by the defendant, and, when accepted by the judicial authority, shall be followed by a finding of guilty.

COMMENTARY: The changes to this section require the judicial authority to confirm that a criminal defendant has either received all requested discovery or waives the right to receive further disclosure of requested discovery, except for exculpatory evidence, before allowing the defendant to enter a plea of guilty or nolo contendere, consistent with Open File Criminal Discovery.

Subcommittee's final recommendation in response to Open File Criminal Discovery Request No. 3

Sec. 39-17. –Effect of Disposition Conference

If a case is not resolved at the disposition conference or if the judicial authority rejects the plea agreement, the case shall be assigned to a trial list in accordance with Section 44-15. If an agreement is reached, a judicial authority shall be available to accept guilty pleas and other dispositions.

COMMENTARY: The change to this section clarifies that the judicial authority may only assign a case to the trial list in accordance with Section 44-15.

Sec. 44-15. –Scheduling at Entry of Plea

(a) Upon entry of a not guilty plea, the judicial authority shall, whenever feasible, assign a date certain for the trial of such case, and in jury cases, for a disposition conference pursuant to Sections 39-11 through 39-13, and it shall advise all parties that they are to be prepared to proceed to trial or to a disposition conference on that date.

(b) Prior to assigning any date certain for trial, the judicial authority shall inquire of the parties whether discovery pursuant to Chapter 40 is complete.

If discovery is not complete, the judicial authority shall continue the case for the timely completion of discovery. 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.

If discovery is complete, the judicial authority may assign a date certain for trial no earlier than 45 days after the completion of discovery unless the defendant moves for a speedy trial pursuant to Section 43-41.

(c) If the setting of a definite date at the time of the not guilty plea is not feasible, the case shall be placed on a trial list of pending cases which shall be maintained by the clerk. Cases shall be placed on the trial list in the order in which the not guilty pleas were entered, but in no event shall a trial commence earlier than 45 days after the completion of discovery in the case unless the defendant moves for a speedy trial pursuant to Section 43-41.

(d) If, after the judicial authority has assigned a date certain for trial or has assigned the case to the trial list pursuant to this section, either party identifies and

produces any evidence or witness that is required to be disclosed pursuant to Chapter 40, the opposing party may move the judicial authority for an order in accordance with Section 40-5, including, but not limited to, moving for a continuance or an order prohibiting the producing party from introducing the delayed discovery at trial.]

COMMENTARY: The changes to this section require the judicial authority to confirm that discovery is complete before scheduling a date certain for trial or placing the case on the trial list and authorizes the judicial authority to exercise its subpoena power to assist in the timely completion of discovery, consistent with Open File Criminal Discovery. The changes also authorize the judicial authority to exercise its existing authority to, upon motion, make any order it deems appropriate to address delayed discovery disclosure.