

CHAPTER 8

Dismissal

SECTIONS

§ 801. Dismissal by Attorney General or district attorney.

§ 802. Dismissal by court.

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The Attorney General or the district attorney may by leave of court file a dismissal of an information, or complaint, or citation and the prosecution shall thereupon terminate. Such a dismissal may not, however, be filed during the trial without the consent of the accused.

Source: TT Code 1966 § 491; TT Code 1970, 12 TTC 351; TT Code 1980, 12 TTC 351.

§ 802. Dismissal by court.

If there is unnecessary delay in bringing an accused to trial, the court may dismiss an information, or complaint, or citation.

Source: TT Code 1966 § 492; TT Code 1970, 12 TTC 352; TT Code 1980, 12 TTC 352.

Cross-reference: The statutory provisions on the FSM Supreme Court and the Judiciary are found in title 4 of this code. The statutory provisions the President and the Executive are found in title 2 of this code.

Case annotations: Four factors 1) length of delay, 2) the reason for the delay, 3) the defendant's assertion of his right, and 4) prejudice to the defendant are balanced when analyzing the FSM Constitution's speedy trial right and to determine speedy trial violations; and they are also used to analyze whether a Rule 48(b) dismissal for unnecessary delay in prosecution is warranted. The court will also use the same four-factor balancing test to determine whether dismissal is appropriate under 12 F.S.M.C. 802 since that statutory right is embodied in Rule 48(b). *FSM v. Kansou*, 15 FSM R. 180, 183 (Chk. 2007).

A lengthy delay is a triggering mechanism to determine if further analysis is required to determine if a defendant's right to a speedy trial has been violated. If the delay has not been so lengthy as to be presumptively prejudicial, no further analysis is needed. *FSM v. Kansou*, 15 FSM R. 180, 183 (Chk. 2007).

A longer delay is tolerable for a complex conspiracy, than for an ordinary crime. *FSM v. Kansou*, 15 FSM R. 180, 184 (Chk. 2007).

The provisions in the FSM Constitution's Declaration of Rights are traceable to the United States Constitution's Bill of Rights, and when a

FSM Declaration of Rights provision is patterned after a U.S. Bill of Rights provision, United States authority may be consulted to understand its meaning. The FSM speedy trial right is patterned after the United States Constitution. *FSM v. Kansou*, 15 FSM R. 180, 185 n.1 (Chk. 2007).

A defendant may waive his right to a speedy trial. He effects a waiver, in respect of a particular delay, when he requests it, consents to it, enters a plea of guilty, makes certain dilatory pleas or motions, or when the delay is otherwise attributable to the defendant. *FSM v. Kansou*, 15 FSM R. 180, 185 (Chk. 2007).

Although non-assertion of the right does not constitute waiver of the speedy trial right, a court can consider whether the right was asserted, and how vigorously, in determining the reasonableness of any delay. *FSM v. Kansou*, 15 FSM R. 180, 185 (Chk. 2007).

The court can disregard the delay during the 2005 discovery when the defendant's first assertion of his speedy trial right was not until he filed a motion to dismiss on that ground on November 6, 2006, since he had already waived any claim based on that right by consenting to the March 13, 2006 trial date. A defendant's consent to a trial date that may, or is, beyond the time when a trial would have to be held under the defendant's speedy trial right, constitutes the defendant's waiver of his right to a speedy trial. Since an express waiver of an accused's speedy trial right is not required if defense counsel agrees to a trial date beyond the speedy trial limit, the defendant thus waived any speedy trial claim for the delay before the March 13, 2006 trial date when his attorney consented to that trial date. *FSM v. Kansou*, 15 FSM R. 180, 185-86 (Chk. 2007).

Delay caused or requested by a defendant suspends his speedy trial right, or is considered his waiver of that right, until that delay is over, even when that delay is justified. The movant's speedy trial right was thus suspended or waived by his successful (and justified) motion to disqualify the FSM Department of Justice. *FSM v. Kansou*, 15 FSM R. 180, 186 (Chk. 2007).

When a defendant raises an issue before trial which makes the original trial date impractical, the reasonable period of delay caused thereby is attributable to the defendant. *FSM v. Kansou*, 15 FSM R. 180, 186 (Chk. 2007).

A defendant is free to take whatever actions he feels are necessary to protect his rights prior to trial. He may not, however, use the delaying consequences of those actions as a basis for claiming that his trial was improperly delayed. *FSM v. Kansou*, 15 FSM R. 180, 186 (Chk. 2007).

Delay caused by a defendant's successful motion to disqualify the FSM Department of Justice is attributable to him, if not wholly, at least in large part, and delay caused by his successful motion to disqualify the judge is also attributable to him. *FSM v. Kansou*, 15 FSM R. 180, 186 (Chk. 2007).

Although judicial economy considerations cannot be elevated to where they impair a defendant's constitutional rights, they are relevant. *FSM v. Kansou*, 15 FSM R. 180, 187 n.3 (Chk. 2007).

When co-defendants are charged together and will be tried together, any delay attributed to one co-defendant is attributed to all of them. *FSM v. Kansou*, 15 FSM R. 180, 187 (Chk. 2007).

Delay due to a co-defendant's unavailability is not attributed to the government, and this includes the time a co-defendant was a fugitive. *FSM v. Kansou*, 15 FSM R. 180, 187 (Chk. 2007).

A single speedy trial "clock" governs in cases with multiple defendants. The "clock" starts to run with the most recently added defendant and any delay attributable to any one defendant is charged against the single clock, thus making the delay applicable to all defendants. No other rule is practical. If every co-defendant had a different "clock," the advantages of a joint trial would be destroyed and multiple trials, with all their disadvantages, would have to be held in sequence. *FSM v. Kansou*, 15 FSM R. 180, 187-88 & n.5 (Chk. 2007).

A defendant remains free to move for a severance at any time during which his speedy trial clock has not begun to run because a codefendant has not been apprehended. *FSM v. Kansou*, 15 FSM R. 180, 188 (Chk. 2007).

When the movant's case has never been severed from his co-defendant's and the movant never sought a severance, the speedy trial "clock" therefore did not start to run until December 11, 2006, when the co-defendant made his initial appearance. *FSM v. Kansou*, 15 FSM R. 180, 188 (Chk. 2007).

