

# STATUTORY SPEEDY TRIAL PERIOD CALCULATIONS FOR DISMISSED AND REFILED CHARGES: A CASE STUDY OF COLORADO'S APPROACH

## INTRODUCTION

Imagine being arrested and charged with a crime. Months pass, and your trial is continuously delayed because of congestion in the court's calendar and the prosecution's lack of preparation. You know that, in Colorado, the State only has six months to bring you to trial,<sup>1</sup> but five and a half months after your plea of not guilty, you still have yet to be tried. After all this time, just before the six-month speedy trial period expires, the charges against you are dropped. After months of legal stress, you breathe a sigh of relief. And then, months or even years later, the prosecution refiles the same charges against you again—and you are shocked to discover your six-month speedy trial period, previously just weeks from expiring, restarts from zero. The prosecution now gets another six months to bring you to trial on the previously dismissed charges.

The situation described above is a reality for some defendants who face criminal charges in Colorado. This Note analyzes the application of Colorado's statutory six-month speedy trial period when charges are dismissed and later refiled. Under Colorado law, the speedy trial period restarts for refiled charges,<sup>2</sup> unless the defendant can prove that the prosecution "*indiscriminately*" dismissed and refiled the charges in order to circumvent the speedy trial mandate.<sup>3</sup> However, no Colorado court to date has held that a defendant has met this difficult burden of proving that the prosecution dismissed and refiled the charges specifically to circumvent the six-month speedy trial period.<sup>4</sup> This Note suggests that Colorado courts have created too big of a loophole in Colorado's statutory right to a speedy trial through their longstanding precedent of allowing the speedy trial window to restart following the prosecution's dismissal and later refile of

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1. COLO. REV. STAT. ANN. § 18-1-405(1) (West 2019).

2. Colorado's six-month statutory window technically starts (and restarts) *when the defendant's not-guilty plea is entered*, and not from the time when charges are refiled. § 18-1-405(1). However, this Note will use "when charges are refiled" as a shorthand to refer to the point from which the speedy trial clock starts and/or restarts, even though refileing is not technically the time when the clock starts in Colorado, nor in every other state with a speedy trial statute.

3. *Meehan v. Cty. Court ex rel. Cty. of Jefferson*, 762 P.2d 725, 726 (Colo. App. 1988) (emphasis added); *see also* *Huang v. Cty. Court of Douglas Cty.*, 98 P.3d 924, 928 (Colo. App. 2004); *People v. Allen*, 885 P.2d 207, 210 (Colo. 1994) (en banc); *People v. Dunhill*, 570 P.2d 1097, 1099 (Colo. App. 1977).

4. *See infra* note 72 and accompanying text.

the same charges. Therefore, this Note argues that Colorado should *not* restart the speedy trial window for refiled charges, but rather toll the speedy trial window during the period between when the charges are dismissed and refiled.

Part I of this Note will first provide an overview of the speedy trial protections found in both the United States and Colorado Constitutions. Part II will summarize Colorado's speedy trial requirements, stemming from both statutes and case law, detailing when the speedy trial period restarts for refiled charges. More precisely, Part II will explain that Colorado's statutory speedy trial period generally restarts when charges are refiled (the "restarting" approach). Part III will explain other states' approaches to calculating the statutory speedy trial period for refiled charges. Specifically, Part III will describe three alternative approaches for calculating the speedy trial period when charges are dismissed and refiled: letting the speedy trial period continue to run after the charges are initially dismissed (the "continuous" approach); calculating the speedy trial period from when the charges are originally filed but pausing the clock between when the initial charges are dismissed and then later refiled (the "tacking-and-tolling" approach); or a hybrid approach combining the restarting and the tacking-and-tolling approaches (the "hybrid" approach).<sup>5</sup>

Next, Part IV will argue that Colorado's current approach of restarting the speedy trial period for refiled charges does not adequately protect Coloradans' statutory and constitutional right to a speedy trial. Part IV will argue that the better approach is the tacking-and-tolling approach, meaning calculating the speedy trial period using the initial, not refiled, charges as a starting point, while not including the period between dismissal and refiled in the calculation.<sup>6</sup> Because of tacking-and-tolling's relative benefits, Part V will propose replacing Colorado's current restarting approach with the tacking-and-tolling approach. Finally, Part VI will discuss this Note's applicability to other states with speedy trial statutes similar to Colorado's. More specifically, Part VI will note that, while each state's statutory speedy trial landscape is unique because it is also influenced by other factors, such as statutes of limitations, the arguments in tacking-and-tolling's favor are broadly applicable to most states that have a concrete speedy trial period prescribed by statute. Thus, this Note's arguments for adopting the tacking-and-tolling approach apply not just in Colorado, but in any state with a concrete statutory speedy trial period that does not yet follow the tacking-and-tolling approach.

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5. See Table 1 for a description and examples of the four approaches.

6. See Table 2 for a summary of the strengths and weakness of each of the four approaches.

## I. FEDERAL AND STATE CONSTITUTIONAL SPEEDY TRIAL PROTECTIONS

### A. *United States Constitutional Speedy Trial Protections: The Due Process Clause and the Sixth Amendment*

The Federal Constitution protects the right to a speedy trial through both the Due Process Clause of the Fifth Amendment<sup>7</sup> and the Sixth Amendment's Speedy Trial Clause.<sup>8</sup> This Section will describe, in turn, the protections found in the Due Process Clause, then the Sixth Amendment, as interpreted by the courts.

First, courts' interpretations of the Fifth Amendment's Due Process Clause provide a narrow speedy trial protection by forbidding "oppressive delay."<sup>9</sup> However, the United States Supreme Court has been clear that the Due Process Clause only has "a *limited* role to play in protecting against oppressive delay."<sup>10</sup> To prevail on an oppressive delay claim, "the defendant must prove (1) the delay resulted in substantial prejudice to his rights, and (2) the prosecution intentionally delayed prosecution in order to gain a tactical advantage."<sup>11</sup> Thus, the Due Process Clause protects the right to a speedy trial in a few, albeit "limited," circumstances.

In addition to the Fifth Amendment's Due Process Clause's protection against oppressive delay, the United States Constitution's Sixth Amendment explicitly provides defendants the right to a speedy trial.<sup>12</sup> To determine if a defendant's Sixth Amendment right to a speedy trial has been violated, courts apply the balancing test established in *Barker v. Wingo*,<sup>13</sup> which uses factors including the "[l]ength of delay, the reason for the delay,

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7. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

8. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy *the right to a speedy . . . trial.*" (emphasis added)).

9. *United States v. Lovasco*, 431 U.S. 783, 788–89 (1977) (citing *United States v. Marion*, 404 U.S. 307 (1971)).

10. *Id.* at 789 (emphasis added).

11. *United States v. Abdush-Shakur*, 465 F.3d 458, 465 (10th Cir. 2006). Most circuits follow this formulation of an oppressive delay claim. Eli DuBosar, Note, *Pre-Accusation Delay: An Issue Ripe for Adjudication by the United States Supreme Court*, 40 FLA. ST. U. L. REV. 659, 665–69 (2013). However, the Fourth and Ninth Circuits apply a slightly more lenient oppressive delay test, not requiring *substantial* prejudice and instead applying a test that balances the prosecution's reason for delay with the prejudice to the defendant. *Id.* at 670. Colorado courts have provided inconsistent guidance on the exact elements of an oppressive delay claim, but have broadly followed *Abdush-Shakur's* formulation requiring some form of prejudice combined with some type of prosecutorial misconduct. *See id.* at 681; see *infra* notes 143–149 and accompanying text for a discussion of the difficulties in proving a Due Process Clause oppressive delay claim.

12. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy *the right to a speedy . . . trial.*" (emphasis added)). This Sixth Amendment right to a speedy trial applies to state criminal cases through the Fourteenth Amendment. *Klopper v. North Carolina*, 386 U.S. 213, 222–23 (1967).

13. 407 U.S. 514 (1972).

the defendant's assertion of his right, and prejudice to the defendant."<sup>14</sup> However, in *United States v. MacDonald*,<sup>15</sup> the United States Supreme Court held that dismissing and refileing the same charges does not necessarily violate a defendant's right to a speedy trial: "[T]he Speedy Trial Clause has no application after the Government, acting in good faith, formally drops charges."<sup>16</sup> Thus, courts cannot include the time between when the Government, acting in good faith, drops and later refiles the same charges in analyzing whether the defendant's Sixth Amendment speedy trial rights have been violated.<sup>17</sup>

Instead, "[a]ny undue delay after charges are dismissed, like any delay before charges are filed, must be scrutinized *under the Due Process Clause, not the Speedy Trial Clause* [of the Sixth Amendment]."<sup>18</sup> This is because, unlike the Due Process Clause, the "Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time."<sup>19</sup> Rather, the

speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.<sup>20</sup>

Because of the importance of these protections, speedy trial rights have been "considered fundamental" since even before this country's founding,

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14. *Id.* at 530.

15. 456 U.S. 1 (1982).

16. *Id.* at 7.

17. *Id.*

18. *Id.* (emphasis added). Thus, in excluding the period between when charges are dismissed and later refiled, the *MacDonald* Court's approach is similar to (and arguably the same as) the tacking-and-tolling approach. However, *MacDonald* does not "directly" answer the question whether "the period from the initial filing of the charges until the dismissal of those charges is relevant." *People v. Nelson*, 360 P.3d 175, 181–82 (Colo. App. 2014). Instead, the *Nelson* court held that *MacDonald*'s rationale *indirectly* "supports the conclusion that [the] period [between the initial filing of charges and dismissal] counts" towards the length of delay for constitutional speedy trial purposes. *Id.* But see *United States v. Artez*, 290 F. App'x 203, 208 (10th Cir. 2008) (noting contradicting cases interpreting *MacDonald* as requiring the tacking-and-tolling approach *or* the restarting approach). See also *infra* note 236 and accompanying text.

19. *MacDonald*, 456 U.S. at 8.

20. *Id.*; see also *United States v. Marion*, 404 U.S. 307, 320 (1971) ("[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.").

dating back to the Magna Carta.<sup>21</sup> Thus, the right to a speedy trial “is one of the most basic rights preserved by our Constitution.”<sup>22</sup> Due to the importance of speedy trial rights, violations of the Sixth Amendment right to a speedy trial require

the unsatisfactorily severe remedy of dismissal of the indictment . . . . This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.<sup>23</sup>

Thus, violations of the Sixth Amendment right to a speedy trial require a dismissal.<sup>24</sup>

### *B. Colorado’s Constitutional Speedy Trial Protections*

Colorado’s State Constitution similarly protects a defendant’s right to a speedy trial: “In criminal prosecutions the accused shall have the right to . . . a speedy public trial.”<sup>25</sup>

Because Colorado’s constitutional speedy trial protections mirror the Federal Constitution’s,<sup>26</sup> Colorado courts have held that similar interests underlie both the federal and state constitutional speedy trial protections, namely “the defendant’s right to be free from the anxiety accompanying a public accusation and society’s need for a speedy and final determination of criminal charges.”<sup>27</sup> However, these “speedy trial provisions are not intended to be applied in a wooden or mechanistic fashion” due to the “countervailing interest in effective enforcement of the criminal laws.”<sup>28</sup>

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21. *Klopper v. North Carolina*, 386 U.S. 213, 223, 225 (1967) (noting that the right to a speedy trial “has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta”).

22. *Id.* at 226.

23. *Barker v. Wingo*, 407 U.S. 514, 522 (1972) (footnote omitted).

24. *Id.*

25. COLO. CONST. art. II, § 16.

26. *People v. Deason*, 670 P.2d 792, 796 (Colo. 1983) (en banc); *see also* *People v. Watson*, 666 P.2d 1114, 1116 (Colo. App. 1983), *rev’d en banc on other grounds*, 700 P.2d 544 (Colo. 1985).

27. *Deason*, 670 P.2d at 796 n.10. More specifically, constitutional speedy trial provisions serve the purposes of the

minimization of the anxiety and concern resulting to a defendant from public accusation, and the prevention of prejudice to the accused arising from long delays. . . . The more general public interest is also served by an early determination of guilt “so that the innocent may be exonerated and the guilty punished.”

*People v. Sanchez*, 649 P.2d 1049, 1052 (Colo. 1982) (en banc) (quoting *Jaramillo v. Dist. Court*, 484 P.2d 1219, 1221 (Colo. 1971) (en banc)).

28. *Sanchez*, 649 P.2d at 1052.

Because Colorado's constitutional protections mirror the federal ones, state constitutional speedy trial violations are examined using a similar test as federal violations under *Barker*,<sup>29</sup> relying on the same four factors: "the length of the delay, the reasons for the delay, the defendant's assertion of his right to a speedy trial, and the prejudice to the defendant."<sup>30</sup> Thus, a holding that a defendant has not been denied a speedy trial under the Colorado Constitution "requires . . . the concomitant finding that the requirements of the United States Constitution concerning speedy trial have also been met."<sup>31</sup>

For this reason, consistent with the United States Supreme Court's analysis in *United States v. MacDonald*,<sup>32</sup> the Colorado Constitution's Article II Section 16 speedy trial right does not apply when the prosecution dismisses the charges in good faith, because then, no charges are pending.<sup>33</sup> Under this logic, "a dismissal entered before jeopardy attaches is not equivalent to an acquittal and does not operate to bar a subsequent prosecution for the same offense."<sup>34</sup> Likewise, because a dismissal before trial is "not a final judgment on the merits of the case," neither *res judicata* nor collateral estoppel apply to preclude future prosecutions based on the same crime as the dismissed charges.<sup>35</sup>

In very limited circumstances, Colorado courts have held that the Due Process Clauses of the United States Constitution's Fourteenth Amendment<sup>36</sup> and Colorado Constitution<sup>37</sup> may protect defendants from prosecutorial dismissal and refiling of the same charges.<sup>38</sup> In *People v. Abrahamsen*,<sup>39</sup> the Colorado Supreme Court held that the prosecution's repeated dismissal and subsequent refiling of the same charges throughout a one-year period, "although procedurally within the law, in fact violated the due process requirement of fundamental fairness."<sup>40</sup> The court noted that the repeated dismissals and refilings "required the defendant to make multiple court appearances and subjected the defendant to excessive expense in defending himself, and to unwarranted prolonged anxiety and

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29. *Barker v. Wingo*, 407 U.S. 514 (1972).

30. *People v. Small*, 631 P.2d 148, 154 (Colo. 1981) (en banc).

31. *Lucero v. People*, 476 P.2d 257, 259 (Colo. 1970) (en banc).

32. 456 U.S. 1 (1982).

33. *People v. Watson*, 666 P.2d 1114, 1116 (Colo. App. 1983), *rev'd en banc on other grounds*, 700 P.2d 544 (Colo. 1985); *see also People v. Castango*, 674 P.2d 978, 981 (Colo. App. 1983).

34. *People v. Abrahamsen*, 489 P.2d 206, 209 (Colo. 1971) (en banc).

35. *Id.*

36. U.S. CONST. amend. XIV, § 1.

37. COLO. CONST. art. II, § 25 ("No person shall be deprived of life, liberty or property, without due process of law.")

38. *Abrahamsen*, 489 P.2d at 209; *see also People v. Aragon*, 643 P.2d 43, 46 (Colo. 1982) (en banc).

39. 489 P.2d 206 (Colo. 1971).

40. *Id.* at 209.

concern under the circumstances. In addition, [the] defendant was placed under the cloud of undetermined criminal charges for an indeterminate and unreasonable period of time.”<sup>41</sup> Thus, the Due Process Clauses of the United States Constitution’s Fourteenth Amendment and Colorado Constitution protect defendants in the limited circumstance of *repeated* dismissals and refilings of the same charges.

In sum, both the United States and Colorado Constitutions’ speedy trial and Due Process Clauses—as interpreted by the courts—offer some speedy trial protections, albeit in three, limited circumstances. First, the state and federal Constitutions’ speedy trial clauses protect against prolonged pre-trial delays using *Barker*’s four-part balancing test when charges are pending, but not when they have been dismissed (and are later refiled).<sup>42</sup> Second, both Constitutions’ Due Process Clauses protect against oppressive delay in cases of prosecutorial misbehavior.<sup>43</sup> Third, both Constitutions’ Due Process Clauses protect against the *repeated* dismissal and refiling of the same charges.<sup>44</sup>

## II. COLORADO STATUTORY AND JUDICIAL SPEEDY TRIAL REQUIREMENTS

In addition to the *constitutional* protections discussed in Part I, Colorado provides defendants a *statutory* right to a speedy trial within six months of their initial not-guilty plea, barring certain excluded time periods.<sup>45</sup> This Section will discuss Colorado’s speedy trial landscape generally, then turn to Colorado’s approach to calculating the statutory speedy trial period when the prosecution initially dismisses and then later refiles the same charges.

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41. *Id.*

42. *See supra* Part I.

43. *See supra* Part I.

44. *See supra* Part I(B).

45. COLO. REV. STAT. ANN. § 18-1-405 (West 2019). Periods omitted when computing the speedy trial period under the statute include:

[a]ny 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 the defendant’s mental condition, insanity, incompetency, or impaired mental condition is raised; . . . [t]he period of delay caused by an interlocutory appeal whether commenced by the defendant or by the prosecution; . . . [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; . . . [t]he period of delay resulting from the voluntary absence or unavailability of the defendant; . . . [t]he period of delay caused by any mistrial, not to exceed three months for each mistrial; . . . [t]he period of any delay caused at the instance of the defendant.

§ 18-1-405(6)(a)–(f). Additionally, certain types of delays “not exceeding six months resulting from a continuance granted at the request of the prosecuting attorney, without the consent of the defendant” are excluded from the calculation. § 18-1-405(6)(g).

### A. Colorado's Speedy Trial Statute Generally

In order to implement the state's constitutional speedy trial protections,<sup>46</sup> Colorado gives defendants a statutory right to a speedy trial within six months of their not-guilty plea under Colorado Revised Statute Section 18-1-405 (Section 18-1-405).<sup>47</sup> The burden of complying with the statutory speedy trial mandate is on the prosecution and the court.<sup>48</sup>

While Section 18-1-405 is intended to “clarify and simplify” the constitutional right to a speedy trial,<sup>49</sup> it can nonetheless “be violated without proof of violation of the underlying constitutional guarantee.”<sup>50</sup> Even without demonstrating a *constitutional* violation, under Colorado's *statute*, when a defendant is not brought to trial within the six-month window, “and no allowable extensions or exclusions are applicable, then the charges against the defendant must be dismissed.”<sup>51</sup> After a dismissal for a statutory speedy trial violation, “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.”<sup>52</sup> Thus, Colorado's remedy for statutory speedy trial violations is a dismissal that bars refileing the same charges, leaving courts and prosecutors little discretion to refile after a violation. When Section 18-1-

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46. *People v. Deason*, 670 P.2d 792, 796 (Colo. 1983) (en banc) (“The speedy trial statute is intended to implement the constitutional right to a speedy trial.”).

47. § 18-1-405(1) (“Except as otherwise provided in this section, if a defendant is not brought to trial on the issues raised by the complaint, information, or indictment within six months from the date of the entry of a plea of not guilty, he shall be discharged from custody if he has not been admitted to bail, and, whether in custody or on bail, the pending charges shall be dismissed, 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.”); *see also* COLO. R. CRIM. P. 48(b)(1). Whereas the *statutory* speedy trial period begins with a not-guilty plea, both the federal and state “*constitutional* right to a speedy trial attaches with the filing of a formal charge.” *People v. Chavez*, 779 P.2d 375, 376 (Colo. 1989) (en banc) (emphasis added).

48. *Marquez v. Dist. Court ex rel. Tenth Judicial Dist.*, 613 P.2d 1302, 1303–04 (Colo. 1980) (en banc). This “burden includes making a record sufficient for an appellate court to determine statutory compliance.” *Id.* at 1304.

49. *Watson v. People*, 700 P.2d 544, 548 (Colo. 1985) (en banc) (quoting *Carr v. Dist. Court ex rel. Eighth Judicial Dist.*, 543 P.2d 1253, 1254 (Colo. 1975)); *see also* *Nagi v. People*, 389 P.3d 875, 877 (Colo. 2017) (holding that Section 18-1-405 “is designed to effect” “the federal and state constitutional guarantees” to a speedy trial); *People v. Sanchez*, 649 P.2d 1049, 1052 (Colo. 1982) (en banc).

50. *Watson*, 700 P.2d at 548.

51. *Tongish v. Arapahoe Cty. Court*, 775 P.2d 63, 64 (Colo. App. 1989); *see also* COLO. REV. STAT. ANN. § 18-1-405 (West 2019); *Watson*, 700 P.2d at 548.

52. § 18-1-405(1). In contrast to Colorado's statute *mandatorily* prohibiting refileing charges after a speedy trial violation, the federal system allows judges *discretion* to dismiss the charges either with or without prejudice following a speedy trial violation. *See infra* notes 115–117 and accompanying text.

405 is violated, the court *must* dismiss the charges; “the mandatory language of the statutory provision leaves no room for court discretion.”<sup>53</sup>

*B. Escape Hatches: Colorado’s Speedy Trial Statute Excludes Several Periods from the Six-Month Window*

Despite the six-month statutory speedy trial mandate, the prosecution can ask the courts for additional time on top of the six-month period, without the defendant’s consent, in several circumstances.<sup>54</sup> First, the six-month window does not include delay caused by the prosecution’s interlocutory appeal.<sup>55</sup> Second, it does not include 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.”<sup>56</sup> Third, Colorado’s six-month speedy trial window can be tolled for an additional six months, without the defendant’s consent, when the prosecutor requests a continuance because of the unavailability of evidence:

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 [is excluded], if . . . [t]he 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 this evidence will be available at the later date . . . .<sup>57</sup>

Fourth, Colorado’s six-month window can be tolled for an additional six months, without the defendant’s consent, when the prosecutor requests a continuance for felony trials under “exceptional circumstances”:

The period of delay not exceeding six months resulting from a continuance granted at the request of the prosecuting attorney,

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53. *Watson*, 700 P.2d at 548; *see also* *People v. Gallegos*, 946 P.2d 946, 949 (Colo. 1997) (en banc) (“The language of section 18-1-405(1) is mandatory and leaves no discretion for the court to make exceptions to the six-month rule beyond those delineated in section 18-1-405(6).”).

54. Section 18-1-405 also excludes several other additional periods of delay, such as delays caused by mistrials, delays caused by the defendant’s voluntary absence or unavailability, or periods in which the defendant is incompetent or otherwise unable to attend the trial. § 18-1-405(6).

55. § 18-1-405(6)(b).

56. § 18-1-405(6)(c).

57. § 18-1-405(6)(g)(I); *see also* *People v. Jompp*, 440 P.3d 1166, 1172 (Colo. App. 2018) (“[The Statute] allows an additional delay of up to six months at the prosecution’s request, without the defendant’s consent, if the prosecution demonstrates that (1) evidence material to the state’s case is unavailable; (2) the prosecution has exercised due diligence to obtain the evidence; and (3) there exist reasonable grounds to believe the evidence will be available at a later date.”), *cert. denied*, No. 18SC718, 2019 WL 1894699 (Colo. Apr. 29, 2019).

without the consent of the defendant [is excluded], if: . . . [t]he 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 enters specific findings with respect to the justification . . . .<sup>58</sup>

Thus, Colorado's speedy trial statute allows prosecutors and courts several "escape hatches" that allow the trial to begin more than six months after the defendant's not-guilty plea, under the specific circumstances described above.

*C. Colorado's Speedy Trial Window Calculation when Charges Are Dismissed and Later Refiled: The Restarting Approach*

Colorado follows what this Note will refer to as the restarting approach: Colorado's six-month statutory speedy trial window generally restarts when charges are dismissed and later refiled. While the "clear language" of Section 18-1-405 "precludes the prosecution from reinstituting identical charges against" a defendant if the six-month window *expired* before a trial or dismissal,<sup>59</sup> the same preclusion does not apply if the charges *are dismissed* before the speedy trial window expires.<sup>60</sup> The six-month statutory speedy trial window must restart when the prosecution dismisses and later refiles the same charges, *unless* the defendant can affirmatively show that the prosecution "indiscriminately" dismissed and refiled the charges specifically to circumvent the speedy trial mandate.<sup>61</sup> In contrast, for federal and state *constitutional* speedy trial purposes, Colorado does *not* restart the speedy trial period, but rather calculates it from the period of the initial filing

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58. § 18-1-405(6)(g)(II) (emphasis added).

59. *Watson v. People*, 700 P.2d 544, 549 (Colo. 1985) (en banc).

60. *People ex rel. C.O.*, 870 P.2d 1266, 1268-69 (Colo. App. 1994) (explaining that "if the charges in a summons and complaint are properly dismissed without prejudice, that case becomes a nullity, and a new speedy trial period begins if and when the accused enters a plea to subsequently filed charges" unless there is prosecutorial bad faith).

61. Thus, if

the charges of the original information are dismissed without prejudice by the trial court within the speedy trial period, such dismissal is sufficient to protect a defendant's rights under § 18-1-405. . . . An initial indictment becomes a nullity upon its dismissal and computation of the six-month speedy trial period commences upon the arraignment for the last information filed. It is true that the People cannot indiscriminately dismiss and refile charges in order to avoid the mandate of § 18-1-405; however, to be entitled to dismissal on such grounds, a defendant must affirmatively establish the existence of such a course of action by the People.

*Meehan v. Cty. Court ex rel. Cty. of Jefferson*, 762 P.2d 725, 726 (Colo. App. 1988) (citations omitted); *see also Huang v. Cty. Court of Douglas Cty.*, 98 P.3d 924, 928 (Colo. App. 2004); *People v. Allen*, 885 P.2d 207, 210 (Colo. 1994) (en banc); *People v. Dunhill*, 570 P.2d 1097, 1099 (Colo. App. 1977).

of charges to the dismissal plus the period after charges are refiled, without counting the period between the dismissal and refiling.<sup>62</sup>

The exception to restarting the statutory speedy trial window is a “narrow” exception that only applies when the defendant affirmatively shows that the prosecution dismissed the charges to circumvent the statutory speedy trial mandate.<sup>63</sup> Given how narrow this exception is, Colorado courts have yet to find that a defendant has met this burden, and instead routinely allow the speedy trial period to restart.<sup>64</sup>

For example, a Colorado appellate court held that the defendant failed to show that the prosecution attempted to circumvent the speedy trial mandate when the prosecution refiled the charges after the defendant successfully moved to dismiss the initial charges due to an impending speedy trial violation, in a case where the prosecution’s “essential” witness was unavailable when only five days remained of the initial speedy trial window.<sup>65</sup> Similarly, a Colorado appellate court held that the defendant did not meet this burden when the trial court granted the defendant’s motion to dismiss the initial charges after the prosecution, during the initial speedy trial period, asked for a continuance due to the absence of a key witness that would have required setting the trial outside of the initial speedy trial period (but where the prosecution never actually requested a setting outside the speedy trial window).<sup>66</sup> Likewise, the defendant did not meet his burden by offering “proof only that the district attorney sought and obtained a subsequent indictment for different offenses arising from the same transaction.”<sup>67</sup> Further, the exception was not met where the same charges were dismissed and refiled *four* times due to “uncertainty as to the proper venue.”<sup>68</sup> In sum, Colorado courts have allowed the speedy trial window to restart in a wide range of situations in which the prosecution could not have brought the case to trial within the initial speedy trial period and/or when the initial speedy trial period was close to expiring when the initial charges were dismissed.

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62. *People v. Nelson*, 360 P.3d 175, 181 (Colo. App. 2014); *see also infra* note 236 and accompanying text.

63. *People v. Walker*, 252 P.3d 551, 552 (Colo. App. 2011) (holding that the exception was not met when the court *sua sponte* dismissed the charges *days* before the expiration of the speedy trial period because the prosecutor’s key witness failed to appear despite the prosecutor’s diligence and where the defendant did not object to the dismissal). *See supra* note 61 for cases discussing this exception, all of which found that the defendant had not met this burden of showing that the prosecution dismissed and refiled in order to circumvent the speedy trial mandate, and so allowing the speedy trial period to restart for the refiled charges.

64. *See infra* note 72 and accompanying text.

65. *Huang*, 98 P.3d 924.

66. *Meehan*, 762 P.2d 725.

67. *People v. Wilkinson*, 555 P.2d 1167, 1170 (Colo. App. 1976).

68. *People v. Dunhill*, 570 P.2d 1097, 1099 (Colo. App. 1977).

Finally, while a key factor in holding that the restarting exception is not met can be that the *defendant*, not the prosecution, moved to dismiss the initial charges,<sup>69</sup> some Colorado courts have held that even the *prosecution* moving to dismiss the initial charges is *not* dispositive.<sup>70</sup> For example, the exception was not met when the prosecution moved to dismiss the initial charges and “had been minimally negligent (if negligent at all), but had not acted in bad faith.”<sup>71</sup> Thus, even when the prosecution moves to dismiss the initial charges and then later refiles them, Colorado courts regularly allow the speedy trial window to restart, finding that the defendant has not met his burden of showing that the prosecution dismissed the charges in order to circumvent the speedy trial mandate.

In fact, this burden appears insurmountable; as of this writing, no published<sup>72</sup> Colorado case has held that a defendant has met this burden of showing that the prosecution dismissed and refiled in order to get around the speedy trial period.<sup>73</sup> Instead, as of this writing, Colorado courts have always allowed the speedy trial clock to restart and granted prosecutors (and courts) a new six-month period to bring the case to trial.<sup>74</sup>

### III. ALTERNATIVE APPROACHES FOR CALCULATING THE SPEEDY TRIAL PERIOD WHEN CHARGES ARE DISMISSED AND LATER REFILED

States with fixed statutory speedy trial periods generally follow one of roughly four approaches for calculating the speedy trial period when the

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69. *Huang*, 98 P.3d at 929.

70. *See Schiffner v. People*, 476 P.2d 756 (Colo. 1970) (en banc) (holding that the exception did not apply when the state prosecutor moved to dismiss the initial charges because the defendant was being tried for the same crime federally and later refiled when the federal case was dropped).

71. *People v. Nelson*, 360 P.3d 175, 179–80 (Colo. App. 2014).

72. Nor has any unpublished case that I have been able to find held that a defendant has met this burden of showing that the prosecution dismissed and refiled in order to circumvent the speedy trial mandate. To try to find such cases holding that a defendant had successfully met this burden, I ran various Westlaw searches. More specifically, I read all of the cases returned through the following search in Westlaw’s Colorado database: ((dismiss! or nolle) /s (reindict! or refile!)) /100 (speedy /3 trial). I also filtered cases citing Section 18-1-405 with the search terms above and read these cases. Finally, I checked the cases that cited *Meehan*, *Huang*, *Dunhill*, and the other cases listed in notes 61–71. All of the cases returned through these searches held that the defendant had not met the burden and so the speedy trial period would restart; none held that the speedy trial period would not restart.

73. The standard of review for speedy trial issues also makes it difficult for defendants to win an appeal of a trial court’s finding that the prosecution did not dismiss and refile in order to circumvent the speedy trial mandate. On appeal, speedy trial issues are “a mixed question of law and fact.” *People v. Valles*, 412 P.3d 537, 544 (Colo. App. 2013). Where the facts are undisputed, the appellate court reviews the application of the speedy trial statute as a question of law and reviews it de novo. *Id.*; *see also* *People v. Curren*, 348 P.3d 467, 473 (Colo. App. 2014). However, where the facts are disputed, the appellate court cannot “disturb the trial court’s factual findings underlying its speedy trial decision if those findings are supported by the record.” *Valles*, 412 P.3d at 544.

74. *See supra* note 72 and accompanying text.

prosecution dismisses and later refiles the charges.<sup>75</sup> First, states such as Colorado, as discussed above, restart the statutory speedy trial period when charges are refiled after a previous dismissal, which this Note refers to as the “restarting” approach.<sup>76</sup>

Second, in other jurisdictions, the speedy trial window does not restart when charges are dismissed and then refiled. Nor does dismissal toll the speedy trial period. Instead, the speedy trial period runs continuously from when the charges are *first* filed, regardless of any dismissals and refilings.<sup>77</sup> This Note will refer to this approach as the “continuous” approach.

Third, in yet other jurisdictions, the speedy trial period begins with the initial charges and does not restart even for refiled charges, but the period is tolled during the time between dismissal and refiling.<sup>78</sup> This Note will refer to this approach as the “tacking-and-tolling” approach.

Fourth, some jurisdictions apply what this Note will refer to as a “hybrid” approach: the restarting approach applies when the *defendant* moves to dismiss the initial charges, but the tacking-and-tolling approach applies when the *prosecution* moves to dismiss the initial charges.<sup>79</sup>

This Part will describe the case law in jurisdictions that follow the second, third, and fourth approaches as an example of alternatives to Colorado’s restarting approach. See Table 1 below for a summary of each of these approaches.

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75. See generally John H. Derrick, Annotation, *Application of Speedy Trial Statute to Dismissal or Other Termination of Prior Indictment or Information and Bringing of New Indictment or Information*, 39 A.L.R.4th 899 (1985); Gregory P.N. Joseph, *Speedy Trial Rights in Application*, 48 *FORDHAM L. REV.* 611, 641 (1980); Nancy Nowlin Kerr, *Constitutional Law—Speedy Trial—Sixth Amendment Right to Speedy Trial Does Not Apply During Interim Between Dismissal of Charges and Subsequent Indictment by Same Sovereign*, Case Note, 14 *ST. MARY’S L.J.* 113, 119 (1982). These works do not refer to these four approaches using the same names that this Note uses, but they do roughly refer to the same categories of approaches noted here. Derrick, *supra*; Joseph, *supra*, at 641; Kerr, *supra*, at 119; see also *State v. Hettle*, 848 N.W.2d 582, 590 (Neb. 2014) (naming and describing the “tacking-and-tolling approach,” without referring to the other three types of approaches). The four approaches noted above are the primary approaches followed by most jurisdictions with concrete statutory speedy trial periods, but a few states follow other approaches that will not be discussed in depth here due to their limited influence. See Joseph, *supra*, at 641 (describing a few alternate approaches, such as prohibiting reaccusation on the whole).

76. See *supra* Part II(C).

77. See *infra* Part III(A).

78. See *infra* Part III(B).

79. See *infra* Part III(C).

*Table 1: The Four Approaches for Calculating the Statutory Speedy Trial Period*

<b>Name</b>	<b>Example Jurisdiction</b>	<b>Rule</b>	<b>Example Calculation:<sup>80</sup></b>
<b>1. Restarting</b>	Colorado (statutory); Arizona post- <i>Mendoza</i>	The speedy trial window restarts for refiled charges, unless the defendant can show that the prosecution dismissed and refiled the charges to circumvent the speedy trial mandate.	The speedy trial window for the refiled charges starts on 1/1/18, unless the defendant can show that the prosecution dismissed and refiled to avoid the speedy mandate. Assuming the defendant cannot make this showing, the speedy trial period elapses on 7/1/18 and so, the refiled charges cannot be tried after 7/1/18.
<b>2. Continuous</b>	Illinois; Arizona pre- <i>Mendoza</i> for DUI cases	The speedy trial window is calculated starting from the initial charges, even for refiled charges. The window does not restart, nor is it tolled.	The speedy trial window for the <i>refiled</i> charges starts on 1/1/17, <i>not</i> 1/1/18. The speedy trial clock neither restarts nor is tolled when the initial charges are dismissed. Thus, the speedy trial window elapses on 7/1/17 and so, the charges cannot be tried after 7/1/17. Thus, the charges

80. The example calculations assume that the defendant pleads not guilty to the initial charges on 1/1/17 and the charges are dismissed on 5/1/17. The charges are then refiled and the defendant pleads not guilty to the refiled charges on 1/1/18.

Table 1 also assumes a similar statutory scheme to Colorado's as an example, even though different states' speedy trial statutes vary from Colorado's in reality. Specifically, using Colorado's statute only for example purposes, Table 1 assumes a *six-month* statutory window that starts (or restarts) from *when the defendant's not-guilty plea is entered*. See COLO. REV. STAT. ANN. § 18-1-405 (West 2019). Table 1 also assumes that no other events, such as mental incompetency, etc., result in time being excluded from the speedy trial period's calculation. In reality though, different states' statutes do not always mirror Colorado's statute this closely, sometimes providing for different speedy trial period lengths, starting points, periods excluded from the window, etc. See Part III(A)–(C) for examples of such differences.

			refiled on 1/1/18 would have to be dismissed.
<b>3. Tacking-and-Tolling</b>	Nebraska; Colorado (constitution)	The speedy trial window is calculated starting from the initial charges, even for the refiled charges, but is tolled during the time between the dismissal and refileing.	The speedy trial window for the refiled charges starts on 1/1/17, but is tolled in the period during which the charges are dismissed and not yet refiled between 5/1/17 to 1/1/18. The four months that elapse between the initial charges and initial dismissal are included the speedy trial window for the charges refiled on 1/1/18. Therefore, on 1/1/18, with a speedy trial window of six months, the prosecution has only two months remaining (of the total six months) within which to try the charges, given that four months already elapsed between 1/1/17 and 5/1/17. The speedy trial period elapses on 3/1/18, and so, the refiled charges cannot be tried after 3/1/18.
<b>4. Hybrid Tacking-and-Tolling and Restarting</b>	The Federal Speedy Trial Act of 1974	The hybrid approach applies the restarting approach when the charges are dismissed on the defendant's motion, but follows the	For charges dismissed on the defendant's motion, the restarting approach applies, so the speedy trial period elapses on 7/1/18 and the refiled charges cannot be tried after 7/1/18.

		tacking-and-tolling approach when the charges are dismissed on the government's motion.	For charges dismissed on the government's motion, the tacking-and-tolling approach applies, so the speedy trial period elapses on 3/1/18, and the refiled charges cannot be tried after 3/1/18.
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### A. Illinois: The Continuous Approach

Like Colorado, Illinois also has a speedy trial statute<sup>81</sup> granting defendants a fixed period of time in which the trial must take place, with certain times excluded<sup>82</sup> from the period. However, Illinois's approach to refiled charges is unlike Colorado's. Illinois's speedy trial period begins running and is calculated for refiled charges from the time when the charges were *first* filed; the period is not tolled when the charges are dismissed, nor does the period restart if the charges are later refiled.<sup>83</sup> Thus, Illinois's approach to refiled charges falls into the continuous category.

Since at least 1878, Illinois courts have held that when charges are dismissed and later refiled, the statutory speedy trial window continues to run based on the initial, not the refiled, charges.<sup>84</sup> The 1878 Illinois Supreme Court went on to observe that any other approach

would open a way for the complete evasion of the [speedy trial] statute, as the prosecuting officer, upon the arrival of a second or third

81. 725 ILL. COMP. STAT. ANN. 5/103-5 (LexisNexis 2019). Unlike Colorado's six-month speedy trial period, Illinois's statute provides for a speedy trial period of 120 days from the date the defendant was taken into custody for defendants in custody or 160 days from the date the defendant demanded a trial for defendants on bail or recognizance. *Id.* § 5/103-5(a)–(b).

82. The defendant must be tried within the statutory period “unless delay is occasioned by the defendant, by an examination for fitness . . . , by a fitness hearing, by an adjudication of unfitness to stand trial, by a continuance allowed . . . after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal,” or in certain circumstances when the State needs additional time to obtain material evidence. *Id.* § 5/103-5(a)–(c).

83. *People v. Lee*, 254 N.E.2d 469, 471–72 (Ill. 1969) (“[R]e-indictment for the same offense does not toll the [speedy trial] statute.”); *see also* *People v. E.-W. Univ., Inc.*, 637 N.E.2d 594, 597 (Ill. App. Ct. 1994) (holding that the state striking the initial charges “with leave to reinstate them does not toll the statutory speedy trial period”); *People v. Beerli*, 358 N.E.2d 386, 388 (Ill. App. Ct. 1976).

84. *Brooks v. People*, 88 Ill. 327, 330 (1878) (holding that the statutory speedy trial window for refiled charges continues to run “as if there had been no dismissal of the first indictment,” or as if the refiled charges were the same as the initial (now dismissed) ones); *see also* *Lee*, 254 N.E.2d at 471–72 (“[A]s early as [*Brooks*], this court held that where an original indictment is dismissed and defendant is re-indicted for the same offense the statutory period continues to run ‘as if there had been no dismissal of the first indictment’, or as if the indictment under which defendant is tried had been the first indictment returned.” (citations omitted) (quoting *Brooks*, 88 Ill. at 330)).

term, would have only to enter a *nolle prosequi* to the indictment, have the defendants held in custody until another indictment could be found, and thus nullify the provision of the statute.<sup>85</sup>

This logic continues today, with Illinois courts noting that “[t]he State’s right to reinstate [charges] subject to the speedy trial statute limits the State’s power to reinstate cases indefinitely.”<sup>86</sup>

Per this statutory speedy trial mandate, Illinois courts have held that the prosecution cannot avoid a speedy trial violation simply by dismissing and later refileing the same charges.<sup>87</sup> As a result, the speedy trial period for new and/or additional charges arising out of the same events as the initial charges, known to the State at the time of the initial charges, is subject to the *initial* charge’s speedy trial period.<sup>88</sup> Consequently, “[t]he speedy trial provisions on . . . new and additional charges filed by the State . . . beg[*in*] to run as of the date of the original . . . charges” even when the original charges are “dismissed after the filing of the amended information.”<sup>89</sup>

Following this principle, Illinois courts have held that a reindictment on the same offense in the form of a *new crime* is likewise still subject to the same statutory speedy trial window as the initial indictment, when the new charges arise “from the same set of facts” as the original charges and “the State knew of these facts at the time the initial indictment was returned.”<sup>90</sup> This is because “[r]e-indictment on the same offense, although in form a new crime, in substance continues to represent the State’s original charge against the defendant.”<sup>91</sup>

Thus, Illinois follows what this Note refers to as the continuous approach: it calculates the statutory speedy trial period continuously starting from the initial charges, even for refiled charges.<sup>92</sup> This Note will argue that the continuous approach is insufficiently flexible to account for the realities of the justice system in Part IV(C).

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85. *Brooks*, 88 Ill. at 330.

86. *People v. Rievia*, 719 N.E.2d 1077, 1083 (Ill. App. Ct. 1999) (holding that “[t]he speedy trial term continues to run even after a case is stricken with leave to reinstate”).

87. *People v. Howard*, 563 N.E.2d 1219, 1224–25 (Ill. App. Ct. 1990) (“The State cannot avoid a speedy trial violation by dismissing and recharging a defendant where it is clear . . . that the new . . . offenses charged [are] substantially the same charges as were originally filed.”).

88. *Id.*; *see also* *People v. Rodgers*, 435 N.E.2d 963, 965 (Ill. App. Ct. 1982) (“[R]eindictment following dismissal of a prior indictment for the same offense is a restatement of the State’s original charge and an inquiry into an allegation of a speedy trial violation must consider the time which has elapsed since the first charge.”).

89. *Howard*, 563 N.E.2d at 1224–25.

90. *People v. Parker*, 375 N.E.2d 465, 467–68 (Ill. App. Ct. 1978).

91. *Id.* Following this same logic, “the same rule” that the statutory window is calculated from the first charges “applies even when the second indictment is brought in a different county where . . . the first county had jurisdiction to try the offense.” *Rodgers*, 435 N.E.2d at 965.

92. *See supra* note 83 and accompanying text.

### B. Nebraska: The Tacking-and-Tolling Approach

Nebraska follows the tacking-and-tolling approach to calculate the speedy trial period: the speedy trial window does not restart for refiled charges, but it is tolled during the period between when the charges are dismissed and later refiled.<sup>93</sup>

Nebraska's speedy trial statute is similar to Colorado's. Nebraska's statute also applies a six-month speedy trial period, barring certain excluded periods similar to Colorado's.<sup>94</sup> As in Colorado, Nebraska's statutory speedy trial right exists independently of the speedy trial rights found in the federal and state constitutions.<sup>95</sup> The remedy is also similar: if the "defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to his absolute discharge from the offense charged."<sup>96</sup> Finally, just as in Colorado, the burden of bringing the defendant to trial within the six-month period in Nebraska falls on the State.<sup>97</sup>

Despite the similarities in their statutory speedy trial schemes, however, Nebraska and Colorado do not approach the speedy trial window calculation similarly for dismissed and refiled charges.<sup>98</sup> In Nebraska, the speedy trial window starts when the initial information is filed, but is tolled during the period between the dismissal of the initial information and the refiled of an information charging the same crime.<sup>99</sup> Thus, for dismissed and refiled charges, "the periods during which the informations are pending for the same offense must be combined in determining the last day for commencement of trial under Nebraska's speedy trial statutes."<sup>100</sup>

Following this rule, an amendment to the complaint or information that "charges a different crime, without charging the original crime(s), . . . acts

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93. See *infra* note 99 and accompanying text.

94. See NEB. REV. STAT. ANN. § 29-1207 (West 2019).

95. See *State v. Karch*, 639 N.W.2d 118, 123 (Neb. 2002).

96. *State v. Hutton*, 648 N.W.2d 322, 326 (Neb. Ct. App. 2002).

97. See *id.*

98. Additionally, Nebraska requires a prosecutor to provide "a statement in writing, containing his reasons, in fact and in law, for not filing an information" to request a dismissal, and the court must approve the dismissal. NEB. REV. STAT. ANN. § 29-1606 (West 2019). The Nebraska legislature requires these steps for dismissal "out of an apparent fear that lazy or corrupt prosecutors were using *nolle* to let too many guilty defendants go free." Joseph A. Thorp, *Nolle-and-Reinstitution: Opening the Door to Regulation of Charging Powers*, 71 N.Y.U. ANN. SURV. AM. L. 429, 450 n.98 (2016).

99. *State v. Trammell*, 484 N.W.2d 263, 266 (Neb. 1992); see also *State v. Batiste*, 437 N.W.2d 125, 129 (Neb. 1989) ("[T]he time between the dismissal and refiled of the charge is not includable in calculating the 6-month time period set forth in § 29-1207."); *State v. Dyer*, 513 N.W.2d 316, 323 (Neb. 1994) ("While time chargeable against the State under the speedy trial act commences with the filing of an initial information against a defendant, the time chargeable to the State ceases, or is tolled, during the interval between the State's dismissal of the initial information and refiled of an information charging the defendant with the same crime alleged in the previous, but dismissed, information.")

100. *Trammell*, 484 N.W.2d at 266.

as a dismissal,” and so the “time between the dismissal and refiling of the same or a similar charge is not includable in calculating the 6 month time period set forth in § 29-1207.”<sup>101</sup> Building on this, Nebraska also applies its tacking-and-tolling approach when the State dismisses and then later files an information that “alleges (1) the same offense charged in the previously dismissed information, (2) an offense committed simultaneously with a lesser-included offense charged in the information previously dismissed by the State, or (3) commission of a crime that is a lesser-included offense of the crime charged in the previously dismissed information.”<sup>102</sup>

Thus, whereas Colorado restarts the speedy trial window when charges are refiled, Nebraska does not restart the clock for the refiled charges. Rather, Nebraska continues using the speedy trial window as was started by the initial, not refiled, charges, and only pauses the clock for the period between the dismissal and refiling.<sup>103</sup>

Nebraska courts have argued that the tacking-and-tolling approach is necessary to protect a defendant’s right to a speedy trial, as the restarting approach—followed by Colorado—provides the prosecution with too much discretion.<sup>104</sup> First, without the tacking-and-tolling approach, “whenever a prosecutor desired a postponement of trial beyond the 6-month period specified in” Nebraska’s speedy trial statute, the State “could regularly evade the Nebraska speedy trial act as a result of the prosecutor’s dismissing a charge, refiling the same charge, and acquiring a new 6-month period for commencement of a defendant’s trial on the refiled charge.”<sup>105</sup> In contrast, the tacking-and-tolling approach does not allow the “undermining or subverting implementation of the speedy trial act by automatically providing prosecutors a new period in which to bring an accused to trial, irrespective of the time involved in the pendency of a prior proceeding dismissed by the State.”<sup>106</sup> Therefore, to protect defendants’ statutory speedy trial rights against prosecutorial circumvention, Nebraska adopted the tacking-and-tolling approach.<sup>107</sup> Following this line of reasoning, Parts IV and V of this Note will argue that Colorado should adopt the tacking-and-tolling approach.

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101. *State v. French*, 633 N.W.2d 908, 914 (Neb. 2001). In contrast, where “the amendment to the complaint or information does not change the nature of the charge, then obviously the time continues to run against the State for purposes of the speedy trial act.” *Id.*

102. *State v. Sumstine*, 478 N.W.2d 240, 247 (Neb. 1991).

103. *See supra* note 99 and accompanying text.

104. *See Sumstine*, 478 N.W.2d at 246.

105. *Id.*

106. *Id.*

107. *See id.* at 245.

C. *The Federal System: The Hybrid Tacking-and-Tolling and Restarting Approach*

The Federal Speedy Trial Act of 1974 uses a hybrid approach for calculating the speedy trial period when charges are dismissed and refiled, in which the tacking-and-tolling approach applies when the *government* moves to dismiss the initial charges, but the restarting approach applies when the *defendant* moves to dismiss the initial charges.<sup>108</sup>

The Federal Speedy Trial Act of 1974 provides a concrete speedy trial period of seventy days, which is tolled by delays caused under several circumstances.<sup>109</sup> Relevant here, delays caused by the “unavailability of . . . an essential witness” are excluded.<sup>110</sup> Additionally, delays

resulting from a continuance granted by any judge on his own motion or . . . at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial

are excluded.<sup>111</sup>

In addition to excluding the periods of delay mentioned above (as well as a few other periods of delay not relevant here), the Speedy Trial Act of 1974 follows a hybrid approach for calculating the speedy trial period.<sup>112</sup> When the indictment or information is dismissed upon the *government’s* motion, the seventy-day window is tolled in the time between when the charges are dismissed and then later refiled (the tacking-and-tolling approach).<sup>113</sup> In contrast, when the indictment or information is dismissed

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108. See *infra* notes 113–114 and accompanying text.

109. 18 U.S.C. § 3161(c)(1) (2018) (requiring that trial “commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs”). Additionally, under this statute, the trial may not begin *less* than thirty days from when “the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se,” unless the defendant consents in writing. 18 U.S.C. § 3161(c)(2). This minimum thirty-day period before trial does not restart when charges are refiled. See *United States v. Rojas-Contreras*, 474 U.S. 231, 234–35 (1985).

110. 18 U.S.C. § 3161(h)(3)(A). Section 3161(h) also describes several additional circumstances in which the speedy trial period is tolled. One notable period of time excluded is the time during which a motion is pending, so the seventy-day period will often not include time during which the defendant’s motions, such as commonly-filed motions like motions to dismiss the indictment or to suppress evidence, are pending. Matt Kaiser, *Dismiss a Case Because of a Speedy Trial Act Violation? Not So Fast.*, FED. CRIM. APPEALS BLOG (Sept. 12, 2011), <https://www.federalcriminalappealsblog.com/speedy-trial-act-violation-not-so-fast/> [https://perma.cc/7WP4-HZ5S].

111. 18 U.S.C. § 3161(h)(7)(A).

112. See *infra* notes 113–114 and accompanying text.

113. 18 U.S.C. § 3161(h)(5).

upon the *defendant's* motion, the seventy-day speedy trial window begins anew (the restarting approach).<sup>114</sup>

Similar to Colorado, under the Federal Speedy Trial Act of 1974, the remedy for violations of the speedy trial period is dismissal on the defendant's motion.<sup>115</sup> However, unlike Colorado, federal courts have discretion to dismiss the charges with *or without* prejudice following a speedy trial violation.<sup>116</sup> The factors the court must consider in determining whether to dismiss the charge with or without prejudice are, "among others, . . . the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice."<sup>117</sup> Should a federal court allow dismissal *without* prejudice, the prosecution could then refile the charges again, barring any statute of limitations or other non-speedy trial issues. This Note will argue that the Federal hybrid approach inappropriately punishes defendants for asserting their statutory speedy trial rights in Part IV(D)(4).

#### IV. COLORADO SHOULD FOLLOW THE TACKING-AND-TOLLING APPROACH

Because of the importance of statutory speedy trial rights, Colorado should reconsider its current approach of restarting the speedy trial window when previously dismissed charges are refiled. This Part will first discuss the importance of speedy trial rights generally. Second, this Part will explain why other remedies cannot fully protect speedy trial rights, so a *statutory* speedy trial remedy is required. Finally, this Part will argue that Colorado should adopt the tacking-and-tolling approach because it is the most consistent with the Federal and Colorado Constitutions and because it best accounts for the realities of the judicial system while still protecting defendants' speedy trial rights.<sup>118</sup> See Table 2 at the end of this Part for a summary of the reasons why the tacking-and-tolling approach is superior to the continuous, restarting, and hybrid approaches.<sup>119</sup>

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114. § 3161(d)(1).

115. 18 U.S.C. § 3162(a)(2) (2018).

116. *Id.*

117. *Id.* The statute also provides for additional sanctions against attorneys who improperly delay a trial. *Id.* § 3162(b).

118. See Thorp, *supra* note 98, at 476–78, for an argument that courts should apply a rebuttable presumption against dismissal and refile that can be overcome when "the prosecutor can show that she could not have predicted or prevented the problem through due diligence and better investigation" and the state's interest in refile outweighs any prejudice to the defendant. Challenging dismissal and refile on the whole, however, is outside the scope of this Note, which is instead focused on calculating the speedy trial period when charges are dismissed and refile. Therefore, this Note will not further address this proposed approach.

119. But see Part IV(C)(c) for a discussion of the drawbacks of the tacking-and-tolling approach.

### A. *The Importance of Speedy Trials Generally*

The right to a speedy trial is critical to protect the rights of defendants for many reasons. First, a speedy trial is often necessary to a “defendant’s ability to present an effective defense.”<sup>120</sup> Without a speedy trial, witnesses are lost, evidence decays, and memories fade.<sup>121</sup> Second, speedy trials protect defendants’ interests in a timely adjudication of their guilt or innocence.<sup>122</sup> Because an accusation often impacts a defendant’s reputation, career, finances, mental state, and family, the accused will often have an interest in proceeding to trial quickly.<sup>123</sup> Thus, dismissing and later refileing the charges lengthens the time during which the accusation lingers over the defendant:

The special anxiety that a defendant suffers because of a public accusation does not disappear *simply because the initial charges are temporarily dismissed*. Especially when the defendant and the public are aware of an ongoing government investigation of the same charges, the defendant’s interest in final resolution of the charges remains acute. After all, the government has revealed the seriousness of its threat of prosecution by initially bringing charges.<sup>124</sup>

Third, a speedy trial is important because drawn-out criminal proceedings can drain the resources the defendant needs to effectively defend himself.<sup>125</sup> Thus, the right to a speedy trial is critical to defendants, both to enable them to present an effective defense and to protect their interests more broadly.<sup>126</sup>

In addition to protecting defendants, the right to a speedy trial protects society’s more general interest in the timely adjudication of justice.<sup>127</sup> First,

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120. *United States v. Marion*, 404 U.S. 307, 320 (1971).

121. *Id.* at 331 (Douglas, J., concurring).

122. *Id.* at 330–31 (Douglas, J., concurring).

123. *See Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967) (“The pendency of the indictment may subject [the defendant] to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes.”); *United States v. MacDonald*, 456 U.S. 1, 8 (1982) (holding that the Federal Constitution’s speedy trial clause of the Sixth Amendment is “designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges”).

124. *MacDonald*, 456 U.S. at 17 (Marshall, J., dissenting) (emphasis added).

125. *Klopfer*, 386 U.S. at 222.

126. *See United States v. Ewell*, 383 U.S. 116, 120 (1966) (holding that the right to a speedy trial is necessary “to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself”).

127. *See Barker v. Wingo*, 407 U.S. 514, 519 (1972); *see also United States v. Marion*, 404 U.S. 307, 330 (1971) (Douglas, J., concurring); *see generally* Daniel Hamburg, *A Broken Clock: Fixing New York’s Speedy Trial Statute*, 48 COLUM. J.L. & SOC. PROBS. 223, 228–31 (2015) (discussing the negative impacts of delayed trials, specifically in New York).

speedy trials protect society by ensuring that those criminals who pose an ongoing threat are promptly imprisoned.<sup>128</sup> Faster prosecutions prevent the guilty from committing additional crimes before facing trial and punishment for their initial crimes.<sup>129</sup> Faster punishment will also often better deter criminal behavior than punishment that comes years later, if at all.<sup>130</sup> Long delays “between arrest and punishment may have a detrimental effect on rehabilitation.”<sup>131</sup> Likewise, victims have an interest in timely justice.<sup>132</sup> Finally, an inability to bring a speedy trial tends to delegitimize the judicial system and rule of law by creating the perception of unfairness in the criminal justice system.<sup>133</sup> Thus, society has a general interest in speedy trials.

However, against defendants’ and society’s interests in speedy trials, courts and legislators must balance society’s equally crucial countervailing interest in not allowing the guilty to escape justice on a technicality.<sup>134</sup> Because speedy trial violations require a court to dismiss the charges with prejudice,<sup>135</sup> a defendant who is tried too late can escape justice, regardless of the defendant’s actual guilt. Thus, though society and defendants have important interests in speedy trials, these protections must be carefully drawn so as not to allow the guilty to escape justice on technicalities rather than on the merits of their cases.<sup>136</sup>

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128. *Marion*, 404 U.S. at 330 (Douglas, J., concurring).

129. *Hinson v. Coulter*, 723 P.2d 655, 659 (Ariz. 1986) (en banc) (noting that had the defendant been promptly tried on his first DWI, he might not have been able to commit the three additional DWI offenses that followed his initial arrest), *overruled by* *State v. Mendoza*, 823 P.2d 51 (Ariz. 1992) (en banc) (overruling *Hinson*’s adoption of the continuous approach for DWI cases and re-adopting the restarting approach).

130. *Marion*, 404 U.S. at 330 (Douglas, J., concurring); *see also Hinson*, 723 P.2d at 659.

131. *Barker*, 407 U.S. at 520.

132. *Hamburg*, *supra* note 127, at 229, 235.

133. *Id.* at 230. The inability to deliver a speedy trial “produces guilty pleas or negotiated dispositions en masse,” which results in “other harmful externalities.” *Id.* Specifically, defendants begin to accept guilty pleas regardless of their actual guilt or innocence in the face of the justice “system’s slow grind.” *Id.* at 231. Additionally, as defendants take pleas instead of going to trial, the “criminal justice system loses an important check on the police because the quality of their work is rarely tested in open court.” *Id.* at 230.

134. *See Beavers v. Haubert*, 198 U.S. 77, 87 (1905) (“The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.”).

135. In Colorado, dismissal with prejudice is required for statutory speedy trial violations. COLO. REV. STAT. ANN. § 18-1-405 (West 2019); *see also People v. Martin*, 732 P.2d 1210, 1213 (Colo. 1987) (en banc). This same rule—that speedy trial violations must result in dismissal—also applies to Sixth Amendment speedy trial violations. *See Strunk v. United States*, 412 U.S. 434, 439–40 (1973). However, the Federal Speedy Trial Act of 1974 is an exception to the general trend prohibiting refiling charges following a speedy trial violation, as the Federal Speedy Trial Act grants judges discretion to dismiss the charges with *or without* prejudice following a violation. *See supra* note 116 and accompanying text.

136. The Colorado Supreme Court recognized this concern in *People v. Sanchez*, where the court noted that the purposes of speedy trial rights

include minimization of the anxiety and concern resulting to a defendant from public accusation, and the prevention of prejudice to the accused arising from long delays. The more

### *B. Speedy Trial Statutes Compared with Other Remedies*

Speedy trial statutes are uniquely designed to protect the above interests; other legal remedies will not fully ensure that defendants face trial in a timely manner while striking the appropriate balance with society's interests in not allowing the guilty to escape justice on a technicality. This Section will address the other remedies that serve to partially protect speedy trials: criminal statutes of limitations, the Due Process Clauses, the Sixth Amendment, and the Colorado Constitution. This Section will then explain why each of these remedies alone, as interpreted by courts, does not fully protect speedy trial rights.

Statutes of limitation are “usually considered the primary guarantee against bringing overly stale criminal charges.”<sup>137</sup> They indirectly protect speedy trial rights when charges are dismissed, because the statute of limitations prevents the prosecution from delaying in refile past the end of the specified period. However, although they provide indirect protections, statutes of limitations cannot protect speedy trial rights fully “because they do not purport to account for prejudice, bad faith, or fairness.”<sup>138</sup> Thus, statutes of limitations alone only partially and indirectly protect speedy trial rights when charges are dismissed and refiled.

Additionally, while Colorado has statute of limitations periods of varying length for most crimes, the state has no statute of limitations for the most serious crimes.<sup>139</sup> And Colorado's statute of limitations exceeds six months for everything except petty crimes.<sup>140</sup> Thus, as Colorado has no statute of limitations for serious crimes, no statute of limitations acts to indirectly protect speedy trial rights for the most serious of crimes. And, even for crimes for which Colorado has a statute of limitations, that statute of limitations extends for a longer period than the six months provided for by Colorado's speedy trial statute for all but petty crimes.<sup>141</sup> Thus, Colorado's statute of limitations cannot force a speedy trial within six months, but can only indirectly protect this right by preventing prosecutors from delaying too long in refile charges for crimes that have a statute of

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general public interest is also served by an early determination of guilt “so that the innocent may be exonerated and the guilty punished.”

649 P.2d 1049, 1052 (Colo. 1982) (en banc) (citation omitted) (quoting *Jaramillo v. Dist. Court*, 484 P.2d 1219, 1221 (Colo. 1971) (en banc)). However, “speedy trial provisions are not intended to be applied in a wooden or mechanistic fashion” because “[t]here is also a countervailing interest in effective enforcement of the criminal laws.” *Id.*

137. *United States v. Ewell*, 383 U.S. 116, 122 (1966).

138. *Thorp*, *supra* note 98, at 457.

139. COLO. REV. STAT. ANN. § 16-5-401(1)(a) (West 2019).

140. *Id.*

141. *Id.*

limitations period. For this reason, Colorado's statute of limitations alone does not fully protect speedy trial rights.

Likewise, federal and Colorado courts' interpretations of the constitutional speedy trial rights found in the Due Process Clauses and the Sixth Amendment mean that these constitutional protections will not wholly guarantee speedy trials.<sup>142</sup> First, the Fifth Amendment's Due Process Clause protects speedy trial rights only in limited circumstances.<sup>143</sup> To prevail on an oppressive delay claim under the Fifth Amendment's Due Process Clause, the defendant must prove actual, substantial prejudice and prosecutorial bad faith in delaying the trial.<sup>144</sup> However, defendants will rarely be able to meet either of these burdens.<sup>145</sup> First, "because of the very nature of delay, . . . the passage of time often makes it impossible to prove" the requisite actual, substantial (not just potential) prejudice.<sup>146</sup> Second, by focusing narrowly on actual, substantial prejudice, the Due Process Clause does not protect against other harms from dismissal and refiling, such as prolonged "anxiety and concern, loss of counsel of choice, and coercion of guilty pleas."<sup>147</sup> Finally, the Fifth Amendment's Due Process Clause requires a showing of prosecutorial bad faith in delaying, similar to Colorado's existing restarting exception.<sup>148</sup> It is very difficult for defendants to show such prosecutorial bad faith, especially given that prosecutors are rarely "foolish enough" to record evidence of their bad faith.<sup>149</sup> Thus, the Fifth Amendment's Due Process Clause, as interpreted by courts, protects speedy trial rights only in cases where the defendant can prove both actual prejudice and prosecutorial misconduct, so it does not protect speedy trial rights in all cases.

Likewise, the Federal Fourteenth Amendment's Due Process Clause and the Colorado Constitution's Due Process Clause<sup>150</sup> offer limited protections.<sup>151</sup> These Due Process Clauses protect against *repeated* dismissals and refilings of the same charges—albeit in a small number of cases.<sup>152</sup> However, these Due Process Clauses do not address the speedy

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142. Thorp, *supra* note 98, at 459–61.

143. See *United States v. MacDonald*, 456 U.S. 1, 20 (1982) (Marshall, J., dissenting) (arguing that the Court's interpretation of the Due Process Clause does not wholly protect speedy trial rights because it does not protect against prosecutorial *negligence*); see also Thorp, *supra* note 98, at 459–61.

144. *United States v. Abdush-Shakur*, 465 F.3d 458, 465 (10th Cir. 2006); see also *supra* notes 9–11 and accompanying text.

145. See DuBosar, *supra* note 11, at 685.

146. Thorp, *supra* note 98, at 460.

147. *Id.*

148. See *supra* notes 9–11 and accompanying text.

149. Thorp, *supra* note 98, at 460; see also *supra* Part II(C) for a discussion of the difficulties of proving prosecutorial bad faith with respect to Colorado's speedy trial statute.

150. COLO. CONST. art. II, § 25.

151. See *supra* notes 38–41 and accompanying text.

152. See *supra* notes 38–41 and accompanying text.

trial issue directly, especially in circumstances where the case is only dismissed then refiled one time (not repeatedly).

The United States Constitution's Sixth Amendment's speedy trial protections, as interpreted by the courts, are similarly limited. First, the Sixth Amendment does not prevent dismissal and refiling, as it does not count the period between when the prosecution drops the initial charges and when it refiles them in calculating the speedy trial period.<sup>153</sup> Moreover, under *Barker*, "[i]t is . . . impossible to determine with precision when the right [to a speedy trial] has been denied."<sup>154</sup> In fact, the United States Supreme Court has noted that it cannot establish a definitive Sixth Amendment speedy trial timeframe due to separation of powers concerns, as setting a concrete timeframe

would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts. . . . We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach *must be less precise*.<sup>155</sup>

In following this intentionally vague Sixth Amendment speedy trial test, "the Court has been hesitant to find violations of the speedy trial right or provide broad protection for criminal defendants."<sup>156</sup> Thus, the Supreme Court's interpretations of the Federal Constitution have provided for an intentionally vague speedy trial standard that offers only limited protections in cases where charges are dismissed and later refiled.

Finally, as previously mentioned, Colorado courts largely interpret the state constitution's speedy trial provision as following the Federal Constitution's, and so the Colorado Constitution does not provide additional speedy trial protections to Colorado defendants.<sup>157</sup> Therefore, because both state and federal *constitutional* speedy trial protections, as interpreted, are vague and circumscribed by separation of powers concerns, state *statutes* can fill the gaps. Speedy trial statutes can go further than the constitutions in providing definite and concrete speedy trial periods to ensure that trials take place in a timely manner.

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153. *United States v. MacDonald*, 456 U.S. 1, 7 (1982).

154. *Barker v. Wingo*, 407 U.S. 514, 521 (1972).

155. *Id.* at 523 (emphasis added).

156. Hamburg, *supra* note 127, at 237; *see also* Alfredo Garcia, *Speedy Trial Swift Justice: Full-Fledged Right or "Second-Class Citizen?"*, 21 SW. U. L. REV. 31, 60 (1992) (arguing that the Supreme Court "has failed to develop a consistent, principled approach protective of defendants' speedy trial interests").

157. *See supra* Part I(B).

However, the extent to which such speedy trial statutes protect speedy trial rights when charges are dismissed and refiled depends on how the speedy trial period is calculated. The benefits and drawbacks of each of the approaches for calculating the speedy trial period will be discussed in Parts IV(C) and IV(D) below.

### *C. The Continuous Approach Is Too Harsh*

#### *1. The Continuous Approach Is Too Inflexible to Account for the Realities of the Justice System*

The continuous approach, which calculates the speedy trial period starting from the initial charges even when those charges are dismissed and then refiled much later,<sup>158</sup> is not sufficiently flexible to account for the realities of the justice system. Because charges must be dismissed when the trial falls outside the statutory speedy trial period, harsher statutory speedy trial period calculations will more frequently allow the guilty to escape justice, not because of their innocence, but because of technical speedy trial statutory violations.<sup>159</sup>

By applying a categorical rule that the judicial system only gets six months<sup>160</sup> from when charges are first filed,<sup>161</sup> the continuous approach does not sufficiently recognize that there are instances in which the prosecution should be able to refile previously dismissed charges. A statutory speedy trial mandate using the continuous approach will usually bar the prosecution from dismissing and refileing the charges (because time has run out), even when it has a truly valid reason for doing so.<sup>162</sup> For example, suppose the prosecution files charges and an essential witness falls into a coma during

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158. See *supra* Part III(A).

159. This concern also applies to constitutional speedy trial violations, which also carry the unsatisfactorily severe remedy of dismissal of the indictment when the [Sixth Amendment speedy trial] right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.

*Barker*, 407 U.S. at 522 (footnote omitted).

160. For the purposes of clarity, I use six months as the length of time statutorily provided during which the prosecution and courts must bring the case to trial, but some states with speedy trial statutes provide a different fixed length of time other than six months.

161. This example assumes that nothing else tolls the statutory speedy trial period, such as the “period during which the defendant is incompetent to stand trial,” the “period of delay caused by an interlocutory appeal,” or any of the other time periods excluded from the six-month speedy trial period by statute. See COLO. REV. STAT. ANN. § 18-1-405(6) (West 2019).

162. While the continuous approach does not bar dismissal and refileing outright, it will usually prevent dismissal and refileing because refileing the charges is barred more than six months (or whatever the statutory period is in that state) from the initial filing.

this time, and so the prosecution must dismiss the charges.<sup>163</sup> Once the witness awakens, the prosecution should be able to then refile the charges in this situation.<sup>164</sup> However, if the witness awoke more than six months from the initial filing, the continuous approach would bar the prosecution from refiling the case. As another example, the prosecution may often have good reasons for dismissing and refiling charges, such as the discovery of new evidence.<sup>165</sup> However, once the period has run under the continuous approach, the prosecution is barred from refiling, even in cases where it has good reason to do so. Thus, the continuous approach would unjustifiably reward some defendants by requiring the dismissal of their cases due to technical speedy trial violations, even where they might be guilty.<sup>166</sup>

Additionally, the continuous approach incentivizes prosecutors to proceed even when they should dismiss the charges (for example, because the key witness is in a coma).<sup>167</sup> In these situations, prosecutors may refuse to dismiss the charges because they know that doing so under the continuous approach means they will likely be barred from refiling the charges due to violations of a speedy trial statute.<sup>168</sup>

## 2. *The Continuous Approach Failed in Arizona*

Because of the continuous approach's inflexibility, Arizona abandoned the continuous approach in favor of the restarting approach, finding the continuous approach too prone to abuses.

Arizona currently follows the restarting approach, similar to Colorado, allowing the statutory speedy trial period to restart for charges that were dismissed without prejudice and later refiled, "absent a showing of" prosecutorial "bad faith . . . or prejudice to the accused."<sup>169</sup> However, in 1986, in *Hinson v. Coulter*,<sup>170</sup> the Arizona Supreme Court departed from the restarting approach and instead decided to follow the continuous approach for calculating the statutory speedy trial period for driving while intoxicated

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163. Thorp, *supra* note 98, at 438.

164. *Id.*

165. *See, e.g.*, State v. Bonarrigo, 402 N.E.2d 530, 534–35 (Ohio 1980).

166. *Id.*

167. *Id.*

168. *Id.*; *see also* United States v. MacDonald, 456 U.S. 1, 11 (1982) (Stevens, J., concurring) (noting that "the interest in allowing the Government to proceed cautiously and deliberately before making a final decision to prosecute" means that the prosecution should sometimes be able to dismiss and refile charges).

169. State v. Rose, 589 P.2d 5, 11 (Ariz. 1978) (en banc); *see also* Godoy v. Hantman, 67 P.3d 700, 702 (Ariz. 2003) ("[T]ime limits for purposes of the right to a speedy trial begin to run anew when a grand jury reindicts a defendant following the dismissal of an earlier action against the defendant.").

170. 723 P.2d 655 (Ariz. 1986) (en banc), *overruled by* State v. Mendoza, 823 P.2d 51 (Ariz. 1992) (en banc).

(DWI) and driving under the influence (DUI) cases.<sup>171</sup> The court held that preventing the statutory speedy trial window from restarting was necessary because the evidence in DWI<sup>172</sup> cases is “often fleeting.”<sup>173</sup> Moreover, dropping DWI charges led defendants to believe they did not need to make efforts to preserve evidence, which created problems for those defendants when the DWI charges were later refiled.<sup>174</sup> Additionally, the court held that the continuous approach best followed the legislature’s “clear intention” of removing drunk drivers from the roads by prosecuting them in a timely fashion.<sup>175</sup>

However, less than six years later, the Arizona Supreme Court overruled *Hinson*, reverting to the restarting approach and holding that the continuous approach had proven unworkable in practice.<sup>176</sup> The court noted that “numerous DUI<sup>177</sup> defendants have avoided trial or conviction, not on the merits, but because of” *Hinson*’s continuous approach.<sup>178</sup> Rather than accelerating the prosecution of drunk drivers, the continuous approach delayed their prosecution due to the need to litigate *Hinson* issues related to calculating the speedy trial period under the continuous approach.<sup>179</sup> *Hinson* clogged the court system, creating an “avalanche of cases” and producing “a whole new subspecies of DUI litigation” in which DUI cases were litigated based on *Hinson* speedy trial violation issues, instead of “the merits of the case.”<sup>180</sup> DUI cases under *Hinson* had become “time games, with defendants escaping conviction not because of the merits of their defenses, but because of fortuitous circumstances” of too-slow prosecutions under the continuous approach.<sup>181</sup>

Additionally, the *Mendoza* court found that the *Hinson* rule did not give prosecutors and courts enough flexibility. While defendants were allowed to delay as much as needed because their continuances were excluded from speedy trial calculations under *Hinson*, the court and prosecution’s delays

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171. See *Hinson*, 723 P.2d at 660.

172. In its reasoning for applying the continuous rule to drunk driving cases, the *Hinson* court explicitly referred to only DWI cases, but appears to also implicitly include DUI cases in its rationale as well. See *id.* at 658–60.

173. *Id.* at 658.

174. *Id.* at 658–59.

175. *Id.* at 659–60.

176. *State v. Mendoza*, 823 P.2d 51 (Ariz. 1992) (en banc). The *Mendoza* court never discussed the tacking-and-tolling approach, but only the continuous and restarting approaches. See *id.*

177. The *Mendoza* court explicitly referred to DUI cases only, but appears to also implicitly include DWI cases as well. See *id.* at 55–59.

178. *Id.* at 55.

179. *Id.* at 56.

180. *Id.* (quoting *State ex rel. Romley v. Superior Court*, 783 P.2d 241, 244–45 (Ariz. 1989) (en banc) (Moeller, J., specially concurring)).

181. *Id.* at 57.

were included in the speedy trial period under *Hinson*.<sup>182</sup> Because of this discrepancy, the *Hinson* rule did “not allow the necessary flexibility to grant a continuance when the trial judge” or prosecutor was needed “at another trial or when a key witness ha[d] been injured.”<sup>183</sup> Additionally, the court held that establishing the continuous approach had been an improper reach of the court into the legislative arena, as the court does not have the “prerogative to redefine the application of our own Rules of Criminal Procedure differently from the plain language of the rules.”<sup>184</sup> In sum, *Hinson*’s continuous approach did “not br[ing] speedy trials,” but rather occasionally “resulted in unwarranted dismissals of charges and undoubtedly . . . spawned a great deal of collateral litigation.”<sup>185</sup> Thus, the continuous approach proved unworkable in practice in Arizona.

3. *The Tacking-and-Tolling Approach Is More Flexible than the Continuous Approach, Although Still Harsher than the Restarting Approach*

The tacking-and-tolling approach is more flexible than the continuous approach. The continuous approach starts the speedy trial period when the initial charges are filed and does not toll the speedy trial when the initial charges are dismissed. Thus, under the continuous approach, assuming a six-month statutory period, the prosecution only has the six months from when the initial charges are filed to bring the case to trial, even if the charges are later dismissed and refiled.<sup>186</sup> In contrast, the tacking-and-tolling approach tolls the speedy trial clock in the period between when the charges are dismissed and when they are later refiled. Thus, under the tacking-and-tolling approach, a prosecutor can dismiss the initial charges and then still refile the charges at a later point, *even if more than six months have passed* from when the initial charges were filed.<sup>187</sup> Thus, the tacking-and-tolling approach is more flexible than the continuous approach because it will generally allow prosecutors to refile charges for a longer period of time, and so will less often allow the guilty to escape on a speedy trial technicality.

However, while the tacking-and-tolling approach is more flexible than the continuous approach, the restarting approach allows even more flexibility than both the tacking-and-tolling and continuous approaches. Both the restarting and tacking-and-tolling approaches generally allow the

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182. *Id.* at 56–57.

183. *Id.*

184. *Id.* at 59.

185. *Id.* at 62 (Feldman, Vice C.J., specially concurring).

186. See Table 1 for an example of this calculation.

187. This example calculation assumes that the entire statutory six-month period had not run before the initial charges were dismissed. See Table 1 for an example of this calculation.

prosecution to refile charges, even when more than six months have passed since the initial charges were filed.<sup>188</sup> The restarting approach, though, allows the prosecution a full, *new* six-month period for the refiled charges, whereas the tacking-and-tolling approach only provides the prosecution whatever time remained on the speedy trial clock when the initial charges were dismissed. In sum, while both the restarting and tacking-and-tolling approaches generally allow for refiling charges even when more than six months have passed from when the initial charges were filed, the restarting approach offers the prosecution the longest time period in which to bring the refiled charges to trial.

Nevertheless, the increase in flexibility offered by the restarting approach over the tacking-and-tolling approach does not outweigh the tacking-and-tolling approach's other benefits. The next Section will explain why the tacking-and-tolling approach offers greater benefits than the restarting approach.

*D. The Tacking-and-Tolling Approach Protects Speedy Trial Rights Better than the Restarting Approach*

Colorado courts have already noted that “speedy trial provisions are not intended to be applied in a wooden or mechanistic fashion” due to the “countervailing interest in effective enforcement of the criminal laws.”<sup>189</sup> In the case of dismissed and refiled charges, the tacking-and-tolling approach better protects the countervailing interests of protecting speedy trials while also ensuring that the guilty face punishment than does Colorado’s current approach of restarting the period.

For this reason, the Ohio Supreme Court, which also has a speedy trial statute,<sup>190</sup> noted that the tacking-and-tolling approach best aligned with the legislature’s intent in adopting a statute providing a concrete speedy trial period.<sup>191</sup> The Ohio Supreme Court found that the tacking-and-tolling approach best balances defendants’ speedy trial rights with the public interest in convicting criminals:

It was not the General Assembly’s sole purpose in enacting the speedy trial statutes to reward those accused of criminal conduct for a prosecutor’s lack of diligence. Concededly, an accused has a valid interest in, and an independent constitutional right to, a speedy trial.

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188. See Table 1 for an example of this calculation for the restarting approach and the tacking-and-tolling approach. Again, this assumes that the entire statutory six-month period had not run before the initial charges were dismissed.

189. *People v. Sanchez*, 649 P.2d 1049, 1052 (Colo. 1982) (en banc).

190. OHIO REV. CODE ANN. § 2945.71 (West 2019).

191. *State v. Bonarrigo*, 402 N.E.2d 530, 534 (Ohio 1980).

However, in construing the speedy trial statutes, this court also recognizes the public's interests not only in the prompt adjudication of criminal cases, but also in obtaining convictions of persons who have committed criminal offenses against the state.<sup>192</sup>

Applying this logic, the Ohio Supreme Court correctly decided to follow the tacking-and-tolling approach, noting that it adequately protects defendants' statutory speedy trial rights.<sup>193</sup> Colorado should apply the same logic to its speedy trial statute and likewise adopt the tacking-and-tolling approach to best protect defendants' speedy trial rights while also allowing for the effective prosecution of criminals.

*1. Colorado's Restarting Approach's Speedy Trial Loophole Is Oversized Compared to Tacking-and-Tolling's Narrower Loophole for Trials Outside the Six-Month Window*

This Section will contrast the length of time usually granted to prosecutors and courts to bring cases to trial under the restarting and tacking-and-tolling approaches when charges are dismissed and refiled. First, this Section will explain that Colorado courts currently regularly restart the six-month speedy trial period under the restarting approach when charges are dismissed and refiled, in effect granting prosecutors at least *two* six-month periods, instead of just the one six-month period provided by statute. This Section will then argue that the regular granting of an additional six-month period (on top of the one statutorily-provided six-month period) when charges are dismissed and refiled is too large a loophole to Colorado's speedy trial statute. Next, this Section will argue that Colorado could narrow this loophole by adopting the tacking-and-tolling approach, which grants prosecutors less time when charges are dismissed and refiled than the restarting approach. Finally, this Section will explain that adopting a narrower speedy trial calculation approach would not unduly hamstring courts and prosecutors because Colorado's speedy trial statute already provides courts and prosecutors several other escape hatches from the speedy trial period.

Colorado's restarting approach has an exception if the defendant can affirmatively demonstrate that the prosecution dismissed and refiled the charges in order to avoid the speedy trial mandate.<sup>194</sup> However, such a showing—that circumventing a speedy trial “was the true motive behind the dismissal”—is “difficult to make.”<sup>195</sup>

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192. *Id.*

193. *Id.*

194. *See supra* Part II(C).

195. Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 849 (1957).

This difficulty for defendants to prove the prosecution's motives has played out in the application of this exception in Colorado. Colorado courts have yet to find that a defendant has met his burden of affirmatively showing that the prosecution dismissed and refiled charges in order to circumvent the speedy trial statute.<sup>196</sup> Because courts have been so hesitant to find this exception satisfied, Colorado's current approach leaves prosecutors with too much discretion to restart the speedy trial window. Under Colorado's current restarting approach, the prosecution is free to "regularly evade" the speedy trial statute "as a result of the prosecutor's dismissing a charge, refileing the same charge, and acquiring a new [six]-month period for commencement of a defendant's trial on the refiled charge."<sup>197</sup> At its worst, this approach allows "the prosecutor to grant herself an unauthorized continuance," impinging on the impartial court's decision-making authority.<sup>198</sup> Thus, in practice, Colorado's approach has created too large a loophole for prosecutorial evasion of the statutory speedy trial mandate, regularly allowing prosecutors not one, but at least two, six-month speedy trial periods when charges are dismissed and later refiled.

Finally, because Colorado's exception only applies upon a showing that the prosecution dismissed and refiled the charges to circumvent the speedy trial mandate,<sup>199</sup> the exception does not adequately account for cases where prosecutorial *negligence* caused the dismissal and refileing. However, "[a] negligent failure by the government to ensure [a] speedy trial is virtually as damaging to the interests protected by the right as an intentional failure."<sup>200</sup> Hence, Colorado's current approach creates too large a loophole that allows prosecutorial *negligence* to circumvent the speedy trial statutory period.

While the tacking-and-tolling approach still allows for dismissal and refileing,<sup>201</sup> this approach significantly limits the extent to which such dismissal and refileing benefits the prosecution. Because the speedy trial window does not restart under the tacking-and-tolling approach, prosecutors only receive the amount of time that remained on the speedy trial clock when the initial charges were dismissed, not a whole, new six-month period after refileing.<sup>202</sup> Thus, the tacking-and-tolling approach is necessary to "prevent undermining or subverting implementation of the speedy trial act

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196. See *supra* note 72 and accompanying text. The extreme difficulty in proving prosecutorial bad faith in dismissing and refileing charges can also be seen in the difficulties that defendants have in showing bad faith in the context of Federal Due Process Clause cases regarding dismissal and refileing. Kerr, *supra* note 75, at 125.

197. State v. Sumstine, 478 N.W.2d 240, 246 (Neb. 1991).

198. Thorp, *supra* note 98, at 440.

199. See *supra* Part II(C).

200. United States v. Marion, 404 U.S. 307, 334 (1971) (Douglas, J., concurring) (quoting Dickey v. Florida, 398 U.S. 30, 51–52 (1970) (Brennan, J., concurring)).

201. See *supra* Part III(B).

202. See *supra* note 99 and accompanying text.

by automatically providing prosecutors a new period in which to bring an accused to trial, irrespective of the time involved in the pendency of a prior proceeding dismissed by the State.<sup>203</sup> Thus, while the tacking-and-tolling approach still allows prosecutors and courts some flexibility, it offers a much narrower loophole around the statutory speedy trial period.

Finally, Colorado could narrow its current speedy trial calculation from the restarting to the tacking-and-tolling approach without overly narrowing prosecutors' and courts' discretion, because Colorado's speedy trial statute already provides prosecutors and courts several escape hatches (regardless of approach).<sup>204</sup> For example, Section 18-1-405(6)(g)(I) gives prosecutors an additional delay of six months, on top of the six-month speedy trial period, when "the prosecution demonstrates that (1) evidence material to the state's case is unavailable; (2) the prosecution has exercised due diligence to obtain the evidence; and (3) there exist reasonable grounds to believe the evidence will be available at a later date."<sup>205</sup> Thus, Colorado's speedy trial statute already provides prosecutors additional time when evidence is unavailable, which would somewhat soften the tacking-and-tolling approach's harshness in calculating the speedy trial clock. As another example, Section 18-1-405(6)(g)(II) allows courts to grant prosecutors up to six additional months, without the defendant's consent, over and above the six-month speedy trial period under exceptional circumstances.<sup>206</sup> Thus, Section 18-1-405(6)(g) provides courts and prosecutors several escape hatches through which they can receive additional time on top of the six-month speedy trial period. And because Colorado's speedy trial statute already provides these escape hatches, Colorado need not retain its current restarting approach which regularly provides prosecutors and courts another avenue to obtain more than six months to bring cases to trial. Colorado could adopt the narrower tacking-and-tolling approach—which gives prosecutors and courts less flexibility than the restarting approach when charges are dismissed and refiled—because Colorado's speedy trial statute already allows prosecutors and courts flexibility through its statutorily-provided escape hatches.

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203. *State v. Sumstine*, 478 N.W.2d 240, 246 (Neb. 1991).

204. *See supra* Part II(B).

205. *People v. Jompp*, 440 P.3d 1166, 1172 (Colo. App. 2018) (citing COLO. REV. STAT. ANN. § 18-1-405(6)(g)(I) (West 2019)), *cert. denied*, No. 18SC718, 2019 WL 1894699 (Colo. Apr. 29, 2019); *see also supra* note 57 and accompanying text. Section 18-1-405(6) also describes several other circumstances that toll the speedy trial clock, none of which are relevant here.

206. *See supra* note 58 and accompanying text.

## 2. *The Tacking-and-Tolling Approach Promotes Efficiency in the Justice System*

The tacking-and-tolling approach best promotes efficiency in the justice system for prosecutors, courts, and defendants themselves.<sup>207</sup> First, by including the time between the initial charges and their dismissal, the tacking-and-tolling approach incentivizes prosecutors to approach dismissal with due caution, while still allowing them to dismiss and refile when appropriate.<sup>208</sup> Because prosecutors know they will not get the full six-month statutory period when they refile the charges, they will be more careful to dismiss charges only when they cannot proceed on the initial charges due to a valid reason. Prosecutors will therefore be more hesitant to dismiss and refile.

Second, tacking-and-tolling promotes judicial efficiency. Because tacking-and-tolling makes prosecutors less likely to dismiss and refile charges, these benefits spill over into the court system. The court will less often need to reacquaint itself with previously dismissed cases. Additionally, Colorado's current restarting approach requires the court to make a fact-specific inquiry into the prosecution's motives for dismissing and refiling the charges, as prosecutorial efforts to evade the speedy trial mandate prevent the window from restarting.<sup>209</sup> Colorado's restarting approach requires courts to determine whether the dismissal was supported by a valid rationale that allows restarting the speedy trial clock, or whether it was a prosecutorial maneuver to avoid the speedy mandate.<sup>210</sup> Requiring the defendant to try to prove bad faith, the prosecution to try to defend its motives, and the court to then determine said motives impairs judicial efficiency by burdening the court with making a fact-specific determination every time a defendant challenges the refiling of previously dismissed charges.

In contrast, the tacking-and-tolling approach avoids this difficult and subjective inquiry.<sup>211</sup> Whereas the restarting approach requires courts to

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207. See Thorp, *supra* note 98, for a detailed discussion of the harms of dismissal and refiling on the justice system.

208. Kerr, *supra* note 75, at 125.

209. See *supra* Part II(C).

210. See *supra* Part II(C).

211. However, this lack of subjective inquiry also presents a difficulty to the tacking-and-tolling approach, by not accounting for the prosecution's potential *good* faith. The tacking-and-tolling approach does not allow the prosecution additional time, even when the prosecution has a valid reason for dismissing and later refiling, such as a subsequent discovery of new evidence. However, tacking-and-tolling's good faith issue is mitigated in two ways. First, the prosecution still has whatever time remained of the speedy trial window when the initial charges were dismissed, and so will usually be able to refile the charges, even when more than six months have passed since the initial charges were filed. See *supra* Part IV(C)(c). Second, Colorado's speedy trial statute already provides a few escape hatches for

make a fact-specific inquiry into a prosecutor's motives, the tacking-and-tolling approach requires no such inquiry into the prosecutor's good or bad faith. Instead, the tacking-and-tolling approach is a purely objective standard applied in all cases in which charges are dismissed and refiled regardless of the prosecution's motives.<sup>212</sup> By avoiding a subjective inquiry into motives, the tacking-and-tolling approach is easier for courts to apply. And so, the tacking-and-tolling approach increases judicial efficiency.

Third, because tacking-and-tolling decreases the number of needlessly dismissed and refiled cases, it allows defendants to be most efficient with their resources. Defendants who pay for their own defense spend significant resources during the initial charges,<sup>213</sup> but if the charges are dismissed and later refiled, the defendant will need to rehire their original counsel or hire new counsel. Then this rehired or new counsel will need to spend significant resources learning (or relearning) the case and deciding whether to challenge the prosecution's motive for dismissal. Thus, dismissing and refiled increases costs on defendants who need these resources to mount an effective defense. A similar point can be made for defendants who use public defenders, who will likewise need to spend time learning or relearning the case when charges are refiled after a previous dismissal.

In sum, the tacking-and tolling approach promotes efficiency in the justice system. First, it encourages prosecutors to approach dismissing-and-refiling with due caution, while still allowing such action when necessary. Second, it is more efficient for courts, because it is an objective rule easy for courts to apply, rather than requiring a subjective, fact-specific inquiry into the prosecution's motives. Third, by decreasing the number of cases dismissed and refiled, tacking-and-tolling allows defendants (and public defenders) to be efficient in defending cases once, instead of twice.

### *3. Colorado's Restarting Approach Is Too Vague Whereas the Tacking-and-Tolling Approach Provides Clarity*

Colorado's current restarting approach is too vague about when the speedy trial window will restart and when it will not due to prosecutorial attempts to circumvent the speedy trial mandate.<sup>214</sup> Colorado courts have

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prosecutors, such as in cases of the unavailability of evidence or exceptional circumstances, that allow prosecutors more time when warranted. *See supra* Part II(B).

212. *See supra* Part III(B).

213. *United States v. Ewell*, 383 U.S. 116, 120 (1966) (noting that a long delay before trial may "impair the ability of an accused to defend himself").

214. *See* Sheila Kles, *Criminal Procedure II: How Much Further Is the Furtherance of Justice?*, 1989 ANN. SURV. AM. L. 413, 455-68 (1989), for a discussion of the vagueness problem in other states and the federal system's dismissal and refiled speedy trial window calculations and an argument for why specific criteria for dismissal is necessary.

yet to hold that a prosecutor dismissed and refiled in order to circumvent the speedy trial mandate, and so there is little guidance yet on what constitutes an invalid reason for dismissal and refiling.<sup>215</sup> Thus, under the current approach, it is unclear to courts, prosecutors, and defendants what constitutes a valid reason for dismissal and what constitutes impermissible circumvention of the speedy trial mandate.

By contrast, the tacking-and-tolling approach does not require an inquiry into the prosecution's motives, but rather simply tolls the period after dismissal automatically.<sup>216</sup> Thus, the tacking-and-tolling approach does not require the application of any vague standards to the prosecution's motives for the dismissal and refiling of the charges.

Moreover, while the tacking-and-tolling approach does not include a good faith element, Colorado defendants would still be protected against prosecutorial bad faith through the Federal and Colorado Constitutions' Due Process Clauses, even should Colorado adopt the tacking-and-tolling approach.<sup>217</sup> When the prosecution repeatedly dismisses and refiles charges in bad faith, such an action violates both the Colorado and Federal Constitutions' Due Process Clauses and is not allowed.<sup>218</sup> Thus, a good faith requirement is not needed as part of the speedy trial calculations under tacking-and-tolling's objective approach, because the Due Process Clauses protect against bad faith separately from the speedy trial statutory calculation.

#### *4. Colorado's Restarting Approach and the Federal Hybrid Approach Both Penalize Defendants Who Assert Their Statutory Speedy Trial Rights*

As discussed, under current Colorado law, the speedy trial period will restart unless the defendant can prove prosecutorial bad faith in dismissing and refiling the charges.<sup>219</sup> While not dispositive, several Colorado courts have held that the defendant, not the prosecution, moving to dismiss the initial charges can be a factor in finding that there was not prosecutorial bad faith when the court dismissed the initial charges due to an imminent speedy trial violation.<sup>220</sup> Thus, Colorado courts indirectly penalize defendants who

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215. See *supra* note 72 and accompanying text.

216. See *supra* Part III(B). Other tacking-and-tolling approach states are more explicit in holding that prosecutorial motives are immaterial under this approach. See, e.g., *Cole v. State*, 650 S.W.2d 818, 820 (Tex. Crim. App. 1983) (en banc).

217. See *supra* Part I.

218. See *People v. Abrahamsen*, 489 P.2d 206, 209 (Colo. 1971) (en banc); see also *supra* Part I.

219. See *supra* Part II(C).

220. *Huang v. Cty. Court of Douglas Cty.*, 98 P.3d 924, 929 (Colo. App. 2004); see also *Meehan v. Cty. Court ex rel. Cty. of Jefferson*, 762 P.2d 725 (Colo. App. 1988).

move to dismiss the initial charges by asserting their statutory speedy trial rights in the face of an impending speedy trial violation.

While Colorado implicitly penalizes defendants who move to dismiss the initial charges, the Federal Speedy Trial Act of 1974<sup>221</sup> explicitly penalizes defendants who assert their statutory rights. The federal system applies the restarting approach when the indictment or information is dismissed on the defendant's motion, but follows the tacking-and-tolling approach when charges are dismissed on the government's motion.<sup>222</sup> Consequently, defendants are penalized for moving to dismiss charges, while the prosecution is not, under the Federal Speedy Trial Act of 1974.

Thus, both Colorado's restarting approach and the federal system's hybrid approach penalize defendants for asserting their statutory rights. For example, under the restarting and hybrid approaches, a defendant in either the Colorado or federal courts faces a difficult choice when the prosecution cannot possibly bring the case to trial within the speedy trial period, but the speedy trial violation has yet to actually occur: If the defendant moves to dismiss based on the impending speedy trial violation, she opens the door for the prosecution to be able to refile the charges with a restarted speedy trial window. However, if the defendant chooses to strategically wait for the impending speedy trial violation to actually occur in order to prevent the speedy trial window from restarting, she is forced to endure further time under the threat of prosecution and spend further resources defending herself.<sup>223</sup> Moreover, such waiting further clogs the court's calendar instead of removing a trial that will certainly not occur within the speedy trial period.

In contrast, under the tacking-and-tolling approach, the speedy trial clock is tolled as soon as the initial charges are dismissed.<sup>224</sup> For this reason, prosecutors are incentivized to dismiss the charges as soon as they know that they will not be able to bring the case to trial within the speedy trial window. Moreover, under the tacking-and-tolling approach, defendants are free to move for dismissal when a speedy trial violation is inevitably looming, instead of being forced to sweat out the speedy trial clock or risk punishment in the form of a renewed speedy trial window.

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221. 18 U.S.C. §§ 3161–3174 (2018).

222. See *supra* Part III(C).

223. See *supra* notes 120–126 and accompanying text for a discussion of the burdens that delayed trials place on defendants.

224. See *supra* Part III(B).

### 5. *Colorado's Restarting Approach Infringes on the Courts' Powers*

By allowing the speedy trial window to restart upon the refiling of charges, the restarting approach essentially allows prosecutors the ability to grant themselves an unauthorized continuance, because a prosecutor can dismiss and later refile the case to give him or herself more time, even if the court has refused to continue the initial trial.<sup>225</sup> This infringes on the power given to the court, as a neutral party, to set the timing of the proceedings.<sup>226</sup> Moreover, it biases the proceedings in favor of the prosecution.<sup>227</sup> The prosecutor has power over the timing of the trial and a stop-gap ability to grant him or herself an unauthorized continuance through dismissal and later refiling, whereas the defendant does not have the same power over the timing of the proceedings.<sup>228</sup>

A prosecutor's ability to essentially grant him or herself these unauthorized continuances "undermines defendants' confidence in the justice system. Any defendant who has watched a prosecutor override a judge's denial of a continuance invariably begins to question the integrity and fairness of the system."<sup>229</sup> Because it undermines defendants' confidence in the judicial system and emphasizes prosecutorial power, seeing a prosecutor control the court's power through dismissal and refiling can cause defendants to lose faith entirely in the justice system, making them more likely to accept a guilty plea regardless of their actual guilt or innocence.<sup>230</sup>

While the tacking-and-tolling approach may still allow prosecutors to grant themselves unauthorized continuances, this approach lessens the risks significantly. As prosecutors still face the same speedy trial limitation under the tacking-and-tolling approach because the period does not restart when charges are dismissed and later refiled,<sup>231</sup> they are much more limited in the length of time they can gain by dismissing and refiling. In contrast, dismissing and refiling under Colorado's restarting approach grants prosecutors an entire new six-month period, unless the defendant is able to prove prosecutorial bad faith.<sup>232</sup> Thus, the tacking-and-tolling approach better defends the court's power from prosecutorial infringement.

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225. Thorp, *supra* note 98, at 448.

226. *Id.*

227. *Id.* at 446.

228. *Id.*

229. *Id.* at 446–47 (footnote omitted).

230. *Id.* at 447; *see also supra* note 133 and accompanying text.

231. *See supra* Part III(B).

232. *See supra* Part II(C).

6. *The Tacking-and-Tolling Approach Is Consistent with Colorado's Approach to Constitutional Speedy Trial Violations*

In contrast to its approach of restarting the window for *statutory* speedy trial calculations, Colorado does not restart the speedy trial period for *constitutional*<sup>233</sup> speedy trial purposes, but rather essentially follows the tacking-and-tolling approach.<sup>234</sup> For *constitutional* speedy trial purposes, Colorado includes the period between the initial filing of charges and their dismissal plus the period after charges are refiled, but does not count the period between dismissal and refiled, absent a showing of prosecutorial bad faith.<sup>235</sup> The Colorado courts adopted this approach because they found it consistent with the Supreme Court's approach for federal constitutional speedy trial calculations in *United States v. MacDonald*,<sup>236</sup> as well as with the approaches of the "majority of courts in other jurisdictions."<sup>237</sup>

Because Colorado follows the restarting approach for *statutory* speedy trial purposes but follows the tacking-and-tolling approach for *constitutional* ones, Colorado's *statutory* speedy trial calculation for dismissed and refiled charges is inconsistent with its *constitutional* calculation in the same case. Aside from needlessly complicating speedy trial cases, this inconsistency also contradicts the purpose of the statute, because the "speedy trial statute is intended to implement the constitutional right to a speedy trial."<sup>238</sup> It is inconsistent to use different calculations for the statute than the calculations used for the constitutional provision that the statute is meant to implement. Hence, to be consistent with its tacking-and-tolling constitutional approach, Colorado should adopt a tacking-and-tolling

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233. As discussed in Part I(B), the Colorado Constitution echoes the Federal Constitution's speedy trial protections.

234. See *supra* notes 61–62 and accompanying text.

235. *People v. Nelson*, 360 P.3d 175, 182 (Colo. App. 2014); see also *supra* notes 61–62 and accompanying text.

236. 456 U.S. 1 (1982) (holding that the courts should not include the period between the government's good-faith dismissal and refiled of the same charges when analyzing whether the defendant's Sixth Amendment speedy trial rights were violated). However, as a Colorado appellate court noted in *People v. Nelson*, *MacDonald* does not "directly" answer the question whether "the period from the initial filing of the charges until the dismissal of those charges is relevant." *Nelson*, 360 P.3d at 182. Instead, the *Nelson* court held that *MacDonald's* rationale indirectly "supports" the *Nelson* court's conclusion that the period between the initial filing of charges and dismissal should be included in calculating the length of delay for constitutional speedy trial purposes. *Id.* But see *United States v. Artez*, 290 F. App'x 203, 208 (10th Cir. 2008) (observing that "[t]here appears to be some confusion whether the dismissal of an indictment prior to refiled for the same conduct pauses or resets the clock for purposes of the Sixth Amendment Speedy Trial Clause" and noting contradicting cases applying *MacDonald*).

237. *Nelson*, 360 P.3d at 181–82.

238. *People v. Deason*, 670 P.2d 792, 796 (Colo. 1983) (en banc); see also *supra* note 46 and accompanying text.

approach for statutory speedy calculations when charges are dismissed and refiled.<sup>239</sup>

Table 2 below provides a summary of the relative benefits and disadvantages of all four approaches for calculating the speedy trial period in Colorado, as described throughout Part IV.

*Table 2: A Summary of the Benefits and Disadvantages of Each Approach*

<b>Approach</b>	<b>Example Jurisdiction</b>	<b>Benefits</b>	<b>Disadvantages</b>
<b>1. Restarting</b> (Speedy trial window restarts when charges are refiled, unless defendant shows prosecutorial bad faith)	Colorado (statute); current Arizona law under <i>Mendoza</i> and <i>Rose</i>	<ul style="list-style-type: none"> <li>• Grants courts and prosecutors the most flexibility</li> <li>• Most infrequently allows the guilty to escape justice on a technicality, rather than due to innocence</li> <li>• Exception for prosecutorial bad faith theoretically protects defendants from blatant speedy trial violations</li> <li>• Accounts for the realities of overwhelmed court and prosecution systems</li> </ul>	<ul style="list-style-type: none"> <li>• Exception for prosecutorial bad faith is nonexistent in practice, as Colorado courts have never found prosecutorial bad faith</li> <li>• Creates too large a loophole in speedy trial rights by allowing two six-month periods, not one, as prosecutors have maximum discretion to dismiss and refile charges with more than six months between pleas and trials (given that Colorado courts have so far always allowed the speedy trial window to restart)</li> <li>• Friendliest to dismissal and refile, which</li> </ul>

239. Finally, although unaddressed by Colorado courts, several other states' courts have found that the tacking-and-tolling approach is most consistent with the legislative intent behind their respective states' speedy trial statutes, namely preventing long pre-trial delays. *See, e.g.,* State v. Sumstine, 478 N.W.2d 240, 247 (Neb. 1991); State v. Bonarrigo, 402 N.E.2d 530, 534–35 (Ohio 1980).

			<p>decreases judicial efficiency</p> <ul style="list-style-type: none"> <li>• Too vague: insufficient notice to courts, defendants, and prosecutors as to what constitutes an acceptable reason for dismissing and refiling</li> <li>• Penalizes defendants for asserting their statutory speedy trial right when a violation is certain</li> <li>• Infringes on judiciary’s power by essentially allowing prosecutors to grant themselves unauthorized continuances</li> <li>• Inconsistent with Colorado’s constitutional speedy trial period calculation</li> </ul>
<p><b>2. Continuous</b> (speedy trial period does not restart or pause. Time is calculated from initial filing)</p>	<p>Illinois; previous Arizona approach for DWI and DUI cases under <i>Hinson</i></p>	<ul style="list-style-type: none"> <li>• Greatest protection of defendants’ speedy trial rights</li> <li>• Greatest incentivization of speedy trials</li> <li>• Judicial efficiency (disincentivizes refiling cases in already overburdened court system)</li> </ul>	<ul style="list-style-type: none"> <li>• Allows the guilty to escape on a technicality</li> <li>• Proven unworkable in practice in Arizona under the <i>Hinson</i> rule, which led to <i>Mendoza</i> overruling <i>Hinson</i>’s adoption of the continuous approach</li> <li>• Does not provide for refiling in cases</li> </ul>

			<p>where new evidence is found</p> <ul style="list-style-type: none"> <li>• Incentivizes defendants to try to run out the speedy trial clock rather than succeed on the merits of their cases</li> <li>• Inappropriate judicial overreach into the legislative arena if approach is judicially-adopted and aimed at shifting prosecutorial priorities</li> </ul>
<p><b>3. Tacking -and-Tolling</b> (speedy trial period is calculated from initial charges, but is tolled in the time between dismissal and refile)</p>	<p>Nebraska; Colorado (constitution)</p>	<ul style="list-style-type: none"> <li>• Best balances speedy trial rights with punishing guilty</li> <li>• Accounts for reality that prosecution will not always be ready and able to proceed to trial within six months of filing the initial charges, while also preserving the speedy trial right for defendants facing refiled charges</li> <li>• Most consistent with Colorado's <i>constitutional</i></li> </ul>	<ul style="list-style-type: none"> <li>• While not as inflexible as the continuous approach, still more inflexible than the restarting approach</li> <li>• Does not provide for additional time in cases where the prosecution acts in good faith in dismissing and refile, such as when the prosecution refiles due to discovering new evidence.<sup>240</sup></li> <li>• Allows larger degree of prosecutorial evasion of the speedy trial period through dismissing</li> </ul>

240. This concern is mitigated somewhat by the escape hatches provided by Colorado's speedy trial statute in cases of exceptional circumstances and/or unavailable evidence. *See supra* Part IV(D)(1).

		<p>speedy trial approach</p> <ul style="list-style-type: none"> <li>• Incentivizes prosecutors to approach dismissal and refiling with due caution, while still allowing them some flexibility to do so, which best incentivizes efficiency in the justice system</li> <li>• Objective standard does not require courts to make fact-specific inquiries into the prosecutor's intent for each dismissal and refiling</li> </ul>	<p>and refiling charges than the continuous approach allows</p>
<p><b>4. Hybrid Tacking-and-Tolling and Restarting</b> (applies the restarting approach when the charges are dismissed on the defendant's motion, but follows the tacking-and-tolling approach when charges are</p>	<p>Federal Speedy Trial Act of 1974</p>	<ul style="list-style-type: none"> <li>• See above for the respective benefits of the continuous and tacking-and-tolling approaches</li> </ul>	<ul style="list-style-type: none"> <li>• See above for the respective drawbacks of the continuous and tacking-and-tolling approaches</li> <li>• Penalizes defendants for asserting their rights and moving to dismiss charges when a speedy trial violation is imminent, by providing a different speedy trial period calculation</li> </ul>

dismissed on the government's motion)			depending on whether the defendant or government moves to dismiss the initial charges
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#### V. PROPOSAL: COLORADO SHOULD ADOPT THE TACKING-AND-TOLLING APPROACH

Colorado should abandon the restarting approach and adopt the tacking-and-tolling approach for calculating the statutory speedy trial period when charges are dismissed and refiled.<sup>241</sup> As the restarting approach was adopted by the courts and is not mandated by statute, the Colorado Supreme Court could overrule its previous decisions<sup>242</sup> adopting the restarting approach and replace it with the tacking-and-tolling approach. The Colorado Supreme Court should overrule its judicially-adopted restarting approach the next time a defendant appeals the dismissal and refile of the charges against him on statutory speedy trial grounds.<sup>243</sup> While adopting the tacking-and-tolling approach would require the court to reverse itself, the *res judicata* concerns are somewhat mitigated by the fact that adopting the tacking-and-tolling approach for *statutory* speedy trial calculations would be consistent with the court's approach to *constitutional* speedy trial calculations.<sup>244</sup>

If Colorado's courts fail to act, given the flaws in its current restarting approach, the Colorado legislature should consider adopting the tacking-and-tolling approach by statute.<sup>245</sup> The legislature could amend the current speedy trial statute<sup>246</sup>—which mandates that trials take place within six months and already includes certain types of periods to be excluded in calculating that six-month window<sup>247</sup>—to include that the speedy trial

241. See *supra* Part IV and Table 2 for a summary of the arguments against the restarting and continuous approaches and in favor of the tacking-and-tolling approach.

242. See *supra* note 61 and accompanying text for the Colorado judicial decisions adopting the restarting approach.

243. For example, when the Arizona Supreme Court realized its judicially-adopted approach to calculating the statutory speedy trial window for dismissed and refiled charges was not working, the court overruled itself and judicially adopted a different approach. See *supra* Part IV(C)(b). Realizing that Colorado's current restarting approach is not working in the interests of justice and efficiency, the Colorado Supreme Court could likewise overrule its judicially-adopted restarting approach and replace it with the tacking-and-tolling approach.

244. See *supra* Part IV(D)(f); see also *supra* notes 61–62 and accompanying text.

245. See *supra* Part IV and Table 2 for a summary of the arguments against the restarting approach and in favor of the tacking-and-tolling approach.

246. COLO. REV. STAT. ANN. § 18-1-405 (West 2019).

247. See *supra* Part II(B).

period when charges are dismissed and refiled must be calculated using the tacking-and-tolling approach.

#### VI. THE TACKING-AND-TOLLING APPROACH'S APPLICABILITY TO OTHER JURISDICTIONS WITH SPEEDY TRIAL STATUTES

Speedy trial schemes are unique to each state due to each state's different general speedy trial landscape, which consists of: the length of the state's statutory speedy trial period (if the state has a statutory speedy trial period at all),<sup>248</sup> the state's criminal statutes of limitations, the state's constitutional speedy trial provisions (if the state constitution includes such provisions), the state's speedy trial case law, time periods excluded from the state's statutory speedy trial period, and the state's remedy for speedy trial violations, in addition to the state's approach to calculating the speedy trial period when charges are dismissed and later refiled.<sup>249</sup> Because each state's speedy trial landscape is unique, this Note focused narrowly on only one state, Colorado, for the sake of clarity and specificity. Any consideration of the merits of the four approaches to calculating the statutory speedy trial window for refiled charges must be evaluated in light of the broader speedy trial landscape in that specific state, which primarily consists of the seven factors described above.

For example, the importance of having a condensed speedy trial period lessens in states with relatively short criminal statutes of limitations. This is because a short criminal statute of limitations will generally force prosecutors to file charges within a relatively narrow window, thus decreasing the risk of a drawn-out delay before the trial. As another example, the restarting approach may be more workable in a state in which the courts more critically inquire into a prosecutor's motives for dismissing and refiled the charges than Colorado's courts do (which, as noted previously, generally accept the prosecutor's motives as valid, given that a defendant has never met the burden of showing prosecutorial bad faith).<sup>250</sup>

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248. See *supra* Part IV(B) for a discussion of why a statutory speedy trial right is necessary due to Colorado's broader speedy trial landscape.

249. The list above is not intended to be exhaustive, but only to describe the most important factors in a state's broader speedy trial landscape. However, other factors exist. For example, Colorado's speedy trial clock begins to run when the defendant pleads not guilty, but not every state uses this same starting point. See, e.g., 18 U.S.C. § 3161(c)(1) (2018) (the Federal Speedy Trial Act of 1974 starts the federal seventy-day speedy trial clock from "the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs"). See *supra* Part IV(B) for a discussion of how each of these different speedy trial factors intersect to form the broader speedy trial landscape in Colorado; see also Joseph, *supra* note 75, at 649–56, for a list of extraconstitutional speedy trial protections by state.

250. See *supra* Part II(C).

Additionally, a factor states should consider in determining the best approach is what time periods are statutorily excluded from the speedy trial period. For example, as mentioned in Part II(B), Colorado's speedy trial statute allows prosecutors to exclude several delays from the six-month speedy trial period: interlocutory appeals, joining with a codefendant, unavailability of material evidence, and "exceptional circumstances" for felony trials.<sup>251</sup> Since these escape hatches for appropriate cases exist, changing Colorado's restarting approach to the slightly harsher tacking-and-tolling approach would not fully foreclose courts' and prosecutors' ability to try cases when justice so demands, even when more than six months have passed from the initial not-guilty plea. However, in states with fewer or no escape hatches, the flexibility of the restarting approach would be more important.

As a final example, a factor weighing in favor of an approach that is more lenient to prosecutors is whether the state has a relatively harsh remedy for speedy trial violations. In other words, a factor weighing in favor of a more lenient approach in Colorado is the fact that speedy trial violations act as a complete, not discretionary, bar on the later refiling of the same charges. In contrast, when courts have discretion to permit the refiling of charges following their dismissal due to a speedy trial violation,<sup>252</sup> then a harsher approach, such as the continuous approach, could be balanced out by the court's ability to permit refiling, even when the speedy trial period has elapsed.

As demonstrated above, numerous factors unique to each state influence what the best approach to calculating the speedy trial period for dismissed and refiled charges is in that state. Thus, the best approach for each state depends on each state's unique speedy trial landscape.<sup>253</sup>

However, the relative benefits and drawbacks of each of the four approaches for calculating the speedy trial period, as described in Table 2 and Part IV, are generally applicable to any state that provides a fixed speedy trial window by statute. Specifically, the tacking-and-tolling approach's benefits of allowing prosecutors needed flexibility, but not unlimited discretion, in dismissing and refiling charges are broadly applicable, although such benefits must be considered in relation to an individual state's criminal law system. Thus, each state should consider whether its current approach to calculating the speedy trial period for refiled charges best serves justice.

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251. COLO. REV. STAT. ANN. § 18-1-405(6); *see supra* Part II(B).

252. *See, e.g.*, 18 U.S.C. § 3162(a)(2) (allowing courts to dismiss charges with or without prejudice following a violation of the Federal Speedy Trial Act of 1974).

253. *See supra* note 249 and accompanying text for a list of the most important factors influencing a state's speedy trial landscape.

## CONCLUSION

Colorado's current approach of allowing the speedy trial period to restart creates too large a loophole in the state's statutory right to a speedy trial within six months because it grants too much leeway to prosecutors. As courts have yet to apply the exception to restarting upon a showing that the prosecution dismissed and refiled to circumvent the speedy mandate, the exception is too vague to provide sufficient notice to courts, prosecutors, and defendants about when the exception applies, if it ever does. Moreover, because the restarting approach forces courts to make fact-specific inquiries into the prosecution's motives for dismissal and refileing and because it over-incentivizes dismissals and refileings, the approach creates inefficiencies in the justice system. It also permits prosecutors to infringe on the powers of the courts by essentially allowing prosecutors to grant themselves unauthorized continuances. Thus, the restarting approach is inadequate.

While the continuous approach better protects defendants' speedy trial rights, it is too inflexible. The continuous approach creates too harsh a timeline for dismissal and refileing, even in cases where such refileing is appropriate. Moreover, the continuous approach has proven unworkable in practice in Arizona.

Therefore, Colorado should adopt the tacking-and-tolling approach. This approach best balances the countervailing interests of society and defendants in speedy trials, while still rarely allowing the guilty to escape justice on technical speedy trial violations instead of the merits of their cases. Additionally, the tacking-and-tolling approach is most consistent with Colorado's *constitutional* speedy trial rights. Lastly, this approach best incentivizes efficiency in the justice system.

No approach is perfect. While the tacking-and-tolling approach is not as inflexible for prosecutors as the continuous approach, it is still much more inflexible than the restarting approach. The tacking-and-tolling approach does not allow the speedy trial clock to restart even where dismissal and refileing is appropriate, but rather only pauses the clock, and so has more potential to allow the guilty to escape on a speedy violation technicality than does the restarting approach. Moreover, the tacking-and-tolling approach, while allowing less prosecutorial discretion than the restarting approach, still allows more prosecutorial discretion in dismissal and refileing than does the continuous approach, as prosecutors may still dismiss and refile charges in order to pause the speedy trial clock.

Despite these drawbacks, the tacking-and-tolling approach provides the best middle ground between the extremes of the too inflexible continuous approach and the too lenient restarting approach. Therefore, Colorado

should abandon its current restarting approach and adopt the tacking-and-tolling approach.

Moreover, while each state must evaluate its approach for calculating the speedy trial period when charges are dismissed and refiled in light of its broader speedy trial landscape,<sup>254</sup> other states with speedy trial statutes providing concrete speedy trial periods should consider adopting the tacking-and-tolling approach for calculating the speedy trial period when charges are dismissed and refiled.

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254. See *supra* note 249 and accompanying text for a list of the most important factors in creating a state's speedy trial landscape.

\* J.D. (2020), Washington University School of Law; B.A. (2014), American University. Thank you to Professors Daniel Epps and Russell Osgood for their thoughtful contributions to this Note. Thanks also to the *Washington University Law Review* staff for their tireless edits, and especially to Notes Editor Emily Scholting for her irreplaceable guidance.