

CHAMBERS

District Court

CITY AND COUNTY BUILDING

DENVER, COLO. 80202

MORRIS BEN HOFFMAN, JUDGE

August 2, 2011

Justice Alex J. Martinez
Colorado Supreme Court
101 W. Colfax #800
Denver, CO 80203

Re: Recommendations for Amending Crim. P. 17(h)

Dear Justice Martinez:

The Advisory Committee on Rules of Criminal Procedure has delegated to me the task of transmitting to the Court the Committee's recommendations for amending Crim. P. 17(h), as well as an explanation for the proposed changes.

Crim. P. 17(h) deals generally with a subpoenaed witness's failure to appear at a trial or hearing. We recommend two main changes: 1) a clarification that such a failure to appear is indirect contempt that may be dealt with under C.R.C.P. 107; and 2) an addition codifying, but also limiting, what many trial judges across the state have always believed was their inherent power to issue bench warrants when witnesses fail to appear for a criminal trial. The Committee recommends four limitations to this power to issue arrest warrants: 1) that it be limited to trials, and not apply to hearings; 2) that the arrested witness must be brought directly and immediately to court; 3) that a bond be immediately set; and 4) that the authority to issue the bench warrant automatically expire, and any already-issued warrant automatically be vacated, when the trial is either continued or concluded. The details of our suggested changes are reflected in the attached red-lined and clean versions of the Rule.

Because the Committee's recommendations were not unanimous, I thought I would take the time to describe in more detail than usual the discussions that eventually gave rise to these recommendations.

The matter was brought to our attention by a state district judge, who wrote to us requesting that Rule 17 be clarified as to whether a criminal witness's failure to appear at a trial or hearing is direct or indirect contempt. Rule 17(h) currently states that such a failure to appear may be deemed contempt, but does not refer to C.R.C.P. 107 and does not state whether such contempt would be direct or indirect.

The Committee quickly and unanimously agreed that Rule 17(h) should be amended to make it clear that a subpoenaed witness's failure to appear at a criminal hearing or trial should be treated as indirect contempt under C.R.C.P. 107(c). After all, the non-appearing witness has not

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done anything contemptuous that the judge has *seen or heard*, which is how C.R.C.P. 107(a)(2) now defines direct contempt, and of course is not present to receive any immediate sentence. The proposition that a witness's failure to appear is indirect rather than direct contempt seems consistent with Colorado appellate decisions under both the prior version of C.R.C.P. 107 and the current version. *See In re Marriage of Johnson*, 939 P.2d 479, 481-82 (Colo. App. 1997) (under current rule, lawyer commits indirect contempt by failing to appear in person); *People v. Madonna*, 651 P.2d 378, 388 (Colo. 1982) (under prior rule, criminal defendant's failure to appear for sentencing is indirect contempt).

But then we addressed a related, and much more controversial subject: whether contempt under C.R.C.P. 107 was intended by Rule 17(h) to be the exclusive remedy and, quite apart from the existing language of Rule 17(h), whether civil contempt should be the exclusive remedy. The problem with leaving C.R.C.P. 107 as the exclusive remedy is a practical one. Virtually all criminal trials in district court are jury trials. Our juror-citizens simply cannot be kept waiting while a trial judge proceeds with an indirect contempt citation under C.R.C.P. 107(c), which will take at least 20 days. These realities mean that trial judges have two choices when an important criminal trial witness fails to appear: declare a mistrial or empower law enforcement to try to find the missing witness.

Each of the trial judge-members of our Committee indicated that they believed they had inherent authority to issue such bench warrants, and in fact each had done so in the past. On the other hand, some of those member-judges also indicated they had colleagues who believed there was no such inherent authority, and that C.R.C.P. 107 was the exclusive remedy to address the problem of the criminal witness who fails to appear. Indeed, in our survey of other districts on the technical warrant issues mentioned below, several clerks in smaller districts reported that they had never issued such warrants. In any event, it seems clear that district judges are not of one mind about their authority in this regard, and that a large part of the problem lies in the existing language of Crim. P. 17(h), which, as it currently reads, simply does not answer the question of whether resort to C.R.C.P. 107 is the exclusive remedy.

These were the initial concerns that stimulated a long process of debate both within a subcommittee assigned to this issue and within the Committee as a whole.

We could not find any reported authority in Colorado addressing this issue, though there are cases from other states holding or suggesting that trial courts have the inherent power to issue bench warrants when witnesses fail to appear. *See, e.g., Martin v. Waters*, 151 Ga. App. 149, 259 S.E.2d 153 (1979); *People v. Allibalogun*, 312 Ill. App.3d 515, 727 N.E.2d 633 (2000); *Jones v. State*, 847 N.E.2d 190 (Ind. App. 2006); *Terry v. State*, 56 P.3d 636 (Wyo. 2002). Many other states have statutes or rules expressly codifying this inherent power. *See, e.g., ARIZ. REV.*

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STAT. §12-2211(B); Cal. Local R. 8.87 (Los Angeles County); CONN. GEN. STAT. ANN. §54-82j; IDAHO. CODE ANN. § 9-709; Iowa Crim. P. 2.15(5); NEV. REV. STAT. ANN §50.205; WIS. STAT. ANN. §968.09. We found no reported case, state or federal, expressly holding that a trial court does not have the inherent authority to issue a bench warrant for the arrest of non-appearing witnesses, but we also recognize that this authority, by its very nature, is the kind whose exercise will often evade review. We also found no rule, state or federal, stating or suggesting that a trial court does not have this authority.

There are several Colorado statutes and rules that expressly permit the issuance of bench warrants for a failure to appear in certain circumstances. Perhaps most pertinent, § 16-5-204(1.5)(a) *requires* a grand jury judge to issue a bench warrant at the prosecution's request when a subpoenaed grand jury witness fails to appear. Section 16-2-110 permits the trial court to issue a bench warrant when a criminal defendant served with a summons and complaint fails to appear. Municipal courts have the same authority under C.M.C.R. 204(f). C.R.C.P. 69(e) allows the trial court to issue a bench warrant when a judgment debtor fails to appear for post-judgment examination after having been subpoenaed. C.R.C.P. 103(7)(b)(2) permits a bench warrant when a garnishee fails to appear on a post-judgment subpoena, and there is an identical county court rule. C.R.C.P. 403(7)(b)(2). But there is no Colorado rule or statute giving a trial judge any express authority to issue bench warrants when subpoenaed witnesses fail to appear for criminal trials.

After wide-ranging discussions over many months, a substantial majority of the Committee concluded that the uncertainties surrounding this inherent power should be formally addressed by modifications to Crim. P. 17(h), and that those modifications should expressly recognize the trial court's power to issue bench warrants for the arrest of non-appearing criminal witnesses, as a practical alternative to indirect contempt proceedings under C.R.C.P. 107. A substantial majority of the Committee also believed that there should be four express limitations on this power: 1) it should be available only for trials, not hearings; 2) an arrested witness must be brought directly and immediately to the courtroom of the issuing judge (that is, not booked as all other arrestees typically are); 3) bond must immediately be set; and 4) the warrant, and the power to issue it, must expire when the witness is no longer needed.

Only one Committee member expressed the view that trial courts have no inherent authority to arrest non-appearing witnesses and that such express authority should not be given to them. His arguments, in his own summarizing words, are reported here:

First, since a witness's failure to appear is considered as indirect contempt (and this view was unanimous in the Committee), the indirect contempt procedures in Rule 107 already provide an enforcement mechanism. The Rule

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would be inconsistent to both deem a witness's failure to appear as indirect contempt, and then to adopt an enforcement mechanism contrary to the procedural safeguards already imposed for indirect contempt proceedings. Second, the issuance of a bench warrant is not prescribed by the legislature in this instance, though the legislature has prescribed circumstances in the Colorado Criminal Code for when a bench warrant may issue. § 16-5-204(1.5)(a) requires a Grand Jury judge to issue a bench warrant when a subpoenaed grand jury witness fails to appear. § 16-2-110 allows a court to issue a bench warrant when a criminal defendant fails to appear on a summons. In both of these instances, the issue is similar to when a witness fails to appear for a trial subpoena. Yet, the legislature has not authorized a court to proceed with a bench warrant. Finally, there is a good reason for the indirect contempt process: it allows for the witness to have some modicum of process without being grabbed by law enforcement. Perhaps service of process did not occur as relayed by the serving party, or the witness had a valid excuse (such as a belief that the witness was placed "on call".) Rather than expanding the opportunity for a peace officer to take someone into custody, the process of indirect contempt allows for a less aggressive avenue to address the problem of a missing witness, one that is much less threatening to civil liberties. For these reasons, I am strongly against adopting a rule-based framework for issuance of a bench warrant when a criminal trial witness is alleged to have failed to appear on a subpoena.

These were concerns the Committee took seriously, and discussed at length. In the end, however, a substantial majority concluded that there was simply no legitimate basis on which to distinguish non-appearing grand jury witnesses, who are expressly subject to bench warrants, and non-appearing criminal trial witnesses. In both cases, the proceedings are thrown into chaos when the witness does not appear, and the availability of a bench warrant makes it at least possible that the witness can be found in time to proceed. Indeed, the problem is more severe with trial witnesses—grand juries typically sit for many months and might be able to wait for the C.R.C.P. 107 process to procure the witness's attendance.

As for the limitations on this proposed express power, the first—that the power be available only for trials and not hearings—was not controversial. After all, the problem this change was meant to address is the problem of what to do in a jury trial when a witness fails to appear. The Committee was unanimous that should this power to issue bench warrants be made express, it should be limited to trials, and not apply to hearings.

The second limitation—that the non-appearing witness be brought immediately to the issuing court—was also not controversial. We discussed the realities of how these bench

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warrants are actually working, in courts where trial judges who believe they have the inherent power to issue them actually do issue them. Typically, if the witness failing to appear is a prosecution witness, then the DA's investigator, armed with the warrant, goes out and tries to find the witness. If the witness can be found, then the DA's investigator brings the witness to the courtroom, the witness testifies and the warrant is vacated (though the trial court or parties could also then proceed with contempt under Rule 107). If the witness cannot be found, then the case either proceeds without him/her or it is continued, in which case the warrant is vacated (and, again, the trial court or parties could proceed with contempt under C.R.C.P. 107). The situation is more difficult for defense lawyers, who have no employees with arrest powers. As a result, we wrote into our suggested revisions the provision that the warrant be directed to "any peace officer," which will allow the court to direct local police or sheriffs to execute the warrant.

In any event, the idea is that these are not your ordinary arrest warrants that sit out there until a subject commits a traffic violation. They are either executed or not-executed in the course of the trial itself. And when they are executed, that is, the witness is found and arrested, we thought it makes sense for the warrant to be limited to its purpose—and therefore to direct the arresting officer to take the arrestee directly to the court where the trial is being conducted.

But this limitation did raise some technical questions about whether our existing statewide and NCIC systems could accommodate such warrants. On the one hand, this may seem like a moot point, since, as mentioned above, these warrants will be on the system only for a few hours or days at most. On the other hand, they still need to be processed. Our subcommittee therefore contacted both the SCAO and local clerk's offices throughout the state for their input about how such warrants could be accommodated by the existing systems. SCAO reported that a few small changes in the warrant format would be needed, but that they were all do-able. Local clerks with whom the Subcommittee spoke had either never come across the problem, or report that they treat these just like any other warrant and then vacate them when the witness is found or the trial is done. One of our members, Judge Fisch, regularly attends cross-district clerk's meetings, and would, if the Court were to adopt our recommendations in whole or in part, be willing to participate in discussions of these technical issues at those meetings.

The third limitation—the requirement that a bond be set—was more controversial. A minority of members, including some trial judges, expressed the view that this requirement was unnecessary as a practical matter, precisely because the witness would be released in any event after his/her testimony. But a majority, including some trial judges, believed a bond was required (since, after all, the witness was only being accused of failing to appear after being duly served), and that there could be circumstances where a warrant would need to hold a witness for more than just an hour or two—for example, where the witness's testimony might last for more

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than a day, or if the witness were picked up on the warrant over an intervening weekend or holiday and therefore could not be brought directly to court without being booked into jail.

The fourth limitation—that the warrant automatically expire after the witness is done testifying or after the trial is over or continued—was not controversial. Such a warrant should not, and as they are now being issued do not, need to be any broader than their fundamental purpose: trying to save a criminal jury trial by obtaining the presence of a non-appearing witness before the court must proceed without the witness or declare a mistrial.

We thank the Court for its attention, and of course stand ready to answer any questions.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Morris B. Hoffman".

Morris B. Hoffman
District Judge
Second Judicial District

cc: Hon. John Dailey, Chairperson
Colorado Supreme Court Advisory Committee on Rules of Criminal Procedure