

CERTIFICATE OF COMPLIANCE

I certify this Petition complies with all requirements of C.A.R. 21, 28 and 32, as applicable, including all formatting requirements set forth in the Colorado Appellate Rules.

/s/ Lucy H. Deakins

Lucy H. Deakins, #41729

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	v
JURISDICTION AND RULE-MAKING AUTHORITY.....	0
ISSUE PRESENTED	0
FACTS NECESSARY TO UNDERSTAND THE ISSUE PRESENTED	1
<i>A.</i> Executive Branch Orders	1
<i>B.</i> Judicial Branch Orders	3
<i>C.</i> <i>People v. Castro</i>	4
RULING COMPLAINED OF AND RELIEF SOUGHT	8
NO OTHER ADEQUATE REMEDY IS AVAILABLE.....	8
PARTIES.....	11
ENTITY AGAINST WHOM RELIEF IS SOUGHT	12
ARGUMENT.....	12
I. The District Court Judge erred in denying defendant’s motion to dismiss the charges against him for violating his right to a speedy trial.	12
<i>A.</i> Defendants have a right to speedy trial.	12
(i) Chief Justice Coats’ April 16, 2020 Order cannot be read to authorize statutory speedy trial violations that do not fall within a statutory exclusion.	13
(ii) Therefore, the only relevant exception to the speedy trial deadline is found in the statute: “any mistrial”.	16

B. Mistrial standard.....	16
(i) Section 13-71-140, C.R.S. governs mistrials based on problems summoning or managing jurors.	16
(ii) A mistrial can only be declared if it meets the “manifest necessity” standard.....	18
(iii) To the extent Crim. P. 24(c)(4) purports to allow a mistrial to be declared without meeting the requirements of § 13-71-140 and the “manifest necessity” standard, it violates the separation of powers doctrine and is unconstitutional.....	20
(iv) Crim. P. 24(c)(4) is subject to those same standards.	21
C. There was insufficient evidence to show a jury pool could not be assembled in Mesa County prior to the expiration of the speedy trial deadline.	21
(i) There was no evidence that it was unsafe to assemble a jury pool in Mesa County.	21
(ii) It was not “impossible” to assemble a jury pool in compliance with the law.	24
D. The circumstances here were not outside the control of the trial court. ..	26
(i) Failure to call a jury.....	27
(ii) Pandemic preparedness planning.	28
a) The risk of a pandemic has been known to the State of Colorado for over a decade.....	28
b) Colorado has been honing its disaster response for decades.	33
c) The Judicial Branch was consulted in the disaster preparedness planning process but failed to make plans for holding jury trials during a pandemic.....	35

<i>E.</i> The district court did not determine whether there were reasonable alternatives to a mistrial	36
<i>F.</i> Conclusion.	38
CONCLUSION	39
LIST OF SUPPORTING DOCUMENTS	39
CERTIFICATE OF SERVICE.....	41

TABLE OF AUTHORITIES

Cases

<i>Arizona v. Washington</i> , 434 U.S. 497 (1978)	20
<i>Barker v. Wingo</i> , 407 U.S. 514 (1972)	14, 36
<i>Bermel v. BlueRadios, Inc.</i> , 2019 CO 31	20
<i>Frost v. Thomas</i> , 56 P. 899 (Colo. 1899).....	26
<i>In re Lucy & Meresa</i> , 2020 CO 68	11, 13, 29
<i>Jones v. Dist. Court In & For Second Judicial Dist.</i> , 780 P.2d 526 (Colo. 1989) ..	10
<i>Maes v. Dist. Court In & For City & Cty. of Denver</i> , 503 P.2d 621 (Colo. 1972) ..	19
<i>Margolis v. District Court</i> , 638 P.2d 297 (Colo. 1981)	9
<i>Mosley v. People</i> , 2017 CO 20	15
<i>Paul v. People</i> , 105 P.3d 628 (Colo. 2005)	10
<i>People ex rel. Att’y Gen. v. Richmond</i> , 26 P. 929 (Colo. 1891)	40
<i>People v. Angel</i> , 2012 CO 34	1
<i>People v. Arledge</i> , 938 P.2d 160 (Colo. 1997)	28
<i>People v. Berreth</i> , 13 P.3d 1214 (Colo. 2000).....	20, 27, 28
<i>People v. DeGreat</i> , 2020 CO 25.....	14, 36
<i>People v. Dist. Court In & For City & Cty. of Denver</i> , 743 P.2d 432 (Colo. 1987)	10
<i>People v. Erickson</i> , 574 P.2d 504 (Colo. 1978).....	19
<i>People v. Harrison</i> , 2020 CO 57	18
<i>People v. Hollis</i> , 670 P.2d 441 (Colo. App. 1983).....	15, 16

<i>People v. McKenna</i> , 585 P.2d 275 (Colo. 1978).....	16
<i>People v. Segovia</i> , 196 P.3d 1126 (Colo. 2008)	19, 20, 21
<i>People v. Slender Wrap, Inc.</i> , 536 P.2d 850 (Colo. App. 1975).....	13
<i>People v. Steen</i> , 318 P.3d 487 (Colo. 2014)	9
<i>People v. Voth</i> , 2013 CO 61	18
<i>People v. Wiedemer</i> , 852 P.2d 424 (Colo. 1993).....	14, 15
<i>United States v. Jorn</i> , 400 U.S. 470 (1971)	19, 21, 29
<i>United States v. Lynch</i> , 598 F.2d 132 (D.C. Cir. 1978)	27
<i>United States v. Perez</i> , 22 U.S. 579 (1824)	20

Statutes

§ 13-71-140, C.R.S.	17, 18, 19, 21
§ 18-1-405(6)(e), C.R.S.	17
§ 18-1-405, C.R.S.	9, 13
§ 18-1-405(6)(g)(I), C.R.S.	11
§ 18-1-405(1), C.R.S.....	14
§ 24-31-101, C.R.S.	35
§ 24-33.5-704.5(1)(a), C.R.S.....	34
§ 24-33.5-704(8)(a), C.R.S.	34
§ 24-33.5-704(3)(a), C.R.S.	34, 35
§ 24-32-2104(3)(a), C.R.S.	34, 35
§ 24-33.5-704.5(1)(b)(I)(F), C.R.S.....	35
§ 24-33.5-704(8)(b)(I)(F), C.R.S.....	35

Rules

C.A.R. 21	9, 10
C.A.R. 28.....	9, 10
C.A.R. 32.....	9, 10
Crim. P. 24.....	1, 11
Crim. P. 24(c)(4).....	passim
Crim. P. 48(b)(6)(V)	17

Constitutional Amendments

Colo. Const. art. II, § 6.....	13
Colo. Const. art. II, § 16.....	13
Colo. Const. art. III	26
Colo. Const. art VI, § 2	1
Colo. Const. art. VI, § 3	1, 9
Colo. Const. art. VI, § 21	1, 14, 16
U.S. Const. amend. VI	13

JURISDICTION AND RULE-MAKING AUTHORITY

The Colorado Constitution vests this Court with both appellate jurisdiction and general superintending control over all inferior courts. Colo. Const. art VI, § 2. The same article confers on this Court the power to issue original or remedial writs as provided for by its procedural rules. Colo. Const. art. VI, § 3.

In addition, the Colorado Constitution vests this Court with plenary authority to promulgate and interpret the Colorado Rules of Criminal Procedure. Colo. Const. art. VI, § 21; *People v. Angel*, 2012 CO 34, ¶ 13.

ISSUE PRESENTED

Did the Mesa County District Court err in granting a mistrial under Crim. P. 24(c)(4) where there was no evidence that a jury pool could not be safely assembled in Mesa County before the expiration of the speedy trial deadline, the circumstances leading to the declaration of mistrial were within the control of the court, and the court failed to examine other reasonable alternatives to a mistrial?

Is the April 7, 2020 modification to Colorado Rule of Criminal Procedure 24(c), as applied to Mr. Castro, a violation of the separation of powers doctrine?

FACTS NECESSARY TO UNDERSTAND THE ISSUE PRESENTED

Colorado is in the midst of a pandemic caused by the novel coronavirus or COVID-19. Both the Executive Branch and the Judicial Branch have issued orders during the pandemic.

A. Executive Branch Orders

Within the Executive Branch, both the Governor and the Colorado Department of Public Health and Environment (“CDPHE”) have issued state-wide orders requiring social distancing and the use of masks in certain situations and at certain times.¹

On April 26, Governor Polis issued Executive Order D 2020 044. The order recognized that some Colorado counties may have lower levels of COVID-19 cases and may not need the same stringent public health guidelines as other areas of the state. Exec. Order D 2020 044 at II.M. CDPHE’s Public Health Order (“PHO”) 20-28, issued the same day, gave flesh to the Governor’s order, explaining that counties that were not “experiencing a high rate of transmission” could request a variance from the state-wide public health orders and tailor policies to their local conditions. Public Health Order 20-28 (April 26, 2020) at app’x G.

¹ Executive Branch orders from the Governor and the CDPHE are all available at <https://covid19.colorado.gov/prepare-protect-yourself/prevent-the-spread/public-health-executive-orders> (last visited 08/02/2020).

That public health order defined “judicial operations” as “critical government functions” and authorized them to continue with certain limited restrictions.² Although Critical Business operations were to comply with social distancing requirements (defined as six feet apart) at all times, critical government functions were not required to do so. *Id.* at § II.B, III.N.

The next day, April 27, Mesa County filed a variance request with CDPHE which was granted on April 28. App’x I, pdf p 11. Mesa’s variance allowed restaurants to open for limited in-person service (30% capacity with no specified maximum number of people) and for up to 50 people to gather for worship services. App’x I, pp 5 & 9. Mesa County’s variance did not specifically address assembly of a jury pool.

In issuing the variance, CDPHE noted that Mesa had “only 39 total COVID-19” cases as of April 28. App’x I, pdf p 11. For comparison, by April 25, Colorado as a whole had 13,441 known cases. CDPHE PHO 20-28, pdf p 1.

² CDPHE PHO 20-28, § III.D (“Critical Government Functions. The provision, operation and support of the following state and local government functions shall continue: ... Judicial branch operations, including attorneys if necessary for ongoing trials and required court appearances, unless appearances can be done remotely[.]”). Critical Government Functions were to continue under the requirements of PHO 20-28 § II.I, governing the management of employees and “customers”, i.e., non-employees.

B. Judicial Branch Orders

In reaction to the pandemic, on March 16, 2020, Chief Justice Coats of the Colorado Supreme Court issued an order barring jury trials through April 3, except in the case of imminent speedy trial deadlines.³ March 16 Coats Order.

On March 18, Chief Judge Flynn of the Twenty-First Judicial District issued Administrative Order 2020-05, vacating all jury trials set within the district through May 1 except those facing an imminent speedy trial deadline. App’x J, ¶ 5.

On March 20, Chief Justice Coats extended his March 16 order through May 15, again except in the case of speedy trial deadlines. March 20 Coats Order.

On April 12, Chief Judge Flynn issued Administrative Order 2020-07, which mandatorily continued all hearings other than those specified. The order provided two exceptions for cases with speedy trial issues:

- v. Proceedings necessary to protect the constitutional rights of criminal defendants...including... any hearing that the judge finds to be necessary due to the defendant’s right to have a speedy trial;
- vi. Any hearing that the presiding judge deems necessary to avoid an issue related to speedy trial.

³ All Chief Justice Coats Orders are available at <https://www.courts.state.co.us/announcements/COVID-19.cfm> (last visited 08/02/2020).

App'x K, ¶ 4.b.

On April 16, Chief Justice Coats issued an order banning jury trials before June 1 with no exception provided for cases with speedy trial deadlines. April 16 Coats Order. On May 5, Chief Justice Coats issued an order banning jury trials before July 6, but, acknowledging the need to protect constitutional and statutory rights, asked chief judges of the judicial districts to seek a waiver of the prohibition on assembling a jury pool. May 5 Coats Order.

C. People v. Castro

The prosecution has charged David Castro with four felonies. Mr. Castro pled not guilty on December 2, 2019. His six-month speedy trial period was set to expire on June 2, 2020. The district court scheduled his jury trial to commence on April 21, 2020, well within the speedy trial deadline. At a status conference on March 24, the trial court reset Mr. Castro's trial, over defense objection, to May 18.

On May 4, the Prosecution filed a motion asking the district court to again continue the trial or to declare a mistrial under Crim. P. 24(c)(4). App'x D. As grounds, the Prosecution relied on:

- Chief Justice Coats' April 16 Order barring jury trials before June 1, 2020;

- Chief Judge Flynn’s direction to the Jury Commissioner for the 21st Judicial District to not summon any jurors during the month of May;
- Chief Judge Flynn’s 2020-05 Administrative Order (March 18, 2020) stating:

Furthermore, [CDPHE] is working to stop the spread of COVID-19 and has implemented emergency measures as Colorado is experiencing rapid increase [sic] in COVID-19 that threatens the health of residents and risks overwhelming the healthcare system in the State of Colorado.

- Executive orders banning gatherings of more than 10 people and requiring social distancing measures.

App’x D.

The Prosecution failed to inform the district court that the March 18 Administrative Order 2020-05 had been superseded weeks before by the April 12 Administrative Order 2020-07 which removed the quoted language and added two exceptions to the otherwise mandatory continuance of a hearing: (1) for “[p]roceedings necessary to protect the constitutional rights of criminal defendants ... including ... the defendant’s right to have a speedy trial” and (2) for “[a]ny hearing that the presiding judge deems necessary to avoid an issue related to speedy trial.” *Compare* App’x J, p 1, *with* App’x K, p 1; App’x J, ¶¶ 4.b.v & vi.

At the pretrial readiness conference later on May 4, the Defense announced ready for trial and that it was not waiving the speedy trial deadline. App’x E, pp

2:23–3:7. During the conference, the Defense asked the Court to consider alternative locations for the trial in order to hold the trial within the speedy trial deadline. App’x E, pp 6:24–7:5. The Defense also argued that the People had not provided sufficient evidence to show that assembling a jury was unsafe, but rather was just speculating. App’x E, pp 6:15–23 & 12: 7–11.

During argument at the May 4 conference, the Prosecution asserted as an additional reason for resetting the trial that its witnesses were unavailable, but no specifics were provided. The Defense specifically objected that the Prosecution’s record regarding witness unavailability was insufficient. No further record was made by the Prosecution on that issue. The District Court did not rely on witness unavailability in its declaration of a mistrial or its resetting of the trial.

Without declaring a mistrial, the District Court tentatively reset the trial to June 1, which was within Mr. Castro’s speedy trial deadline. App’x E, p 14:13–21.

The District Court issued a written order on May 5, with a revision on May 7, declaring a mistrial effective as of May 4. App’x F & App’x H. The court’s decision was based on the following:

- Jury summons were “unlikely to be issued in time” for a June 1 trial because of Chief Judge Flynn’s direction to the jury commissioner not to summon jurors in May;

- Its finding that “there is no reasonable, and safe, way a jury can be seated in this matter on June 1, 2020” and Crim. P. 24(c)(4);
- Chief Justice Coats’ May 5 Order barring jury trials through July 5.

App’x F, p 1 (incorporating arguments from the Prosecution’s motion for mistrial contained in pp 2–3); App’x H. In declaring a mistrial, the District Court relied on “emergency orders ... from local and state officials” that prohibit gatherings of more than 10 people and require six feet of social distance between people. App’x F. But the court did not make any specific findings as to why gathering a jury pool in Mesa County would be unsafe.

The District Court reset the trial to August 3, a date within three months of the mistrial. App’x F.

On June 17, the Defense filed a motion to dismiss all charges based on a violation of Mr. Castro’s speedy trial rights. App’x A. The People filed a response on July 8.⁴ App’x B. The District Court denied the motion to dismiss on July 8. App’x C.

⁴ The People’s response relied almost entirely on an analysis of § 18-1-405(6)(g)(I) (mistrial due to prosecution’s inability to proceed to trial), but that was not the authority relied by the District Court in granting a mistrial. App’x F (“There is no reasonable, and safe, way a jury can be seated in this matter on June 1, 2020.”).

RULING COMPLAINED OF AND RELIEF SOUGHT

The ruling complained of is:

The Mesa County District Court's *Order Re: Defendant's Motion to Dismiss* (Appendix C).

Pursuant to C.A.R. 21 and Article VI, Section 3 of the Colorado Constitution, Mr. Castro respectfully requests that this Court issue an Order to Honorable Matthew D. Barrett to show cause why the district court's order should not be vacated and the charges against him dismissed under § 18-1-405, C.R.S.

NO OTHER ADEQUATE REMEDY IS AVAILABLE

Original proceedings pursuant to C.A.R. 21 are authorized to determine whether a trial court is proceeding in excess of, or without, jurisdiction and to review a serious abuse of discretion where an appellate remedy would not be adequate. *See, e.g., Margolis v. District Court*, 638 P.2d 297, 300-301 (Colo. 1981). Although relief under C.A.R. 21 is an extraordinary remedy, it is appropriate in cases that raise issues of first impression and that are of significant public importance. *People v. Steen*, 318 P.3d 487, 490 (Colo. 2014). Relief is also appropriate where the normal appellate process is inadequate. *Id.*

Although generally pre-trial orders are not reviewable before direct appeal, this Court recognizes an exception when a pre-trial order will cause unwarranted damage which cannot be cured on appeal. *People v. Dist. Court In & For City & Cty. of Denver*, 743 P.2d 432, 435 (Colo. 1987). Specifically, denial of a motion to dismiss criminal charges after a mistrial is usually reviewed on direct appeal, but this court has also chosen to address it under its original jurisdiction. *Paul v. People*, 105 P.3d 628, 633 (Colo. 2005).

However, because there are likely to be a number of mistrials declared under Crim. P. 24(c)(4) due to the coronavirus, guidance from this Court would be appropriate. Without that guidance defendants may be subject to improper trials and may be incarcerated for years before their appeals are finally decided. In such circumstances, exercise of this Court's jurisdiction under C.A.R. 21 is appropriate. *See Jones v. Dist. Court In & For Second Judicial Dist.*, 780 P.2d 526, 528 (Colo. 1989) ("we have not hesitated to exercise original jurisdiction where an otherwise interlocutory ruling may have a significant impact on a party's ability to litigate the merits of a controversy").

Additionally, the issue at hand is one of first impression. There are numerous issues of first impression that are arising out of the coronavirus pandemic. For example, this Court recently addressed whether the prosecution

may seek to toll the speedy trial deadline under § 18-1-405(6)(g)(I), C.R.S. based on the pandemic. *In re Lucy & Meresa*, 2020 CO 68. However, this Court has never addressed whether and how a pandemic affects the declaration of a mistrial under Crim. P. 24(c)(4) for the purposes of speedy trial.⁵

Finally, this is an issue of significant public importance. The coronavirus pandemic has significantly impacted the administration of justice in Colorado. That the Court has felt the need to amend Crim. P. 24 twice in the span of less than four months indicates the urgency of the issue. Mistrial declarations to avoid speedy trial deadlines are likely to occur in many jurisdictions in the state. Until it is addressed by this Court, decisions will likely vary dramatically from jurisdiction to jurisdiction with some defendant's having their rights protected and some not.

⁵ The mistrial in this case was declared under the original language of Crim. P. 24(c)(4). That rule was amended on July 22, 2020, possibly to address some of the problems with the language of the original rule as noted in this Petition.

PARTIES

Attorneys for Petitioner:

Sarah Tenhoff, #43400
Tenhoff Law, LLC
114 N. Spruce St, Ste. 102
Grand Junction, CO 81501
Phone: 970-235-1053

Kimberly Van Dyke, #46511
Van Dyke Law
102 N. 4th St., Ste. 107
Grand Junction, CO 81501
Phone: 970-628-1640
Fax: 970-628-1641

District Attorneys:

Richard B. Tuttle, #19015 (for 19CR1200)
Assistant District Attorneys
Twenty-First Judicial District of Colorado
125 Spruce
Grand Junction, CO 81501
Phone: 970-244-1730
Fax: 970-244-1729

Mesa County District Court Judge:

The Honorable Matthew D. Barrett
Mesa County District Court
125 N. Spruce Street
Grand Junction, CO 81506

ENTITY AGAINST WHOM RELIEF IS SOUGHT

The relief requested in this case would issue against the Mesa County District Court, Judge Matthew D. Barrett.

ARGUMENT

I. THE DISTRICT COURT JUDGE ERRED IN DENYING DEFENDANT’S MOTION TO DISMISS THE CHARGES AGAINST HIM FOR VIOLATING HIS RIGHT TO A SPEEDY TRIAL.

A. Defendants have a right to speedy trial.

The United States and Colorado constitutions guarantee a defendant the right to a speedy trial. U.S. Const., amend. VI; Colo. Const., Art. II, §§ 6 & 16. The Colorado legislature enacted a law designed to implement the speedy trial right: § 18-1-405, C.R.S.. A defendant’s constitutional right to a speedy trial is independent of his statutory right. *People v. Slender Wrap, Inc.*, 536 P.2d 850, 853 (Colo. App. 1975).

The burden of complying with the speedy trial requirements lies entirely with the prosecution and the trial court. *In re Lucy & Meresa*, 2020 CO 68, ¶ 21.

Indeed,

[a] defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. Moreover, ... society has a particular interest in bringing swift

prosecutions, and society's representatives are the ones who should protect that interest.

People v. DeGreat, 2020 CO 25, ¶ 17, quoting *Barker v. Wingo*, 407 U.S. 514, 527 (1972). It is not a defendant's responsibility to provide solutions to the government to enable his own trial.

The speedy-trial statute requires dismissal of a case when the defendant is not tried within six months and the delay does not qualify for one of the exclusions specifically set out in the statute. § 18-1-405(1), C.R.S.; *People v. DeGreat*, 2020 CO 25, ¶ 13. The language of the speedy trial statute is mandatory; the court has no discretion to mold other exceptions. *People v. DeGreat*, 2020 CO 25, ¶ 13.

(i) *Chief Justice Coats' April 16, 2020 Order cannot be read to authorize statutory speedy trial violations that do not fall within a statutory exclusion.*

The doctrine of separation of powers ensures that “the executive, legislative, and judicial departments each shall exercise only its own powers.” *People v. Wiedemer*, 852 P.2d 424, 436 (Colo. 1993). The Colorado Supreme Court may make rules “governing the administration of all courts and ... governing practice and procedure in ... criminal cases....” Colo. Const. art. VI, § 21. The legislature, on the other hand, is authorized to enact statutes addressing substantive, as opposed to procedural, matters. *Wiedemer*, 852 P.2d at 436.

In general, “rules adopted to permit the courts to function and function efficiently are procedural whereas matters of public policy are substantive[.]” *Wiedemer*, 852 P.2d at 436. Some overlap between substantive statutes and procedural rules is allowed, so long as there is no substantial conflict between statute and rule. *Wiedemer*, 852 P.2d at 436. But if a procedural rule is in direct conflict with a statutory provision, the procedural rule must give way. *People v. Hollis*, 670 P.2d 441, 442 (Colo. App. 1983).

The statutory right to a speedy trial protects defendants by “preventing prejudice caused by long delays and minimizing the anxiety that results from public accusation. Similarly, a speedy trial serves the interests of the general public by providing an expeditious determination of guilt ‘so that the innocent may be exonerated and the guilty punished.’” *Mosley v. People*, 2017 CO 20, ¶ 18 (internal citations omitted). These are public policy concerns, not matters related to permitting the court to function efficiently. The statute setting out the right to a speedy trial is therefore a substantive matter, not a procedural one.

Chief Justice Coats’ authority to issue orders related to jury trials is derived from the Supreme Court’s rule making authority cited above.⁶ This authority only

⁶ Coats’ April 16 order states that it is an “exercise by the supreme court of its constitutional rulemaking powers relative to the safe assembly of a fair jury pool

extends to making procedural rules. The April 16 Coats Order prohibits a court from requiring any person to appear for jury service before June 1, 2020. No provision was made (as was done in earlier Coats orders) for cases with speedy trial issues. The effect of the April 26 Coats Order reached beyond whether a citizen was required to appear for jury service and affected whether defendants received trials within their speedy trial deadline. In fact, the order is in direct conflict with the statutory requirement for speedy trials.

Although legislative and judicial authority may overlap to some extent, the Colorado Supreme Court does not have authority to override (or “suspend”) the legislatively enacted speedy trial statute. *Hollis*, 670 P.2d at 442 (“in substantive matters, a statutory enactment of the legislative branch prevails over a conflicting Supreme Court rule”), citing *People v. McKenna*, 585 P.2d 275 (Colo. 1978).

Because Chief Justice Coats did not have authority to issue an order that suspended the operation of the speedy trial statute, his April 16 is either void or the exception for speedy trial must be read in.⁷ Justice Coats’ earlier March 20 order excepted cases with speedy trial deadlines from its bar on jury trials and his later

during a health crisis[.]” This particular power is not specified in the Colorado Constitution but could only be derived from the power granted in Article VI, § 21.

⁷ Defendant makes no argument as to the effect of the April 16 order on cases not facing an approaching speedy trial deadline.

May 5 order provided a similar exception. *Compare* March 20 Coats Order (“excepting cases with imminent speedy trial deadlines”) *with* May 5 Coats Order (exception for “[p]roceedings necessary to protect the constitutional rights of criminal defendants”). Such an exception must be read into the April 16 order to avoid a separation of powers problem. Therefore, the April 16 order did not authorize violations of speedy trial that were not separately authorized in the speedy trial statute.

(ii) *Therefore, the only relevant exception to the speedy trial deadline is found in the statute: “any mistrial”.*

As relevant here: the speedy trial deadline will be tolled for the period of delay caused by “any mistrial” (up to three months per mistrial). § 18-1-405(6)(e); *see also* Crim. P. 48(b)(6)(V) (identical).

B. Mistrial standard.

Although the speedy trial statute allows an exception for “any” mistrial, mistrials must meet certain standards to be upheld.

(i) *Section 13-71-140, C.R.S. governs mistrials based on problems summoning or managing jurors.*

Where, as here, a mistrial was declared based on problems summoning or managing jurors, the declaration must meet the requirements of § 13-71-140:

The court shall not declare a mistrial ... based upon allegations of any irregularity in selecting, summoning, and managing

jurors, ... or based upon any other defect in any procedure performed under this article unless the moving party objects to such irregularity or defect as soon as possible after its discovery and demonstrates specific injury or prejudice.

§ 13-71-140.

There is no case law defining what constitutes “managing jurors”. However, the Colorado Uniform Jury Selection and Service Act, which contains § 13-71-140, applies to the jury pool, not just impaneled jurors. The term “managing” is not defined in the Act and therefore Colorado will use the plain and ordinary meaning of the term. *People v. Harrison*, 2020 CO 57, ¶ 16. To determine the plain and ordinary meaning, the court may consider a definition from a “recognized dictionary.” *Harrison*, 2020 CO 57 ¶ 16; *People v. Voth*, 2013 CO 61, ¶ 23 (citing Merriam-Webster Online Dictionary and Black’s Law Dictionary). “Managing” is defined by Merriam-Webster Online Dictionary as “to handle or direct with a degree of skill: such as (a) to exercise executive, administrative, and supervisory direction of; to treat with care; to make and keep[.]”⁸ All aspects of the jury pool, such as where they will sit during voir dire, are “managed” by the trial court.

⁸ Other definitions of “managing” from the same Merriam-Webster entry are not relevant here: to direct the professional career of; to succeed in accomplishing; to work upon or try to alter for a purpose. <https://www.merriam-webster.com/dictionary/managing> (last visited 08/02/2020).

A request for a declaration of mistrial under Crim. P. 24(c)(4) on the basis that it is unsafe to gather a jury pool is necessarily an allegation of an irregularity in managing jurors. Thus, the declaration must meet the requirements of §13-71-140, C.R.S.

(ii) *A mistrial can only be declared if it meets the “manifest necessity” standard.*

Separately from the requirements of 13-71-140, any declaration of mistrial must be “legally justified” in order to be upheld.⁹ *Maes v. Dist. Court In & For City & Cty. of Denver*, 503 P.2d 621, 624 (Colo. 1972). A trial court is legally justified in declaring a mistrial only “where the circumstances amount to ‘manifest necessity[.]’” *People v. Segovia*, 196 P.3d 1126, 1133 (Colo. 2008); *United States v. Jorn*, 400 U.S. 470, 485 (1971) (“the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant’s option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.”).

The requirement of “manifest necessity” for a mistrial was in place by 1824, before Colorado was admitted to the Union in 1876 and therefore necessarily

⁹ Issues related to the declaration of a mistrial are generally litigated in relation to violations of double-jeopardy, i.e., a mistrial after a jury has been impaneled. However, a mistrial declared before a jury is impaneled is subject to same analysis. *People v. Erickson*, 574 P.2d 504, 506 (Colo. 1978).

before the Colorado legislature enacted the speedy trial statute. *United States v. Perez*, 22 U.S. 579, 580 (1824); Colorado Const. §5. The “manifest necessity” requirement must therefore be understood to be part of the legislatively enacted statute. *Bermel v. BlueRadios, Inc.*, 2019 CO 31, ¶ 39 (“this court adheres to the rule that statutes are “not presumed to alter the common law” unless the statute “expressly [so] provides,”... that rule is rooted in the principle that a legislature is understood to act against a background of well-established common law rules” (internal citation omitted)).

Proving manifest necessity is not supposed to be easy. *Arizona v. Washington*, 434 U.S. 497, 505 (1978) (“the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one....The words “manifest necessity” appropriately characterize the magnitude of the prosecutor's burden.”). Manifest necessity requires “substantial and real” circumstances “that interfere with or retard the administration of honest, fair, even-handed justice to either, both, or any, of the parties to the proceeding.” *Segovia*, 196 P.3d at 1133. (internal quotation marks removed).

Further, “both case law and statutory criteria show that circumstances must be serious and outside the control of the trial court in order to justify a finding of ‘manifest necessity.’” *People v. Berreth*, 13 P.3d 1214 (Colo. 2000). And, a

mistrial is manifestly necessary only where other reasonable alternatives are not available. *Segovia*, 196 P.3d at 1133; *see also Jorn*, 400 U.S. at 487.

(iii) *To the extent Crim. P. 24(c)(4) purports to allow a mistrial to be declared without meeting the requirements of § 13-71-140 and the “manifest necessity” standard, it violates the separation of powers doctrine and is unconstitutional.*

The language of Crim. P. 24(c)(4) on May 5 when the mistrial was declared was: “At any time before trial, upon motion by a party or on its own motion, the court may declare a mistrial on the ground that a fair jury pool cannot be safely assembled due to a public health crisis.”

On July 22, 2020, Crim. P. 24(c)(4) was modified to read: “At any time before trial, upon motion by a party or on its own motion, the court may declare a mistrial in a case on the ground that a fair jury pool cannot be safely assembled in that particular case due to a public health crisis or limitations brought about by such crisis. A declaration of a mistrial under this paragraph must be supported by specific findings.” The new language attempts to incorporate the requirements of § 13-71-140 into Crim. P. 24(c)(4). Before the July 22 amendment, however, Crim. P. 24(c)(4) appears to authorize a declaration of mistrial without the need to comply with § 13-71-140. Such an authorization would be a violation of the separation of powers doctrine.

Similarly, to the extent that the original Crim. P. 24(c)(4) authorized the declaration of a mistrial without requiring a showing of manifest necessity, including that the circumstances leading to the mistrial were outside the control of the court, and that no other reasonable alternatives were available, the rule infringes on the legislature's prerogative to enact substantive law and is unconstitutional.

(iv) Crim. P. 24(c)(4) is subject to those same standards.

A mistrial under Crim. P. 24(c)(4), therefore, can only be legally justified when (1) it is unsafe to assemble a jury pool due to a public health crisis, (2) serious circumstances outside the control of the trial court have caused the inability to proceed safely; (3) no other reasonable alternatives are available, and (4) the moving party demonstrates “specific injury or prejudice.”

C. There was insufficient evidence to show a jury pool could not be assembled in Mesa County prior to the expiration of the speedy trial deadline.

(i) There was no evidence that it was unsafe to assemble a jury pool in Mesa County.

In its motion for mistrial, the Prosecution did not allege any information specific to Mesa County to show that a jury could not be safely assembled there prior to the speedy trial deadline. Nor did the Prosecution allege any specific injury or prejudice it would suffer if a mistrial was not declared. It simply relied

on state-wide orders by the Executive Branch, specifically Executive Order D 2020 044, and an outdated 21st Judicial District order (related to CDPHE's statewide response), meanwhile completely ignoring Mesa County Public Health's variance and the specific information from CDPHE related to Mesa County. *Compare App'x D with App'x I.*

In fact, Executive Order D 2020 044 cannot be read alone. The requirements referred to by the Prosecution in that order are not direct orders to the public, rather they are directions to CDPHE to issue a public health order fleshing out the broad-stroke requirements of D 2020 044. *See* D 2020 044 at II.H.

CDPHE did issue an order pursuant to the Governor's direction: PHO 20-28 (April 26, 2020). In that order, CDPHE specifically authorized continued Judicial Branch operations. CDPHE PHO 20-28, §§ II.B, II.I, III.A.4, III.B, & III.D.3. Even presuming that the CDPHE order was binding on the Judicial Branch,¹⁰ it required 6 feet of distance only between employees, and simply "encouraged" that distance between non-employees. CDPHE PHO 20-28, § II.I.1.b & 3.b. Similarly, it only "encouraged" the use of masks by non-employees. None of these orders clearly made assembly of a jury pool unsafe.

¹⁰ The CDPHE order did not address the separation of powers issues involved if the executive branch is directing operations of the judicial branch.

Similarly, the district court made no findings specific to why a jury pool could not be safely assembled in Mesa County in its order granting a mistrial. It simply relied on a generic reference to emergency orders from “local and state officials” barring gatherings of more than 10 people and requiring social distancing and on the Prosecution’s motion. The court had noted that it needed a jury pool of 22 people. App’x E, pp 8:18–19. In fact, however, the then-current Mesa County PHO allowed gatherings of up to 50 people at places of worship and up to 30% of a restaurant’s capacity with no set numerical limit of people. App’x I, pp 5 & 9. There were no findings made as to why 50 people could gather for worship, but 30 people¹¹ could not gather to provide a trial by jury. The orders by “local and state officials” did not provide support for finding that a jury could not be safely assembled.

During the May 4 conference, Defendant had urged the district court to consider information specific to Mesa County in making its decision on whether to declare a mistrial. App’x E, p 6:19–24. The District Court did not cite to any such information in its decision. App’x F & App’x H.

¹¹ Approximately 30 people, including the jury pool and other trial participants.

(ii) *It was not “impossible” to assemble a jury pool in compliance with the law.*

The People’s motion appears to conflate what would be needed to show that a jury could not *safely* assemble with what would be needed to show a jury could not *legally* assemble. App’x D, ¶ 4 (“Given the current public safety lockdown and slowdown orders, a jury trial may not be safely held in Mesa County in May, 2020.”). The state-wide “public safety lockdown and slowdown orders” say nothing about whether a jury could be safely assembled in Mesa County. Whether it would be “physically impossible to proceed with the trial in conformity with the law” is a question under § 18-1-301(2)(b)(I) and was not alleged by the Prosecution.

It would not have been impossible to legally assemble a jury for a trial before the speedy trial deadline under the Judicial Branch orders in place at the time: Chief Justice Coats’ April 16 order (see § I.A.i 13, *supra*) and Chief Judge Flynn’s April 12 order all provided exceptions allowing cases with speedy trial issues to move forward or must be read to provide such an exception.

To the extent the district court’s order is based on a belief that orders of “state and local” executive branch officials were binding on the Judicial Branch, that belief is based on a flawed understanding of the relationship between the Judicial and Executive Branches. The Executive Branch does not have authority to

govern the actions of the co-equal Judicial Branch, a fact recognized in Chief Judge Coats' orders requiring the chief judge of any judicial district to apply to the Colorado Supreme Court for a waiver of the jury trial ban, not to the Governor, CDPHE, or the local health department. Colo. Const. art. III; *see also Frost v. Thomas*, 56 P. 899, 900 (Colo. 1899) ("Our state government is divided into three co-ordinate branches, executive , legislative, and judicial, each of which, by the constitution, has its powers limited and defined. They are of equal dignity and, within their respective spheres, equally independent.").

Even if the Executive Branch has the authority to direct operations of the Judicial Branch during a pandemic, it would not have been physically impossible to legally assemble as the Governor and CDPHE had provided that Judicial Branch operations could go on with limited restrictions that would not have prevented assembling a jury pool and local orders made clear that gatherings of more than 10 people were allowed in some circumstances, including allowing people to worship and to eat at restaurants. CDPHE PHO 20-28, II.I; App'x I, pp 5 & 9.

D. The circumstances here were not outside the control of the trial court.

Although the pandemic itself is obviously outside the control of the Judicial Branch, the courts' ability to prepare for a pandemic and its response to the current pandemic is not.

In *Berreth*, this Court held that there was no manifest necessity for a mistrial where the district court's clerk resigned without notice during a trial, the district court's docket was crowded, and the trial ran longer than anticipated. *Berreth*, 13 P.3d at 1218 & 1215. Although this Court sympathized with the difficult position of the district judge, it could not agree that the mistrial "was compelled by forces beyond the trial judge's control and that to continue the trial would have been contrary to the fair administration of justice." *Berreth*, 13 P.3d at 1218. In other words, it was within the trial court's control to anticipate an employee resigning, a crowded docket, and a lengthy trial and to plan for those eventualities.

In making its decision in *Berreth*, this Court contrasted the circumstances presented there with the situation where a trial judge himself becomes suddenly ill and the chief judge cannot find a replacement. *Berreth*, 13 P.3d at 1217, citing *United States v. Lynch*, 598 F.2d 132, 135 (D.C. Cir. 1978) (jury had already been impaneled before judge fell ill). Such a circumstance indeed can be found to be out of the court's control and legally justify a mistrial. *Id.* But, "a mistrial cannot

be based primarily on circumstances that are within the trial court's control and under its supervision.” *Id.* at 1218. Similarly, where no efforts were made to find a replacement judge to try the case within the speedy trial deadline, recusal of the presiding judge is not sufficient to allow a mistrial. *People v. Arledge*, 938 P.2d 160, 167–68 (Colo. 1997).

This case is like *Berreth* and *Arledge*: the court could have and should have made a plan for the eventuality of a pandemic.

(i) *Failure to call a jury.*

The trial court here failed to summon a jury pool in a timely fashion and was thus unprepared to hold a trial before the end of the speedy trial period. The Prosecution noted in its motion for mistrial that Chief Judge Flynn had directed the Jury Commissioner of the district not to summon any jurors for trial during the month of May. App’x D, p 1. The District Court relied on its inability to summon a jury pool in granting the motion for mistrial. App’x F; *see also* App’x E, p 14:13–21. During the May 4 conference argument over the People’s motion for continuance or mistrial, the District Court was clear that it would reset the trial for June 1 (within speedy) if it could summon a jury pool in time. Only when the court discovered that a jury pool could not be summoned in time for a June 1 trial did it declare a mistrial. App’x E, p 14:13–21 (“If it is vacated and there is no way

to get a jury on June 1st, then the trial will be reset to August 3rd through the 6th of 2020.”); App’x F.

The jury commissioner did not issue any summons to any jurors in May, apparently under the mistaken impression that the order stating that no jurors were to be summoned for trials set in May meant that no summons should be issued in May for trial set after May. Nothing in the April 16 Chief Justice Coats Order or the April 12 Chief Judge Flynn order indicated that jury summons could not go out in May for appearances in June.

Whether to summon jurors or not was a matter within the control of the court. The court relied on its failure to summon jurors in a timely fashion to declare a mistrial. This simply is not an adequate basis for a mistrial. *See, e.g. Jorn*, 400 U.S. at 486 (lack of preparedness by the Government to hold the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee).

(ii) *Pandemic preparedness planning.*

- a) The risk of a pandemic has been known to the State of Colorado for over a decade.

While the current situation is unusual and challenging, it did not take a Nostradamus to predict that it would happen. *Contra Lucy*, 2020 CO 68 ¶ 34. In fact, by 2007, CDPHE was concerned enough about a pandemic that it published

“Guidelines for Business Pandemic Readiness” to assist the Colorado business community in preparing for one. <https://tinyurl.com/y29y9cpm> (last visited 08/02/2020) (the “Guidelines”). CDPHE has since warned that a pandemic is “inevitable.” <https://tinyurl.com/yyb6duh2> (the “Mitigation Plan”), at pdf p 527.¹²

The scope of the problem was also predicted: “[u]p to 40% of your workforce may be absent at one time.... Communities may be affected in 6–8 week waves that may continue for up to 18 months.” Guidelines, pdf p 4. In its most recent Hazard Mitigation Plan,¹³ Colorado’s Division of Homeland Security and Emergency Management devoted 14 pages to a discussion of the hazards a pandemic could present to Colorado.¹⁴ Mitigation Plan, pdf pp 526–39. Its

¹² “A pandemic is defined as a disease affecting or attacking the population of an extensive region which may include several countries and/or continents. A pandemic is a worldwide epidemic of a disease and may occur when a new virus appears against which the human population has no immunity.” Mitigation Plan, pdf p 515. This document may also be accessed by navigating to <https://www.colorado.gov/dhsem>, hovering over “Emergency Management” and selecting “Resources”, then, under “Plans”, selecting “2018-2013 Colorado Hazard Mitigation Plan” (last visited 08/04/2020).

¹³ This document was created pursuant to the Colorado Disaster Emergency Act of 1992, § 24-33.5-701, et seq., as amended. Mitigation Plan, pdf p 4.

¹⁴ Most disasters identified by Colorado’s Division of Homeland Security would not have a significant effect on the judicial system as they are reasonably local or short in duration. *See generally*, Mitigation Plan. However, pandemics are, by definition, not local and, as noted in the text, a pandemic is expected to last a significant period of time. In other words, even if the Judicial Branch did not have to do much planning in regard to other disasters, pandemics are (and were) known to be different.

description was largely an accurate prediction of what we are currently experiencing:

Pandemics have the ability to shut down large segments of the population for long periods of time. Unscheduled sick leave from a large portion of the workforce could result in millions, even billions, of dollars lost in productivity. As previously discussed, an estimated 3,000 to 30,000 people could die as a result of a widespread, deadly pandemic. This is the equivalent population of small towns or counties.

In the event of a pandemic, medical personnel would be incredibly overtaxed. Help from the federal government and from other states would likely be limited, as all personnel would be deployed throughout the country already. While the federal government would do what they can, communities would have to rely on their own resources for a much longer period of time as compared to other disasters.

Medications may be limited to help prevent or treat the disease. It takes five to six months to manufacture a vaccine, but it would likely become available in small quantities at first. It may become necessary to ration limited amounts of medications, vaccinations, and other health care supplies.

Social and economic disruptions could be temporary but may be amplified in today's closely interrelated and interdependent systems of trade and commerce. Social disruption may be greatest when rates of absenteeism impair essential services, such as power, transportation, and communications.

Based on an extrapolation for a severe pandemic, Colorado deaths are estimated to exceed 30,000. It is assumed that the pandemic will occur in two waves, lasting six to eight weeks each. Colorado can expect to see approximately 350 deaths per day. This factors in the 80 deaths per day that Colorado typically has per day.

In a severe pandemic, it is expected that absenteeism may reach 40 percent due to illness, the need to care for ill family members, and fear of infection during the peak weeks of a community outbreak. Certain public health measures (closing schools, quarantining household contacts of infected individuals, “snow days”) are likely to increase rate of absenteeism.

Outbreaks can be expected to occur simultaneously throughout much of the United States, preventing shifts in human and material resources that usually occur in response to other disasters.

[] Localities must be prepared to rely on their own resources to respond. The effect of influenza on individual communities will be relatively prolonged (weeks to months) in comparison to other types of disasters.

Effective prevention and therapeutic measures, including vaccine and antiviral agents, may be delayed and, initially, in short supply or not available.

In the event of a pandemic, upwards of 50 percent of the working population may be out sick. Fear of public gatherings would eliminate most in-person commerce.

With an estimated 30 percent of the workforce absent, the continuity of government may be severely affected. The state has Continuity of Operations Plans (COOPs) for pandemics that seek to minimize the amount of time and efficiency lost to a pandemic flu.

Mitigation Plan, pdf p 529–32. The Mitigation Plan noted that a pandemic may be so severe or long-lasting that infrastructure may not be able to be maintained.

Mitigation Plan, pdf p 536. These warnings painted a clear picture of substantial disruptions to all aspects of government operations.

Not only was the risk of a pandemic known to Colorado well over a decade ago, one of the most disruptive aspects¹⁵ of the response to the pandemic was also known. “Social distancing” was adopted as an official U.S. policy in response to a pandemic in 2007. <https://stacks.cdc.gov/view/cdc/11425>, pdf p 8 & 34. Since at least 2016, Colorado has acknowledged that it would use social distancing during a pandemic response. <https://www.colorado.gov/pacific/dhsem/atom/60606>, p 246 at 1.

Another disruptive aspect, wearing masks, should also not have been a surprise as it has happened in Colorado before. During the 1918 influenza pandemic, Coloradans were ordered to wear masks. “Health Proclamation,” *Denver Post*, 24 Nov. 1918, 2; “Epidemic Closing Order Revoked; Masks Urged To Stop Disease Spread,” *Rocky Mountain News*, 24 Nov. 1918, 1. However, Coloradans were reluctant to do so at sufficient rates to stop the spread of the disease. “Police Will Enforce Flu Masking Order,” *Denver Post*, 25 Nov. 1918, 1. Ultimately, Colorado had one of the highest mortality rates in the country during the 1918 influenza pandemic. Mitigation Plan, pdf p 528.

¹⁵ Disruptive to society in general, but also disruptive specifically to the jury trial process.

Since the 1918 pandemic, there have been several others: 1957 (Asian Flu); 1968 (Flu); 2003 (SARS); 2009 (Swine Flu / H1N1). Mitigation Plan, pdf pp 528–29; <https://www.cdc.gov/sars/> (last visited 07/18/2020). Ebola did not turn into a pandemic in 2014, but it caused enormous concern within the United States. See <https://tinyurl.com/y33stpea>. These pandemics and scares provided additional warning that plans should be made.

b) Colorado has been honing its disaster response for decades.

Indeed, the government of Colorado as a whole, did make plans. Since at least 1992, Colorado’s governor has had an advisory group dedicated to planning the government’s response to an epidemic disease, called the “disaster emergency council” or the “expert emergency epidemic response committee.” § 24-33.5-704.5(1)(a), C.R.S. (2018); § 24-33.5-704(8)(a), C.R.S. (2014); § 24-33.5-704(3)(a), C.R.S. (2012); § 24-32-2104(3)(a), C.R.S. (2010); § 24-32-2104(3)(a), C.R.S. The purposes of this group have been to “advise ... on all matters pertaining to the declaration of disasters and the disaster response and recovery activities of the state government” (1992, 2010, 2012) and, more recently, to “review and amend...the supplement to the state disaster plan that is concerned

with the public health response to...pandemic influenza, and epidemics caused by novel and highly fatal infectious agents” (2014, 2018).¹⁶

In addition, Colorado passed a law requiring the CDPHE to monitor, investigate and control the causes of epidemic and communicable diseases affecting public health in Colorado. Mitigation Plan, pdf p 515. Colorado also created the Division of Homeland Security and Emergency Management and the Office of Emergency Management to prepare Colorado to survive, respond to, and recover from emergencies such as a pandemic. §§ 24-33.5-702 & -705; §§ 24-33.5-1601 & -1604 Those preparations include generally how to “minimize interruption of essential services and activities” and specifically how to ensure “continuity of government services” during a pandemic.¹⁷ Mitigation Plan, pp 2 & 532.

¹⁶ Interestingly, the Attorney General has always been a member of that advisory group. § 24-33.5-704.5(1)(b)(I)(F), C.R.S. (2018); § 24-33.5-704(8)(b)(I)(F), C.R.S. (2014); § 24-33.5-704(3)(a), C.R.S. (2012); § 24-32-2104(3)(a), C.R.S. (2010); § 24-32-2104(3)(a), C.R.S.. The Attorney General is “legal counsel and advisor of each department, division, board, bureau, and agency of the state government other than the legislative branch.” § 24-31-101, C.R.S. What obligation the Attorney General had to advise the Judicial Branch on pandemic preparedness is beyond the scope of this Petition.

¹⁷ Colorado has identified Judicial Branch operations as a “critical government function”. *See, e.g.*, CDPHE PHO 20-28, at III.D.

- c) The Judicial Branch was consulted in the disaster preparedness planning process but failed to make plans for holding jury trials during a pandemic.

As part of its preparedness planning process, Colorado's Homeland Security Strategy working group surveyed its "stakeholders"¹⁸ in order to identify issues that the state emergency management strategy should address.

<https://tinyurl.com/y5dew3cy>, p 15. The Colorado Judicial Branch was consulted as a stakeholder. *Id.*, p 54. Thus, the Attorney General, the Colorado Judicial Branch, and the State of Colorado were all aware of the importance of the emergency planning process in Colorado.

The State has the responsibility to bring a defendant to trial and the duty to ensure that trial is consistent with due process. *People v. DeGreat*, 2020 CO 25, ¶ 17. Yet, the Judicial Branch apparently made no plans for how it would continue to safeguard defendants' statutory rights to a speedy trial and operate safely during a pandemic.¹⁹

¹⁸ "STAKEHOLDER: A stakeholder is an individual or organization who can affect or is affected by an organization, strategy, or project."

<https://tinyurl.com/y5dew3cy>, p 59.

¹⁹ "A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. Moreover, ... society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest." *People v. DeGreat*, 2020 CO 25, ¶ 17, quoting *Barker*, 407 U.S. at 527. Therefore, it is not a defendant's responsibility to provide solutions to the government to enable his own

While it is comforting to think that “we could not have predicted this”, it simply is not true. The State of Colorado could, *and did*, predict that a pandemic was likely and the outcome of pandemic would be almost exactly what we are in the midst of. The fact is that this risk was known but the Judicial Branch did not make plans in advance, nor did any of the judicial districts, nor the trial courts. The fact that the Judicial Branch did not prepare for the inevitable pandemic, does not place the current situation “out of the control of the trial court.” Defendant’s constitutional rights should not be a casualty of the Judicial Branch’s failure to prepare.

***E.* The district court did not determine whether there were reasonable alternatives to a mistrial**

Alternatives to business as usual are best explored before an emergency has arisen. However, even if plans that would have addressed a pandemic were not made in advance, the court still has an obligation to determine if there are

trial. However, some possibilities would have been for the Judicial Branch to enter into contracts with large venues in advance of a pandemic to allow the Judicial Branch to use them to safely hold trials, requiring a courthouse to maintain one “pandemic ready” courtroom with plexiglass shields and adequate ventilation, or purchasing devices that would allow a defendant and his counsel to safely but quickly and easily confer during a trial. Even now, some of these options may be possible.

reasonable alternatives available before declaring a mistrial.²⁰ Here, no reasonable alternatives were explored.

The trial court apparently did not seek to have its chief judge request a variance from the Colorado Supreme Court to allow the trials to take place. This alternative was clearly reasonable. Mesa county had already sought (and received) a variance to allow businesses to expand their operations beyond the orders in place. The court could reasonably have understood it should do the same. There was no evidence or finding that this was not a reasonable alternative.

The trial court did not have a discussion with the local public health department to explore “reasonable alternatives” to a mistrial that would safeguard the defendants’ constitutional rights while still satisfying the public health department. If it had done so, it might have discovered that the public health department was seeking a variance from the State’s Department of Public Health because, in fact, it was possible by May 18 to gather more than 10 people safely in a room.

²⁰ As noted above, a defendant has no obligation to come up with possible alternatives to bring himself to trial. In this case, however, Defendant did raise several possibilities. None of them were explored by the District Court.

The trial courts did not seek to hold the trial in an alternate location. Trials have been held outside of courthouses before.²¹ The trial court did not explore the possibility of holding jury selection in another location or in an online forum while holding trial in person after a jury was selected to keep down the number of people in the courthouse. These alternatives may have been reasonable, but they were not explored.

There is no evidence that “reasonable alternatives” were not available.

F. Conclusion.

Courts cannot suffer from myopia regarding their own operations and then call the results of that failure “manifest necessity”. There was no manifest necessity to declare a mistrial in this case, nor were the requirements of § 13-71-140 met.

²¹ See, e.g., <https://tinyurl.com/y65lwp5z> (Colorado’s Courts in the Community program); 8.C.I.V “Problem-Solving Courts” <https://tinyurl.com/yy5ryypk> (“The City of Portland, Oregon, for example, opened a number of ‘Community Courts’ throughout the city, in many cases holding court at existing local community centers.”); “Community/Homeless Courts” <https://www.courts.ca.gov/5976.htm> (“[California] homeless courts are special court sessions held in a local shelter or other community site”); “Why is community court held outside a traditional courthouse?” <https://tinyurl.com/y6ff5cn4> (having court hearings in a safe, neutral and community-centered location such as a library or community center encourages the participants to stay engaged and removes the stigma associated with the courthouse.).

CONCLUSION

This Court should exercise its superintending control over the inferior courts in this state and thereby insure the harmonious working of the judicial system.

People ex rel. Att’y Gen. v. Richmond, 26 P. 929, 929 (Colo. 1891). The courts need guidance on the requirements for declaring a mistrial during the pandemic because even with the best intentions, they are violating defendants’ statutory speedy trial rights.

WHEREFORE, Mr. Castro respectfully asks this Court to issue a rule to show cause as to why the lower court’s order should not be reversed, and why Mr. Castro should not have the charges against him dismissed.

LIST OF SUPPORTING DOCUMENTS

- Appendix A: Motion to Dismiss for Violation of Mr. Castro’s Speedy Trial Rights and Due Process of Law (June 17, 2020)
- Appendix B: People’s Response to Motion to Dismiss for Violation of Mr. Castro’s Speedy Trial Rights and Due Process of Law (July 8, 2020)
- Appendix C: Order re: Defendant’s Motion to Dismiss (July 8, 2020)
- Appendix D: People’s Motion to Continue Jury Trial and/or Declare a Mistrial (May 4, 2020)
- Appendix E: Transcript, May 4, 2020

- Appendix F: Order: People’s Motion to Continue Jury Trial and/or Declare a Mistrial (May 5, 2020)
- Appendix G: People’s Supplementation of Record Related to People’s Motion to Continue Jury Trial and/or Declare a Mistrial (May 7, 2020)
- Appendix H: Order: People’s Supplementation of Motion to Continue Jury Trial and/or Declare a Mistrial (May 7, 2020)
- Appendix I: Mesa County Public Health, Public Health Order MCPH2020-02 (April 30, 2020)
- Appendix J: Twenty-First Judicial District Administrative Order of the Chief Judge 2020-05 (March 18, 2020)
- Appendix K: Twenty-First Judicial District Administrative Order of the Chief Judge 2020-07 (Amending 2020-05) (April 12, 2020)

Respectfully submitted August 10, 2020.

/s/ Lucy H. Deakins

Lucy H. Deakins, Reg. No. 41729

Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE

I certify that on August 10, 2020 a copy of the foregoing **PETITION FOR RULE TO SHOW CAUSE** was served via CCE, email, and/or mailed by United States Mail, postage prepaid and addressed to:

Attorneys for Petitioner-Appellant

Sarah Tenhoff, #43400
Tenhoff Law, LLC
114 N. Spruce St, Ste. 102
Grand Junction, CO 81501
Phone: 970-235-1053

Kimberly Van Dyke, #46511
Van Dyke Law
102 N. 4th St., Ste. 107
Grand Junction, CO 81501
Phone: 970-628-1640
Fax: 970-628-1641

District Attorneys

Richard B. Tuttle, #19015
Assistant District Attorney
Twenty-First Judicial District of Colorado
125 Spruce
Grand Junction, CO 81501
Phone: 970-244-1730
Fax: 970-244-1729

Mesa County District Court Judge (VIA U.S. MAIL)

The Honorable Matthew D. Barrett
Mesa County District Court
125 N. Spruce Street
Grand Junction, CO 81506

By: /s/ Lucy H. Deakins