

SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 2 East 14 th Avenue Denver, Colorado 80203	DATE FILED: July 28, 2020 9:08 AM FILING ID: 46D63B7ADB066 CASE NUMBER: 2020SA262
Fremont County District Court Honorable Ramsey Lama Case No. 2020CR54	
IN RE: THE PEOPLE OF THE STATE OF COLORADO <i>Respondent-Appellee</i> v DAVID SUBJACK <i>Petitioner-Appellant</i>	
<i>Attorney for David Subjack</i> Kyle R Nettleblad, #51543 MEGAN A. RING, COLORADO STATE PUBLIC DEFENDER 8044 W. Hwy 50, Ste. 100 Salida, CO 81201 Phone: 719-539-3521 ext. 1587 Fax: 719-539-4597 Email: Kyle.Nettleblad@coloradodefenders.us	▲ COURT USE ONLY ▲ Case Number:
IN RE: PEOPLE V. DAVID SUBJACK	

Mr. Subjack petitions this court, pursuant to C.A.R. 21, to issue an order to show cause and to grant appropriate relief as requested below.

THE PARTIES

The petitioner in this original proceeding is David Subjack, the defendant in the district court. The proposed respondents are the People of the State of Colorado (the prosecution) and the Fremont District Court (the trial court). *See People v. Williams*, 987 P.2d 232, 233 n.1 (Colo. 1999) (acknowledging that, although any relief under C.A.R. 21 would issue against the tribunal below, the prosecution is the “real party in interest”).

TRIBUNAL BELOW

The tribunal that issued the order that is the subject of this original proceeding is the Fremont District Court. The contested order was issued in Case No. 2020CR54.

ENTITY AGAINST WHICH RELIEF IS SOUGHT

The relief requested in this case would issue against the Fremont County District Court.

RULINGS COMPLAINED OF AND RELIEF SOUGHT

The ruling complained of here is the district court’s denial of a Request for a Preliminary Hearing on July 13, 2020. Appendix G. The district court ruled that when a defendant, like Mr. Subjack, is serving a Department of Corrections Sentence, that Department of Corrections Sentence is the “primary” basis of that defendant’s custody and therefore the defendant is not “in custody” for the purpose of demanding a

preliminary hearing in any other case, even when an arrest warrant was issued and there is bond set in that other case.

Mr. Subjack seeks a preliminary hearing in this matter.

NO OTHER ADEQUATE REMEDY IS AVAILABLE

This Court should exercise its discretion to hear this Rule 21 appeal because no other adequate remedy is available, the case raises an issue of first impression, and the issue is of significant public importance. Though 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 would prove inadequate.” *Id.*

First, a direct appeal is not sufficient to address this issue concerning a preliminary hearing because Mr. Subjack’s right to a preliminary hearing would be moot after trial. *People v. Tafoya*, 434 P.3d 1193 (Colo. 2019).

Next, the issue at hand is one of first impression. Although this Court has previously denied cert on one of the cases relied upon by the trial Court, Justice Martinez wrote that the issue of “primary custody” should be addressed. *Taylor v. People*, 04SC541, 2004 WL 2926373 (Colo. 2004). This court has not directly addressed

whether an individual's in-custody status must be the "primary basis" for their present incarceration for the purposes of whether they are entitled to a preliminary hearing.

ISSUE PRESENTED

Whether a criminal defendant who is unable to post bond on a class four felony is in custody and entitled to a preliminary hearing on that charge, as specifically provided for by Colorado statute and rule, even if the defendant is also in custody on a separate unrelated charge.

FACTUAL AND PROCEDURAL BACKGROUND

On January 21, 2020, a warrant was issued for Mr. Subjack. Appendix A, Affidavit for Arrest. Bond was set at \$10,000 cash-only. *Id.* The District Court thereafter issued a writ of prosequendum following a request by the prosecution. Appendix B, Minute Orders. On March 10, 2020, the prosecution filed a Complaint and Information charging Mr. Subjack with Possession of Contraband in the First Degree – Dangerous Instrument, pursuant to § 18-8-204.1(1), (3) C.R.S. (2020), a Class 4 Felony. Appendix C, Felony Complaint for Fremont Case 20CR54.

Mr. Subjack was advised by the District Court and counsel was appointed on March 11, 2020. On March 12, 2020, counsel, on behalf of Mr. Subjack, filed an

invocation of several rights, including Mr. Subjack's right to a preliminary hearing. Appendix D, Invocation of Rights.

On April 20, 2020, Mr. Subjack requested a preliminary hearing, which was set for June 1, 2020. Appendix B. On June 1, 2020, the Prosecution requested and the Court granted a request for a continuance, over the objection of the defense. *Id.* At that time, the Prosecution requested that the Court to find that Mr. Subjack was not entitled to a preliminary hearing in the present case. *Id.* Mr. Subjack filed a written response on June 15, 2020, arguing that he was entitled to a preliminary hearing. Appendix E, Defense's Response to People's Oral Request to Vacate Preliminary Hearing.

Mr. Subjack is in custody unable to post bond (Appendix F) on a Class Four Felony. (Appendix C). The district court issued an order on July 13, 2020, overruling Mr. Subjack's written objection to the Prosecution's request to vacate the preliminary hearing. (Appendix G). Mr. Subjack filed a motion to request the district court reconsider its July 13, 2020 order. (Appendix H). The district court denied Mr. Subjack's request for reconsideration on July 27, 2020. Mr. Subjack appeals from this order.

**ARGUMENTS IN SUPPORT OF REQUEST FOR RELIEF PURSUANT
TO C.A.R. 21**

- 1. Mr. Subjack was entitled to a preliminary hearing under section 16-5-301(1)(b)(II), C.R.S. (2020) and Crim. P. 7(h)(1) because he is in custody for the offense for which the preliminary hearing is requested.**

By statute and rule, defendants charged with felonies that are “in custody” have the right to a preliminary hearing. § 16-5-301(1)(b)(II), C.R.S. (2020); Crim. P. 7(h). The question here is whether the case at issue must be the “primary basis” for Mr. Subjack’s in-custody status to trigger his right to a preliminary hearing?

- A. The plain language of the preliminary hearing rule supports the conclusion that Mr. Subjack is in custody and is therefore entitled to a preliminary hearing.**

An individual who is not otherwise entitled to a preliminary hearing may demand a preliminary hearing if the defendant is “in custody.” § 18-1-404(2)(b), C.R.S. (2020); § 16-5-301(1)(b)(II), C.R.S. (2020); Crim. P. 7(h). Nothing within the plain language of the statutes or rules require that the “primary basis” for an individual’s custodial status must be the case at issue.

As relevant here, section 16-5-301(1)(b)(II) provides in pertinent part:

(II) Any defendant accused of a class 4, 5, or 6 felony or level 3 or level 4 drug felony who is not otherwise entitled to a preliminary hearing pursuant to subparagraph (I) of this paragraph (b), may demand and shall receive a preliminary hearing within a reasonable time pursuant to paragraph (a) of this subsection (1), if the defendant is in custody for the offense for which the preliminary hearing is requested; except that, upon motion of either party, the court shall vacate the preliminary hearing if there is a reasonable showing that the defendant has been released from custody prior to the preliminary hearing.

C.R.S. § 16-5-301(1)(b)(II).

Similarly, Colo. R. Crim. P. 7(h)(1) provides in pertinent part:

... any defendant accused of a class 4, 5, or 6 felony or a level 3 or 4 drug felony who is not otherwise entitled to a preliminary hearing may request a preliminary hearing if the defendant is in custody for the offense for which the preliminary hearing is requested; except that, upon motion of either party, the court shall vacate the preliminary hearing if there is a reasonable showing that the defendant has been released from custody prior to the preliminary hearing....

Colo. R. Crim. P. 7(h)(1). Where the plain language of a statute is unambiguous, the Court should give effect to that plain language. *Danielson v. Castle Meadows, Inc.*, 791 P.3d 1106, 1111 (Colo. 1990) (“If the legislative intent of a statute is clear from the plain language of the statute, the courts must give effect to the statute according to its plain language.”). As such, a court should not resort to statutory interpretation unless the plain language is ambiguous. *6S Corp. v. Martinez*, 831 P.2d 509 (Colo.App. 1992). Nothing within the plain language of the relevant statutes or rules is ambiguous and requires further interpretation. Mr. Subjack is in custody for the purposes of the statute and entitled to a preliminary hearing, as he requested.

The trial court’s reading of the law would render portions of section 16-5-301(1)(b)(II) and Crim. P. 7(h) superfluous. Based on the trial court’s interpretation, the existence of a case in any other jurisdiction where a defendant is also in custody, or even a parole hold that might be lifted the next day would serve to nullify an individual’s right to preliminary hearing if a court finds that the present case is not the “primary basis” for their incarceration. Presently, the creation of a “primary custody” status determination is an unnecessary creature of judicial legislation that reaches beyond the plain language of the statutes and rules.

Further, it is significant that both the statute and the rule only contain a single, specific exception to the preliminary hearing entitlement. Both provide that the

defendant “shall receive” a preliminary hearing upon request, “except that, upon motion of either party, the court shall vacate the preliminary hearing if there is a reasonable showing that the defendant has been released from custody prior to the preliminary hearing.” C.R.S. 16-5-301(1)(b)(II); Colo. R. Crim.P. 7(h)(1). This single exception does not apply in Mr. Subjack’s case.

“Under the rule of interpretation *expressio unius exclusio alterius*, the inclusion of certain items implies the exclusion of others.” *Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001); *Cain v. People*, 327 P.3d 249, 253 (Colo. 2014). Accordingly,

[a]n exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted and excludes all other exceptions. *See New York Indemnity Co. v. Industrial Comm'n*, 86 Colo. 364, 281 P. 740 (1929). An exception not made by the legislature is not to be read into the statute. *See Karoly v. Industrial Comm'n*, 65 Colo. 239, 176 P. 284 (1918); *see also Reale v. Board of Real Estate Appraisers*, 880 P.2d 1205 (Colo.1994)(*expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another).

Lang v. Colorado Mental Health Inst. in Pueblo, 44 P.3d 262, 264 (Colo. App. 2001).

In *Cain, supra*, this Court applied that rule of interpretation to the portion of the DUI statute governing admissibility of preliminary breath test results. *Cain, supra*, at 252-253. This Court noted the statute provided that such results were inadmissible in court proceedings, with only one specifically identified exception. Applying *expressio unius est exclusio alterius*, this Court rejected the argument that any additional exceptions

should be read into the statute. *Cain, supra* at 253 (“ ‘Under the rule of interpretation *expressio unius exclusio alterius*, the inclusion of certain items implies the exclusion of others.’ ... Hence, we read the General Assembly's inclusion of a single, specific, narrow exception to mean that the General Assembly intended that there be no other exceptions to the rule that PBT evidence is inadmissible.” (internal citation omitted).; *see also People v. Worosello*, 463 P.3d 308, 312 (Colo. App. 2019) (“ ‘Under the rule of interpretation *expressio unius exclusio alterius*, the inclusion of certain items implies the exclusion of others.’ ... By specifying one circumstance where incompetence excepts a Rule 35(c) motion from the time limits in section 16-5-402(1), the General Assembly intended that no other competence-related exception exist.” (internal citation omitted)).

Similarly, here, the General Assembly’s specification of a single exception in the statute (and this Court’s specification of the same single exception in the rule) implies the exclusion of any other exceptions. Further, “an exception not made by the legislature is not to be read into the statute.” *Lang, supra* at 264 (citing *Karoly v. Industrial Comm'n*, 65 Colo. 239, 176 P. 284 (1918) and *Reale v. Board of Real Estate Appraisers*, 880 P.2d 1205 (Colo.1994)). Since the lone exception in the statute and rule is inapplicable to Mr. Subjack, he is entitled to his preliminary hearing.

B. The Court of Appeals's decisions in *Pena* and *Taylor* are incorrect, especially in light of this Court's recent ruling in *Russell*.

The District Court relied on two Court of Appeals cases, *People v. Taylor*, 104 P.3d 269 (Colo. App. 2004), and *People v. Pena*, 250 P.3d 592 (Colo. App. 2009), in finding that Mr. Subjack was not in custody for the purposes of the preliminary hearing statute. Appendix G, pp 9. In *Taylor*, the Court of Appeals found that the defendant was not entitled to a preliminary hearing as he was in the custody of another jurisdiction. *Taylor*, *supra* at 272. The *Taylor* Court cited a purpose of preliminary hearings as serving to facilitate the the release of defendants on cases where no probable cause exists. *Ibid*, citing *Gerstein v. Pugh*, 420 U.S. 103 (1975).

However, this is not the only purpose of preliminary hearings. Beyond ensuring release, preliminary hearings further serve as a screening device to test the sufficiency of evidence prior to expending the time, cost, and potential embarrassment of a public trial. *People ex. Rel. Farina v. District Court*, 522 P.2d 589 (Colo. 1974).

Ultimately, the *Taylor* Court found that, notwithstanding the existence of a warrant, that case was not the “primary basis” for Taylor’s custodial status. *Id.* The Court of Appeals, in coming to this position, never explained from where they derived the term “primary basis.” *Ibid.*

Crucially, the court in *Taylor* compared this “primary basis” analysis to presentence confinement credit, noting that there must be a substantial nexus to one’s incarceration for them to be awarded presentence confinement credit. *Id.*, citing *People v. Fitzgerald*, 973 P.2d 708, 710 (Colo. App. 1998). However, the Court of Appeals’ application of presentence confinement credit principles to preliminary hearings is inapt. A preliminary hearing occurs while a defendant maintains a presumption of innocence as to the pending charge(s), and is designed to screen out unwarranted prosecutions and custodial restraints on citizens’ liberty, when charges are unsupported by adequate evidence. A citizen should not be subject to unwarranted prosecution or custodial restraints, regardless of any other pending charges or sentences. Presentence confinement credit, on the other hand, is simply meant to ensure that defendants receive appropriate credit for time served against their sentence in a particular case, while also ensuring they do not receive duplicative credit. There is no such duplicative credit concern in the preliminary hearing context. Consequently, the Court of Appeals’ analysis in *Taylor* is fundamentally flawed.

Moreover, even if the analogy to presentence confinement cases was appropriate, the *Taylor* court’s analysis should still be rejected. As this Court recently explained in *Russell v. People*, “a defendant is entitled to [presentence confinement credit] when he would have remained confined on the charge or conduct for for which credit is sought in the absence of any other charge, whether that charge is in the same or a different jurisdiction, so long as the PSCC is not duplicative.” 462 P.3d 1092, 1098 (Colo. May

11, 2020). The Court's ruling in *Russell* undercuts the Court of Appeals reasoning in *Taylor*.

In *People v. Pena*, the defendant was serving a jail sentence in Pueblo County when he requested a preliminary hearing in a case in El Paso County. 250 P.3d 592, 594 (Colo. App. 2009). There, the Court of Appeals adopted the ruling of *Taylor* and found that, notwithstanding a warrant and bond in that case, the defendant was not entitled to a preliminary hearing as he was not in custody for the offense on which the preliminary hearing was requested. *Pena*, 250 P.3d. at 595.

Because the *Pena* court's decision was based on *Taylor*, and the rationale in *Taylor* is now called into question by this Court's decision in *Russell*, it would appear that both *Taylor* and *Pena* were wrongly decided. In addition, by reading an unwritten exception into the statute and rule in *Taylor* and *Pena*, the Court of Appeals acted contrary to basic rules of statutory interpretation, as discussed above.

Mr. Subjack, even in the absence of any other charge or sentence, would remain confined and in custody on the present case. On a plain reading of the statutes and rules, and based on the same reasoning this Court applied in *Russell*, Mr. Subjack is in custody for the purposes of the preliminary hearing statute and is therefore entitled to a preliminary hearing.

C. In addition to being legally incorrect, the trial court's factual assumptions underlying its ruling are unwarranted.

In ruling that Mr. Subjack was not entitled to a preliminary hearing, the trial court noted that Mr. Subjack's mandatory release date was currently 9/25/21 and that he remains in the custody of the Department of Corrections. See Appendix G, p. 8. The court therefore concluded that: "Even were the Court to proceed to preliminary hearing today and find no probable cause for the offense charged, he would still remain in custody." *Id.* at pp. 8-9.

However, Mr. Subjack is currently parole eligible. As demonstrated in the affidavit attached to Mr. Subjack's motion for reconsideration (Appendix H), the pendency of this case can and likely will affect any decisions regarding his release to parole. Contrary to the trial court's conclusion, this pending case will likely result in Mr. Subjack remaining confined within the Department of Corrections. If the case were dismissed at preliminary hearing, however, it would not act as an impediment to his possible release on parole.

D. Canons of statutory interpretation and the legislative history of the preliminary hearing statute further support the conclusion that a defendant's case need not be the “primary basis” for their custodial status

If this court finds that the term “in custody” is ambiguous, other canons of statutory construction along with the legislative history weigh in favor of granting a preliminary hearing for in custody defendants who are charged with felonies whilst in the custody of the Department of Corrections. *See* § 2-4-203, C.R.S. 2020.

Prior to 1998, all defendants charged with a felony were entitled to request a preliminary hearing, regardless of their custodial status. However, Colorado Senate Bill 98-008 narrowed the availability of preliminary hearings to those charged with Class 1 through 3 felonies, sexual offense felonies, and those “in custody.” S.B. 98-008, 61st Gen. Assemb., 2d Sess, 1999 Colo. Sess. Laws 1272. The General Assembly provided no explicit explanation in the statutory text for this limitation. However, at one point a proposed amendment was discussed and rejected which would have required a showing of good cause for an “in custody” preliminary hearing. Colorado House Journal, 1998 Reg. Sess. No. 71. The General Assembly declined to further expand the requirements to receive a preliminary hearing, finding “in custody” to be sufficient on a plain reading. Moreover, the General Assembly has not further defined the term “in custody” since the passage of § 16-5-301, C.R.S. (2020).

The General Assembly has, within the larger context of Title 16, defined “custody” as meaning “the restraint of a person's freedom in any significant way.” § 16-1-104, (9), C.R.S. (2020). This definition is further referenced, with “correctional facility” being defined as “any facility under the supervision of the department of corrections in which persons are or may be lawfully held in custody as a result of conviction of a crime.” § 16-1-104, (7.5) C.R.S. (2020).

The rule of lenity weighs in favor of granting defendants who are concurrently in the custody of the Department of Corrections and held on a district court case a preliminary hearing. Under that rule, “ambiguity in the meaning of a criminal statute must be interpreted in favor of the defendant.” *People v. Summers*, 208 P.3d 251, 258 (Colo. 2009). Therefore, even if the term “in custody” is ambiguous, it should be interpreted to include all forms of incarceration, not simply those serving at the “primary” basis for a defendant’s incarceration. *See id.* Because Mr. Subjack would be held in custody on the present case, this Court should grant Mr. Subjack a preliminary hearing.

E. Constitutional considerations support a plain language reading of the statute and rule.

Mr. Subjack contends that the plain language of the statute and rule are clear and unambiguous and entitle him to a preliminary hearing. However, if this Court feels the statute is ambiguous, then it should strive to interpret the statute in a constitutional manner.

(1) Mr. Subjack should receive a preliminary hearing in accordance with due process principles.

When a state guarantees a structural protection associated with a criminal prosecution, it violates the Due Process Clause of the federal constitution if the state fails to meaningfully vindicate that guarantee. *See* U.S. CONST. amend. XIV; *Evitts v. Lucey*, 469 U.S. 387, 400–01 (1985); *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Vitek v. Jones*, 445 U.S. 480 (1980) ("We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment."); *People v. Lefebre*, 5 P.3d 295, 307 (Colo. 2000) (Recognizing that a federal due process violation occurs if a trial court deprives a defendant of procedures "to which he is entitled by state law," even if those procedures would not be required by the federal constitution.). Colorado's constitutional guarantee of due process provides even more protection than the federal constitution in some

circumstances. *See e.g. People v. Dunaway*, 88 P.3d 619, 630 -631 (Colo. 2004) (“We are, of course, aware that the Colorado Constitution may afford greater due process protections to a criminal defendant than the U.S. Constitution.”); *People ex rel. Juhan v. District Court*, 165 Colo. 253, 266, 439 P.2d 741, 748 (1968); COLO. CONST. art. II, sec. 25.

Consequently, where a state has created structural and procedural protections - not required by the federal constitution - that are "an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant," their application in a given case "must comport with the demands of the Due Process and Equal Protection Clauses of the [federal] Constitution." *Evitts v. Lucey*, 469 U.S. at 393, quoting *Griffin v. Illinois*, 351 U.S. 12,18 (1956).

In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), defendant's sentence had been originally imposed by a jury under a recidivist statute that was later declared invalid. The Oklahoma Court of Criminal Appeals affirmed the sentence, though, because it was within the range of possible sentences the jury validly *could* have imposed absent the invalid statute. However, pursuant to Oklahoma state law, Hicks was entitled to have the jury determine the appropriate sentence. The United States Supreme Court reversed and held that, under state law, Hicks had a liberty interest in having the jury impose punishment under the correct law, and that the failure to have a jury impose sentence

in accord with Oklahoma law constituted error because “[s]uch an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.” *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

Likewise, here, Mr. Subjack is entitled to the structural and procedural protections provided by Colorado law in this criminal prosecution. Those structural and procedural protections include his right to a preliminary hearing in this case under C.R.S. § 16-5-301 and Colo. R. Crim. P. 7. As discussed above, criminal defendants in Colorado have had a long-standing right to preliminary hearings in defined circumstances. “In Colorado, the preliminary hearing is held for the limited purpose of determining if probable cause exists to believe that the crime or crimes charged were committed by the defendant. ... The preliminary hearing was created as a screening device of afford the defendant an opportunity to challenge the sufficiency of the prosecution's evidence to establish probable cause before an impartial judge.” *People ex rel. Farina v. Dist. Court of 21st Judicial Dist.*, 184 Colo. 406, 409, 521 P.2d 778, 779 (1974). For purposes of due process, Mr. Subjack has a liberty interest in being afforded an opportunity to challenge the sufficiency of the prosecution’s evidence before an impartial judge at a preliminary hearing, in accordance with Colorado laws and procedures. The arbitrary disregard of that liberty interest constitutes a denial of due process.

(2) Mr. Subjack should receive a preliminary hearing in accordance with equal protection principles.

The Fourteenth Amendment to the United States Constitution and the Due Process Clause in Article II, § 25 of the Colorado Constitution guarantee equal protection of the laws. U.S. CONST. amend. XIV; COLO. CONST. art. II, § 25; *People v. Jefferson*, 748 P.2d 1223 (Colo. 1988); *People v. Marcy*, 628 P.2d 69 (Colo. 1981); *People v. Bramlett*, 194 Colo. 205, 573 P.2d 94 (1977), *cert den'd*, 435 U.S. 956. “Equal protection of the laws assures that those who are similarly situated will be afforded similar treatment.” *People v. Rickstrew*, 775 P.2d 570, 574 (Colo. 1989).

The “threshold question in any equal protection challenge is whether the legislation results in dissimilar treatment of similarly situated individuals.” ...This identical analysis also applies to a substantive due process challenge. ...Both equal protection and substantive due process challenges require a court to determine whether the challenged policy or statute creates a suspect class or affects a fundamental right. ...

Snook v. Joyce Homes, Inc., 215 P.3d 1210, 1216 (Colo.App. 2009) (internal citations omitted).

As with due process, “[t]o determine whether a statute operates to deny equal protection of the laws, a court must similarly determine at the outset the level of scrutiny to be applied. If a fundamental right or a suspect class is involved, a strict scrutiny analysis is applied, under which the statute must be supported by a compelling state

interest. In most other types of cases, a rational basis test applies and the statute will be upheld if it is rationally related to a legitimate state interest." *Collins v. Jaquez*, 15 P.3d 299, 303 (Colo.App. 2000).

Where a state has enacted certain procedures as a part of its "system for finally adjudicating the guilt or innocence of a defendant," such procedures "must comport with demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). A state cannot provide those procedures to one class of citizens, yet deny them to a similarly situated class of citizens, without violating the latter's rights to due process and/or equal protection. *See e.g. Griffin v. Illinois*, 351 U.S. 12 (1956); *Burns v. Ohio*, 360 U.S. 252 (1959); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Little v. Streater*, 452 U.S. 1 (1981); *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

Here, the trial court's ruling and the Court of Appeals' rulings in *Taylor* and *Pena* violate equal protection in depriving Mr. Subjack of his right to a preliminary hearing when other persons charged with a class four felony and unable to post bond would receive a preliminary hearing upon request.

(3) If this Court believes the statute and rule are ambiguous, this Court should construe them in a manner to avoid any doubt about their constitutional validity.

If this Court believes ambiguity exists in the statute, it should resolve such ambiguity by construing the statute and rule to avoid any possible constitutional problems, such as the due process and equal protection problems discussed above, by applying the canon of constitutional doubt or constitutional avoidance:

The constitutional-doubt canon provides that, ‘when possible, statutes should be construed so as to avoid questions of their constitutional validity.’ *Adams Cty. Sch. Dist. No. 50 v. Heimer*, 919 P.2d 786, 790 (Colo. 1996); *see also*, e.g., *People v. Iannicelli*, 2019 CO 80, ¶ 22, 449 P.3d 387 (“[I]f a statute is capable of alternative constructions, one of which is constitutional, then the constitutional interpretation must be adopted.” (quoting *People v. Zapotocky*, 869 P.2d 1234, 1240 (Colo. 1994))); *Perry Park Water & Sanitation Dist. v. Cordillera Corp.*, 818 P.2d 728, 732 (Colo. 1991) (“A construction of statutory language that creates doubts as to the constitutional validity of the legislation should be assiduously avoided if an alternative construction consistent with legislative intent is available.”).”

People v. McDonald, 2020 COA 65, ¶ 19. In the event of any perceived ambiguity in the statute and rule, application of the constitutional doubt canon, as well as the rule of lenity previously discussed, require interpretation of the statute and rule to provide Mr. Subjack with a preliminary hearing.

CONCLUSION

Mr. Subjack should be granted relief pursuant to Rule 21 because the trial court erroneously denied him a preliminary hearing in violation of section 16-5-301(1)(b)(I), C.R.S. (2018), Crim. P. 7(h)(1), and Crim. P. 5(a)(4). Both provisions entitle Mr. Subjack to a preliminary hearing because he was charged with a class 4 felony and is held on bond in this case.. Accordingly, a rule to show cause should issue.

MEGAN A. RING, COLORADO STATE
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INDEX OF SUPPORTING DOCUMENTS

Appendix A: Affidavit for Arrest

Appendix B: Minute Orders

Appendix C: Felony Complaint for Fremont County Case Number
20CR54

Appendix D: Invocation of Rights, filed March 12, 2020.

Appendix E: Defense's Response to People's Oral Request to Vacate
Preliminary Hearing

Appendix F: Print-out showing current bond for case 20CR54, accessed July
21, 2020

Appendix G: Transcript of July 13, 2020 Hearing.

Appendix H: Motion for Reconsideration and Accompanying Exhibits

CONTACT INFORMATION FOR THE PARTIES BELOW

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CERTIFICATE OF SERVICE

I certify that, on July 28, 2020, a copy of In Re: People v. Subjack was served through E-Filing on the 11th Judicial District Attorney and Fremont County District Court.

/s/ KRN