



of the events resulting from COVID-19 and the People's decision not to pursue the death penalty at this point in the trial. As a result, the Court's *sua sponte* declaration of a mistrial is warranted because the Court cannot remedy the prejudice through other reasonable means.

In *People v. Erickson*, 574 P.2d 504, 506 (Colo. 1978), the Colorado Supreme Court held that "[a] trial court has broad discretion to declare a mistrial at any point during trial when it appears that, because of irregularities in the proceeding, either party will not receive a fair trial." (citing *Maes*, 503 P.2d 621; *Brown v. People*, 291 P.2d 680 (Colo. 1955)). The cause for the mistrial "need not be vital" but must be "substantial and real." *Brown*, 291 P.2d at 684. To be substantial and real, the cause "need only be such as could affect, or might in some way or manner be considered as interfering with, retarding, or influencing, to even a slight degree, the administration of honest, fair, even-handed justice to either, both, or any, of the parties to the proceeding." *Brown*, 291 P.2d at 684. In declaring a mistrial, the Court's reason cannot be based (1) on a "whimsical notion or frivolous impulse," *Maes*, 503 P.2d at 624 (citations omitted) (internal quotation marks omitted); nor (2) primarily on circumstances within the trial court's control or where other reasonable alternatives are available. *People v. Berreth*, 13 P.3d 1214, 1218 (Colo. 2000); *Paul v. People*, 105 P.3d 628, 633-34 (Colo. 2005).

Under federal law, the Supreme Court eschews a mechanical formula or rigid rules for declaring mistrials and grants the trial court broad discretion. See *Illinois v. Somerville*, 410 U.S. 458, 462 (1973). A trial court usually must find "manifest necessity" or that the "ends of public justice" dictate a mistrial. *Id.* at 463. However, "[o]nly if jeopardy has attached is a court called upon to determine whether the declaration of a mistrial was required by 'manifest necessity' or the 'ends of public justice.'" *Id.* at 468. In this case, jeopardy has not attached because a jury has not been sworn. C.R.S. § 18-1-301(1)(d); *Maes*, 503 P.2d at 623; *U.S. v. Jorn*, 400 U.S. 470, 479 (1971) (holding that "a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge"); see also *Somerville*, 410 U.S. at 467 (stating that "[i]n Downum, the Court held . . . that jeopardy 'attached' when the first jury was selected and sworn"). Thus, regarding any federal limitations, the Defendant has not been put

in jeopardy, so the Court retains broad discretion to *sua sponte* declare a mistrial.

## **II. The Events Impacting this Case and Warranting a Mistrial**

The Court finds that the events resulting from COVID-19 and the People's decision not to pursue the death penalty at this point in the trial warrants a mistrial. The recent events unfolding around COVID-19 created a sudden and overwhelming emergency beyond the control of the Court. While these events stem from one source, the COVID-19 pandemic, the resulting events are disparate and have individualized impacts on this case. Additionally, the People filed a motion to withdraw the death penalty from this case on March 30, 2020. This action of the District Attorney occurred shortly after Governor Polis signed the bill from the Colorado General Assembly doing away with the death penalty in Colorado for offenses charged after July 1, 2020. On the same date that the Governor signed the bill, he commuted the sentences of all three men on death row in Colorado. Two of those three men had not yet applied for commutation of the death sentence. People's Mot. to Withdraw the Death Penalty from Consideration in this Case [P-LLL] (Mar. 30, 2020). This motion came after the trial proceedings were under way to select a death qualified venire. While each of these events standing alone may not warrant a mistrial, the simultaneous occurrence of these events does warrant a mistrial.

### **a. Effects of COVID-19**

On December 31, 2020, China notified the World Health Organization ("WHO") of an "unusual pneumonia" in Wuhan.<sup>1</sup> Throughout January, the situation surrounding the "unusual pneumonia" escalated as China reported deaths from the virus, and cases of what later became known as the novel coronavirus, or COVID-19, appeared in the United States and numerous other countries throughout the world.<sup>2</sup> The WHO then declared a Public Health Emergency of International Concern from COVID-19 on January 30, 2020.<sup>3</sup> On

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<sup>1</sup> *Timeline: How the new coronavirus spread*, AL JAZEERA (Apr. 8, 2020), <https://www.aljazeera.com/news/2020/01/timeline-china-coronavirus-spread-200126061554884.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)*, WORLD HEALTH ORG. (Jan. 30, 2020), <https://www.who.int/news->

January 31, 2020, the Secretary of the U.S. Department of Health and Human Services ("HHS") followed suit and declared a public health emergency for the entire United States in response to COVID-19.<sup>4</sup>

The Colorado Department of Public Health and Environment ("CDPHE") confirmed the first presumptive case of COVID-19 in Colorado on March 5, 2020.<sup>5</sup> On March 9, the Court began bringing in prospective jurors in groups of approximately 250 people to complete juror questionnaires and to watch the Court's videotaped remarks for this case. On March 11, the WHO announced that the COVID-19 outbreak could be characterized as a pandemic;<sup>6</sup> Governor Polis formally declared a state of emergency in Colorado because of COVID-19;<sup>7</sup> and the Board of County Commissioners for Adams County declared a state of emergency because of COVID-19.<sup>8</sup> At that time, the number of COVID-19 cases in Colorado had risen to 33 presumptive positives.<sup>9</sup> On March 12, following these declarations, the Court cancelled the jury call for all remaining prospective jurors in this case who were expected to fill out juror questionnaires on March 13. On March 13, the President of the United States declared that the COVID-19 outbreak in the United States constituted a national emergency.<sup>10</sup> Colorado also reported its first death related to COVID-19 on that day.<sup>11</sup>

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room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).

<sup>4</sup> *Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus*, U.S. DEP'T OF HEALTH & HUMAN SERVICES (Jan. 31, 2020), <https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html>.

<sup>5</sup> *Updated information on COVID-19*, STATE OF COLO. (Mar. 5, 2020), <https://www.colorado.gov/governor/news/updated-information-covid-19>.

<sup>6</sup> *WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020*, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>7</sup> Colo. Exec. Order No. D 2020 003 (Mar. 11, 2020), <https://drive.google.com/file/d/1szJfU9WF36-lCVgRhXMAAnJdlQyTSG83e/view>.

<sup>8</sup> Adams County Board of County Commissioners, *Order Declaring a Disaster in and for Adams County, Colorado* (Mar. 11, 2020), <http://www.adcogov.org/sites/default/files/Disaster-Declaration-031120.pdf>.

<sup>9</sup> Colo. Exec. Order No. D 2020 003.

<sup>10</sup> Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020).

<sup>11</sup> Jessica Seaman, *Colorado confirms first coronavirus death since outbreak hit state last week*, THE DENVER POST (Mar. 13, 2020, 5:58 PM), <https://www.denverpost.com/2020/03/13/colorado-coronavirus-death/>.

Since then, the number of COVID-19 cases in Colorado, and Adams County specifically, continues to rise. On March 18, 2020, the CDPHE reported 10 cases in Adams County, 216 cases in Colorado, and 2 related deaths in Colorado.<sup>12</sup> As of April 5, 2020, the CDPHE reported 354 cases in Adams County, 4,950 cases in Colorado, 140 related deaths in Colorado, and 10 related deaths in Adams County.<sup>13</sup> As of April 7, 2020, the CDPHE reported 388 cases in Adams County, 5,429 cases in Colorado, 179 related deaths in Colorado, and 14 related deaths in Adams County.<sup>14</sup> An official from CDPHE predicted that the number of COVID-19 cases has yet to peak and will not peak until some date between May and September, though these projections vary based upon compliance with stay-at-home orders and social distancing guidelines.<sup>15</sup>

These COVID-19 case numbers follow a host of preventative steps taken by federal, state, and local governments, steps which impact the legal underpinnings of this case. These steps include:

1. The stay-at-home guidelines and orders issued by the President of the United States,<sup>16</sup> Governor Polis,<sup>17</sup> and the Tri-County Health Department;<sup>18</sup>

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<sup>12</sup> COVID-19 Colorado Case Summary, COLO. DEP'T OF PUBLIC HEALTH & ENV'T (Mar. 18, 2020, 4:00 PM), <https://covid19.colorado.gov/sites/covid19/files/COVID%20-%2019%20Case%20Summary%20%281%29.pdf>.

<sup>13</sup> COVID-19 Colorado Case Summary, COLO. DEP'T OF PUBLIC HEALTH & ENV'T (Apr. 5, 2020, 4:00 PM), <https://covid19.colorado.gov/case-data> (follow the "Access the case summary data files" hyperlink; then open the "covid19\_case\_summary\_2020-04-05.csv" file).

<sup>14</sup> COVID-19 Colorado Case Summary, COLO. DEP'T OF PUBLIC HEALTH & ENV'T (Apr. 7, 2020, 4:00 PM), <https://covid19.colorado.gov/case-data> (follow the "Access the case summary data files" hyperlink; then open the "covid19\_case\_summary\_2020-04-07.csv" file).

<sup>15</sup> See Jessica Seaman, *National model predicts coronavirus pandemic in Colorado has peaked, but state officials say worst is still to come*, THE DENVER POST (Apr. 7, 2020, 6:00 AM), <https://www.denverpost.com/2020/04/07/colorado-coronavirus-covid-model-predictions/>; Andrea Buchwald et al., *Projections of the COVID-19 epidemic in Colorado under different social distancing scenarios*, Apr. 6, 2020, <https://drive.google.com/file/d/19ST3tRnntUGV3h7YI0tQHJDnCoL5dRE7/view>.

<sup>16</sup> *Coronavirus Guidelines for America*, <https://www.whitehouse.gov/briefings-statements/coronavirus-guidelines-america/> (issued Mar. 16, 2020); *Remarks by Pres. Trump, V.P. Pence, and Members of the Coronavirus Task Force in Press Briefing*, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-14/> (issued Mar. 30, 2020) (extending the coronavirus guidelines, which include social distancing and staying at home, from March 30, 2020 to April 30, 2020).

2. The Public Health Orders issued by CDPHE throughout March to control and slow the spread of COVID-19 and to mitigate the effects of the virus, including Public Health Order Nos. 20-20 (restricting visitors from all Colorado skilled nursing facilities, assisted living residences and intermediate care facilities), 20-22 (closing bars, restaurants, theaters, gymnasiums, casinos, nonessential personal services facilities, and horse track and off-track betting facilities statewide), 20-23 (implementing social distancing measures), and 20-24 (implementing statewide stay-at-home requirements);
3. The orders from the Chief Justice of the Supreme Court of Colorado<sup>19</sup> and the Chief Judge of the Seventeenth Judicial District<sup>20</sup> regarding state court operations under COVID-19,

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<sup>17</sup> Colo. Exec. Order No. D 2020 017 (Mar. 25, 2020), [https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20017%20Ordering%20Coloradoans%20to%20Stay%20at%20Home\\_0.pdf](https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20017%20Ordering%20Coloradoans%20to%20Stay%20at%20Home_0.pdf) (ordering Coloradoans to stay at home through April 11, 2020 except for limited exceptions); Colo. Exec. Order No. D 2020 024 (Apr. 6, 2020), [https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20024%20Amending%20and%20Extending%20Executive%20Order%20D%202020%20017%20Stay%20at%20Home%20Order\\_0.pdf](https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20024%20Amending%20and%20Extending%20Executive%20Order%20D%202020%20017%20Stay%20at%20Home%20Order_0.pdf) (extending the stay-at-home order from Colo. Exec. Order No. D 2020 017 through April 26, 2020).

<sup>18</sup> Tri-County Health Department "Stay at Home" Public Health Order (Mar. 25, 2020), <https://www.tchd.org/DocumentCenter/View/6965/Stay-At-Home-Public-Health-Order-> (mandating that Adams County residents stay at their place of residence through April 17, 2020, except for Essential Activities, Essential Governmental Functions, or to operate Essential Businesses, all terms defined in the Public Health Order); *Statement: Metro Denver Public Health Departments Rescind Stay at Home Public Health Orders; Adopt State Order*, TRI-COUNTY HEALTH DEP'T (Mar. 26, 2020), <http://www.tchd.org/CivicAlerts.aspx?AID=374> (stating that the Tri-County Health Department rescinds its local level orders and adopts Governor Polis's stay-at-home orders).

<sup>19</sup> Chief Justice Order Regarding COVID-19 and Operation of Colorado State Courts (March 16, 2020), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Filing%20Information/COVID-19%20Order%2016Mar2020.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Filing%20Information/COVID-19%20Order%2016Mar2020.pdf); Chief Justice Order Extending Prohibition on Jury Calls (Mar. 16, 2020), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/17th\\_Judicial\\_District/Order%20Extending%20Prohibition%20on%20Jury%20Calls%20\(002\).pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/17th_Judicial_District/Order%20Extending%20Prohibition%20on%20Jury%20Calls%20(002).pdf)

<sup>20</sup> Chief Judge Administrative Order No. 2020-01 (Mar. 17, 2020), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/17th\\_Judicial\\_District/Adams/17th%20JD%20CJO%2C%20Limited%20Court%20Operations.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/17th_Judicial_District/Adams/17th%20JD%20CJO%2C%20Limited%20Court%20Operations.pdf) ("Regarding Court Operations Under COVID-19 Advisory"); Chief Judge First Amended Administrative Order No. 2020-01A (Mar. 18, 2020), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/17th\\_Judicial\\_District/Adams/17th%20JD%2C%202nd%20Amend%20CJO%2C%20Limited%20Court%20Operati](https://www.courts.state.co.us/userfiles/file/Court_Probation/17th_Judicial_District/Adams/17th%20JD%2C%202nd%20Amend%20CJO%2C%20Limited%20Court%20Operati)

which reduce staff and operations, focus court resource's on matters of public safety, discourage in-person hearings, vacate and continue matters not of public safety to May 2020, and suspend most jury calls until May 2020;

4. The numerous other executive orders from Governor Polis seeking to mitigate the impact of COVID-19 on Coloradoans;<sup>21</sup>

5. And the local school districts moving classes online and closing for the remainder of the school year.<sup>22</sup>

These steps impact this case because bringing in prospective jurors under the current conditions creates a substantial and real prejudicial effect against either or both the Defendant and the

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ons.pdf; Chief Judge Second Amended Administrative Order No. 2020-01A (Mar. 26, 2020), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/17th\\_Judicial\\_District/Adams/17th%20JD%2C%202nd%20Amend%20CJO%2C%20Limited%20Court%20Operations.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/17th_Judicial_District/Adams/17th%20JD%2C%202nd%20Amend%20CJO%2C%20Limited%20Court%20Operations.pdf); Chief Judge Temporary Administrative Order No. TCJO2020-01 (Mar. 25, 2020), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/01st\\_Judicial\\_District/17th%20JD%20Admin%20Order%2C%20Jury%20Commissioner.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/01st_Judicial_District/17th%20JD%20Admin%20Order%2C%20Jury%20Commissioner.pdf) (temporarily authorizing the release of jurors for health reasons related to COVID-19).

<sup>21</sup> See, Colo. Exec. Order No. D 2020 004 (Mar. 14, 2020) ("Ordering Closure of Downhill Ski Resorts Due to the Presence of COVID-19 in the State of Colorado"); Colo. Exec. Order No. D 2020 009 (Mar. 19, 2020) ("Ordering the Temporary Cessation of All Elective and Non-Essential Surgeries and Procedures and Preserving Personal Protective Equipment and Ventilators in Colorado Due to the Presence of COVID-19"); Colo. Exec. Order No. D 2020 010 (Mar. 20, 2020) ("Ordering the Suspension of Statute to Extend the Income Tax Payment Deadlines Due to the COVID-19 Disaster Emergency"); Colo. Exec. Order No. D 2020 011 (Mar. 20, 2020) ("Ordering the Temporary Suspension of Certain Regulatory Statutes Due to the Presence of COVID-19"); Colo. Exec. Order No. D 2020 012 (Mar. 20, 2020) ("Order Limiting Evictions, Foreclosures, and Public Utility Disconnections and Expediting Unemployment Insurance Claim Processing to Provide Relief to Coloradans Affected by COVID-19"); Colo. Exec. Order No. D 2020 013 (Mar. 22, 2020) ("Ordering Colorado Employers To Reduce In-Person Workforce by Fifty Percent Due to the Presence of COVID-19 In the State), which was later rescinded; Colo. Exec. Order No. D 2020 016 (Mar. 25, 2020) ("Temporarily Suspending Certain Regulatory Statutes Concerning Criminal Justice"); and other executive orders amending, rescinding, and extending certain of these orders.

<sup>22</sup> *Schools closed for remainder of school year*, ADAMS 12 FIVE STAR SCHOOLS (Apr. 3, 2020, 10:30 AM), <https://www.adams12.org/news/video-message-schools-closed-remainder-school-year-2020-04-03>; see also Colo. Exec. Order No. D 2020 007 (Mar. 18, 2020), [https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20007%20Ordering%20Suspension%20of%20Normal%20In-Person%20Instruction\\_0.pdf](https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20007%20Ordering%20Suspension%20of%20Normal%20In-Person%20Instruction_0.pdf) (ordering suspension of normal in-person interaction at all public and private elementary and secondary schools in Colorado due to the presence of COVID-19).

People. Proceeding with the case at this time also risks the health and safety of these jurors, the other participants in this trial, and the public at large. As the Defendant's own counsel brought up, COVID-19 also affects out-of-state witnesses' ability to appear for the trial. Tr. at 14:7-12 (Mar. 18, 2020). Taken together, the current circumstances would preclude the Defendant from having a fair trial that complies with state and federal constitutional requirements. More specifically, the current pandemic and the resulting preventative measures (1) impact the public's access to this trial, (2) affect the jury pool, and (3) create prejudice and fear in prospective jurors forced to come into the courthouse.

The public's access to the trial will be limited. Most people will not have the choice to attend the proceedings because of social distancing requirements, stay-at-home orders, limitations on the size of group gatherings, and administrative orders discouraging people from coming to the courthouse. The Court has considered the possibility of a close-circuit transmission and other transmission options to alleviate this concern. However, the time to purchase and receive the requisite equipment, have the equipment installed, and other logistics do not create a reasonable alternative given the current pandemic affecting the operations of not just the judiciary but retailers and service providers.

At this time, the jury pool cannot represent a cross-section of the community. The Colorado government currently classifies a "vulnerable individual" as people who are disabled, over the age of 60, or have a serious underlying health condition.<sup>23</sup> There is a high risk for these individuals to contract COVID-19. Prospective jurors for this case have reached out requesting dismissal or postponement and expressed these fears and anxieties:

- "Because of the Covid-19 pandemic and being 70 years old, I am staying out of public places. I will not be able to come into Adams County Court on March 18." Email from Juror #175 (Mar. 19, 2020).

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<sup>23</sup> CDPHE Third Updated Public Health Order 20-24 (Apr. 1, 2020), <https://drive.google.com/file/d/1hSyVD4wlb6evhqrbEgygpcgKMr6i8SOX/view>.



- Juror requests excusal because "I am 74 and have a chronic auto-immune disease LUPUS." Email from Juror 3783 (Mar. 19, 2020).
- "Instead I must ask for dismissal due to the recent CDC guidelines for the elderly with regards to COVID 19. I'm listed in the highest group for Stay-in-Place. I am 72 and in November had a pacemaker implanted, also I have been ill and am taking antibiotic Cefdinir for this issue." Email from Juror 4867 (Mar. 19, 2020).
- "With the Global health crisis, I will not be attending. There is no greater risk then public gatherings." Email from Juror 39 (Mar. 20, 2020).
- "I will not be able to attend voir dire. My step-daughter has been sick with a fever and cough. She was seen in the ER yesterday, but due to her age (16) she was not given a test for COVID-19. We were told she should be treated like she does have the virus and err on the side of caution. Our household is on lockdown for the next few weeks or more. Also, my 65-year-old mother lives in my home and I don't want to increase the risk to her by exposing myself to the public." Email from Juror 249 (Mar. 20, 2020).
- "Due to the Coronavirus pandemic please dismiss juror #4085, . . . as she is 83 yrs old and diabetic." Email from Juror 4085 (Mar. 21, 2020).
- "I am worried about the Covid-19, I'm 78 years old and most of the one's that get it at my age can die from it very easy. Is there any way that any of us that are older can get postponed to a later date after this virus has let up?

I don't mind at all doing jury duty but getting around people now is very scary and concerning for my life." Email from Juror 4884 (Mar. 23, 2020).

- "I am not comfortable leaving quarantine and congregating in crowds. My senior citizen mother lives with me full time and I don't want to expose her to anything that could kill her." Email from Juror 249 (Mar. 24, 2020).

- "As you probably have heard, Governor Polis has signed an executive order closing all schools through April 17th. I am parent/guardian half time to my son who is now not able to go to school. This has hit hard as this affects my ability to get coverage for care especially as the Governor has advised to remain home unless otherwise necessary. Coverage was going to be very difficult as it was prior to school closures but almost impossible with all childcare with after school care being shut down to include all other day cares. This would cause a huge financial and family hardship.

In addition, due to this Coronavirus epidemic, I do not believe that justice can not be given out fairly if jurors are angry about being put in harms way and made to risk their lives because they could be charged and jailed for choosing to keep their family safe. Seems as though that the safety of those that you asking to serve, and likewise their families, is not being taken into consideration as this continues to get worse." Email from Juror 4874 (Mar. 24, 2020).

- "I am asking to be excused , or for my presence to be postponed from this service i am ashed to appear for on April eighth at 8:30 a.m. i am a diabetic and my age is sixty six years old .I am quite concerned that i will contract COVID 19 upon introduction to others that may have the virus and not know it . Even worse, my wife has just had a very invasive operation on her lungs for a mycobacterial infection(mac).her medical condition is called bronchiectasis. She is very high risk ,especially right now,for any introduction to infection , especially COVID 19. if i bring this virus home to her she will undoubtedly die . her health is that compromised.i can't justify taking that chance." Email from Juror 101 (Mar. 24, 2020).
- "I wish to be dismissed from further jury duty due to my age (74, . . . ) and health issues." Email from Juror 2746 (Mar. 25, 2020).
- "Attached is a letter from my pulmonologist, requesting I be excused from jury duty given my heath & the viral pandemic that is currently taking place." Email from Juror 5792 (Mar. 26, 2020).

- "I have obtained a letter from my doctor indicating that I am to minimize exposure to the pandemic as I am pregnant. Can you please advise me on how to submit the medical letter for a hardship excusal?" Email from Juror 4160 (Mar. 27, 2020).

These communications are just a few the Court has received on the issue. Some of the individuals broke down and cried while filling out the juror questionnaire or called in later crying about the possibility of having to return because of their fear of COVID-19. Recently, the Supreme Court of Colorado acknowledged this problem and amended Crim. P. 24 to address it. See Crim. P. 24(c)(4) ("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."). The Court does not have a reasonable method to adequately protect these prospective jurors if they come into the courthouse. With asymptomatic people present in the population, no accurate and accessible screening method exists for the Court. And personal protective gear has been withdrawn from the shelves of many retailers to ensure that healthcare workers and those working in-contact and directly against this pandemic have proper protection. The Court's own staff has brought in their own protective equipment, as the Court has not been provided with any. Therefore, the Court cannot remedy this defect in the proceeding at this time.

Additionally, the closing of the local schools for the remainder of the year and an unprecedented and historic rise in unemployment<sup>24</sup> from the responsive actions taken to combat COVID-19 also impact the jury pool. These events have created more single income and no income families and single-parent homes with children unexpectedly out-of-school or being home schooled.<sup>25</sup> Such a result creates an undue hardship for those prospective jurors

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<sup>24</sup> See *State Labor Dept: Nearly 20,000\* Jobless Claims Filed in Colorado Last Week | 750% Increase From Week Prior*, COLO. DEP'T OF LABOR & EMPLOYMENT (Mar. 26, 2020), <https://www.colorado.gov/pacific/cdle/news/state-labor-dept-nearly-20000-jobless-claims-filed-colorado-last-week-750-increase-week-prior>; *State Labor Department: More Than 60,000 Initial Unemployment Claims Filed in March*, COLO. DEP'T OF LABOR & EMPLOYMENT (Apr. 2, 2020), <https://www.colorado.gov/pacific/cdle/news/state-labor-department-more-60000-initial-unemployment-claims-filed-march>; *Colorado unemployment claims soar 737% amid virus shutdown*, THE DENVER CHANNEL.COM, Mar. 26, 2020, <https://www.the-denverchannel.com/news/coronavirus/colorado-unemployment-claims-soar-737-amid-virus-shutdown>.

<sup>25</sup> § 13-71-119 C.R.S.; § 13-71-119.5 C.R.S.

and likely precludes them from serving on this jury. The Court has received communications from prospective jurors expressing these sentiments:

- "The impact to my family of potentially having to miss work myself or have my self-employed husband, who needs to be able to take any job he can get at this time as work availability has dropped immensely with the current course the COVID-19 pandemic has taken, which will affect the availability to pick up our child from daycare as well. I am concerned that the court is not taking into account the financial impact this may have on some potential jurors in this current work environment. I know this is affecting many people, but hope exceptions can be made to keep people able to bring an income in for their families during this time and to keep them safe as well." Email from Juror #470 (Mar. 31, 2020).
- "I don't believe I'm able to appear. I have several circumstances that will make it very difficult for me to comply. I'm currently the only one in my family that is employed. I don't work for a large company and I'm one of 3 people in my company who can do my job. I am considered essential personnel for my company." Email from Juror 301 (Mar. 19, 2020).

As all the aforementioned communications from prospective jurors show, continuing the trial at this time, in these circumstances, would create a substantial and real prejudice in prospective jurors and affect the administration of honest, fair, even-handed justice.

For all the reasons mentioned, the Court finds that the confluence of the many events stemming from COVID-19 legally justify a mistrial. In *Brown*, a venireman was present for and available for jury duty, but his name could not be selected because of an irregularity in the selection process. *Brown*, 291 P.2d at 563. The court *sua sponte* declared a mistrial, though after the jury was selected and sworn but before a verdict reached, because of this irregularity. *Id.* at 565. The irregularity made it so that the jury panel was not selected from the panel called but the panel less one. *Id.* at 566. Though *Brown* involved an irregularity created by an officer of the court and a distinction is drawn regarding excusals through regular and lawful channels, the irregularity intruded on the routine of proper jury selection

and created unforeseeable results, which legally justified a mistrial. Here, some members of the original panel were excused by stipulation or after individual voir dire based upon their views on the imposition of the death penalty. In this case, the Court similarly finds that the events aforementioned create irregularities that intrude on jury selection so as to create unforeseeable results. Thus, the events warrant a mistrial.

**b. Effects of the People's Withdrawal of the Death Penalty**

In addition to the events originating from COVID-19, the Court also finds that the People's withdrawal of the death penalty affects the proceedings in their current form. The Court finds that all of the prospective jurors received extraneous information about the case; the Court will not continue with individual voir dire; and the case has received more press than at any other time because of COVID-19 and the withdrawal of the death penalty.

"[A] criminal defendant is entitled to have the jury reach a verdict based solely on the evidence presented in the courtroom." *Dunlap v. People*, 173 P.3d 1054, 1091 (Colo. 2007). A jury's exposure to extraneous information implicates a defendant's due process right to a fair trial. *Id.*; see also *People v. Harmon*, 284 P.3d 124, 127 (Colo. App. 2011). "[A]ny information that is not properly received into evidence or included in the court's instructions is extraneous to the case and improper for juror consideration." *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005). The juror questionnaire, videotaped remarks, and individual voir dire have exposed the jurors to an abundance of information about the case. In part, this was because the statutory aggravators and offenses charged were intertwined and were relevant to individual voir dire on the stages of the sentencing trial.

Solely because of the previous potential of a death penalty sentence, all of the prospective jurors completed an extensive juror questionnaire and watched video remarks from the Court. These materials discussed in great detail and at great length the death penalty, the jurors' thoughts on the death penalty, and the circumstances surrounding this case, namely the death of a peace officer. The Court would not have provided jurors with this level of information but for the death penalty.

Further, the Court scheduled individual voir dire solely to death qualify all prospective jurors. The Court will not proceed with individual voir dire now that the death penalty has been

withdrawn. At this time in the proceedings, twelve prospective jurors have been brought in for individual voir dire. All of these jurors watched a second video of recorded remarks from the Court, which all other jurors will now never see. From these twelve, one prospective juror was notified that the juror would be called back on another day due to time constraints. Another prospective juror's individual voir dire was stopped after several minutes because the Court was notified that the courthouse doors had been locked. That juror was notified that the juror would be reschedule for another day of individual voir dire. And ten other prospective jurors underwent questioning for individual voir dire, in which five jurors were excused and five notified that they would return for general group voir dire. This questioning further exposed these jurors to extraneous information about the case. Additionally, the voir dire process for these jurors will not match the selection process for the remaining jurors. The Court could simply dismiss these jurors, but such an action would be but another irregularity in the jury selection process.

### **c. Recent Media Coverage**

In addition, this case has received more media coverage following the recent pandemic and the withdrawal of the death penalty than at any other point during the proceedings.<sup>26</sup> Of note, the Court

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<sup>26</sup> Janet Oravetz, *Jury selection begins for man accused of killing Adams County deputy*, 9NEWS, Mar. 9, 2020, <https://www.9news.com/article/news/crime/trial-man-accused-killing-adams-county-deputy-heath-gumm/73-b2784694-96be-432f-9675-5b5f4f8d8d9c>; Susan Greene, *Months-long death penalty jury trial starts despite coronavirus crisis*, THE COLO. INDEPENDENT, Mar. 17, 2020, <https://www.coloradoindependent.com/2020/03/17/colorado-dearing-death-penalty-trial-jury-pandemic/>; Neil Vigdor, *Colorado Abolishes Death Penalty and Commutes Sentences of Death Row Inmates*, THE NEW YORK TIMES, Mar. 23, 2020, <https://www.nytimes.com/2020/03/23/us/colorado-death-penalty-repeal.html>; Shelly Bradbury, *Adams County death penalty trial postponed due to coronavirus*, THE DENVER POST, Mar. 23, 2020, <https://www.denverpost.com/2020/03/23/dreion-dearing-death-penalty-trial-postponed-coronavirus/>; Crystal Bonvillian, *Colorado abolishes death penalty, governor commutes sentences of 3 death row inmates*, BOSTON 25 NEWS, Mar. 25, 2020, [https://www.boston25news.com/news/trending/colorado-abolishes-death-penalty-governor-commutes-sentences-3-death-row-inmates/FMIT6T3ZSFD3\\_VHWFHGXCXU5X7EM/](https://www.boston25news.com/news/trending/colorado-abolishes-death-penalty-governor-commutes-sentences-3-death-row-inmates/FMIT6T3ZSFD3_VHWFHGXCXU5X7EM/); Conor McCormick-Cavanaugh, *Prosecutors Drop Death Penalty Possibility in Adams County Case*, WESTWORD, Mar. 30, 2020, <https://www.westword.com/news/prosecutors-drop-possible-death-penalty-sentence-in-dearing-case-11678065>; Shelly Bradbury, *Prosecutors ask to drop death penalty against man charged with killing Adams County sheriff's deputy*, THE DENVER POST, Mar. 30, 2020, <https://www.denverpost.com/2020/03/30/death-penalty-killing-adams-county-sheriffs-deputy/>; *Colorado District Attorneys Drop One Capital Prosecution, Continue a Second, After*

sanctioned one reporter for violating the Court's decorum order by taking photographs on her phone in the courtroom. Order - Sanction of Susan Greene (Mar. 16, 2020). This reporter had also published an article on March 12, 2020 that included direct quotes from a motion from the Defendant, in which the Defendant requested specific procedures during jury selection in light of the COVID-19 situation in Colorado, before the motion had been accepted by the Court and made public.<sup>27</sup> That motion, Defendant's Motion for Forthwith Protective Measures to Protect Jurors' Health and Safety [D-285], was filed on March 11, 2020 at 4:20 P.M. The motion was not uploaded to the registry of actions and available to the public until March 13, 2020. In another article, a spokesperson from defense counsel's office stated:

We remain seriously concerned that the court has exposed, at this point, 1,700 people to a virus and we believe a doctor or medical professional needs to tell us how we can safely proceed. . . . At this time, we want a fair trial and also want the judge to ensure the jurors, the lawyers, witnesses, court staff and our client are all safe.<sup>28</sup>

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*State Abolishes Death Penalty*, DEATH PENALTY INFO. CENTER, Apr. 1, 2020, <https://deathpenaltyinfo.org/news/colorado-district-attorneys-drop-one-capital-prosecution-continue-a-second-after-state-abolishes-death-penalty>; *Man charged with killing Colorado deputy won't face death*, AP NEWS, Apr. 2, 2020, <https://apnews.com/c283f28c7c99cdcd0ec31bc495d4de11>; *Man charged with killing Colorado deputy won't face death*, ASPEN DAILY NEWS, Apr. 2, 2020, [https://www.aspendailynews.com/associated\\_press/man-charged-with-killing-colorado-deputy-wont-face-death/article\\_9cb3db51-b481-5136-a3db-3c947049bb39.html](https://www.aspendailynews.com/associated_press/man-charged-with-killing-colorado-deputy-wont-face-death/article_9cb3db51-b481-5136-a3db-3c947049bb39.html); *Man charged with killing Colorado deputy won't face death*, THE DURANGO HERALD, Apr. 2, 2020, <https://durangoherald.com/articles/320185>; *Man Charged With Killing Colorado Deputy Won't Face Death*, U.S. NEWS, Apr. 2, 2020, <https://www.usnews.com/news/best-states/colorado/articles/2020-04-02/man-charged-with-killing-colorado-deputy-wont-face-death>; *Man charged with killing Colorado deputy Heath Gumm won't face death penalty*, THE DENVER CHANNEL.COM, Apr. 3, 2020, <https://www.thedenverchannel.com/news/state-news/man-charged-with-killing-colorado-deputy-heath-gumm-wont-face-death-penalty>.

<sup>27</sup> See Susan Greene, *Colorado attorneys argue jury selection amid pandemic putting people at 'needless and severe risk'*, THE COLO. INDEPENDENT, Mar. 12, 2020, <https://www.coloradoindependent.com/2020/03/12/colorado-juror-selection-coronavirus-death-penalty-case/>.

<sup>28</sup> Shelly Bradbury, *Court will not test potential jurors for coronavirus in Adams County death penalty case*, The Denver Post, Mar. 20, 2020, <https://www.denverpost.com/2020/03/20/adams-county-death-penalty-trial-jury-selection-coronavirus/>.

These public actions further exacerbate and engender the prejudice the Court discussed above as resulting from the COVID-19 epidemic. Though the media coverage alone does not persuade the Court that a mistrial is warranted, it represents one of the many coalescing events that adds to the Court's decisions to declare a mistrial.

### **III. Conclusion**

While each of these events might not individually warrant a mistrial, the events coalescing at a single point in time prejudices the proceedings and undermines the administration of honest, fair, even-handed justice to both the Defendant and the People. As the court in *Brown* stated, "when any irregularity worthy of notice and capable of correction appears, a declaration of mistrial is legally justified." *Brown*, 291 P.2d at 684. The Court cannot correct the effects of COVID-19, but it can correct the defects from the jury selection process that now exist because of the withdrawal of the death penalty. Further, by declaring a mistrial, the Court finds that the ends of public justice will be served by protecting the Defendant's rights, the health and safety of the prospective jurors and public at large, and to remedy the prejudice and defects resulting from the current pandemic.

Wherefore, the Court *sua sponte* declares a mistrial

Dated at Brighton, Colorado this 13th day of April, 2020.

By the court:

**Duly signed original  
in court file**



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Mark D. Warner  
District Court Judge