SUMMARY
January 12, 2023

2023COA1

No. 19CA2403, *People v. Cox* — Juries — Impasse — Supplemental Instruction When Jurors Fail to Agree

A division of the court of appeals considers whether a district court must, without request, inquire about potential jury deadlock any time a jury asks what happens if it cannot reach a unanimous decision. The division declines to prescribe a categorical rule requiring such an inquiry in all circumstances. The district court has broad discretion to determine an appropriate response, so long as the response is not coercive under all the circumstances, including whether the circumstances as a whole indicate that the jury is in fact deadlocked. Under the circumstances in this case — where the jury did not indicate it was deadlocked, the question came relatively early in the deliberations, and no one at trial

perceived the possibility of deadlock — the district court did not abuse its discretion, much less plainly err, by instructing the jury to continue deliberating without first asking whether further deliberation was likely to result in a unanimous verdict.

The division further concludes that (1) the district court did not abuse its discretion in denying the defendant's proposed jury instruction regarding the sixteen-year time gap between the offense and trial; (2) there was no constitutional speedy trial violation where the defendant was tried five months after his fifteen-year-old conviction was vacated; and (3) the district court had jurisdiction and imposed a lawful sentence, notwithstanding the State's prior relinquishment of primary custody to the federal government and the defendant's completion of his consecutive federal sentence.

Accordingly, the division affirms the judgment.

COLORADO COURT OF APPEALS **2023COA1**

Court of Appeals No. 19CA2403
City and County of Denver District Court No. 03CR2984
Honorable Shelley I. Gilman, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

William Allen Cox,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division I
Opinion by JUDGE SCHOCK
Dailey and Furman, JJ., concur

Announced January 12, 2023

Philip J. Weiser, Attorney General, Brittany Limes Zehner, Assistant Solicitor General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Andrea R. Gammell, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 After his fifteen-year-old conviction was vacated, defendant, William Allen Cox, was reprosecuted and convicted of second degree murder. Four and a half hours into the first (and only) day of deliberation, the jury asked the court what happens if the jury fails to reach a unanimous decision. Without objection or further admonition, the court told the jury to continue deliberating.

¶ 2 Relying on *People v. Black*, 2020 COA 136, Cox argues that the court plainly erred by so instructing the jury without first asking the jury if it was deadlocked. We decline to prescribe a categorical rule that a district court must, without request, make such an inquiry any time a jury asks about the consequences of a failure to reach a unanimous verdict at any point in its deliberation. Under the circumstances of this case, the district court did not abuse its discretion — much less plainly err — in responding as it did.

¶ 3 Cox also challenges his conviction on three other grounds, each of which stems from the vacating of his first conviction after fifteen years and the ensuing trial on the original charge. He argues that (1) the district court erred by rejecting his proposed jury instruction regarding the time gap between the date of the offense and the date of trial; (2) his constitutional speedy trial right was

violated by the passage of time between the original charge and trial; and (3) the district court lacked jurisdiction or lawful authority to sentence him after he had completed a consecutive federal sentence on unrelated charges. We disagree and affirm.

I. Cox's Vacated Guilty Plea and Subsequent Trial

¶ 4 In 2004, Cox pleaded guilty to second degree murder. The plea agreement included a stipulation to a forty-eight-year sentence, concurrent with a yet-to-be-imposed sentence in a pending federal robbery and firearm case. The district court sentenced Cox accordingly. Several months later, the federal court imposed an aggregate fourteen-year sentence on the federal counts, ordering that sentence to be served consecutively to the state sentence.

¶ 5 The inconsistency between the concurrent state sentence and the consecutive federal sentence led to a series of efforts by the parties to allow the state sentence to run concurrently. Ultimately, based on the parties' agreement, the district court vacated Cox's state sentence and released him on a personal recognizance bond, at which point he was taken into federal custody. In 2006, with Cox in federal custody, the court reimposed the state sentence, again ordering it to run concurrently to the federal sentence.

¶ 6 Cox completed his federal sentence in 2015 and returned to state custody. In 2016, Cox filed a postconviction motion, arguing, among other things, that his state sentence was illegal because it violated a federal statute that required his federal sentence to run consecutively to his state sentence. After the district court denied the motion, a division of this court reversed, agreeing with Cox. *People v. Cox*, (Colo. App. No. 16CA1237, Jan. 24, 2019) (not published pursuant to C.A.R. 35(e)). Further concluding that the illegal concurrent state sentence was a material part of the plea agreement, the division ordered the district court to vacate Cox's 2004 guilty plea and conviction. The division noted that, on remand, the district attorney could reinstate the original charge.

¶ 7 The People reinstated the murder charge in April 2019, and Cox went to trial five months later. Unsurprisingly, given the long and winding procedural history of the case, the passage of time was an issue both parties had to contend with at trial. Examination touched on how the passage of time affected witnesses' memories, the availability of evidence, and the nature of the investigation.

¶ 8 Concerned that jurors might hold the delay against Cox, defense counsel tendered a proposed jury instruction that provided:

> You are not to consider the passage of time between the date of the offense and the date of trial in reaching your verdict. The passage of time is through no fault of either party and should not be considered for any purpose.

¶ 9 The district court denied the request, finding that "the passage of time was the basis of substantial cross-examination throughout the case," and thus, the instruction would be "misleading."

¶ 10 Two hours after beginning deliberations, the jury posed three written questions to the court, two of which related to the time between the offense and trial: (1) "When were charges brought up against William Cox?" and (2) "Why was trial delayed 16 ½ years?" With no objection from the parties, the court responded: "You have received all the evidence that you may consider in reaching your verdict. Thus, I am unable to answer your questions."

¶ 11 Two and a half hours later, the jury asked two more questions:

- "What happens if the jury fails to reach a unanimous decision?"
- "Is there a max length for jury deliberations?"

¶ 12 The court again showed the questions to the parties, along with its proposed responses:

- "Please continue your deliberations."

- "A jury takes as long as it needs to reach a unanimous decision."

¶ 13 The court asked if there was any objection to these proposed responses, and the prosecutor and defense counsel both said they did not object. The court responded to the jury as proposed.

¶ 14 The jury deliberated for approximately two and a half hours more before finding Cox guilty of second degree murder. The court again sentenced Cox to forty-eight years' imprisonment.

II. Response to Jury Questions

¶ 15 Relying primarily on *Black*, Cox contends that the district court plainly erred by instructing the jury to continue deliberating without first asking the jury whether further deliberation was likely to result in a unanimous verdict. We conclude that the district court did not abuse its discretion, much less plainly err.

A. Standard of Review and Applicable Law

¶ 16 Because "[a]ddressing the fluid dynamics associated with possible deadlock is a quintessential district court responsibility," district courts have broad discretion in this area. *Gibbons v. People*, 2014 CO 67, ¶ 31. We review the district court's response to a jury question for an abuse of discretion. *Id.* at ¶ 12. When the

defendant does not object to the court's proposed response or request a supplemental instruction, we review for plain error. *Id.* Plain error is obvious and substantial error that so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the conviction. *Hagos v. People*, 2012 CO 63, ¶ 18.

¶ 17 A district court must take care to avoid giving any instruction that coerces the jury to reach a verdict. *People v. Schwartz*, 678 P.2d 1000, 1012 (Colo. 1984); *People v. Munsey*, 232 P.3d 113, 119 (Colo. App. 2009). Thus, when a jury has indicated it is deadlocked, the court may provide a "modified-*Allen*" instruction,[1] which seeks to "encourage jurors to reach a verdict without coercing them into doing so." *Gibbons*, ¶ 1. Before giving such an instruction, the court "must first determine whether there is a likelihood of progress towards a unanimous verdict upon further deliberations." *Schwartz*, 678 P.2d at 1012. After making that

[1] A modified-*Allen* instruction tells the jury "that it should attempt to reach a unanimous verdict; that each juror should decide the case for himself or herself; that the jurors should not hesitate to reconsider their views; and that they should not surrender their honest convictions solely because of others' opinions or to return a verdict." *Gibbons v. People*, 2014 CO 67, ¶ 1.

determination, the district court has discretion to decide whether to give the instruction. *Fain v. People*, 2014 CO 69, ¶ 19; *Black*, ¶ 21.

¶ 18 But because a modified-*Allen* instruction may itself be coercive, *Black*, ¶ 22, there is a flip side. If there is no indication that the jury is deadlocked, the district court's questions to the jury about its deliberative process may themselves be improper. *People v. Pellegrin*, 2021 COA 118, ¶ 25 (*cert. granted on other grounds* July 25, 2022). And a premature modified-*Allen* instruction in that scenario may unnecessarily involve the court in jury deliberations that are progressing just fine on their own. Thus, the coercive effect of a supplemental jury instruction (or a response to a jury question) is necessarily content- and context-dependent and must be assessed on a case-by-case basis. *Gibbons*, ¶¶ 29-30.

B. The District Court Did Not Abuse Its Discretion

¶ 19 Under the circumstances of this case, we are not convinced that the district court abused its discretion.

¶ 20 First, the jury question did not indicate that the jury was deadlocked. The jury did not say it was unable to reach a verdict. *See Munsey*, 232 P.3d at 119. Nor did it suggest that further deliberations were unlikely to result in a verdict. *Id.* at 120.

Instead, like in *Munsey*, the jury asked only what would happen *if* it did not reach a unanimous verdict. *Cf. id.* at 119 ("If the jury is hung on one or more counts, but has reached a verdict on the majority of counts, is it considered to be a hung jury for the entire case?"). That hypothetical question falls well short of the explicit declarations of impasse that more typically trigger further inquiry or instruction. *Id.* at 120; *Fain*, ¶ 11 ("One juror will not change their viewpoint, and stated they will not change it."); *Martin v. People*, 2014 CO 68, ¶ 10 ("We . . . have found ourselves at a hopeless deadlock and do not believe we will ever reach a unanimous decision.").

¶ 21 Second, the question came just four and a half hours into the first day of deliberation, after a four-day murder trial. This was not, therefore, a situation in which "a hopelessly deadlocked jury [had] been deliberating for days." *Black*, ¶ 17. Rather, given the context, it was still fairly early in the deliberations. *Fain*, ¶ 21. That made it less likely that the jury question reflected a true state of impasse — as opposed to, perhaps, some frustration over being unable to reach a unanimous verdict immediately. *See Schwartz*, 678 P.2d at 1011 (holding, in mistrial context, that length of deliberation is a factor in

determining whether the jury is unable to reach a unanimous verdict). It also limited the coercive risk of the court's response. *Black*, ¶ 17 ("If it is early in deliberations and the jury is making progress towards a verdict, an instruction to continue deliberating, even an unqualified one, carries little coercive risk.")

¶ 22 Third, there was nothing coercive about the content of the court's response. For example, the court did not place any deadline on deliberations. *See Allen v. People*, 660 P.2d 896, 898-99 (Colo. 1983). To the contrary, it explicitly assured the jury there was *no* deadline. *See Pellegrin*, ¶ 23 (holding that instruction to continue deliberations was not coercive where it did not set deadline). Nor did the court urge jurors, explicitly or implicitly, to compromise their views for the sake of unanimity. *Munsey*, 232 P.3d at 120.

¶ 23 Indeed, the district court's response here arguably did *less* to encourage a verdict than the response in *Munsey*. In *Munsey*, the court instructed the jury that it had a "sworn duty to reach verdicts on all counts contained in the indictment." *Id.* at 119. Here, the court did not tell the jury that it *had* to reach a verdict. It simply told the jury to continue deliberating, while alleviating any potential perceived pressure of a ticking clock. *See Gibbons*, ¶ 30.

¶ 24 Cox suggests that the district court's response could have left the jury with the impression that it would be forced to continue deliberating until it reached a unanimous verdict. But "most jurors will not think that a trial judge has the power or wherewithal to keep them indefinitely captive in a deliberation room until they reach a verdict." *Id.* at ¶ 32. And "absent some affirmative indication from the jury that it harbors this concern, the trial court should not interfere with the jury's deliberative process" by specifying otherwise. *Id.* The jury question here gave no such affirmative indication. Nor did the court's assurance that the jury could have "as long as it needs" reasonably indicate that the jury would be required to deliberate forever. Thus, this was not one of those "rare circumstances" in which the district court should have "consider[ed] exercising its discretion" to clarify to the jury that deliberations could end without a unanimous verdict. *Id.* at ¶ 36.

¶ 25 The reason for the inquiry requirement before the district court gives a modified-*Allen* instruction is the potential coercive effect of an instruction that is specifically designed to encourage a deadlocked jury to reach a unanimous verdict. *Fain*, ¶¶ 2, 19. In particular, that instruction directs jurors to "attempt to reach a

unanimous verdict" and to "not hesitate to reconsider their views." *Id.* at ¶ 2. A district court's decision *not* to give a modified-*Allen* instruction — opting instead for the more neutral direction to continue deliberating — does not carry the same degree of coercive risk. *See People v. Farley*, 712 P.2d 1116, 1120 (Colo. App. 1985), *aff'd*, 746 P.2d 956 (Colo. 1987).

¶ 26 We recognize that the division in *Black* concluded differently with respect to a jury question similar to the one here. In doing so, the division held that "when faced with a jury question that indicates the possibility of an impasse, a trial court cannot simply tell the jury to continue deliberating" without determining whether further progress toward a unanimous verdict is likely. *Black*, ¶ 29.

¶ 27 But although the jury question in *Black* was similar, the circumstances were different. Most significantly, the district court in *Black* understood the question — which came on the second day of deliberation — as *potentially* indicating an impasse. *Id.* at ¶ 23 (noting district court's "uncertainty"). So, apparently, did defense counsel, who requested a modified-*Allen* instruction. *Id.* at ¶ 8.

¶ 28 Here, in contrast, no one at trial — not the trial judge, not the prosecutor, not defense counsel — suggested that the jury question

might indicate a deadlock. And no one requested further inquiry. The district court, which has "eyes and ears on the situation as it unfolds," is in a better position than this court to determine whether a jury has in fact indicated it is deadlocked. *Gibbons*, ¶ 31. A question that on the second day of deliberation might indicate potential impasse, and on the fourth day might all but confirm it, will not necessarily have the same effect on the first. *Id.* at ¶ 17.

¶ 29 We do not read *Black* as establishing an "inflexible" per se rule that any time a jury asks a question about reaching unanimity — at any point in its deliberation — the district court must immediately, and without request, launch into the modified-*Allen* instructional framework. *Gibbons*, ¶¶ 29-32 (rejecting per se rules in favor of ad hoc inquiry and emphasizing district court's discretion).

¶ 30 To the extent *Black* does establish such a categorical rule, we would disagree and adhere to *Munsey*. Although *Black* deemed *Munsey* inconsistent with supreme court case law requiring an inquiry before giving a modified-*Allen* instruction, *Black*, ¶ 26, that case law does not impose an absolute duty of inquiry before *not* giving that instruction. In that context, the district court has discretion to determine an appropriate response, so long as the

response is not coercive under all the circumstances, including whether the circumstances as a whole indicate that the jury is in fact deadlocked. *See Gibbons*, ¶¶ 31-33; *Pellegrin*, ¶¶ 24-25.

C. Any Error Would Not Have Been Plain

¶ 31 Even if we were to assume the district court erred in instructing the jury to continue deliberating without inquiring into the existence and extent of impasse, any error would not be plain.

¶ 32 To qualify as plain error, an error must be "so obvious that a trial judge should be able to avoid it without the benefit of an objection." *Scott v. People*, 2017 CO 16, ¶ 16. That means it must conflict with (1) a clear statutory command; (2) a well-settled legal principle; or (3) Colorado case law. *Id.* An error will not ordinarily be deemed plain when the supreme court or a division of this court has previously rejected the argument being advanced. *Id.* at ¶ 17.

¶ 33 At the time of Cox's trial, *Munsey* had approved of effectively the same approach the district court took here. 232 P.3d at 119-20. Other divisions of this court had likewise upheld instructions to continue deliberating in response to jury questions containing much more explicit statements of impasse than the one here. *People v. Dunlap*, 124 P.3d 780, 817-18 (Colo. App. 2004); *People v.*

Grace, 55 P.3d 165, 170 (Colo. App. 2001), *overruled on other grounds by Gibbons*, 2014 CO 67; *Farley*, 712 P.2d at 1120. And *Black* had not yet been decided. Thus, nothing would have alerted the district court to a need to do more than what it did. *Scott*, ¶ 18.

¶ 34 Cox urges us to look to the plainness of the error at the time of the appeal. But we need not decide whether the error must be "obvious" at the time of trial or the time of appeal because it makes no difference in this case. Even if we were to look to the state of the law at the time of appeal, the answer would be the same because the law still is not settled, as indicated by *Black*'s express disagreement with *Munsey*. *Black*, ¶ 27; *People v. Valdez*, 2014 COA 125, ¶¶ 32-33 (concluding there is no plain error where "divisions of this court have reached different conclusions").

¶ 35 Moreover, there is no indication the jury was in fact coerced by the court's response. As we note above, at the time of its question, the jury had been deliberating for only half a day, and its question did not say anything one way or the other about its progress. Then, after receiving the instruction to continue deliberating, the jury deliberated for another two and a half hours, which cuts against a conclusion that the jury felt pressured by the court's response. *Cf.*

Black, ¶ 8 (noting that the jury returned a verdict thirty minutes after the court instructed the jury to continue deliberating). Absent at least some indication of coercion, we cannot say that the district court's response undermined the fundamental fairness of the trial or cast serious doubt on the reliability of Cox's conviction.[2]

¶ 36 For all of these reasons, we conclude that the district court did not abuse its discretion, much less plainly err, by instructing the jury to continue deliberating without first asking the jury whether further deliberation was likely to result in a unanimous verdict.

III. Supplemental Jury Instruction

¶ 37 Cox next contends that the district court abused its discretion by rejecting his proposed instruction that the jury should not consider the passage of time in reaching its verdict. We disagree.

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[2] Because *Black* involved a preserved claim of error, it was the People's burden to show the error was harmless beyond a reasonable doubt. *Hagos v. People*, 2012 CO 63, ¶ 11; *People v. Black*, 2020 COA 136, ¶ 32. Thus, reversal was required if the instruction was "*potentially*" coercive or if it was "possible" that the jury was at an impasse. *Black*, ¶¶ 31-32. But here, the burden is reversed. To qualify as plain error, "the error must impair the reliability of the judgment of conviction to a greater degree than under harmless error." *Hagos*, ¶ 14.

¶ 38 The district court has broad discretion in formulating jury instructions, so long as those instructions, as a whole, accurately inform the jury of the governing law. *Day v. Johnson*, 255 P.3d 1064, 1067 (Colo. 2011). If the instructions correctly state the law, we review the district court's decision to give or deny a particular instruction for an abuse of discretion. *Garcia v. People*, 2022 CO 6, ¶ 18. A court abuses its discretion when its ruling is "manifestly arbitrary, unreasonable, or unfair." *Day*, 255 P.3d at 1067. Because Cox does not contend that the jury instructions inaccurately stated the governing law, we review the district court's rejection of Cox's proposed instruction for an abuse of discretion.

¶ 39 Cox's proposed jury instruction stated that the passage of time between the offense and trial "should not be considered for any purpose." But as the district court explained, that instruction would not only have been misleading, but also inaccurate.

¶ 40 At trial, defense counsel cross-examined witnesses on the impact of the passage of time — on witness memories, on the availability of evidence, and on the investigation. In light of these proper subjects of cross-examination, an instruction that the jury should not consider the passage of time *for any purpose* would have

been confusing and incorrect. A jury *could* consider the passage of time for many purposes, including, for example, assessing the credibility of witnesses. The district court's decision not to give the instruction therefore was not an abuse of discretion.

¶ 41 Cox argues that the court left the jury to speculate about the reasons for the delay and to attribute the delay to Cox. But the other instructions foreclosed such speculation. For example, the court instructed the jury that it had "received all of the evidence that [it] may properly consider in deciding the case," and that it should not "speculate" about unanswered questions. Then, when the jury asked during deliberation about the reason for the delay, the court reiterated that the jury had received all the evidence it could consider in reaching a verdict. The district court need not give an instruction that is encompassed in the court's other instructions. *People v. Welsh*, 176 P.3d 781, 787 (Colo. App. 2007).

¶ 42 Cox suggests that the court should have worked with defense counsel to fix the instruction. But with the exception of a theory of defense instruction, a district court has no such obligation. *People v. Quezada-Caro*, 2019 COA 155, ¶¶ 50-51, *cert. granted, judgment vacated on other grounds, and case remanded*, No. 19SC962, 2020

WL 7868226 (Colo. Dec. 21, 2020) (unpublished order). The district court's obligation is to correctly inform the jury of the applicable law. *Garcia*, ¶ 16. Cox does not dispute that it did so here.

IV. Speedy Trial

¶ 43 Cox argues for the first time on appeal that his constitutional right to a speedy trial was violated. Because Cox did not raise this issue below, we review for plain error.[3] *People v. Jompp*, 2018 COA 128, ¶ 14. Cox must therefore show obvious and substantial error that so undermined the fundamental fairness of his trial as to cast serious doubt on the reliability of his conviction. *Hagos*, ¶ 18.

¶ 44 A defendant has a federal and state constitutional right to a speedy trial. To determine whether that right has been violated, we consider four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530

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[3] In *People v. McMurtry*, 122 P.3d 237, 241 (Colo. 2005), the supreme court held that "a defendant may only raise the improper denial of his constitutional right to a speedy trial on appeal if he raised it first in the trial court." But it has since made clear that unpreserved constitutional errors are reviewed for plain error. *E.g.*, *Hagos*, ¶ 14. We need not attempt to reconcile these two principles in this case because we conclude that there was no plain error.

(1972). But if the length of delay is not "presumptively prejudicial," we need not consider the other three factors. *Doggett v. United States*, 505 U.S. 647, 651-52 (1992); *People v. Sandoval-Candelaria*, 2014 CO 21, ¶ 35. A delay generally is deemed "presumptively prejudicial" as it approaches one year. *Sandoval-Candelaria*, ¶ 36.

¶ 45 Cox's speedy trial claim turns primarily on the threshold issue of when the constitutional speedy trial clock began to run. Cox argues the delay should be measured from May 2003, when the charge was initially filed against him. The People argue the delay should be measured from April 2019, when Cox's conviction was vacated and the charge was reinstated. We agree with the People.[4]

¶ 46 The purpose of the constitutional speedy trial guarantee is to alleviate the burdens of *unresolved* criminal charges. *United States v. MacDonald*, 456 U.S. 1, 8 (1982). Thus, when charges are *dismissed* and refiled, the period between dismissal and refiling does not count toward the length of the delay. *Id.* at 8-9; *People v.*

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[4] The mandate in Cox's prior appeal directing the district court to vacate Cox's guilty plea and conviction was issued on March 25, 2019. The district court vacated the conviction and reinstated the original charge on April 25, 2019. Because this one-month difference does not impact our analysis, we need not decide which of these two dates triggered the constitutional speedy trial clock.

Nelson, 2014 COA 165, ¶¶ 27, 29. Although we are aware of no Colorado case directly addressing when the constitutional speedy trial clock runs after a conviction is *vacated*, the same rationale supports measuring the delay from the vacation of the conviction and reinstatement of charges. Even more so than a dismissal, a conviction resolves the charges and "ends the obligation of the prosecutor and the court to bring the defendant to trial." *People v. Schneider*, 25 P.3d 755, 759 (Colo. 2001); *see also United States v. Marler*, 756 F.2d 206, 213 n.4 (1st Cir. 1985) (rejecting distinction between dismissal and conviction and noting that when charge is resolved by conviction, speedy trial guarantee no longer applies).[5]

¶ 47 Another division of our court, without directly addressing the issue, has reached a similar conclusion, measuring the delay "from receipt of the mandate from this court." *People v. Fennell*, 32 P.3d 1092, 1095 (Colo. App. 2000). Other courts have followed the same

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[5] In *Nelson*, the court also counted the period from the initial filing until the dismissal. *People v. Nelson*, 2014 COA 165, ¶ 32. But that is because, in the case of a dismissal, resetting the speedy trial clock would allow the government to "nullify a defendant's speedy trial right" by dismissing and reindicting whenever speedy trial time was running out. *Id.* at ¶ 30. The same rationale does not apply to a guilty plea and conviction. *See Patton v. People*, 35 P.3d 124, 128 (Colo. 2001) (noting that guilty plea waives right to speedy trial).

approach. *See United States v. Bizzard*, 674 F.2d 1382, 1386 (11th Cir. 1982) ("The time between a conviction and a reversal which requires retrial is clearly not counted for speedy trial purposes."); *State v. Rohwedder*, 2018 UT App 182, ¶ 7, 436 P.3d 324, 329 (citing cases "considering only the time period between the appellate mandate reversing a conviction and the retrial"); *cf. United States v. Ewell*, 383 U.S. 116, 121 (1966) ("It has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events.").

¶ 48 This approach is also consistent with the speedy trial statute, which restarts the statutory speedy trial clock when a conviction is reversed on appeal. § 18-1-405(2), C.R.S. 2022; *see People v. Sherwood*, 2021 CO 61, ¶ 22 (noting that purpose of speedy trial statute is to give effect to constitutional right to speedy trial).

¶ 49 Cox pleaded guilty in 2004 and did not again face unresolved charges until April 2019, when his conviction was vacated and the charge was reinstated. Thus, the length of the delay should be measured from then. Because Cox was tried five months later (and less than six months after the appellate mandate was issued), the

delay was not "presumptively prejudicial," and we do not consider the other *Barker* factors. *Sandoval-Candelaria*, ¶ 39.

¶ 50 Cox maintains that the delay should run from the date of his initial charge in 2003 because the prosecution acted in bad faith by seeking to enforce a sentence it should have known was illegal. But even assuming bad faith could allow the speedy trial clock to run while a defendant stands convicted, we are not persuaded that the circumstances in this case indicate bad faith. To the contrary, the parties and the district court worked extensively to effectuate the stipulated concurrent sentence. And they believed they had done so until *Cox* moved to vacate the conviction on the ground that the sentence had to be consecutive. There is no indication that any of these efforts were taken to circumvent the speedy trial guarantee.

¶ 51 We conclude that Cox has failed to show a violation — much less an obvious violation — of his constitutional speedy trial right.

V. Jurisdiction and Legality of Sentence

¶ 52 Cox's final argument is that the district court lacked authority to convict and sentence him after he had completed his federal sentence. He bases this argument on two theories: first, that the State lost jurisdiction to prosecute him when it agreed to his

transfer to federal custody, and second, that Cox's consecutive federal sentence required the state sentence to be served first.

A. The District Court Had Jurisdiction

¶ 53 Cox cites the rule of "primary jurisdiction" — sometimes called "priority of jurisdiction" or "primary custody" — to argue that the State lost jurisdiction to prosecute him when it allowed him to serve his federal sentence. We disagree. That rule has no bearing on the State's jurisdiction to prosecute a defendant for a state offense.

¶ 54 Primary custody is a rule of comity that determines which of two or more sovereigns is deemed to have custody over a defendant who stands convicted by each sovereign. *See Weekes v. Fleming*, 301 F.3d 1175, 1180-81 (10th Cir. 2002). It is used to determine which sentence the defendant is serving at any given time — typically, if not always, for the purpose of calculating the sentence. *Id.*; *United States v. Cole*, 416 F.3d 894, 896-97 (8th Cir. 2005); *see also People v. Subjack*, 2021 CO 10, ¶¶ 24-29 (rejecting rule that entitlement to preliminary hearing turns on primary custody).

¶ 55 Though sometimes referred to as "primary jurisdiction," the rule is not one of subject matter jurisdiction. It "does not destroy the jurisdiction" of the noncustodial sovereign. *Weekes*, 301 F.3d

at 1180. Nor does it confer any rights upon a defendant. *Craig v. Hunter*, 167 F.2d 721, 722 (10th Cir. 1948). Rather, the rule simply allows two sovereigns to decide between themselves which shall have custody of a prisoner and in which order. *Weekes*, 301 F.3d at 1180. The defendant remains subject to prosecution by both. *Hayward v. Looney*, 246 F.2d 56, 57 (10th Cir. 1957).

¶ 56 When the State released Cox to federal custody, it relinquished primary custody, thus allowing him to begin serving his federal sentence. That meant that the State was required to postpone the exercise of its custody until the federal government relinquished custody back. *Weekes*, 301 F.3d at 1180. But it did not bar the State from enforcing Cox's state sentence thereafter or, when that sentence was vacated, from reprosecuting Cox for a state offense. *Id.* at 1181 (noting that where state relinquished custody, defendant returned to state prison upon completion of federal sentence); *see also* § 18-1-201, C.R.S. 2022 (providing that a person is subject to prosecution in this state for an offense committed within the state).

B. Cox's Federal Sentence Does Not Make His State Sentence Unlawful

¶ 57 Cox also argues that service of his state sentence after his federal sentence would violate the federal sentencing order that the federal sentence be consecutive to the state sentence. He effectively contends that the federal sentencing order barred the State from reprosecuting him after his conviction was vacated. We disagree.

¶ 58 The statute underlying Cox's federal conviction provides only that the sentence for that offense shall not run concurrently with any other sentence. 18 U.S.C. § 924(c)(1)(D)(ii). It says nothing about the order in which the sentences must be served. Because Cox's state sentence was imposed after his federal sentence had been completed, it necessarily will be served second. But it will not run concurrently. Thus, even assuming the federal statute binds the state court, Cox's state sentence does not violate federal law.

¶ 59 Nor does it violate the federal sentencing order. Setting aside whether a federal sentencing order could ever bar a state from prosecuting a state offense, the one here does not. That order provides that the federal sentence shall be served "consecutively" to the state sentence. But it says nothing about the sequence.

Contrary to Cox's premise, "consecutive" does not mean "second." It means "following one after the other"— in other words, not concurrent. Merriam-Webster Dictionary, https://perma.cc/8DD3-N2V9. Because Cox's state sentence follows his federal sentence, the two sentences will necessarily be served consecutively.[6]

¶ 60 Cox contends that the federal sentencing order's requirement that Cox report to the probation office within seventy-two hours of his release from federal custody contemplated that the state sentence would be served first. But even if that were true, it does not mean the state sentence *had* to be served first — particularly where the state conviction was later vacated and the instant sentence not imposed until years after the federal sentence was complete. *See Setser v. United States*, 566 U.S. 231, 244 (2012) ("There will often be late-onset facts that materially alter a prisoner's position and that make it difficult, or even impossible, to implement his sentence.").

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[6] In this court's prior order reversing Cox's conviction, the division noted that Cox had completed his federal sentence, but it nevertheless concluded that the State could reinstate the original charge. *People v. Cox*, slip op. at ¶¶ 8, 31 (Colo. App. No. 16CA1237, Jan. 24, 2019) (not published pursuant to C.A.R. 35(e)).

¶ 61 Thus, Cox's prior federal sentence did not deprive the district court of its authority to impose a state sentence.

VI. Conclusion

¶ 62 The judgment is affirmed.

JUDGE DAILEY and JUDGE FURMAN concur.