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| COURT OF APPEALS, STATE OF COLORADO<br><br>2 East 14th Avenue<br>Denver, CO 80203 | |
| THE PEOPLE OF THE STATE OF COLORADO<br>Plaintiff-Appellant,<br><br>v.<br><br>FLOYD JOSEPH SENETTE,<br>Defendant-Appellee. | |
| Appeal from the District Court, El Paso County, Colorado<br>Case No. 16CR1229, Division 17<br>Honorable Jann Patrice DuBois, District Court Judge | ▲ **COURT USE ONLY** ▲<br>Case No.: 16CA1963 |
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# PEOPLE'S REPLY BRIEF

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R.32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

**The brief complies with C.A.R. 28(g).**

It contains 1869 words.

**I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.**

/s/ Tanya A. Karimi

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### I. The standard of review for a court's ruling on a motion to dismiss pursuant to Crim P. 48 is abuse of discretion, and the People preserved error.

Reviewing courts have applied an abuse of discretion standard in evaluating a district court's decision dismissing a case pursuant to Crim. P. 48 where a Defendant's speedy trial rights are not implicated. See People v. Storlie, 327 P.3d 243, 246 (Colo. 2014); Gallagher v. Cnty. Court In and For Arapahoe Cnty, 759 P.2d 859, 861 (Colo. App. 1988).

Defendant advocates a de novo standard of review for a trial court's ruling on a motion to dismiss. See Answer Brief, pp. 7–8. But Defendant's authority for this proposition relies on appeals in which defendants challenge the sufficiency of the evidence supporting their convictions. See People v. Hard, 2014 COA 132, ¶ 38 ("we review de novo to determine whether sufficient evidence supports a conviction"); People v. Lacallo, 2014 COA 78, ¶ 10 ("a third category of Colorado cases applies a de novo scope of review to unpreserved sufficiency claims"). A district court's decision to dismiss a case before trial is been reviewed as an abuse of discretion. See Storlie, 327 P.3d at 246 (Colo. 2014); Gallagher, 759 P.2d at 861 (Colo. App. 1988). Indeed, the Gallagher decision, which Defendant extensively cites in his Answer Brief, held that the trial court "had jurisdiction to

[dismiss a case after preliminary hearing] and it was not an abuse of discretion for it to do so." Gallagher, 759 P.2d at 861. Moreover, Gallagher applied an abuse of discretion review to the trial court's decision regarding the motion to continue and concluded that the same facts supporting denial of a continuance—lack of due diligence in making a witness available—supported the dismissal. Id.

Defendant also argues the district court's denial of the People's motion to continue and granting of Defendant's motion to dismiss were "separate and distinct" actions, to which separate standards of review apply. See Answer Brief, p. 10, ¶ 2. The record belies the assertion that the district court made separate rulings on the motion to continue and the motion to dismiss. The district court's ruling was as follows: a finding that the People's witness was uncooperative; a finding that Defendant had been in custody for a substantial period of time; and dismissal of the case. R. Tr. (10/11/16), p. 5, ll. 1–4; p. 6, ll. 3–5; p. 6, ll. 16–17. The district court never distinctly or separately ruled on the People's motion to continue or the People's request for a bench warrant. The district court's grant of Defendant's motion to dismiss effectively denied those two requests, and therefore, the district court's ruling, not the People's argument as Defendant asserts, conflated the issues.

In the same vein, Defendant argues the People failed to object to the district court's dismissal of the case, and therefore did not preserve error. Defense counsel moved to dismiss the case. R. Tr. (10/11/16), p. 3, ll. 16–17. The prosecution responded by asking the district court to continue the trial and issue a bench warrant for a witness. R. Tr. (10/11/16), p. 4, ll. 6–7. The prosecution, by moving for a continuance in response to Defendant's motion to dismiss, objected to dismissal, and therefore preserved error.

## II. A totality of the circumstances analysis which considers only prejudice to Defendant is unsupported by case law.

Defendant advocates for applying a totality of the circumstances analysis to consideration of motions to continue. Relying on People v Smith, 275 P.3d 715 (Colo. App 2011), Defendant argues the district court acted within its discretion by applying a totality of the circumstances analysis that considered only one circumstance: the prejudice of a continuance to Defendant. See Answer Brief, pp.14–22.

First, the People agree that a totality of the circumstances analysis can be an appropriate mechanism for evaluating a motion to continue. Contrary to Defendant's assertion, the People do not argue that only the factors of due

diligence, reasonable grounds to believe a witness will be available, and consideration of alternatives short of dismissal must apply in evaluating a continuance request. The People argue that when the request for a continuance is made by the prosecution, case law most often looks to these factors. See People v. Crow, 789 P.2d 1104, 1106–07 (Colo. 1990) (addressing due diligence); People v. Bakari, 780 P.2d 1089, 1092–93 (Colo. 1989) (addressing less harsh alternatives); People v. Trujillo, 2014 COA 72, ¶¶ 23–24 (analyzing reasonable grounds to believe a witness could be made available). Case law does not treat these factors as exhaustive, but case law usually addresses all or at least one of these factors. Indeed, consideration of these factors practically requires a totality of the circumstances type analysis, where a court takes into consideration all the circumstances before it. And that analysis may also include factors additional to the three categories discussed in the People's Opening Brief. See e.g. People v. Roberts, 146 P.3d 589, 593–96 (2006) (evaluating the materiality of an unavailable witness in addition to due diligence, and reasonable grounds to believe a witness would be available in the future).

Second, the People agree that prejudice is relevant to analyzing a motion to continue. But a court must consider prejudice to both the moving and opposing parties. See Bakari, 780 P.2d at 1092. The third factor identified in the People's

Opening Brief, consideration of alternatives short of dismissal, incorporates this consideration of prejudice. Id. The district court in this case considered prejudice to Defendant—his substantial time in jail, but failed to explicitly consider if that prejudice outweighed the prejudice to the People of outright dismissal. Defendant argues that "despite any prejudice to the prosecution, the trial court found a continuance was not going to cure it." See Answer Brief, p. 18, ¶ 2. The record fails to show the court made this finding. The district court found the witness was uncooperative, but the record shows the prosecution asked the district court to compel the witness's presence through a warrant. By not addressing the effect of the personal subpoena, the district court failed to consider the viability of a continuance and to weigh the effect of a week-long continuance on both parties.

Third, Defendant's argument that under a totality of the circumstances test the court was within its discretion to consider only one circumstance—the prejudice to Defendant—is not only inconsistent with the mechanics of how a totality of the circumstances analysis operates, but is also unsupported by the law he cites. In Smith, a division of this Court reviewed a district court's denial of a Defendant's motion for continuance. See Smith, 275 P.3d at 721–22. Smith frames its analysis by considering the "prejudice to the moving party if the continuance is denied and whether that prejudice could be cured by a continuance,

as well as the prejudice to the opposing party if the continuance is granted." Id. Smith, therefore, considered prejudice to *both* parties.

Moreover, as part of this prejudice analysis, Smith considered the reasonable grounds to believe a witness could be made available. The Defendant in Smith requested a continuance until after his codefendant's sentencing. See Smith, 275, P.3d at 721–22. The codefendant was unavailable due to invoking her Fifth Amendment privilege. Id. The court concluded that the "codefendant's unavailability…would not necessarily have been cured by the continuance" because the codefendant may have decided to appeal her sentence and keep her Fifth Amendment privilege intact. Id. The court also found that the codefendant was not necessarily a material witness. Thus, Smith analyzed several circumstances: prejudice to *both* parties, reasonable grounds to believe a witness could be made available, and materiality of an unavailable witness. Defendant's argument that the district court was within its discretion to consider only prejudice to Defendant is unsupported by case law.

## III. The cooperativeness of a witness does not determine if a personally served witness can be made available, and the record shows the People requested a warrant for the witness and knew how to locate the witness.

Defendant argues the district court had reasonable grounds to believe the witness was unavailable because the witness was uncooperative, because the People failed to request a bench warrant for the witness, and because the People would not have been able to locate the witness if a warrant were issued.

As the People's Opening Brief argues, the cooperativeness of a witness is relevant to whether the prosecution exercises due diligence. Due diligence does not necessarily require a prosecutor to personally subpoena a witness who is cooperative and has agreed to appear for trial. See People v. Valles, 2013 COA 84, ¶¶ 37–39. But when a witness is personally served, cooperativeness is not determinative of the reasonable grounds to believe the witness can be made available because the witness can be compelled to obey the subpoena. See Crim. P. 17(h). Here, the witness was uncooperative. But her unwillingness to freely obey a subpoena, does not make her unavailable. The district court's unwillingness to issue a warrant made her unavailable. And the district court's inaction when the prosecution requested a subpoena was an abuse of discretion.

Defendant asserts the People never requested a bench warrant pursuant to Crim. P. 17(h). See Answer Brief, p. 13, ¶ 2. And defendant uses that assertion to argue throughout the Answer Brief that there were no reasonable grounds to believe the witness could be made available. The record, however, belies Defendant's factual assertion. The prosecutor asked for a bench warrant and provided the court with proof of service. R. Tr. (10/11/16), p. 4, ll. 1–5. Indeed, the court file contains this proof of service. R. CF, p. 36. Defendant argues the People failed to request a bench warrant pursuant to Crim. P. 17(h) after the district court denied the prosecution a continuance. See Answer Brief, pp. 13–14. Because the court denied the continuance by dismissing the case, it is inconceivable how the prosecution "could still request and utilize a bench warrant during the trial." See Answer Brief, p. 14, l. 1.

Defendant asserts there are no reasonable grounds to believe the witness could be made available because the record implies the district attorney needed two days to locate the defendant. See Answer Brief, p. 19, ¶ 1. The record provides no such implication. The prosecutor informed the court the witness would not testify until the afternoon of the second day of trial because it would take most of the first day to pick a jury. R. Tr. (10/7/16), p. 7, ll. 7–10. Nothing in the prosecutor's representations to the court implies any difficulty in locating the

witness. To the contrary, the prosecutor represented to the court she knew where the witness lived and worked. And even if the prosecutor had represented law enforcement could locate the witness in two days, that representation would present the district court with yet another reasonable ground to believe the witness could be made available.

## CONCLUSION

For the reasons stated in the opening brief and this reply brief the People pray the Court reverse the order of the district court and reinstate all charges against Defendant.

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Entry of Appearance has been mailed by United States Postal Service mail or delivered (as indicated) to:

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June 23, 2017