ADVANCE SHEET HEADNOTE
April 14, 2025

2025 CO 13

No. 24SA213, *People v. Hernandez*—Appellate Procedure—As-Applied Constitutional Rulings—Facial Constitutional Rulings—C.A.R. 4(b)(6)—§ 16-112-102(1)—§ 13-4-110(2), (3).

The supreme court holds that an appeal from an order dismissing all criminal counts against a defendant on as-applied constitutional grounds must be filed in the court of appeals under section 16-12-102(1), C.R.S. (2024), and C.A.R. 4(b)(6)(A). Because this appeal was erroneously filed in the supreme court, it must be transferred to the court of appeals under sections 13-4-110(2) and (3), C.R.S. (2024).

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2025 CO 13

Supreme Court Case No. 24SA213
Appeal from the District Court
El Paso County District Court Case No. 23CR4830
Honorable Dinsmore Tuttle, Senior Judge

Plaintiff-Appellant:

The People of the State of Colorado,

v.

Defendant-Appellee:

Ashley Hernandez.

Appeal Transferred
en banc
April 14, 2025

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PER CURIAM.

PER CURIAM.

¶1 The People appeal from the district court's order dismissing a single-count complaint and information against Ashley Hernandez. We do not reach the merits of the district court's ruling. Instead, we conclude as a threshold jurisdictional matter that, because the district court's order dismissed Hernandez's criminal count on as-applied constitutional grounds, this case should have been appealed to the court of appeals under section 16-12-102(1), C.R.S. (2024), and C.A.R. 4(b)(6)(A). We therefore transfer this case to the court of appeals.

I. Facts and Procedural History

¶2 The People initially charged Hernandez with one count of retaliation against a judge—harassment under section 18-8-615(1)(a), C.R.S. (2024), based on statements she made to a judge while the two were riding in a courthouse elevator. Hernandez moved to dismiss the charge, arguing that her statements were protected speech under the First Amendment. The People amended the complaint to charge one count of retaliation against a judge—credible threat under section 18-8-615(1)(b). The People also responded to the motion to dismiss, arguing that Hernandez's statements constituted true threats of violence and, therefore, were not protected by the First Amendment.

¶3 The district court sided with Hernandez and dismissed the charge on First Amendment grounds. In a written order, the court noted that an audio recording

of the incident had been entered into the record during a pretrial motions hearing. Having reviewed that recording, the court acknowledged that Hernandez's language might have been disrespectful and the judge may have felt threatened. However, the court found that no threats of violence were uttered. Citing *Counterman v. Colorado*, 600 U.S. 66, 73 (2023), the court reasoned that there was no evidence that Hernandez recklessly disregarded the threatening nature of her words. It therefore dismissed the charge because it concluded that Hernandez's statements were protected speech and the charge against her was unconstitutional as applied.

¶4 The People then appealed to this court, citing section 16-12-102(1) and C.A.R. 4(b)(6)(B) as the basis for our jurisdiction. After the parties submitted briefs on the merits of the district court's ruling, we ordered supplemental briefing to address whether the appeal had been properly filed. Specifically, we asked the parties to discuss whether the district court's order determined "that a statute, municipal charter provision, or ordinance is unconstitutional" under Rule 4(b)(6)(B).

II. Appeals of As-Applied Constitutional Rulings

¶5 The People argue that section 16-12-102(1) and Rule 4(b)(6)(B) require rulings that address constitutional challenges, whether facial or as applied, to be appealed to this court. Hernandez disagrees and argues that as-applied

constitutional rulings must be appealed to the court of appeals. Further, she asserts that because the People failed to do so here, this court lacks jurisdiction and must dismiss the case with prejudice.

¶6 We conclude that dismissal of a criminal count on the grounds that it is unconstitutional as applied must be appealed, if at all, to the court of appeals under section 16-12-102(1) and C.A.R. 4(b)(6)(A). However, a party's erroneous filing in this court does not require dismissal of the appeal. Rather, the case must be transferred to the court of appeals under section 13-4-110(2) and (3), C.R.S. (2024).

A. Jurisdiction

¶7 We have the power, as a threshold matter, to determine whether we have jurisdiction in a case. Every tribunal has jurisdiction to determine its own jurisdiction. *Keystone, a Div. of Ralston Purina Co. v. Flynn*, 769 P.2d 484, 488 n.6 (Colo. 1989). This court also has jurisdiction to determine the jurisdiction of lower courts. Colo. Const. art. VI, § 1; *see also People ex rel. Union Tr. Co. v. Superior Ct.*, 488 P.2d 66, 68 (Colo. 1971) (determining that a lower court had appellate jurisdiction).

¶8 Although we transfer the merits of this appeal to the court of appeals, we issue this opinion under our "plenary authority to promulgate and interpret"

Colorado court rules, including the rules of appellate procedure. *People v. Steen*, 2014 CO 9, ¶ 10, 318 P.3d 487, 490; Colo. Const. art. VI, § 21.

B. Analysis

¶9 Whether interpreting a statute or a court rule, "[w]e employ the same interpretive rules." *Steen*, ¶ 10, 318 P.3d at 490. "In so doing, we look to the plain and ordinary meaning" of the language used by the statute or rule. *Id.* at ¶ 9, 318 P.3d at 490 (quoting *People v. Manzo*, 144 P.3d 551, 554 (Colo. 2006)). If the language is unambiguous, we apply it as written. *Id.* at ¶ 10, 318 P.3d at 490.

¶10 Section 16-12-102(1) authorizes the prosecution to appeal "any decision of a court in a criminal case upon any question of law." It further states, "Any order of a court that either dismisses one or more counts of a charging document prior to trial . . . shall constitute a final order that shall be immediately appealable pursuant to this subsection (1)." *Id.* Notably, subsection (1) does not require such appeals to be filed in this court. By contrast, subsection (2) expressly authorizes the prosecution to "file an interlocutory appeal *in the supreme court*" from certain trial court rulings. § 16-12-102(2) (emphasis added). The absence of comparable language in subsection (1) suggests that appeals from dismissals of criminal counts should be filed in the court of appeals. *See* § 13-4-102(1), C.R.S. (2024) (stating that "the court of appeals shall have initial jurisdiction over appeals from final judgments of . . . the district courts"); *see also Well Augmentation Subdistrict of Cent.*

Colo. Water Conservancy Dist. v. City of Aurora, 221 P.3d 399, 419 (Colo. 2009) ("When the General Assembly includes a provision in one section of a statute, but excludes the same provision from another section, we presume that the General Assembly did so purposefully.").

¶11 This interpretation is reinforced by C.A.R. 4(b)(6), which outlines the procedure for prosecutorial appeals. Rule 4(b)(6)(A) says, "Unless otherwise provided by statute or these rules, when an appeal by the state or the people is authorized by statute, the notice of appeal *must be filed in the court of appeals* within [forty-nine] days after the entry of judgment or order appealed from." C.A.R. 4(b)(6)(A) (emphasis added). Although Rule 4(b)(6)(B) provides procedures that apply if the appealed order "dismiss[ed] one or more but *less than all* counts of a charging document," C.A.R. 4(b)(6)(B) (emphasis added), here, all of Hernandez's charges were dismissed, and the appeal is authorized by section 16-12-102(1). Therefore, Rule 4(b)(6)(A) controls, and the appeal must be filed in the court of appeals.

¶12 The People point to language in Rule 4(b)(6)(B) requiring an appeal to be filed in the supreme court if the appealed order "is based on a determination that a statute . . . is unconstitutional." This language mirrors section 13-4-102(1)(b), which excludes from the court of appeals' jurisdiction "[c]ases in which a statute . . . has been declared unconstitutional." The People contend that because

Hernandez's counts were dismissed on constitutional grounds, the appeal must be filed with this court.

¶13 However, this argument relies on an overbroad interpretation of the phrase "[c]ases in which a statute . . . has been declared unconstitutional." If this phrase were construed to encompass *any* constitutional ruling dismissing charges, the court of appeals would lack jurisdiction to consider many of the cases it regularly decides dealing with as-applied constitutional challenges. *See, e.g.*, *People v. Lee*, 2019 COA 130, ¶ 2, 477 P.3d 732, 734 (affirming the district court's dismissal of charges on as-applied equal protection grounds). Instead, we construe the phrase "[c]ases in which a statute . . . has been declared unconstitutional" in section 13-4-102(1)(b) to apply to situations in which a district court has declared a statute to be *facially* unconstitutional.

¶14 A facial constitutional challenge is "a claim that the law or policy at issue is unconstitutional in all its applications." *Bucklew v. Precythe*, 587 U.S. 119, 138 (2019). By contrast, an as-applied constitutional challenge contends that a provision is unconstitutional under the specific circumstances in which a party has acted or is planning to act. *Developmental Pathways v. Ritter*, 178 P.3d 524, 533–34 (Colo. 2008). "The practical effect of holding a statute unconstitutional as applied is to prevent its future application in a similar context, but not to render it utterly inoperative." *Id.* at 534 (quoting *Sanger v. Dennis*, 148 P.3d 404, 411 (Colo. App.

2006)). Accordingly, in as-applied constitutional challenges, the issue is whether certain actions are unconstitutional applications of the law, not whether a statute should be "declared unconstitutional" in *all* of its possible applications.

¶15 This case clearly exemplifies this point. The district court did not declare section 18-8-615(1), which defines the offense of retaliation against a judge, to be unconstitutional in every possible scenario. Rather, the court concluded that the charge against Hernandez was unconstitutional because it sought to criminalize protected nonthreatening speech. The People's appeal from this ruling was therefore not required to be filed in this court under C.A.R. 4(b)(6)(B).

¶16 Finally, the fact that the People erroneously filed their appeal in this court does not result in dismissal, as Hernandez contends. Under section 13-4-110(2), "Any case within the jurisdiction of the court of appeals which is filed erroneously in the supreme court shall be transferred to the court of appeals by the supreme court." Section 13-4-110(3) further specifies that "[n]o case filed either in the supreme court or the court of appeals shall be dismissed for having been filed in the wrong court but shall be transferred and considered properly filed in the court which the supreme court determines has jurisdiction." Because jurisdiction in the court of appeals is proper, this appeal must be transferred to that court.

III. Conclusion

¶17 IT IS THEREFORE ORDERED that jurisdiction of this appeal is transferred to the court of appeals under sections 13-4-110(2) and (3).