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ADVANCE SHEET HEADNOTE
June 8, 2026

2026 CO 42

No. 25SA303, *In Re People v. Mena* – Double Jeopardy – Partial Verdicts – Verdict Forms – Lesser-Included Offenses.

In the underlying criminal case from which this C.A.R. 21 proceeding emerged, the defendant was charged with three counts of sexual assault under three different statutory provisions. The trial court presented the jury with verdict forms that included the charged offenses and the lesser-included offense of attempt as to each count. After three days of deliberation, the jury sent a written note to the court that clearly suggested it had acquitted the defendant of the charged offenses but was deadlocked on the lesser-included offenses.

Departing from federal precedent, the supreme court holds that under these circumstances – when a partial verdict is spontaneous, final, and unambiguous regarding the charges to which it applies – a trial court violates the defendant's right to be protected from double jeopardy under the Colorado Constitution if it fails to accept that verdict. Accordingly, the order to show cause is made absolute.

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

2026 CO 42

Supreme Court Case No. 25SA303
Original Proceeding Pursuant to C.A.R. 21
Larimer County District Court Case No. 23CR1133
Honorable Sarah B. Cure, Judge

In Re
Plaintiff:

The People of the State of Colorado,

v.

Defendant:

Omar Alexander Mena.

Order Made Absolute

en banc

June 8, 2026

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JUSTICE HOOD delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ**, **JUSTICE GABRIEL**, and **JUSTICE SAMOUR** joined.

JUSTICE BOATRIGHT, joined by **JUSTICE BERKENKOTTER**, dissented.

JUSTICE BLANCO did not participate.

JUSTICE HOOD delivered the Opinion of the Court.

¶1 In this original proceeding arising from an underlying criminal action, we examine a double jeopardy issue that first emerged in a note from a stalled jury. More specifically, we consider whether the trial court erred by declaring a complete mistrial after the jury spontaneously informed the court that it had reached a unanimous verdict on the charged offenses but remained deadlocked on lesser-included offenses. Because the jury's note irrefutably implied a partial verdict—namely, that the jury had acquitted the defendant, Omar Alexander Mena, of the charged offenses—we conclude that the trial court's mistrial order violated Mena's right to be protected from double jeopardy under the Colorado Constitution.

I. Facts and Procedural History

¶2 Mena was charged with three counts of sexual assault. *See* § 18-3-402(1)(a), (b), (h), C.R.S. (2025). He pleaded not guilty, and the case proceeded to a jury trial.

¶3 After the close of evidence, the People submitted jury instructions for the lesser-included offense of attempt on each count, which the court accepted over defense counsel's objection. The court then gave the jury verdict forms that contained two options for each charge: (1) the jury could find Mena not guilty of *both* the completed offense *and* the lesser-included attempt offense, or (2) the jury

could find Mena guilty of *either* the completed offense *or* the lesser-included attempt offense.

¶4 The forms gave the jury no way to declare Mena not guilty of the charged offense and simultaneously indicate a deadlock on the lesser-included offense.

Each of the verdict forms was structured¹ as follows:

*I. We, the jury, find the defendant, Omar Alexander Mena, NOT GUILTY of Count No. 1—SEXUAL ASSAULT (PHYSICALLY HELPLESS), and the lesser-included offense of CRIMINAL ATTEMPT TO COMMIT SEXUAL ASSAULT (PHYSICALLY HELPLESS).

FOREPERSON

**II. We, the jury, find the defendant, Omar Alexander Mena, GUILTY of Count No. 1—

SEXUAL ASSAULT (PHYSICALLY HELPLESS)

OR

CRIMINAL ATTEMPT TO COMMIT SEXUAL ASSAULT (PHYSICALLY HELPLESS)

¹ The People charged Mena with sexually assaulting the alleged victim on a single occasion in a way that violated three different statutory subsections; namely, sections 18-3-402(1)(a), (b), and (h). Hence, three charged offenses. Each alleged offense gave rise to a separate elemental instruction, a corresponding lesser-included offense instruction, and a verdict form like the one set forth here. The instructions distinguished among the alleged offenses using self-explanatory shorthand references: “physically helpless,” “incapable of appraising the nature of conduct,” and “no consent.” The format of each verdict form was identical, aside from these shorthand references.

FOREPERSON

* If you find the defendant NOT GUILTY of the charged offense and the lesser-included offense, the foreperson should sign section I above.

** If you find the defendant guilty of the crime charged or the lesser-included offense, the foreperson should complete only this GUILTY verdict by placing, in ink, an "X" in the appropriate square. ONLY ONE SQUARE may be filled in, with the remainder to remain unmarked. The foreperson should then sign only section II above.

¶5 The trial lasted five days. The jury deliberated for an additional three. On the second day of deliberations, the jury indicated that it was divided but still might reach a unanimous verdict.

¶6 On the third day, the jury informed the court, in writing, that it was "unable to come to a unanimous decision on the secondary charges. The jury is unanimous on the primary charges. No further deliberation will change our decision." To clarify what the jury meant, the court asked, "By 'secondary charges' do you mean the lesser-included offenses? By 'primary charges' do you mean the charges as outlined in [the elemental instruction for the completed offense]?" The jury answered both questions, "Yes."

¶7 Defense counsel asked the trial court to provide a new verdict form to the jury to allow it to separately indicate whether it had reached a verdict on the completed offense or the lesser-included offense for each charge. The court denied

the request, declared a mistrial on all charges, and denied defense counsel's request to poll the jury.

¶8 We granted Mena's petition for review under C.A.R. 21.²

II. Original Jurisdiction

¶9 Relief under C.A.R. 21 is an extraordinary remedy "limited in both purpose and availability." *People v. Moore*, 2021 CO 26, ¶ 21, 485 P.3d 1088, 1094. The decision of whether to exercise our jurisdiction under that rule rests solely within our discretion. C.A.R. 21(a)(2). We exercise our jurisdiction "when an appellate remedy would be inadequate [and] . . . a party may otherwise suffer irreparable harm." *People v. Kilgore*, 2020 CO 6, ¶ 8, 455 P.3d 746, 748 (citation omitted).

¶10 We agree with Mena that a traditional appellate remedy would be inadequate. A defendant can't immediately appeal a trial court's order for a new trial because it's not a final judgment. *People v. Cochran*, 490 P.2d 684, 685 (Colo. 1971); *see also* C.A.R. 1(a)(1). Because Mena may otherwise be forced to endure a second trial in violation of his constitutional right against double jeopardy, *see*

² The petitioner presents the following issue:

Whether a district court has abused its discretion by finding a mistrial on all charges manifestly necessary when a jury unequivocally indicates it has a unanimous verdict on originally filed charges and is only deadlocked on lesser included charges.

People v. Segovia, 196 P.3d 1126, 1129 (Colo. 2008), we exercise our original jurisdiction.

III. Analysis

¶11 We begin by identifying the standard of review. Next, we recount the legal framework that structures our analysis of double jeopardy and the manifest necessity exception. We then review when double jeopardy law allows a trial court to declare a mistrial and when it requires a court to accept a partial acquittal. Finally, we apply these principles to the facts of this case.

A. Standard of Review

¶12 We review a trial court’s finding of manifest necessity for a mistrial for an abuse of discretion. *People v. Richardson*, 184 P.3d 755, 760 (Colo. 2008). A court “necessarily abuses its discretion if its ruling is based on an erroneous view of the law.” *People v. Voth*, 2013 CO 61, ¶ 15, 312 P.3d 144, 148.

B. Double Jeopardy and Manifest Necessity

¶13 The United States and Colorado Constitutions both prohibit the government from subjecting criminal defendants to repeated prosecution for the same offense after the government fails to obtain a conviction in the first instance. U.S. Const. amend. V; Colo. Const. art. II, § 18.

¶14 In a jury trial like Mena’s, jeopardy attaches “when the jury is sworn” in. *People v. Porter*, 2015 CO 34, ¶ 9, 348 P.3d 922, 924. If the jury finds the defendant

not guilty or the trial is terminated without the defendant's consent after jury selection and before a verdict has been reached, double jeopardy principles will usually prevent retrial on the charges at issue. *Segovia*, 196 P.3d at 1133. As such, double jeopardy prevents prosecutors from intentionally forcing a mistrial to afford themselves a more favorable opportunity to secure a conviction. *People v. Baca*, 562 P.2d 411, 413 (Colo. 1977).

¶15 A defendant may be retried if a trial court declares a mistrial due to manifest necessity. *Segovia*, 196 P.3d at 1133. Manifest necessity exists under circumstances “substantial and real, that interfere with . . . ‘the administration of honest, fair, even-handed justice to either, both, or any, of the parties to the proceeding.’” *People v. Castro*, 657 P.2d 932, 942 (Colo. 1983) (quoting *Brown v. People*, 291 P.2d 680, 684 (Colo. 1955)), *overruled on other grounds by, West v. People*, 2015 CO 5, ¶ 2, 341 P.3d 520, 523. The declaration of a mistrial for manifest necessity is an extreme step that should be taken only when no “other reasonable alternatives” are available. *Segovia*, 196 P.3d at 1133.

¶16 One circumstance that constitutes manifest necessity for a mistrial is when a “jury is unable to agree upon a verdict.” § 18-1-301(2)(b)(IV), C.R.S. (2025); *see also Richardson*, 184 P.3d at 760. Here, we examine whether it is manifestly necessary to retry all charges when a jury returns a partial verdict that indicates an acquittal on greater offenses but a deadlock on lesser-included offenses.

C. Partial Verdicts

¶17 Juries are often asked to decide guilt as to the charged offense and one or more lesser-included offenses, like attempt. And because Colorado is a “soft transition” jurisdiction, a Colorado jury may consider guilt for charged and lesser offenses simultaneously. *Richardson*, 184 P.3d at 764 n.7. This can sometimes result in a jury reaching a verdict on the charged offenses, while remaining deadlocked on lesser-included offenses. When a jury returns “a final verdict on some, but not all of the greater degrees of the offense included within” a charge, we have a “partial verdict.” *Id.* at 763 n.5 (quoting *Whiteaker v. State*, 808 P.2d 270, 274 (Alaska Ct. App. 1991)).

¶18 A partial verdict, or the suggestion of one, can create a conundrum for the court: Should it try to clarify the jury’s intentions? Should it attempt to interpret and accept the partial verdict? Or should it declare a mistrial based on the jury’s stated deadlock? However unenviable the task is at times, it is the trial court’s responsibility to pick the best path under often shifting circumstances. *See Gibbons v. People*, 2014 CO 67, ¶ 31, 328 P.3d 95, 101 (“Addressing the fluid dynamics associated with possible deadlock is a quintessential trial court responsibility.”).

¶19 Even so, a court generally shouldn’t “interfere with the jury’s deliberative process.” *Id.* at ¶ 32, 328 P.3d at 101. Thus, if a jury raises merely the possibility

of an impasse to the court, the court must avoid making a statement to the jury that may suggest that the court is attempting to coerce any juror to “surrender his conscientious convictions to secure” a unanimous verdict. *Lowe v. People*, 488 P.2d 559, 561 (Colo. 1971). But the court should determine whether the jury is deadlocked or whether further deliberations would be helpful. *Gibbons*, ¶ 31, 328 P.3d at 101. The court then has discretion regarding how to proceed—for example, by giving supplemental instructions or by declaring a mistrial. *See id.* at ¶¶ 30–33, 328 P.3d at 101–02.

1. Prohibition on Partial-Verdict Inquiries

¶20 But the court may not initiate a partial-verdict inquiry—that is, it may not directly ask the jury to clarify its verdict when the jury has simply indicated that it is deadlocked. *See Richardson*, 184 P.3d at 763. The court may not inquire as to the extent of the jury’s deadlock by, for example, asking which offenses the jury is deadlocked on; doing so risks applying improper pressure on the jury. *Id.* If the jury’s communication leaves the court unable to discern the jury’s intention as between charged offenses for which the jury has acquitted a defendant and lesser offenses as to which the jury remains deadlocked, the court has discretion to either declare a mistrial as to all offenses or prompt the jury to continue deliberating. *See Gibbons*, ¶ 31, 328 P.3d at 101.

¶21 In *Richardson*, after three days of deliberation, the jury sent the court a note declaring that it had a unanimous verdict on one charge but had stopped making progress toward a unanimous verdict on the other two charges, each of which encompassed lesser-included offenses on which the court had also instructed the jury. 184 P.3d at 759. The court accepted three verdict forms from the jury: one was signed and found Richardson not guilty of vehicular homicide (DUI); the other two—for vehicular homicide (reckless) and the lesser-included offense of careless driving resulting in death and for first degree murder and the lesser-included offenses of second degree murder, manslaughter, and criminally-negligent homicide—were unsigned and unmarked. *Id.* The court then effectively declared a mistrial by setting Richardson’s case for retrial on the two deadlocked charges. *Id.*

¶22 This court granted Richardson’s petition for review under C.A.R. 21 and concluded that the trial court had appropriately exercised its discretion by declaring a mistrial on the counts for which the jury returned blank verdict forms because the jury was unable to reach a verdict on those charges. *Richardson*, 184 P.3d at 762. Under these circumstances, the trial court couldn’t ask the jurors to explain which offenses they were deadlocked on because it is improper for the court to “initiate any inquiry into partial verdicts premised on lesser included

offenses within a single complaint or count of an indictment.” *Id.* at 763 (quoting *Commonwealth v. Roth*, 776 N.E.2d 437, 450 (Mass. 2002)).

¶23 The rule against judicially initiated inquiries into partial verdicts is born out of a concern that such questioning may coerce jurors into changing their votes so the jury can reach a verdict. *See id.* “[A] judge’s request that the jury divulge the substance of their ‘final’ vote may force the jury to report as ‘final’ some votes that were not intended to be ‘final’ unless they resolved the entire case.” *Roth*, 776 N.E.2d at 448–49. This rule is consistent with other features of Colorado criminal procedure that presume a juror’s votes aren’t final until the jury declares that their unanimity is intended to be final. *See* § 16-10-108, C.R.S. (2025); Crim. P. 23(a)(8).

¶24 But the question here doesn’t implicate inquiries into the jury’s deliberative process. Rather, Mena asks whether a court must accept a partial verdict when the jury spontaneously and unequivocally tells the court that it has reached a final and unanimous verdict on certain offenses.

2. Spontaneous Partial Verdicts

¶25 When a trial court is presented with a jury’s unsolicited and unambiguous partial verdict, concerns about juror coercion disappear. Under these circumstances—when the jury’s unsolicited communication allows a court to distinguish the offenses the jury has unanimously decided from those it

hasn't—there is no ambiguity to resolve. And because Colorado's Double Jeopardy Clause bars retrial on charges for which the jury has unanimously reached "a final judgment favorable to the defendant," *People v. Quintana*, 634 P.2d 413, 420 (Colo. 1981), *overruled on other grounds by, Porter*, ¶ 22, 348 P.3d at 927, a trial court errs by rejecting the jury's clear partial verdict on facts like these.

¶26 Citing to *Blueford v. Arkansas*, 566 U.S. 599 (2012), the People point out that federal double jeopardy precedent doesn't require this result. Even if this is true, we have interpreted Colorado's Double Jeopardy Clause to afford broader protection from repeated prosecution than its federal counterpart. *E.g., People v. Serravo*, 823 P.2d 128, 141 (Colo. 1992). While the state and federal Double Jeopardy Clauses operate along similar principles and have nearly identical text, "even parallel text does not mandate parallel interpretation." *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 37, 467 P.3d 314, 324. Thus, under some circumstances, the Colorado Constitution will provide criminal defendants with protection from retrial even after the federal protection runs out. *People v. Paulsen*, 601 P.2d 634, 635–36 (Colo. 1979). "There is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in the same way." Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 174 (2018).

¶27 We are not alone in reaching this conclusion. Other state high courts also require trial courts to accept partial verdicts that are spontaneous and unequivocal in describing the offenses to which they apply. See *People v. Aranda*, 437 P.3d 845, 856 (Cal. 2019) (“The court has no duty to inquire as to the possibility of a partial verdict *unless* the jury has given some affirmative indication that it has acquitted on a greater offense but deadlocked only on a lesser offense.” (emphasis added)); *State v. Fennell*, 66 A.3d 630, 643 (Md. 2013) (“[I]f the jury indicates an intention to render a partial verdict ‘the court may not preclude the jury from doing so.’” (quoting the State’s brief to the court)); *Oliver v. Justs. of the N.Y. Sup. Ct.*, 324 N.E.2d 348, 351 (N.Y. 1974) (“If the jury still has a partial verdict, and the court is of the opinion that further deliberations would not be likely to produce ultimate agreement[,] . . . the partial verdict must then be accepted.”).

D. Application

¶28 The jury here spontaneously and unequivocally announced that it had reached a final verdict on the completed-act offenses and was deadlocked on the attempt offenses. Although the trial court responded to the jury’s note with a question, that question served only to clarify the phrasing of the jury’s note; the question wasn’t a partial-verdict inquiry. Armed with the jury’s response to the clarifying question, the only logical inference from the jury’s communication is that it had unanimously acquitted Mena of the completed acts. Had the jury found

Mena guilty of the charged offenses, the verdict forms told the jury that it wouldn't need to return a verdict for the lesser-included offenses, and it could return the forms as presented to the court. So, if the jury had unanimously convicted Mena of any of the charged offenses, it could have communicated that verdict to the court through the existing verdict forms. The People seemed to concede as much in oral argument to this court.

¶29 Given the jury's valid partial verdict as to the charged offenses, we conclude that the trial court abused its discretion by declaring a mistrial as to all offenses on which the court instructed the jury, rather than just as to the lesser-included offenses. In reaching this conclusion, we don't mean to suggest that trial courts have no discretion regarding how and when to amend verdict forms.³ Instead, we simply reiterate that a court's discretion is constrained by the principles of double jeopardy.

IV. Conclusion

¶30 The order to show cause is made absolute. On remand, Mena may be retried only for the attempt offenses.

JUSTICE BOATRIGHT, joined by **JUSTICE BERKENKOTTER**, dissented.

³ For example, comment 1 to Colorado's model criminal jury instruction E:15, COLJI-Crim. E:15 (2025), provides an example of how trial judges and the lawyers before them may be able to structure verdict forms to permit a jury to return a valid partial verdict.

JUSTICE BOATRRIGHT, joined by JUSTICE BERKENKOTTER, dissenting.

¶31 Dealing with juries that are struggling to reach a unanimous verdict is extremely challenging for a trial court judge. The majority amply lays out the potential pitfalls of the court weighing in inappropriately and being perceived as trying to coerce a verdict. *See* Maj. op. ¶¶ 18–19. The majority then concedes that dealing with a potential deadlocked jury is “a quintessential trial court responsibility” and that the court has “discretion regarding how to proceed,” whether it be by “giving supplemental instructions or by declaring a mistrial.” *Id.* (quoting *Gibbons v. People*, 2014 CO 67, ¶ 31, 328 P.3d 95, 101). I agree with that observation wholeheartedly. The trial judge made a very difficult decision here using their best judgment, and we should leave that decision alone.

¶32 While the majority seemingly acknowledges that important principle, it then turns around and disregards it by determining that this quintessential trial court decision, which was supported by case law, was an abuse of discretion. Maj. op. ¶ 29. I am not denying that there may be double jeopardy concerns here, but I cannot see how the trial court *abused its discretion* when it declared a mistrial. And perhaps of greater concern, the majority, for the first time, unnecessarily opens trial court proceedings to questions surrounding the use of partial verdict forms that are introduced for the first time *during* jury deliberations. This is going to cause problems. Hence, I respectfully dissent.

¶33 I believe that the proper remedy here would have been to discharge the order to show cause and remand the case to the trial court, with leave for the defense to file a motion to dismiss for violation of Omar Alexander Mena’s double jeopardy rights. Following this approach, the defense could have still raised arguments that retrial would subject Mena to double jeopardy on the lead charges¹ because it is, at the very least, arguable that the jury implicitly acquitted him of these charges.

I. Summary of the Facts

¶34 At Mena’s trial, the jury was provided with verdict forms for three different counts of sexual assault that instructed the jury to either (1) find Mena not guilty of both sexual assault and attempted sexual assault, or (2) find him guilty of sexual assault or attempted sexual assault (but not both). On the second day of deliberations, the jury told the bailiff that it was “split on the secondary charges but not the first.” In response, the trial court sent the jury a request for clarification asking it to elaborate and whether additional deliberation would assist it in

¹ The “lead charges” as used here and throughout this opinion refer to the three original charges brought against Mena for sexual assault (sexual assault – physically helpless, sexual assault – incapable of appraising the nature of conduct, and sexual assault – no consent), rather than the lesser-included attempt charges on which the People later asked the court to instruct the jury.

reaching a unanimous verdict. The jury answered affirmatively but without elaboration.

¶35 The next day, after a total of eighteen and a half hours of deliberation, the jury sent the court the following note: “The jury is unable to come to a unanimous decision on the secondary charges. The jury is unanimous on the primary charges. No further deliberation will change our decision.” The court then sought clarification from the jury, asking if “secondary charges” meant the lesser-included offenses and “primary charges” meant the lead charges; the jury confirmed this interpretation.

¶36 Following this, defense counsel noted that the verdict form was not structured in a way that would allow the jury to formally enter a not-guilty verdict on the lead charges if it could not reach a unanimous verdict on the lesser-included offenses. Accordingly, defense counsel asked the court to create modified verdict forms that would allow the jury to issue a partial verdict. Relying on *People v. Richardson*, 184 P.3d 755 (Colo. 2008), the trial court noted that it had discretionary authority on the matter and declined to issue modified verdict forms. It determined that the original verdict forms were “properly crafted,” and that it was not otherwise inclined to issue any partial verdict that would result from such

inquiry.² The court then declared a mistrial, finding it manifestly necessary to do so because the jury was deadlocked after “what appear[ed] to be incredibly thoughtful and time-intensive deliberations.”

¶37 Without filing any additional motions in the trial court, Mena then petitioned this court for an order to show cause, challenging the trial court’s finding of “manifest necessity” for a mistrial. He argues that the trial court should have issued a partial not-guilty verdict on the lead charges because the jury’s communications indicated that it had necessarily found him not guilty on these charges and was deadlocked only on the lesser-included offenses. Mena thus asks this court to either dismiss the lead charges or issue an order stating that retrial on those charges would violate his right against double jeopardy.

II. Analysis

¶38 One situation in which this court will exercise original jurisdiction under C.A.R. 21 is when “no other adequate remedy is available,” C.A.R. 21(a)(2), and when a trial court’s ruling would otherwise “significantly hinder” a party’s ability to prove the merits of their claim, *P.W. v. Child.’s Hosp. Colo.*, 2016 CO 6, ¶ 12, 364 P.3d 891, 895 (quoting *Warden v. Exempla, Inc.*, 2012 CO 74, ¶ 16, 291 P.3d 30, 34).

² Defense counsel also asked the court to poll the jury, which the court declined, reiterating its discretion on the matter, citing *Richardson*, 184 P.3d 755.

¶39 Mena argues that he has no other adequate remedy and is thus entitled to C.A.R. 21 review because if he is forced to face retrial, “he will have already been subjected to double jeopardy” in violation of his constitutional rights. Agreeing with Mena, the majority summarily concludes that because “Mena *may* otherwise be forced to endure a second trial in violation of his constitutional right against double jeopardy” a “traditional appellate remedy would be inadequate.” Maj. op. ¶ 10 (emphasis added).

¶40 But we don’t know that Mena would have to endure a second trial on the lead charges. Moreover, both Mena and the majority fail to consider what I see as an obvious remedy available here. If and when the People elect to proceed against Mena on a retrial, Mena would have the opportunity to file a motion to dismiss the lead charges on double jeopardy grounds before a second jury trial could commence. In fact, this was the order of operations pursued in the cases heavily cited in the briefing and in the majority opinion: *Richardson*, 184 P.3d 755, and *People v. Segovia*, 196 P.3d 1126 (Colo. 2008). Maj. op. ¶¶ 15, 21. Both cases similarly considered whether a declaration of mistrial was manifestly necessary based on double jeopardy considerations. But, in both cases, the defendants had first filed a motion to dismiss with the trial court and only sought this court’s review *after* the trial court denied those motions. See *Richardson*, 184 P.3d at 760; *Segovia*, 196 P.3d at 1129. Mena skipped a step here.

¶41 Following this approach, the parties could have first made the double jeopardy arguments presented before this court today just as effectively before the trial court in (and in response to) a motion to dismiss. Then, if the trial court were to have denied this motion to dismiss, Mena could still request this court’s C.A.R. 21 review *at that point*, when the issues would be “more obviously ripe and available” (as the trial court argues here).

¶42 Instead, due to the premature nature of this petition, Mena is cabined to presenting arguments that the trial court *abused its discretion* in declaring a mistrial. And, by taking this case in this procedural posture, the majority finds itself locked in to determining that the court abused its discretion; after all, without that determination, it cannot reach the double jeopardy question. Maj. op. ¶ 12.

¶43 I find it difficult to conclude that the trial court *abused its discretion* here when it declared a mistrial. The court acted in accordance with the authority it had before it and proceeded reasonably given the situation. The U.S. Supreme Court has explicitly stated that trial courts are not required to issue partial verdicts. *Blueford v. Arkansas*, 566 U.S. 599, 609 (2012) (“We have never required a trial court, before declaring a mistrial because of a hung jury, to consider *any particular means* of breaking the impasse—let alone to consider giving the jury *new options* for a verdict.” (emphases added)).

¶44 Additionally, the record suggests that the trial court struck an appropriate balance between “employ[ing] all legal and reasonable measures to secure a verdict,” and “tak[ing] care to avoid . . . ‘the coercion of verdicts by improper . . . influence.’” *Richardson*, 184 P.3d at 760 (omission in original) (quoting *Barriner v. Dist. Ct.*, 484 P.2d 774, 776 (Colo. 1971)). In *Richardson*, we concluded that the trial court proceeded properly when it took the following steps before declaring a mistrial instead of conducting a partial verdict inquiry: (1) instructing the jury to “continue to deliberate so long as progress is being made toward a unanimous verdict”; and (2) again instructing the jury to continue deliberating “if there is a likelihood of progress” once the jury communicated that it was still deadlocked as to the degree of the defendant’s guilt. *Id.* at 762–64. The trial court in *Richardson* declared a mistrial only after the jury indicated that further deliberations would be futile and after accepting the (incomplete) verdict forms. *Id.* at 758–59. Here, before declaring a mistrial, the trial court took similar steps to secure a verdict while honoring its discretion to decline a partial verdict inquiry. The trial court only declared a mistrial after over eighteen hours of deliberation and after the jury communicated that it could not come to a unanimous decision on the lesser-included counts. This decision, moreover, came after the court’s instructions to the jury to continue deliberating if progress could be made as well as the court’s multiple requests for clarification. Now, the majority concludes that

the trial court here abused its discretion even though the court proceeded identically to the *Richardson* trial court. In my view, under these facts, the trial court did not abuse its discretion by declining to construct a verdict form mid-deliberations, especially one that had never been given in Colorado.

¶45 While the trial court notes that rejecting jurisdiction here would “result in merely re-briefing these same issues in short order,” by refusing to do so, the majority has set an unnecessary precedent that will sow great confusion in future cases. Anytime a jury indicates some kind of difficulty in reaching a verdict, defense counsel will now be incentivized to request that a partial verdict form be submitted. And, compounding the problem, the majority has needlessly muddied the waters as to when it is proper for a court to tender a partial verdict form during jury deliberations, or when doing so would be deemed coercive. It is my view that the majority has made these decisions all the more difficult for future judges.

¶46 Instead, a fair and just solution remains amply available to Mena without seeking this court’s review at this stage. This court should discharge the order to show cause and remand the case to the trial court with leave for the defense to file a motion to dismiss the original charges. Such an approach would enable Mena to still raise his double jeopardy arguments while reinforcing the correct order of operations that parties should take *before* seeking this court’s review. Hence, I respectfully dissent.