MEMORANDUM

TO: Civil Rules Committee

FROM: Rule 16.2(e)(10) Subcommittee

RE: Proposed revision to Rule 16.2(e)(10) to address the ambiguity flagged in *In re Marriage of Runge*, 2018 COA 23M

The second sentence of Rule 16.2(e)(10) currently reads as follows:

> If the disclosure contains misstatements or omissions, the court shall retain jurisdiction after the entry of a final decree or judgment for a period of 5 years to allocate material assets or liabilities, the omission or non-disclosure of which materially affects the division of assets and liabilities.

In *Marriage of Runge*, the three members of the division ascribed three different meanings to this sentence: the disagreement centered on whether a court could grant a motion to reallocate filed less than 5 years after the final decree if that 5 year window expired before a ruling.

To clear up this ambiguity, the subcommittee proposes that the second sentence be changed, and that a new sentence be added, as follows:

> If a party believes that the disclosure contains a misstatement or omission materially affecting the division of assets or liabilities, the court shall consider and rule on any motion to reallocate assets and liabilities based on such a misstatement or omission that is filed within 5 years of a final decree or judgment. The court shall deny any motion under this paragraph alleging such a misstatement or omission that is filed more than 5 years after the final decree or judgment.

So as long as a motion is filed within 5 years, the court must rule on it; if a motion is filed after 5 years, the court must deny it.

MEMORANDUM

TO: Civil Rules Committee

FROM: Rule 106(a)(4) Subcommittee

RE: Alternative recommendations for changes to Rule 106(a)(4)

The issue the subcommittee has been looking at is the use of Rule 106(a)(4) by prosecutors and defense attorneys to obtain interlocutory appeal of rulings — including purely discretionary rulings — in criminal cases filed in county court. Using the rule in this way results in substantial delay. And a party can't use any similar process if the criminal case is filed in district court (with very limited exceptions, the only avenue for relief is a C.A.R. 21 petition to the Colorado Supreme Court), leading one to ask: why treat county court cases differently from district court cases?

Judge Jones prepared a memo for the subcommittee tracing the history of Rule 106(a)(4) and related rules as they relate to the issue before us. That memo is attached. (Sorry for its length.) The bottom line is that changes to Rule 106 and C.A.R. 21 in 1965, re-establishment of the Court of Appeals in 1970, and changes to Rule 106 in 1986 led to the current situation. The other significant fact

is that in 1999, the supreme court changed C.A.R. 21 to remove the limitation to proceedings in district court, meaning that parties in county court cases can petition the supreme court under that rule.

In short, the way Rule 106(a)(4) is now used for criminal cases in county court has little support in the history of the rule. The phrase "abused its discretion" in the rule is applied much more expansively than originally envisioned and applied, and trial court judges are unaware of the intended, more limited meaning of the phrase.

The subcommittee has several alternative proposals. In considering these alternatives, the subcommittee was guided by the need to solve only the problem at hand — abuse of the rule in county court criminal cases — and the desire to avoid disturbing the current application of the rule in review of agency actions.

The first alternative is to expressly limit the rule to civil cases. This could be done rather simply by adding the clause ", in any civil matter," after "Where" at the beginning of (a)(4). It might be a good idea to pair this change with a comment saying that the avenue for challenging interlocutory rulings in criminal cases is C.A.R. 21.

The benefits of this proposal are (1) it solves the immediate problem of misuse of the rule in county court criminal cases, and (2) it is minimalist (reducing the chances of negative unintended consequences). One downside is that it preserves the opportunity for abuse in *civil* cases filed in county court. Anecdotal evidence, however, suggests that use of the rule in county court civil cases to achieve an interlocutory appeal are very rare. Another downside may be that the supreme court has approved of using the rule to challenge county court jurisdiction in criminal cases. *See Cty. Court v. Ruth*, 575 P.2d 1 (Colo. 1977). But that was at a time when C.A.R. 21 was closed off to county court cases.

The second alternative (for which there is only limited support on the subcommittee) is more ambitious. It would seek to return the rule to its roots by jettisoning the phrase "abused its discretion." As that phrase was originally understood in this context, it didn't apply to merely discretionary acts taken in the course of the lower tribunal's proper exercise of its discretion. Rather, it applied only to situations where the lower tribunal hadn't regularly pursued its authority — meaning, an irregularity in asserting jurisdiction, an improper exercise of power, or imposition

of an improper remedy. So the phrase "failed to regularly pursue its authority" would be substituted for "abused its discretion," in both (a)(4) and (a)(4)(I). This would be accompanied by a comment explaining the meaning of the phrase and perhaps referring back to some older case law.

A third option is to add a comment emphasizing the "and there is no plain, speedy, and adequate remedy otherwise provided by law" limitation. This might help at the front end (a district court might be more apt to dismiss a petition), but it wouldn't do much else. Even a district court's ruling dismissing a petition is appealable to the Court of Appeals.

A fourth option would be to allow the filing of a complaint only if the district court determines that the petition states a proper basis for relief under the rule. If not, the court would summarily deny the petition. This would return the rule to its pre-1986 (perhaps pre-1941) state. No longer would such filings be treated automatically as creating an ordinary civil case, perhaps cutting delays by several months.

The subcommittee recognizes that this is a lot to chew on. Our hope is to discuss this issue at our full committee meeting on

September 27 in some depth so that we can get further direction on next steps (if any).

MEMORANDUM

TO: Rule 106(a)(4) Subcommittee

FROM: Judge Jerry N. Jones

RE: Use of Rule 106(a)(4) as a vehicle for interlocutory appeals in criminal cases filed in county court

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I. The Problem

In my original memo to the full Civil Rules Committee I identified what I see as a problem with how Rule 106(a)(4) is being used in a certain type of case. Specifically, parties in criminal cases (both prosecutors and defendants) filed in county court (and municipal court) are filing Rule 106(a)(4) actions in district court to challenge a variety of interlocutory, discretionary rulings. This is a problem (in my view) for two reasons. My previous memo points out that this wouldn't be possible were the case filed in district court, and, perhaps more importantly, the result is substantial delay (years) in resolving the case. As to this second aspect of the problem, even if a district court judge is diligent about enforcing the "and there is no plain, speedy and adequate remedy otherwise provided by the law" language in the rule, and dismisses a case on that basis, that dismissal is itself appealable to the Court of

Appeals. And, of course, any decision granting or denying the petition is appealable as well.

There seemed to be a consensus on the full committee that this practice shouldn't be allowed. So the subcommittee was formed to look into this.

At our first subcommittee meeting, I proposed that we consider recommending that the rule be changed in one simple way: add the clause ", in any civil matter," after the first word of the rule ("Where"). The first portion of subsection (a)(4) would then read as follows (new material in bold):

> Where**, in any civil matter,** any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by the law . . . .

Two potential drawbacks to this approach have been identified so far.

The first is that the Colorado Supreme Court has expressly blessed the use of the rule to challenge a county court's jurisdiction in a criminal case by filing a petition in district court. *See Cty. Court in and for El Paso Cty. v. Ruth*, 194 Colo. 352, 355-57, 575 P.2d 1, 3-4 (1977). So changing the rule in this way would amount to overruling case law by rule, something we know the supreme court doesn't like to do. And given the history of the rule, which I'll get to later, such a change (barring jurisdictional challenges) would indeed seem to be contrary to longstanding practice.

The second potential drawback, as pointed out by Stephanie Scoville at our meeting, is that my proposal leaves in tact the ability of parties in *civil* cases filed in county court (or municipal court) and parties in judicial or quasi-judicial proceedings before boards and agencies to obtain interlocutory review of discretionary decisions. Why should that be allowed? It seems, based on anecdotal evidence, that this is less of a problem, because Rule 106(a)(4) cases are seldom filed in such cases. But, at least as a matter of logic or consistency, the problem remains.

This second drawback led me to conclude that the root of one aspect of the problem — the ability in the first instance even to file

under Rule 106(a)(4) — is really the "abused its discretion" language in the rule. So I offered to research the history of the rule and its application to hopefully shed some light on how that phrase has been understood in this context historically. In the course of doing that I came across other relevant information. Below, I trace the lineage of Rule 106(a)(4). I discuss the ways in which the rule and its predecessors were understood and applied. And finally I make a few recommendations.

II. History of Rule 106(a)(4)

In the beginning, there were common law writs. In 1887, the General Assembly codified some writs, including, as relevant for our purposes, those for certiorari and prohibition, in sections 331-341 of the Code of Civil Procedure. That group of sections was entitled "Writ of Certiorari and Prohibition," but the text didn't expressly distinguish between the two. Rather, it seems to have created a common procedure for pursuing either. That procedure was to file an "application" with "any court of record" to review certain actions of "an inferior tribunal, board or officer exercising judicial functions." Code of Civil Procedure § 331 (1908). The court could order the opposing party to show cause why the writ shouldn't be

granted, or it could grant the writ without notice. *Id.* at § 332. Importantly, the court could simply deny the writ, terminating the proceeding before any other action — such as obtaining the record or hearing from the other side — was required. In this way, the court's common law discretion to grant or deny the writ was preserved. To grant a writ at this stage meant requiring the lower tribunal or body to send up the record for review; it didn't mean granting the relief requested by the applicant. *See id.* at §§ 333-334; *see also* 14 Am. Jur. 2d, *Certiorari* §§ 1, 8 (2009); Black's Law Dictionary 187 (1st ed. 1891) (defining "certiorari").

If the court chose to issue the writ, review was expressly limited. Much like the current rule, section 331 also provided that

> [t]he writ shall be granted in all cases where an inferior tribunal, board or officer exercising judicial functions, has exceeded the jurisdiction or greatly abused the discretion of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy.

Id. Section 331 thus created only two categories of actions subject to review: where the lower tribunal or body either (1) proceeded in excess of its jurisdiction or (2) greatly abused its discretion. Section 337 further explained that the court's review shouldn't go beyond

"determin[ing] whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer."

Case law decided under Sections 331-341 held that they tracked the common law writs. (A point that I think is fairly important, as explained below.) *Union Pac. R. R. Co. v. Wolfe*, 144 P. 330, 331 (Colo. 1914) ("To all practical intents and purposes, this [statutory] writ is the same as the common-law writ [of certiorari].").

In 1941, the Colorado Supreme Court adopted the Civil Rules, among them, Rule 106, which abolished remedial writs and created new procedures for seeking the types of relief allowed by such writs.[1] The Committee Note to that rule says that subsection (a)(4) is based on sections 331-341 of the Code of Civil Procedure. *See* 1935 Colo. Stat. Ann. 335 (1941 Repl. Vol.). As adopted, Rule 106(a)(4) said as follows:

> In the following cases relief may be obtained by appropriate action or by an appropriate motion under the practice prescribed by these rules:
>
> . . .
>
> (4) Where an inferior tribunal (whether court, board, commission or officer) exercising

[1] The Civil Rules displaced statutory procedures, unless indicated otherwise.

> judicial or quasi-judicial function, has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy. Upon the filing of the complaint the court shall direct the issuance of a citation to the inferior tribunal to show cause why the relief requested shall not be allowed. If the complaint is supported by an affidavit the order to show cause may be issued, or the court may forthwith order the inferior tribunal, or any person having custody of the records of the proceedings described in the complaint, to certify to the court at a specified time and place a transcript of the record and proceedings, or such portion thereof as the court may direct. Review shall not be extended further than to determine whether the inferior tribunal has exceeded its jurisdiction or abused its discretion.

There are four things about the original Rule 106(a)(4) which may be important to us.

First, it seems to have eliminated the court's discretion to simply dismiss the petition (called a "complaint") before any other action was taken. It required that the court either issue an order to show cause or order up the record for review (granting the writ). Presumably the court still had the discretion to dismiss the petition after reviewing the response to an order to show cause without first obtaining the record.

Second, the rule didn't limit the filing of a petition/complaint to district court: it could be filed in district court or the supreme court.[2] And something else: apparently a party could file a Rule 106(a)(4) petition/complaint in the supreme court challenging the action of a county court.

Third, the rule retained the jurisdiction and abuse of discretion limitations of the former Code provisions.

And fourth, the rule replaced the language of Code § 337 limiting review to whether the tribunal had "regularly pursued" its "authority" with language repeating the jurisdiction and abuse of discretion limitations expressed a few sentences earlier in the rule.

In 1965, there was a significant change to Rule 106. Motions thereunder were limited to district courts ("In the following cases relief may be obtained in the district court . . . ."). And at the same time, the supreme court changed C.A.R. 21 (which governs original proceedings in the supreme court) to limit petitions thereunder to

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[2] There was some question about this, as then C.R.C.P. 116 (a predecessor of current C.A.R. 21) provided for discretionary review of district court rulings in the supreme court by writ of prohibition. But in *Stull v. District Court*, 308 P.2d 1006 (Colo. 1957), the court held that review under Rule 106(a)(4) was available in the supreme court notwithstanding any limitations in then Rule 116. *See also Solliday v. Dist. Court*, 313 P.2d 1000, 1002 (Colo. 1957).

challenges to actions of the district courts. Consequently, (1) Rule 106(a)(4) petitions could no longer be filed in the supreme court at all, (2) all such petitions had to be filed in the district court, and (3) a party desiring to challenge the actions of a county court could no longer file a petition in the supreme court, either under Rule 106(a)(4) or under C.A.R. 21. One result was that the delays in county court cases occasioned by Rule 106(a)(4) petitions became more pronounced. Whereas before a party in a county court case could file a Rule 106(a)(4) petition in the supreme court, upon which the supreme court would act rather quickly (either if it decided to deny the petition outright or accept it and rule on the petition's contentions), that option was lost. Such a party had to file its Rule 106(a)(4) petition in district court. And after a ruling by the district court, that party could seek review by way of appeal to the supreme court. (The Court of Appeals didn't exist at that time.)

The delays got worse in 1970 with the re-establishment of the Court of Appeals. That added another layer of review to the process — one which can last quit a while. What's more, that isn't the end of the line. After the Court of Appeals decides the case the aggrieved party can then seek certiorari review by the supreme

court under C.A.R. 51. Even if the supreme court decides not to take the case, the added delay can be substantial. If it takes the case, under the current state of affairs there might not be a decision for another year or more.

In 1986, Rule 106(a)(4) was amended to substantially change the procedures for resolving a petition filed thereunder. In essence, the district court lost discretion to dismiss the petition at the earliest stage. Filing a complaint now entitles (indeed, requires) the opposing party to file "[a]n answer or other response pleading." C.R.C.P 106(a)(4)(II). If the petitioner wants the court to consider the record, it must file a motion to that effect, and the court must direct the lower tribunal or body to file the portions certified by the petitioner with the district court. C.R.C.P. 106(a)(4)(III). The opposing party may then supplement the record. C.R.C.P. 106(a)(4)(IV). The parties then file opening, answer, and reply briefs, just as if the matter were an appeal. All of that adds several months to the delay in resolving a petition for relief in the nature of certiorari or prohibition.

Before going further, I want to note one more relevant rule change. Effective in 1999, C.A.R. 21 was changed to remove the

limitation to proceedings in district court. So, presumably, a party in a county court case now may petition the supreme court for review under C.A.R. 21. I think this has ramifications for how we might potentially address the problem that's the subject of our subcommittee's mandate.

III. Historic Limitations on Relief

The history recounted above seems to show a direct line of descent from the common law writs of certiorari and prohibition and current Rule 106(a)(4), at least in terms of limitations on remedies. It would seem to follow that the jurisdiction and abuse of discretion limitations in Rule 106(a)(4) are the same as those at common law, or at least as those that were developed through case law under former procedures. *See Leonhart v. Dist. Court*, 329 P.2d 781, 783 (Colo. 1958) ("Even under the Rules of Civil Procedure the substantive aspects of remedial writs are preserved, and relief of the same nature as was formerly provided in such proceedings may be granted in accordance with precedents established under the old practice.").

But before turning to those limitations, I think it's worth saying a little about the historical understandings of certiorari and prohibition more generally. One difference between the two is temporal: certiorari, with very rare exceptions, seeks to remedy something that has already occurred, and usually only after a final judgment, while prohibition is preventative or restraining — that is, it prohibits the lower tribunal from doing something. Relatedly, while certiorari is typically available only after a final judgment, prohibition, because it's preventative or restraining, applies before judgment. *See People ex rel. Orcutt v. Dist. Court*, 445 P.2d 887, 889 (Colo. 1968); *Colo. State Bd. of Med. Exam'rs v. Dist. Court*, 331 P.2d 502, 506 (Colo. 1958); *Eveready Freight Serv., Inc. v. Pub. Utils. Comm'n*, 280 P.2d 442, 444 (Colo. 1955); Am. Jur. 2d, *Certiorari* §§ 19, 20; 63C Am. Jur. 2d, *Prohibition* §§ 1, 4, 10 (2009).

The common law writ of certiorari also applied, albeit after the fact, when a court proceeded without jurisdiction or in excess of its jurisdiction, and there was no plain, speedy, or adequate remedy. *State Bd. of Med. Exam'rs v. Noble*, 177 P. 141 (Colo. 1918); *Wolfe*, 144 P. at 330-32; Am. Jur. 2d, *Certiorari* §§ 2, 93. And it applied when the lower tribunal or body had "greatly abused its discretion,"

again if there wasn't any plain, speedy, or adequate remedy. *State Bd. of Dental Exam'rs v. Savelle*, 8 P.2d 693, 695 (Colo. 1932) (quoting Code of Civil Procedure § 331); *Chenowith v. State Bd. of Med. Exam'rs*, 141 P. 132, 133 (Colo. 1913); *see also Wolfe*, 144 P. at 331 ("gross abuse of discretion"); *Pierce v. Hamilton*, 135 P. 796, 797-98 (Colo. 1913) (certiorari inappropriate if the issue can be decided in an appeal).

Prohibition is most commonly applied to prevent a lower tribunal or body from proceeding in the absence of jurisdiction or in excess of its jurisdiction. *See Bustamonte v. Dist. Court*, 329 P.2d 1013, 1016-18 (Colo. 1958) (indictment barred by statute of limitations); *People ex rel. L'Abbe v. Dist. Court*, 58 P. 604, 604-05 (Colo. 1899); *People v. Dist. Court*, 56 P. 1115 (Colo. 1899) (district court properly granted writ of prohibition to preclude county court judge, who should have recused himself, from presiding over the case); Am. Jur. 2d, *Prohibition* § 1. But in some jurisdictions, including, perhaps, Colorado, it may be employed to prevent a lower tribunal or body from abusing its discretion (in the sense of that phrase discussed below) if there isn't a plain, speedy, or adequate remedy. *See Smith v. Dist. Court*, 907 P.2d 611, 612 n.1 (Colo.

1994) (saying, in dictum, that relief in the nature of prohibition is available under C.A.R. 21 "in those cases where the district court has abused its discretion in exercising its functions"); *but see Prinster v. Dist. Court*, 325 P.2d 938, 941 (Colo. 1958) ("Nor may [prohibition] be used to restrain a trial court from committing error in deciding a question properly before it . . . ."); Am. Jur. 2d, *Prohibition* §§ 47, 49 (noting that the majority rule is otherwise; prohibition can't be used in this way).

This brings us, then, to the meanings of jurisdiction and abuse of discretion.

The jurisdiction piece is easy to understand. It means subject matter or personal jurisdiction. *E.g.*, *Bustamonte*, 329 P.2d at 1016-18 (subject matter jurisdiction); *Treadwell v. Dist. Court*, 297 P.2d 891, 892 (Colo. 1956) (personal jurisdiction). And the *meanings* of those concepts (though not, perhaps, the application thereof) have stayed the same for a very long time.

Turning to abuse of discretion, here's where we run into trouble.

As we all know, trial court judges are called on to make a host of discretionary decisions. Indeed, there are so many types of such

decisions that listing them would risk losing your attention. Does "abused its discretion" in this context encompass all of these decisions? The clear answer to this is "no." Aside from the fact that any discretionary ruling for which there is a plain, speedy, and adequate remedy (e.g., an appeal) isn't covered, several other limitations emerge from the case law. The term doesn't encompass factual questions; resolving disputed issues of fact — even reviewing issues of fact — is beyond the scope of the remedy. *Doran v. State Bd. of Med. Exam'rs*, 240 P. 335, 337 (Colo. 1925); *Noble*, 177 P. at 141 ("Whether [the lower body's] decision on the merits is right or wrong is not within the issue."); *Thompson v. State Bd. of Med. Exam'rs*, 151 P. 436, 438-39 (Colo. 1915); Am. Jur. 2d, *Certiorari* § 93. So too are merely discretionary acts taken in the course of the lower tribunal's proper exercise of its jurisdiction. *See Prinster*, 325 P.2d at 941; *Thompson*, 151 P. at 439; *Pierce v. Hamilton*, 135 P. 796, 798 (Colo. 1913); Am. Jur. 2d, *Certiorari* §§ 25, 93. And the same is true for mere errors of law. *Doran*, 240 P. at 337; *State Bd. of Med. Exam'rs v. Brown*, 198 P. 274, 275 (Colo. 1921). If our district courts would consistently apply these

limitations, that would probably, over time, alleviate much of the problem.

But then what kinds of rulings does "abused its discretion" cover? A clue is found in the language of section 337 of the old Civil Code, discussed above. Under that section, review was limited to determining whether the lower tribunal or body regularly pursued its authority. Cases decided under that section held that this section thereby defined "abused the discretion" as used in section 331. *Doran*, 240 P. at 337; *Brown*, 198 P. at 275; *see also* Am. Jur. 2d, *Certiorari* § 93. Of course, going this far only substitutes one term — regularly pursued its authority — for another — abused its discretion.

As a general matter, it's been said that what "regularly pursued its authority" refers to is an irregularity in asserting jurisdiction, an improper exercise of power, or imposition of an improper remedy. Am. Jur. 2d, *Certiorari* § 93; *see Thompson*, 151 P. at 439 ("'Upon every question, except the mere question of power, the action of the inferior tribunal is conclusive.'" (quoting *Whitney v. Bd. of Delegates of San Francisco Fire Dep't*, 14 Cal. 479, 500 (Cal. 1860))). Colorado case law puts some flesh on these bones.

- An order in an eminent domain case granting temporary possession of the subject property to the condemning entity pending a final judgment may be reviewable under Rule 106(a)(4). *Town of Glendale v. City & Cty. of Denver*, 322 P.2d 1053, 1055-56 (Colo. 1958); *Swift v. Smith*, 201 P.2d 609, 616 (Colo. 1948).
- Where a lower body such as an agency misapprehends its authority under a statute, that is an abuse of discretion. *Savelle*, 8 P.2d at 698 (medical board proceeded under the misunderstanding that its only two options were to acquit the defendant or annul his license; suspension was also a remedy authorized by the statute).
- Similarly, a lower tribunal or body may abuse its discretion by misapprehending the meaning of a statute governing its authority. *Dilliard v. State Bd. of Med. Exam'rs*, 196 P. 866, 867-88 (Colo. 1921) (whether doctor's conduct was unprofessional and dishonorable within the meaning of a statute was reviewable).
- Writs of prohibition and certiorari were properly issued by a district court judge to remove a county court judge

from a case from which that judge should have recused himself. *People v. Dist. Court*, 56 P. 1115 (Colo. 1899).

- Asserting that a lower tribunal or body is proceeding under a statute that's unconstitutional doesn't allege an abuse of discretion. *People ex rel. Orcutt*, 445 P.2d at 889; *Colo. State Bd. of Med. Exam'rs*, 331 P.2d at 506.
- A mere assertion that a lower body's procedure is "discriminatory and improper" doesn't allege an abuse of discretion. *City of Colorado Springs v. Dist. Court*, 519 P.2d 325, 327 (Colo. 1974) (challenge to city council's decision denying a zoning application).
- As a general matter, assertions that a lower tribunal or body has committed or may commit procedural or legal errors don't allege an abuse of discretion. *E.g.*, *Banking Bd. v. Dist. Court*, 492 P.2d 837, 838 (Colo. 1972) (petition seeking to restrain the Banking Board from holding a hearing on a particular date; an appeal was an adequate remedy to contest the lawfulness of the Board's procedures and actions); *People ex rel. Orcutt*, 445 P.2d at 888-89 (until agency ruled on merits of matter "[t]here

could be no abuse of discretion"; prohibition improper to restrain scheduled hearings before the agency); *Leonhart,* 329 P.2d at 783-84 (claim that action was barred by a prior proceeding didn't state a basis for prohibition); *Eveready Freight*, 280 P.2d at 444 (until PUC ruled on the merits of a complaint "[t]here could be no abuse of discretion"; prohibition improper to restrain PUC's investigation of a matter within its jurisdiction). As the supreme court has put it, "[t]he writ [of prohibition] cannot be used for appealing cases on the installment plan and it will not be used on account of irregularities where the trial court had both jurisdiction of the subject matter and of the person of the defendant." *Bustamonte*, 329 P.2d at 1017; *see also Banking Bd.*, 429 P.2d at 838 (Rule 106(a)(4) can't be used in a way that "would afford the opportunity for constant delay of the administrative process for the purpose of reviewing mere procedural requirements . . . .").

- A defendant can't challenge a county court's denial of a motion to suppress by means of a Rule 106(a)(4) petition

in district court. *Seccombe v. Dist. Court*, 506 P.2d 153, 154-55 (Colo. 1973). (There is now a separate procedure for doing so.)

As I see it, the case law, though mostly old, and other authorities give some pretty good guidance on when an allegation of an abuse of discretion falls within the rule. So the problem may not be with the rule (though I do suggest changes below). It may be that courts aren't correctly applying it. Unfamiliarity with the history of the rule and relevant case law, and modern notions of "abuse of discretion" have combined to open the doors to petitions that previously wouldn't have been allowed.

IV. Recommendations

So long as the rule is properly understood and applied, I don't oppose the notion of Rule 106(a)(4) being available to challenge actions of a county court in a criminal case.[3] But that isn't to say improvements can't be made. I suggest four.

[3] One could argue that challenges from county court should be limited to C.A.R. 21. The supreme court probably wouldn't like that because it could mean an uptick in the number of Rule 21 petitions it has to review.

First, I suggest that the language "abused its discretion" in the rule be replaced with "failed to regularly pursue its authority" or "acted in excess of its power," or something like that. This would get us away from the language which is partially at the root of the problem and return us to language that was understood as limiting writs of certiorari and prohibition in a particular way.

Second, I would add a note explaining the reasons for changing from "abused its discretion" to "failed to regularly pursue its authority." It would expound (briefly) on the historical limitations of these writs, while, incidentally, giving judges direction on where to begin research on those limitations.

Third, I suggest adding a note emphasizing that the existence of a plain, speedy, and adequate remedy (usually an appeal) precludes relief under the rule. It seems that this limitation is sometimes overlooked.

And fourth, because the problem of delay is, I think, a big one, I suggest adding language saying that an order denying a Rule 106(a)(4) petition may be challenged only by means of a C.A.R. 21 petition. Such a limitation might not work for grants of Rule 106(a)(4) petitions since granting relief could have the effect of

terminating an action. Not to allow full appellate review of such a decision might be unconstitutional. *See Allison v. Indus. Claim Appeals Office*, 884 P.2d 1113 (Colo. 1994) (statute limiting potential review of unemployment compensation decisions of ICAO to petitions for certiorari with the supreme court violated Colorado Constitution's guarantee of access to the courts). Considering this limitation should probably be done in cooperation with the Appellate Rules Committee.

A fifth change might be to reinstitute the discretionary nature of writs and dial back the procedures allowing for extensive and time-consuming briefing. As discussed, under current procedure, filing a petition is just like filing a complaint (in fact, the petition is called a complaint). The record must be submitted and an answer is filed. The parties then take months to file briefs. In my view, this unjustifiably slows down the process in cases where the petition itself isn't convincing of the need for or propriety of relief under the rule.