

DISTRICT COURT, CHAFFEE COUNTY, COLORADO 142 Crestone Avenue P.O. Box 279 Salida, CO 81201 (719) 539-2561	DATE FILED: January 31, 2022 8:34 PM CASE NUMBER: 2021CR78
<p>Plaintiff: The People of the State of Colorado,</p> <p>v.</p> <p>Defendant: Barry Lee Morphew.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case No.: 2021CR78</p> <p>Div.: 2</p>
<p>ORDER RE: [D-34] DEFENDANT’S MOTION TO CHANGE VENUE AND REQUEST FOR EVIDENTIARY HEARING PRIOR TO VOIR DIRE EXAMINATION BECAUSE MR. MORPHEW CANNOT RECEIVE A FAIR TRIAL BY AN IMPARTIAL JURY IN THE ELEVENTH JUDICIAL DISTRICT DUE TO PREJUDICIAL PRE-TRIAL PRESS COVERAGE AND PERVASIVE COMMUNITY INVOLVEMENT IN THE SEARCH FOR SUZANNE MORPHEW</p>	

THIS MATTER comes before the Court on Defendant’s [D-34] Motion to Change Venue and Request for Evidentiary Hearing Prior to Voir Dire Examination (“Motion”) filed on December 7, 2021 along with Exhibits 1 to 237. The People filed its Response to Defendant’s Motion (“Response”) on December 23, 2021. Defendant filed his Reply in Support of Motion (“Reply”) on January 17, 2022 accompanied by Exhibits A to G. The Court heard arguments during the Hearings on January 24-25, 2022 (“the Hearings”). The Court has reviewed all of the briefing, exhibits, and the pertinent law. Being fully advised, the Court finds, concludes, and orders as follows:

BACKGROUND

Defendant is charged with First Degree Murder, along with other counts, for the alleged murder of his wife, Suzanne Morphew, on or about May 9-10, 2020. Defendant has pled not guilty. A jury trial is scheduled to commence on May 3, 2022.

APPLICABLE LAW

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to “speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” U.S. Const. amend. VI. *See also* Colo. Const. art. II, § 16 (“the accused shall have the right to...a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed”). Under C.R.S. § 16-6-102:

(1) A motion for change of venue must be accompanied by one or more affidavits setting forth the facts upon which the defendant relies or by a stipulation of the parties.

(2) Whether circumstances exist requiring, in the interest of justice, a change in the place of trial is a question to be determined by the court in its sound discretion.

C.R.Crim.P. 21(a)(1) (“Rule 21”) allows the place of trial to be changed “when the court in its sound discretion determines that a fair or expeditious trial cannot take place in the county or district in which the trial is pending.” Rule 21(a)(2)(I) requires the motion for change of venue to “be in writing and accompanied by one or more affidavits setting forth the facts upon which the moving party relies, or in lieu of such affidavits the motion, with approval of the court, may contain a stipulation of the parties to a change of venue.” C.R.Crim.P. 22 (“Rule 22”) states “[a] motion for a change of venue or for a change of judge under these Rules may be made at or before arraignment or, for good cause shown for a late filing, at any time before trial.”

A defendant is entitled to a change of venue if he or she can show either: “(1) the existence of ‘massive, pervasive, and prejudicial publicity that created a presumption that the defendant was denied a fair trial,’ regardless of bias disclosed in voir dire, or (2) a nexus between the jury panel and extensive pretrial publicity that created actual prejudice against the defendant, thereby denying him or her a fair trial.” *People v. Munsey*, 232 P.3d 113, 121 (Colo. App. 2009)(internal citation omitted). The “critical inquiry” for a court is “whether the trial court preserved the accused’s right to a fair trial.” *People v. Harlan*, 8 P.3d 448, 468 (Colo. 2000), *as modified on denial of reh’g* (Sept. 11, 2000), *and overruled on other grounds by People v. Miller*, 113 P.3d 743 (Colo. 2005).

Factors to be considered by a court when determining whether there is “such massive, pervasive and prejudicial pretrial publicity to as bias a community” include: (1) “the size and type of the locale”, (2) “the reputation of the victim”, (3) “the revealed sources of the news stories”, (4) “the specificity of the accounts of certain facts”, (5) “the volume and intensity of the coverage”, (6) “the extent of comment by the news reports on the facts of the case”, (7) “the manner of presentation”, (8) “the proximity to the time of trial”, and (9) “the publication of highly incriminating facts not admissible at trial.” *People v. McCrary*, 549 P.2d 1320, 1326 (Colo. 1976).

The courts will only presume prejudice in “extreme circumstances.” *Harlan*, 8 P.3d at 469. “Only when the publicity is so ubiquitous and vituperative that most jurors in a community could not ignore its influence is a change of venue required before voir dire examination.” *McCrary*, 549 P.2d at 1326. *See People v. Botham*, 629 P.2d 589, 599 (Colo. 1981) *superseded by rule on other grounds as recognized in People v. Garner*, 806 P.2d 366, 368-69 (Colo. 1991)(“Where a defendant demonstrates the existence of a pattern of deep and bitter prejudice throughout the community where he is to be tried, a juror’s assurance that he will be fair and impartial is not conclusive”). “The difficulty in meeting this stringent standard is best illustrated by *Botham*.” *People v. Hankins*, 361 P.3d 1033, 1036-37 (Colo. App. 2014). Even though (1) seventy percent (70%) of the county’s residents subscribed to its only daily newspaper (publishing a hundred articles on the case); and (2) throughout the case, the newspaper extensively reported the arrest, details of the investigation, “gruesome” descriptions of the corpses, and comments about relief in the community after the arrest of the defendant; the *Botham* court concluded that “pretrial publicity

was not so massive, pervasive, and prejudicial that the denial of a fair trial could be presumed.” *Hankins*, 361 P.3d at 1036-37. *See Botham*, 629 P.2d at 597.¹

The constitutional right to trial by an impartial jury “must be considered in light of the concomitant right of the public and press to the full protections of the First Amendment.” *Botham*, 629 P.2d at 596. The existence of “extensive pretrial publicity does not alone trigger a due process entitlement to a change of venue.” *Harlan*, 8 P.3d at 469. An important criminal case:

can be expected to generate much public interest and usually the best qualified jurors will have heard or read something about the case. To hold that jurors can have no familiarity through the news media with the facts of the case is to establish an impossible standard in a nation that nurtures freedom of the press. It is therefore sufficient if jurors can lay aside the information and opinions they have received through pretrial publicity.

McCrary, 549 P.2d at 1325. *See Skilling v. United States*, 561 U.S. 358, 381 (2010)(“Prominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*”); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)(“Jurors are not required to be “totally ignorant of the facts and issues involved”; “scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case”); *Reynolds v. United States*, 98 U.S. 145, 155-56 (1879)(“[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.”). *See also* Wayne R. LaFave et al., 6 *Criminal Procedure* § 23.2(a) (4th ed.)(“The press is so ubiquitous nowadays that, given a case of strong public interest, it can follow the forum and rekindle interest in a case that has been moved”)(quoting A. Friendly & R. Goldfarb, *Crime and Publicity* 97 (1967)).

FACTUAL FINDINGS AND ANALYSIS

A. PROCEDURAL ISSUES

As an initial matter, Defendant filed Exhibit 10 (Affidavit of Abby Jefferson) in support of his Motion. The Affidavit satisfies the requirement under Rule 21(a)(2)(I) that the motion for change of venue to “be in writing and accompanied by one or more affidavits setting forth the facts upon which the moving party relies.”

Rule 22 states “[a] motion for a change of venue or for a change of judge under these Rules may be made at or before arraignment or, for good cause shown for a late filing, at any time before trial.” The Motion and Reply are devoid of any good cause argument pursuant to Rule 22 as the Motion was filed after Defendant’s Arraignment. The arguments made in the Motion and Reply even rely on sources published prior to Defendant being arrested in May 2021. *See e.g. Exs. 8-9, 11-13, 17-34* (Dec. 7, 2021)(non-exhaustive list). The People assert the timing of the Motion is “suspect” and there “is nothing in the immediate past that would have changed the basis for the change of venue.” *Resp.*, at 10. While the Motion fails procedurally, the Court, in its discretion, will continue to analyze the pleadings on the merits below.

¹ While there was no presumption of prejudice, the *Botham* court later concluded “that under the totality of the circumstances, after reviewing both the pretrial publicity and the *voir dire* examination of the jury, that the defendant was denied his constitutional right to a fair trial.” 629 P.2d at 597.

B. SUBSTANTIVE ISSUES

The issue is whether there is an existence of such massive, pervasive, and prejudicial publicity which has created a presumption of prejudice to Defendant in violation of his right to fair trial and, therefore, entitles Defendant to a change of venue outside Chaffee County. The Court will consider the *McCrary* factors in turn below. 549 P.2d at 1326. The People request and recommend the Court defer ruling on this issue until after commencing *voir dire. Resp.*, at 10.

1. The Size and Type of the Locale

The Morphews reside in a small rural community in central Colorado, just outside the town of Salida (Chaffee County). Chaffee County has 16,535 residents over the age of 18 years old living in just 8,231 households.² It is the type of community where “many people know each other or know of each other.” *Ex. 10*, ¶ 3 (Dec. 7, 2021)(Affidavit of Abby Jefferson). Chaffee County consists of 1,040 miles of land area and includes the city of Salida and towns of Buena Vista and Poncha Springs.³ There are approximately 10,000 residents who live outside the cities and towns, with several thousand more “part-timers” who return to their homes during the spring and summer.⁴ “[P]eople in this community know the Morphey’s personally, everyone seems to know each other.” *Ex. 10*, at ¶ 16.

2. The Reputation of the Victim

On May 10, 2020, Suzanne Morphey was reported missing. The disappearance of Suzanne Morphey immediately garnered widespread community interest and media coverage. According to Abby Jefferson, many members of the community were highly suspicious of Mr. Morphey and his involvement in his wife’s disappearance. *Ex. 10*, at ¶ 5. The community’s suspicions grew when law enforcement sought the arrest of Barry Morphey. *Id.* at ¶ 6. Defendant asserts Exhibits 14-16 demonstrate the media’s portrayal of Suzanne Morphey and her reputation in the communication. *Mot.*, at ¶ 24(b). Even more so, Defendant points to an annual memorial Christmas tree in Riverside Park in downtown Salida in honor of Suzanne Morphey. *See Exs. A, C-D* (Jan. 17, 2022).

3. The Revealed Sources of the News Stories

The majority of sources covering the Morphey trial, as demonstrated in the record of Exhibits provided to the Court, are local Chaffee County media outlets. Fox21 (*Exs. 17-77*) is the primary local news channel in the County. Lauren Scharf, a Fox21 reporter, posts frequently on her YouTube channel. *See Exs. 78-124* (Dec. 7, 2021). Defendant also notes the extensive coverage in the following three local newspapers: the Ark Valley Voice (*Exs. 125-47*), the Mountain Mail (*Exs. 148-206*), and the Canon City Daily Record (*Exs. 210-28*). *Mot.*, at ¶ 24(c).

4. The Specificity of the Accounts of Certain Facts

The Affidavit for Arrest was originally sealed and suppressed by Court Order on June 4, 2021. However, the Order was to expire seven (7) days after the conclusion of the Proof Evident Presumption Great Hearing and Preliminary Hearings in the case. *Order*, at 6. On September 17,

² *QuickFacts Chaffee County, Colorado*, United States Census Bureau (Jan. 28, 2022), <https://www.census.gov/quickfacts/chaffeecountycolorado>. The total population from the April 1, 2020 Census is 19,476 with 15.1% under 18 years old.

³ *About Our Valley*, Chaffee County Sheriff (Jan. 31, 2022), <http://chaffeesheriff.org/about-2/about-our-valley-2/>.

⁴ *Id.*

2021 after the Court's ruling, the Court granted the release of the Affidavit, which was made publicly available on the Court's website on Monday, September 20, 2021. *See Tr.*, 91:5 (Sept. 17, 2021). As the Court and parties are aware the Affidavit is 129 pages. Since the release of the Affidavit, media sources have reported on the particulars included within the Affidavit. *See Mot.*, at ¶ 24(d)(4)(Mountain Mail and Canon City Daily Record publications). Community members have mentioned they have read parts of the Affidavit. *Ex. 10*, at ¶ 11.

After the Proof Evident Presumption Great and Preliminary Hearings, multiple outlets posted about said Hearings and the Court's findings. *See Mot.*, at ¶ 24(d)(3)(Ark Valley Voice article). Since the Preliminary Hearing, "the talk of the community is that Mr. Morphew murdered his wife." *Ex. 10*, at ¶ 8.

5. The Volume and Intensity of the Coverage

Defendant's arrest coincided with numerous public appearances by the District Attorney of the 11th Judicial District, Linda Stanley. Notwithstanding a pre-trial publicity order prohibiting extrajudicial statements, Ms. Stanley held a press conference after Mr. Morphew's arrest where she told the media that he was not talking and requested a lawyer. *Order*, 1-4 (June 3, 2021). An accused's fundamental right to remain silent cannot be used at trial for any purpose. *See People v. Triplett*, 411 P.3d 1054, 1066 (Colo. App. 2016)("a suspect's statements resulting from custodial police interrogation are generally inadmissible in the prosecution's case in-chief unless the defendant is advised of and waives his or her right to remain silent"). Ms. Stanley also made other extrajudicial statements in violation of Judge Murphy's order, including discussing the case on a podcast called "Profiling Evil". *See [D-22]*, ¶¶ 2, 6 (Sept. 16, 2021). A prosecuting attorney appearing on a show entitled "Profiling Evil" to discuss a pending criminal case materially prejudices Mr. Morphew's right to a fair and impartial jury. The title of the podcast alone is prejudicial. While this podcast is online and readily accessible by anyone, interest in Chaffee County is overwhelming. "The talk of the town was that the media [and] DA Stanley . . . all made statements that convinced them that Barry Morphew killed his wife." *Ex. 10*, at ¶ 17.

For the Proof Evident Presumption Great and Preliminary Hearings, the Court ordered public access to the proceedings through a livestream service to the Chaffee County Fairgrounds. *Order*, 2 (Aug. 4, 2021). The Court did not allow expanded media coverage. *Order*, at 1-2. Beyond the twenty-four seats available to the public and media in the courtroom, the Fairgrounds stream allowed an additional forty to fifty people to attend the proceedings. *Id.* at 2. The volume of interest and coverage is further illustrated in the Court's prior Order where it states "at a prior non-evidentiary hearing over 1,100 devices joined the WebEx meeting and viewed the proceedings. Numerous messages, many of which were inappropriate, were posted in the 'chat' feature." *Id.* at 1.

6. The Extent of Comment by the News Reports on the Facts of the Case

An entire year transpired before law enforcement sought and obtained an arrest warrant for Mr. Morphew. Since her disappearance until today, the media attention has been persistent and pervasive. The media attention is ongoing and will likely continue until the currently scheduled trial in May 2022. The Court witnessed first hand the level of interest in the court proceedings during the recent January 24-25, 2022 Motions Hearings.

7. The Manner of Presentation

Beyond media coverage of the case, the search for Suzanne Morpew and the manner of presentation included flyers being posted, vigils held, and local searches orchestrated and executed throughout the community and town. *Mot.*, at ¶ 9 (flyer images); *Ex. 9* (vigil example); *Ex. 11-12* (searches).

8. The Proximity to the Time of Trial

Trial is currently set to begin on May 3, 2022 (approximately three months as of the date of this Order). The publicity is ongoing and does not seem, at this time, to have an end date in sight.

9. The Publication of Highly Incriminating Facts not Admissible at Trial

As stated in previous sections, the Affidavit is 129 pages and much of the affidavit contains highly prejudicial and inadmissible evidence. In fact, the prior judicial officer, Judge Murphy, commented:

[T]he Court has concerns about the amount of information contained in the 130-page Affidavit. The Affidavit is, by far, the lengthiest and most detailed affidavit the Court has ever seen in almost 30 years of experience with criminal cases. A significant portion of the information in the Affidavit was not relevant to the Court's finding of probable cause and possibly not admissible at trial under the Colorado Rules of Evidence. The Court notes the presence of nearly 100 footnotes in the Affidavit which provide commentary from law enforcement on the veracity of Defendant's statements, along with statements about his having declined a polygraph test and numerous photographs of him while being interviewed by law enforcement. The Affidavit also contains statements from witnesses about Suzanne Morpew being a nice or good person and other statements expressing negative opinions about Mr. Morpew both with regard to his alleged involvement in the disappearance and murder of his wife, his character for truthfulness, sexual history and unrelated business dealings. The Affidavit includes numerous details, from multiple sources, of the Morpew's marital issues, their sexual history and Suzanne Morpew's participation in an extra marital affair. This is not an exhaustive list of the type of information in the Affidavit for which the Court has concerns. Release of this information, prior to input on redaction from the parties and prior to the defense beginning their investigation could hamper Mr. Morpew's ability to effectively prepare his case.

Order, 3 (June 4, 2021). The Court is leaving out the remainder of the commentary to avoid further pre-trial prejudice; however, the Court agrees with the findings made by the prior judge in that much of the Affidavit contains highly prejudicial information, which may not be admissible in trial. The Affidavit was initially sealed; however, it was released with minimal redactions on September 20, 2021.

The Court had occasion to see for itself the prejudice caused by the pervasive pre-trial publicity in conjunction with local interest. On January 25, 2022, the Court heard from Martin Ritter, a neighbor and friend of the Morpews, who the defense called as a witness relative to discovery motions litigation. Mr. Ritter explained that he initially supported Mr. Morpew but came to believe he was guilty after reading the arrest affidavit. Mr. Ritter is an endorsed witness and will not serve as a juror in this case, but the Court cannot ignore that his attitude is consistent

with Abby Jefferson’s opinion articulated in her Affidavit filed in support of the motion to change venue. According to the Affidavit of Abby Jefferson: “[a]fter Mr. Morphew was arrested for First Degree Murder, the once curious and suspicious community, overwhelmingly changed to believe that DA Stanley would not arrest Mr. Morphew unless he was the killer.” *Ex. 10*, at ¶ 6. “And, since the August preliminary hearings, the talk of the community is that Mr. Morphew murdered his wife.” *Id.* at ¶ 7.

On September 21, 2021, the People filed a Motion to Modify Bond Conditions (“[P-24]”) and a related Motion Requesting the Defendant Vacate the Cushman Premises for Time Certain. In the Motions, the People noted some individuals in the neighborhood would be “at the very least, uncomfortable, and possibly not [want] to continue to reside at their home.” [P-24], at ¶ 2(c). In ruling on the People’s [P-24] to require Mr. Morphew to vacate a home, the Court noted:

I mean if I do this in this case, it’s a small town. ... This case is well known in this community, I would be concerned if I ordered Mr. Morphew to do that wherever he ended up the people living around him would make the same request and we’d be right back in here.

Tr., 18:8-15 (Oct. 13, 2021). The undersigned agrees with the prior judicial officer’s general conclusion about this issue. If the Court were to grant said request, it would likely cause a never ending flood of motions due to the general sentiment of the town towards Defendant.

10. Other Considerations

In considering whether prejudice should be presumed in this case, it is important to remember that a change in venue is only one of the tools available to a Court to ensure that an impartial jury is empaneled. The tools available to a trial judge include: (1) “cause extensive voir dire examination of prospective jurors”; (2) “change the trial venue to a place less exposed to intense publicity”; (3) “postpone the trial to allow public attention to subside”; (4) “empanel veniremen from an area that has not been exposed to intense pretrial publicity”; (5) “enlarge the size of the jury panel and increase the number of peremptory challenges”; and (6) “use empathic and clear instructions on the sworn duty of each juror to decide the issues only on the evidence presented in open court.” *Botham*, 629 P.2d at 596.

The Court has considered tools one, three, five, and six enumerated in *Botham* as part of its decision. The Court is concerned with the effectiveness of these additional tools in this case. While the Court does not expect jurors to have “no familiarity through the news and media with the facts of the case”, the Court is ultimately concerned due to the size of the jury pool in Chaffee County and the extent of attention this case has garnered in the local community, that many jurors may not be able to “lay aside the information and opinions they have received through pretrial publicity.” *McCrary*, 549 P.2d at 1325. The Court has reflected on other “high profile” cases in Colorado in recent years and how these courts resolved the same issues in making its determination. One important note is many of these similar situated cases were located in larger judicial districts and counties (*i.e.*, larger populations and areas). This, in turn, makes the ability to enlarge the jury pool more effective and likely to be a successful tool in the Court’s view. While a court in theory, could postpone the trial, Defendant has a right to a speedy trial that the Court cannot infringe upon and it has no guarantee public attention will subside in the future. Lastly, the Court has considered whether the best course of action is to defer ruling until *voir dire* commences in May of 2022.

CONCLUSION

Because of the size of the community and the pervasive negative pretrial publicity since Suzanne Morpew's disappearance, the Court finds that a fair trial cannot take place in Chaffee County. *Munsey*, 232 P.3d at 121. This is a high profile case in a relatively small county with a small jury pool. The media saturation is high. Therefore, the Court also finds, considering the factors articulated in *McCrary* and the *Botham* tools at the Court's disposal, the pretrial publicity in this case has been so massive, pervasive, and prejudicial, that Defendant will not receive a fair trial in Chaffee County. See *Brisbin v. Schauer*, 492 P.2d 835, 836 (Colo. 1971), *overruled on other grounds by Marshall v. Kort*, 690 P.2d 219 (Colo. 1984) ("if a community is prejudiced against a citizen or if other circumstances are likely to deny him a fair and impartial jury trial, then a change of venue must be granted").

WHEREFORE, for the reasons stated above and in the Court's discretion, Defendant's [D-34] Motion is **GRANTED IN PART**. The Court has determined, in its discretion, transfer of venue to Fremont County is appropriate in this case, but not outside the Eleventh Judicial District.

Rule 21(a)(4) states "[e]very order for a change of venue shall be in writing, signed by the judge, and filed by the clerk with the motion as a part of the record in the case. The order shall state the court to which venue has been changed and the date and time at which the defendant shall appear at said court. The bond made, if any, shall remain in force and effect." Mr. Morpew is currently out of custody and on bond and, therefore, Rule 21(a)(5) is inapplicable to the case. However, Mr. Morpew's bond conditions will need to be modified in order for Mr. Morpew to be able to travel to the Fremont County Courthouse. A transcript of the record will be transmitted by the Clerk of Court to the county mentioned below pursuant to Rule 21(a)(6).

C.J.D. 96-07 governs change of venue in criminal cases.⁵ At this time, the undersigned will remain as the judicial officer assigned to the case. The matter is currently set for a Motions Hearing in the Chaffee County Courthouse on **Tuesday, February 1, 2022 at 9:30 am**. Defendant is **ORDERED** to appear at said date and time and the Court will order the next court date and time on the record. Future court dates will be set and occur at the Fremont County Courthouse in Division 1 located at: 136 Justice Center Rd, Canon City, CO 81212.

SO ORDERED this January 31, 2022.

BY THE COURT:

/s/Ramsey Lama
Ramsey Lama
District Court Judge

⁵ Supreme Court of Colorado Office of the Chief Justice, *Chief Justice Directive 96-07: Change of Venue in Criminal Cases*, Colorado Judicial Branch (Jan. 28, 2022), https://www.courts.state.co.us/Courts/Supreme_Court/Directives/96-07.pdf.