

Combined Courts, Fremont County 136 Justice Center Road Canon City, CO 81212	DATE FILED: April 19, 2022 8:51 AM FILING ID: 608B2FE812F2B CASE NUMBER: 2022CR47 <input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
THE PEOPLE OF THE STATE OF COLORADO vs. BARRY LEE MORPHEW, Defendant	Case No: D0222022CR000047 Div: 1 Courtroom:
MOTION TO DISMISS WITHOUT PREJUDICE	

The People, by and through Linda Stanley, District Attorney for the 11th Judicial District, hereby move this Court to dismiss the charges against the Defendant in 22CR47 *without* prejudice.

I. BACKGROUND

On May 6, 2021 the Defendant was brought before the Court on charges including the First Degree Murder of his wife, Suzanne Morphew. To date Ms. Morphew’s remains have not been found. On September 17, 2021, after the Honorable Judge Murphy found probable cause for the charges listed in the indictment, but declined to find proof evident presumption great, the Defendant was granted a bond that was quickly posted. That same day, the Defense entered a formal plea of not guilty, and agreed to toll speedy trial to accommodate a trial date slated to begin on May 3, 2022. In subsequent filings, the Court added an extra few days of trial in anticipation of a more extensive jury selection period. Trial is now scheduled to begin April 28, 2022.

Throughout the pendency of this case, the People and law enforcement have been unrelenting in our search for Ms. Morphew. For some time, a single location has been the target

of ongoing investigation. For the reasons expressed below, the People have a good faith reason to believe further investigation into this matter is essential to answering the most consequential question presented by this case. As this search cannot be accomplished in the coming weeks due to weather and snowpack conditions, the People respectfully ask this Court to dismiss the current indictment against the Defendant without prejudice.

II. AUTHORITY

a. Discretion to Dismiss Pending Criminal Actions

The Prosecution has the constitutional power to exercise its discretion in deciding which of several possible outcomes to pursue in a criminal case. *People v. Lichtenstein*, 630 P.2d 70 (Colo. 1981), citing *Meyers v. District Court*, 518 P.2d 836 (Colo. 1974). Specifically, the decision to charge a suspect, consent to a deferred prosecution, or requesting dismissal are matters within the district attorney's sole discretion. "The district attorney is part of the executive branch, and his discretion in requesting dismissal is governed by practical considerations." *Lichtenstein*, 630 P.2d 70 quoting *People v. District Court*, 527 P.2d 50 (Colo. 1974).

At common law, the prosecution has the unilateral authority to dismiss criminal charges through the entry of *nolo prosequi*. *Id.*, at 72. This authority was limited by the enactment of Crim.P. 48(a), which states in relevant part:

"(a) By the State. No criminal case pending in any court shall be dismissed or a nolle prosequi therein entered by any prosecuting attorney or his deputy, unless upon a motion in open court, and *with the court's consent and approval*. Such a motion shall be supported or accompanied by a written statement concisely stating the reasons for the action. The statement shall be filed with the record of the particular case and be open to public inspection. Such a dismissal may not be

filed during the trial without the defendant's consent.” (Emphasis added). This statute parallels the Federal Rule Crim.P. 48(a).

This provision is intended to give the court some supervisory power over the prosecution for cases to the extent the interests of justice, as well as the interests of the defendant and society, are implicated. *Lichtenstein*, 630 P.2d 70. “Thus, in exercising its discretion in reviewing a motion to dismiss charges, the trial court should not serve merely as a rubber stamp for the prosecution’s decision.” *Id at 73*. Ultimately, while a court has discretion to deny a motion to dismiss, the circumstances are narrow, as the principles behind the separation of powers gives the People the sole power to prosecute crimes. *Id, at 73; see also People v. Zapatocky*, 869 P.2d 1234, 1244 (Colo. 1994)(“[T]he decision to request dismissal of pending criminal charges is within the district's attorney's discretion, and this decision may not be controlled or limited by judicial intervention.”) (citing, inter alia, *Lichtenstein*, 630 P.2d at 72). The trial court, however, should not arbitrarily substitute its own decision for that of the prosecution; rather, the court must exercise judicial restraint, and only act if the dismissal is clearly contrary to public interest. *Id*. A trial court’s refusal to consent to dismissal of charges is only appropriate ***where the evidence is clear and convincing that the interests of the defendant or the public are jeopardized by the refusal to prosecute***. *Id*. (Emphasis added). “Leave (to dismiss) will be granted if the government is without sufficient evidence to obtain a conviction or if dismissal is sought for some other bona fide reason that does not involve harassment of the defendant.” *Id*. (quoting 3 Wright, Federal Practice and Procedure § 802 (formerly § 812)).

In evaluating this standard, the court must look to the reasoning behind the dismissal, and whether or not the decision to dismiss is made in good faith. The court in *Storlie*, later clarified that “[t]he prosecution is presumed to have acted in the best interest of the public unless it is

shown that it acted in a manner inconsistent with good faith.” *People v Storlie*, 327 P.3d 243 (Colo. 2014). See, e.g., *Rinaldi v. United States*, 98 S.Ct. 81 (1977) (holding that the trial court abused its discretion in denying a motion to dismiss without evidence of prosecutorial bad faith).

Examples of bad faith were adopted by the *Storlie* court to include “the prosecutor's acceptance of a bribe, personal dislike of the victim, and dissatisfaction with the jury impaneled.” *Rice v. Rivera*, 617 F.3d 802, 811 (4th Cir. 2010); see also *United States v. Hamm*, 659 F.2d 624, 629–30 (5th Cir. 1981) (“[I]f it should appear that the prosecutor is motivated to dismiss because he has accepted a bribe or because he desires to attend a social event instead of attend upon the court in the trial of the case or because he personally dislikes the victim of the crime, the court should withhold leave.”). Another example of bad faith would be, as was noted in *Lichtenstein*, the harassment of the defendant. *Storlie*, 327 P.3d 243, 248 (Colo. 2014). A trial court’s denial of a motion to dismiss is reviewed under an abuse of discretion standard. *Lichtenstein*, 630 P.2d at 72.

This exercise in discretion to dismiss cases has been tested in many Colorado cases over the years. In *Lichtenstein*, the Supreme Court of Colorado considered whether a trial court abused its discretion by denying a motion to dismiss by the prosecution for a single severed count against a defendant, leaving the remaining count eligible for a jury, rather than a court trial. Specifically, the Court held “[i]n this case the dismissal of the lesser charge was a decision made by the prosecution to maintain its right to require a jury trial on the issue of sanity for the more serious of the two counts. The prosecution was attempting to obviate any potential conflict between two inconsistent statutory rights, and protect the People's interest in a jury trial on the issue of sanity for the class 3 felony, in accordance with the legislative intent of section 16-8-105(2).” *Id.* at 73. The Court held that the trial court abused its discretion because the

prosecution's decision to dismiss the lesser count was as a "good faith exercise in prosecutorial discretion." *Id.*

Similarly, the Court in *Storlie* was asked to review a trial court's denial of a motion to dismiss charges of sexual assault on a child by the prosecution. *Storlie*, 327 P.3d 243 (Colo. 2014). The prosecution pointed to concerns they had with victim's memory, the credibility issues with a different CRE 404(b) victim, and competency issues with a key witness, the victim's mother. While the prosecution initially stated the victim did not object to the dismissal, a subsequent letter to the court authored by the victim revealed the opposite. The trial court, upon hearing the victim's objection, denied the prosecution's motion to dismiss. The Colorado Supreme Court made factual findings that "the prosecution in this case based its motion to dismiss the charges against Storlie on its candid assessment of the strength of the victim's and potential witnesses' testimony... This determination is the quintessential example of a good faith exercise of prosecutorial discretion." *Id.* at 247.

Further, the Court could not find any basis for concluding that the prosecution acted in bad faith. The trial court argued that it properly exercised discretion by acting consistently with the victim's wishes and broader societal concerns, but these arguments were not relevant to the ultimate determination at hand. The Court held that "the discretion to dismiss lies with the prosecution, not the trial court. Therefore, the question is not whether there might be good reasons to deny the prosecution's motion to dismiss, as Respondent suggests. Rather, the question is whether the prosecution sought to dismiss the charges based on a good faith exercise of its discretion." *Id.* at 248. Accordingly, the Court found that the trial court abused its discretion in denying the prosecution's motion to dismiss the case in its entirety. *Id.*

b. Effect of Dismissal Without Prejudice or Nolle Prosequi

A dismissal has varied effects with regard to the final disposition of a case. In some instances, a dismissal will preclude further prosecution and in others it will not. A dismissal without prejudice, or *nolle prosequi*, is a formal declaration of record by the prosecutor that the government will not prosecute the current case further. It is a discharge without an acquittal and is not a bar to a subsequent prosecution for the same crimes. A *nolle prosequi* order is not the final disposition of a criminal case, but leaves the matter in the same condition as before the charges were filed. *People v. Small*, 631 P.2d 148, citing *Lawson v. People*, 165 P.771 (Colo. 1917). *See also People v. Lopez*, 946 P.2d 478 (Colo. 1997). Thus, the indictment against the defendant would function as a nullity upon its dismissal without prejudice.

Colorado rules mirror the federal rules on this subject. A dismissal properly taken under Federal Rule 48(a) is without prejudice, and within the period of the statute of limitations, a second indictment or information may be brought on the same charge. *See U.S. v. Terry*, 5 F.3d 874 (5th Cir. 1995); *U.S. v. Del Vecchio*, 707 F.2d 1214 (11th Cir. 1983); *U.S. vs Ortega-Alvarez*, 506 F.2d 455 (8th Cir. 1974). In fact, federal case law recognizes that there is a presumption in favor of dismissal without prejudice over a dismissal with prejudice. *U.S. v Florian*, 765 F. Supp. 2d 32, 36 (D.D.C. 2011). “The mere fact that a dismissal without prejudice leaves the door open to hypothetical future prosecution in this jurisdiction is not tantamount to prosecutorial harassment; were that the case, it is difficult to imagine when dismissal without prejudice would ever be appropriate.” *Id* at 36.

In *Small*, the Colorado Supreme Court dealt with the issue of a case being refiled after dismissal of charges without prejudice, or *nolle prosequi*. Couched within a constitutional speedy trial argument, the Court assessed the reason for the delay in prosecution. The Court made

factual findings that “[t]he dismissal of charges was here sought to allow further investigation of the underlying crime and to avoid putting the defendant in criminal jeopardy on evidence of uncertain credibility. The nolle prosequi motion was, in other words, in keeping with the prosecutor's duty to seek justice.” *Small*, 631 P.2d 148, 155. *See also See People v. Elliston*, 508 P.2d 379 (1973). *See also ABA Standards for Criminal Justice 3-1.1(b) and (c)* (2d ed. 1980). A prosecutor has the discretion to seek the dismissal of charges, pending further investigation of a case, even if a defendant may be somewhat prejudiced as a result. *Arnold v. McCarthy*, 566 F.2d 1377 (9th Cir. 1978). The Court further held that “where delay is the product of valid investigative or prosecutorial purpose, is it not chargeable against the government. *Id.* Even after identical charges were refiled against the defendant based on new investigation, relevant speedy trial principles were not violated.

IV. ARGUMENT

a. Good Faith Basis to Dismiss

As an offer of proof, the People and law enforcement believe we are close to discovering the victim’s body. The People were hopeful that the search for, and the discovery of, the victim’s body would be concluded well before trial, but weather has complicated the efforts. Specifically, the area law enforcement has been focused on is in a remote and mountainous region nearby the Morphew residence. This area received a significant amount of snow over the winter months before a search could be completed. To date, the area has 5 feet of snow concealing the location where the People believe Ms. Morphew is located. As a result, the People cannot safely excavate this area and resolve this unanswered question.

By filing this motion, the People have complied with Rule 48(a); a motion to dismiss submitted in writing, publicly available, proffered in open court, and accompanied by a statement

summarizing the reasons for the action. Given the timing of this motion before trial, the Defense does not need to consent, and does not have standing to object. The Court need only resolve the question of whether or not this motion was filed in good faith, such that clear and convincing reasons exist which further the interests of justice for the public and the Defendant. Issues related to speedy trial, or any other outstanding litigation would not be relevant to the Court's determination at this juncture.

Here, the People have presented sufficiently reliable good faith reasons to dismiss without prejudice. First, the People believe that we are close to locating the deceased victim's body. The People's fundamental responsibility in the criminal justice system is not to gain a conviction, but to further the truth-seeking process and ensure equal justice. In typical homicide cases, the fact of the victim's death is rarely at issue, but in a case such as this, the most influential fact of consequence is whether or not Ms. Morphew is deceased. If the body proves to be there, further forensic examination could potentially inculcate or exculpate the Defendant, which is incredibly important evidence for the jury to hear in determining the merits of the case. Given the need to conduct further investigation to resolve these issues, this is a good faith basis to dismiss the current indictment.

Second, when this case was filed it was mainly premised on the Defendant's motive to harm the victim, his sole access to the victim at the exact time she was last communicating with anyone by phone, and his consistent dishonesty with law enforcement, which came to light given the truck telematics, phone, and location data recovered. The Court functionally excluded the People's best evidence to move forward in this case by severely limiting our expert's testimony. Even if the Court were to partially reconsider its position on the need for such severe sanctions at this late hour, the People would still be left without several key expert witnesses initially

endorsed. Without this crucial evidence, and without the victim's body, the People cannot move forward at this time in good faith. Ethics demand that prosecutors proceed to trial only in circumstances where a reasonable likelihood of success exists, which given the Court's current rulings and the uncertainty of any further rulings, is impossible to completely ascertain. This assessment of the remaining evidence is an additional, good faith basis for this motion to dismiss without prejudice.

b. The Interests of the Public and Defendant are Furthered by Dismissal

The ongoing investigation into the location of the body must be resolved to further the interests of the public. The public seeks a swift resolution of this case, but more than anything, seeks an indisputable answer as to whether or not Ms. Morpew is dead before her killer can be held accountable. This motion also protects the Defendant, as it spares him from a jury's fast approaching, and potentially unfavorable, verdict. The Defendant's bond would be discharged, and the case would be a nullity. In the event the case is refiled, the Defendant retains all of his rights to further litigation, and perhaps collateral estoppel on issues already decided. As such, the Defendant's position would be no worse, and perhaps even stronger, should the case ever be refiled.

The case law clearly articulates examples of bad faith; including, bribery, not liking the victim, or disagreeing with a juror panel selected before trial, none of which are present here. *Storlie*, 327 P.3d 243 (Colo. 2014). This dismissal does not serve to harass the Defendant in any way. Courts have consistently found that even refiled a case several times over is not enough to constitute harassment, and the mere act of dismissal is not enough to carry this burden. *See*, *Arnold*, 566 F.2d 1377 (9th Cir. 1978); *Small*, 631 P.2d 148, 155; *Elliston*, 508 P.2d 379 (1973). The procedure of dismissing without prejudice or *nolle prosequi* has been accepted in common

law and statute for decades. More, it is a preferred means of proceeding when outstanding evidentiary questions exist. This dismissal places the case in a pre-filing posture, and is no more harassing of the Defendant than the circumstances before May of 2021.

c. Victim's Rights Contact

The People spoke with Melinda Moorman-Baumunk, the victim's sister and primary representative for the Moorman family. Ms. Moorman-Maumunk relayed her agreement with the motion to dismiss, and expressed her wishes that we ultimately resolve absolutely whether or not her sister is dead, prior to further prosecution. The People also spoke with Andrew and David Moorman, the victim's brothers, they are also in agreement with this motion. For obvious reasons, the People have not endeavored to speak with Macy or Mallory Morphew, but would be happy to hear their position in Court.

As such, given the ongoing investigation, the state of the evidence, and the position of the victims, the People ask this court to dismiss the case at this time. This dismissal is in the best interests of justice, the People, and Defendant, and the public.

Dated: April 19, 2022

Respectfully submitted,

A handwritten signature in blue ink that reads "Linda Stanley". Below the signature is a small, faint rectangular stamp with the name "Linda Stanley" printed in it.

Linda Stanley
District Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing served via the Colorado e-filing system on April 19, 2022, and addressed as follows:

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/s/ Linda Stanley