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DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**

ORDER REGARDING DEFENDANT'S MOTION TO SUPPLEMENT MOTION FOR CHANGE OF VENUE AND REPLY IN SUPPORT OF MOTION FOR CHANGE OF VENUE (D-206a)

INTRODUCTION

The defendant is charged with the murders of 12 people and the attempted murders of 70 people at the Century 16 Theatres located at 14300 E. Alameda Ave., Aurora, Colorado, on July 20, 2012, during the midnight premier of the Batman movie, *The Dark Knight Rises*. He has also been charged with Possession of Explosive or Incendiary Devices at his apartment—1690 Paris St., Aurora, Colorado—on July 20, 2012. On June 4, 2013, the defendant entered a plea of not guilty by reason of insanity.

In Motion D-206, the defendant requests a change of venue. Motion D-206 at p. 1. The prosecution opposes the motion. *See generally* Motion D-206

Response. On May 23, 2014, the Court deferred ruling on the motion until after the Court and the parties attempted to select a fair and impartial jury in Arapahoe County. Order D-206 at pp. 1-2. Jury selection commenced on January 20, 2015. The Court selected a jury on April 14, approximately two months faster than the Court had anticipated.[1] Through a pleading filed on March 13, 2015, the defense seeks to supplement its motion. *See* Motion D-206a. The prosecution does not oppose the request to supplement, but continues to oppose the request to change venue. *See generally* Motion D-206a Response. The defense's request to supplement Motion D-206 is granted without objection. However, for the reasons articulated in this Order, the motion for a change of venue is denied on the merits.

ANALYSIS

At the outset, the Court notes that the substantial advances in technology allow today's media to achieve the widespread, far-reaching dissemination of news stories at warp speed. Therefore, transferring a highly publicized case like this one from one large county to another within the State of Colorado would be as useful as installing a screen door on a submarine. As an esteemed and well-respected commentator has recognized, "[i]n some cases, a change of venue will not be a realistic solution" because "[t]he press is so ubiquitous nowadays that, given a case

[1] Opening statements are scheduled to take place on April 27.

of strong public interest, it can follow the forum and rekindle interest in a case that has been moved." Wayne R. LaFave et al., 6 *Criminal Procedure* § 23.2(a) (3d ed. 2013) (quotation omitted). The Court predicts that the United States Supreme Court will rule in the not-too-distant future that in some high profile cases such as this one, motions for a change of venue have gone the way of the dinosaurs. Indeed, to find a suitable location that has not been exposed to the extensive publicity this case has received would require the Court to transfer the proceedings to a different State, if not a different country.

The prosecution suggests that there are no counties in Colorado that would allow a "better opportunity for a fair trial" than Arapahoe County. Motion D-206 Response at p. 4. The prosecution is correct. In a nationally publicized case like this one, fair and impartial jurors are as likely to be selected in Arapahoe County as in any other county in the State. Motion D-206a Response at p. 3. The defense has not identified a single county in Colorado—with a sufficiently robust jury pool and adequate facilities to accommodate this trial—which has been shielded from the pervasive media coverage the case has received.[2] Instead, he contends that this is irrelevant to a presumed prejudice analysis. Motion D-206 Reply at p. 2. The Court disagrees. It would be nonsensical for the Court to grant a motion for a

[2] The Court made this observation Order D-206, almost a year ago. Order D-206 at p. 12 n.8. Yet, despite supplementing its motion, the defense has still not identified a single suitable transfer county in the State of Colorado. None exists.

change of venue if the record is uncontroverted that no other county in Colorado that can accommodate this trial has avoided the pervasive media coverage the case has garnered in Arapahoe County. Otherwise, the Court would be forced to grant the defendant an indefinite number of motions for a change venue based on the case's statewide publicity. If there is no other county in Colorado that is better suited than Arapahoe County for the selection of a fair and impartial jury, it would be absurd to severely delay the trial *ad infinitum* as the case is repeatedly transferred from county to county throughout the state.

Finally, the Court would be remiss if it failed to note that defense counsel and the defendant's family are responsible for some of the publicity the case has attracted. In a pleading filed in March 2013, just days before the prosecution was scheduled to announce whether it would seek the death penalty, defense counsel informed the public and the media that their client had offered to plead guilty to all the charges, but the prosecution rejected the offer. Defendant's Notice in Response to Order C-23 at p. 1.[3] In fact, multiple news agencies reported that the head of defense counsel's office, Douglas Wilson, spoke to the Associated Press about that improper representation. *See e.g.*, *Huffington Post*, http://www.huffingtonpost.com/2013/03/29/aurora-shooting-spree-trial-james-

[3] Pursuant to the Court's Case Management Order, the defense could have filed this pleading suppressed or could have redacted the inflammatory information from the public copy of it. *See* Order C-11a at p. 1. It chose neither of these options.

holmes-plea-rejected_n_2977121.html (last visited on April 22, 2015).[4] Months later, in another pleading, defense counsel informed the public and the media that their client "committed the acts that resulted in the tragic loss of life and injuries sustained by moviegoers on July 20, 2012," but that he was "in the throes of a psychotic episode" at the time. Motion D-76a at p. 2. Shortly before trial, the defendant's parents wrote a letter to the Denver Post, the newspaper with the widest circulation in the State of Colorado, expressing their belief that their son is mentally ill and asking for mercy. The letter made the front page of the Denver Post. *Denver Post*, http://www.denverpost.com/opinion/ci_27166155/holmes-parents-our-son-is-mentally-ill (last visited April 22, 2015). Thereafter, during jury selection, the defendant's mother published a book specifically about this case. *Denver Post*, http://www.denverpost.com/news/ci_27817725/holmes-parents-pray-daily (last visited April 22, 2015).

Based on the defense's public declarations, numerous prospective jurors came into court believing that the defendant was "guilty" of the acts charged and that the only issue in dispute is whether he was insane at the time of the shooting. *See* Motion D-206a Exs. GGGGG, IIIII. Numerous others acknowledged that they had read the letter written by the defendant's parents in the Denver Post. Yet now the defense wants to be heard to complain that the publicity surrounding this case

[4] There has been a Gag Order in effect throughout these proceedings that prevents counsel from discussing any aspect of the case with the media. *See* Orders D-2 and D-2a.

prevents him from getting a fair trial and requires the Court to transfer the case to a different venue. The defense seeks relief from the very situation it helped to create. Courts do not view such motions favorably.

Nevertheless, as the record demonstrates, the Court made diligent, if not Herculean, efforts throughout the pendency of this case to address the publicity concerns raised by the defense and to protect the defendant's constitutional right to a fair trial by a fair and impartial jury. First, the Court ensured that no information related to the insanity defense, the issue at the heart of the case, was publicized. Given the voluminous nature of this case, including the substantial materials related to the defendant's mental health, and given further the strong interest the public and the media have expressed in this case, this was no small feat. Second, the Court instituted an unprecedentedly extensive and careful jury selection process that lasted three months. The Court has unwavering confidence that it selected a fair and impartial jury. Therefore, the motion for a change of venue is denied as meritless.

A. General Legal Principles

The Sixth Amendment to the United States Constitution states, in pertinent part, that a criminal defendant has the right to "a 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.[5] But "[a] trial court must strike the proper balance between the right to trial by a panel of impartial jurors and the right of the public and press under the First Amendment." *People v. Hankins*, 2014 COA 71, ¶ 10, 2014 WL 2525838, at *1 (Colo. App. 2014) (citation omitted). "The critical inquiry" on a motion for a change of venue "is whether the trial court preserved the accused's right to a fair trial." *People v. Harlan*, 8 P.3d 448, 468 (Colo. 2000), *overruled on other grounds*, *People v. Miller*, 113 P.3d 743 (Colo. 2005).

"A defendant is entitled to a change of venue if he . . . can show either (1) the existence of massive, pervasive, and prejudicial publicity that create[s] a presumption that [he will be] denied a fair trial . . . or (2) a nexus between the jury panel and extensive pretrial publicity that create[s] actual prejudice against [him], thereby denying him . . . a fair trial." *People v. Munsey*, 232 P.3d 113, 121 (Colo. App. 2009) (quotation omitted). The defendant moves for a change of venue under both grounds. As demonstrated in this Order, however, he falls woefully short on both fronts.

B. Presumed Prejudice

In *Skilling v. United States*, the United States Supreme Court's most recent pronouncement on pretrial publicity, the Court observed that "[p]rominence does

[5] As relevant here, under section 16-6-101(1)(a), C.R.S. (2014), "[t]he place of trial may be changed" if "a fair trial cannot take place in the county or district in which the trial is pending." Rule 21(a)(1) of the Colorado Rules of Criminal Procedure contains a similar provision: "[t]he place of trial may 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."

not necessarily produce prejudice, and juror ***impartiality*** . . . does not require ***ignorance***." 561 U.S. 358, 381, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010) (emphasis in original) (citations omitted); *see also Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) (there is no requirement that to sit on a jury citizens must be "totally ignorant of the facts and issues involved"). Indeed, "every 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." *Reynolds v. United States*, 98 U.S. 145, 155-56, 25 L.Ed. 244 (1878).

The Court in *Skilling* emphasized that "[a] presumption of prejudice . . . attends only the extreme case." 561 U.S. at 381, 130 S.Ct. 2896. As such, cases in which presumed prejudice is appropriate and justified are "exceedingly rare." *Flamer v. Delaware*, 68 F.3d 736, 754 (3d Cir. 1995) (quotation omitted). "[T]he presumption of inherent prejudice is reserved for rare and extreme cases" because "our democracy tolerates," and "even encourages, extensive media coverage of crimes such as murder and kidnapping." *United States v. Blom*, 242 F.3d 799, 803 (8th Cir. 2001).

"[P]retrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Skilling*, 561 U.S. at 384, 130 S.Ct. 2896 (quotation

omitted). The Supreme Court cautioned in *Skilling* that its decisions "cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process." *Id.* at 380, 130 S.Ct. 2896 (quotation omitted). If pretrial publicity will prevent a defendant from selecting an impartial jury, the court may order a change of venue to avoid such prejudice. *Hankins*, 2014 WL 2525838, at *1 (citation omitted). "However, pretrial publicity does not alone trigger a due process entitlement to a change of venue." *Id.* (quotation omitted). Instead, courts "will presume prejudice only in extreme circumstances." *Id.* (quotation omitted). The only time prejudice may be presumed is when the publicity preceding a trial "is so ubiquitous and vituperative" that the law automatically concludes that most jurors cannot ignore its influence. *Id.* (quotation omitted).

In *People v. McCrary*, the Colorado Supreme Court commented as follows:

> 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.*** Only when the publicity is so ubiquitous and vituperative that most jurors in the community could not ignore its influence is a change of venue required before voir dire examination.

190 Colo. 538, 549 P.2d 1320, 1325-26 (Colo. 1976) (emphasis added). The defense's motion advocates for the type of standard that the *McCrary* Court found would be impossible to satisfy.

The Colorado Supreme Court has set forth multiple factors to guide a trial court as it discerns whether the defendant is entitled to a change of venue under the presumed prejudice standard: (1) the size and type of locale; (2) the reputation of the victim or victims; (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 of the news reports to the time of trial; and (9) the publication of highly incriminating facts not admissible at trial. *Id.* at 1326. "These factors must establish that publicity is so ubiquitous and vituperative that most jurors in the community could not ignore its influence." *Hankins*, 2014 WL 2525838, at *2 (quotation omitted). This "stringent standard . . . is difficult to meet." *Id.* (citations omitted); *see also McCrary*, 549 P.2d at 1325-26 (affirming the trial court's denial of the motion for a change of venue, even though news articles indicated that the defendant may have been connected to twenty-two murders across the country).

The difficulty in meeting the demanding standard required to establish presumed prejudice is illustrated by the decision in *People v. Botham*, 629 P.2d 589 (Colo. 1981), *superseded on other grounds as recognized in People v. Garner*, 806 P.2d 366 (Colo. 1991). There, 70% of the county's residents subscribed to its only daily newspaper, which had published a hundred articles on the case

involving four murders. *Id.* at 597. Throughout the pendency of the case, the newspaper extensively reported the arrest, details about the ongoing investigation, gruesome descriptions of the corpses, and comments about the relief in the community after the arrest of the defendant. *Id.* at 596-99. Despite these facts, the Colorado Supreme Court concluded that the pretrial publicity was not so massive, pervasive, and prejudicial as to presume the denial of a fair trial. *Id.* at 597.[6]

After considering the factors set forth in *McCrary* and examining the record, the Court is satisfied that prejudice may not be presumed in this case. There is no doubt that the publicity preceding this trial has been extensive. However, it has not been so prejudicial to the defendant as to create a presumption that he will be denied a fair trial. It certainly has been nowhere near as vituperative as that which the Court found insufficient in *Botham*.

Arapahoe County is one of the largest and most populous counties in Colorado.[7] The reputation of the victims has barely, if at all, been discussed by the media. There has been extensive media coverage of the incident in question, but most of that publicity occurred almost three years ago in July 2012. Furthermore, a large portion of the media coverage after 2012 has dealt with procedural issues

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[6] The Court later concluded that, despite the presumption not applying, actual prejudice occurred. 629 P.2d at 597.

[7] There were approximately 618,000 individuals living in Arapahoe County in 2014. *United States Census Bureau*, http://quickfacts.census.gov/qfd/states/08/08005.html (last visited April 22, 2015).

and jury selection. Almost none of the recent articles have discussed evidence to be presented at trial, and few, if any, have included inflammatory language about the defendant.

The "significant passage of time" between the occurrence of vituperative publicity and the trial "decreases the prejudicial effect of pretrial publicity." *Harlan*, 8 P.3d at 469 (citations omitted). One of the factors that supported the finding of no presumed prejudice in *Skilling* was the amount of time that elapsed between the crimes charged and the trial. 561 U.S. at 383, 130 S.Ct. 2896. The Court explained that, while the media continued covering the case throughout this period, "the decibel level of media attention diminished somewhat" before the trial. *Id.* (citation omitted). The Court has observed the same phenomenon here.

Nor does the record in this case suggest that the "specificity of the accounts of certain facts," the "extent of comment by the news reports on the facts of the case," the "manner of presentation," or the "publication of highly incriminating facts not admissible at trial" have created publicity that is so "ubiquitous and vituperative that most jurors in the community could not ignore its influence."[8] *See McCrary*, 549 P.2d at 1326. While it is beyond dispute that the publicity

[8] The Court is not aware of any "highly incriminating facts" that have been reported by the media that will not be admissible at trial. Evidence of the defendant's "smirk" shortly after his arrest, *see* Order D-125, is not a "highly incriminating fact." Nor is information related to the security measures generally employed on defendants during death penalty trials, which the defense, not the Court, first made public. Order D-76a at p. 5 ("the defendant fails to acknowledge that ***he*** chose not to suppress or even redact motion D-76") (emphasis in original).

surrounding this case has been ubiquitous—not only in Arapahoe County, but throughout Colorado and perhaps the United States and beyond—the publicity has not been so disparaging and hostile—and therefore, prejudicial—to the defendant as to require a change of venue. Even in cases where the media coverage is extensive, "a presumption of inherent prejudice" is not justified where the publicity is "not so inflammatory or accusatory as to presumptively create a trial atmosphere . . . utterly corrupted by press coverage." *Blom*, 242 F.3d at 804 (quotation omitted).

Some of the publicity, including the self-generated publicity, has been favorable to the defendant. In addition to the letter written by his parents and the book authored by his mother, there have been articles and columns opining that the defendant is mentally ill and should not face the potential of a death sentence. Some journalists have been critical of the prosecution for seeking the death penalty in this case.

Moreover, most of the prejudicial publicity about which the defense complains does little more than link the defendant to the commission of the acts.[9] But, as the defense has admitted in this litigation, this is not a "who done it" case. Identity is not the issue in this case. The issue at the core of this case is the defendant's insanity defense. *See* Motion D-76a at p. 2 (defense counsel

[9] As the Court mentioned earlier, the defense is at least partially responsible for such publicity.

acknowledging that their client "committed the acts that resulted in the tragic loss of life and injuries sustained by moviegoers on July 20, 2012," but asserting that he was "in the throes of a psychotic episode" at the time). When a defendant pleads not guilty by reason of insanity, he "says that he [ ] is not legally responsible for the offense[s] charged because he [ ] was insane at the time of the commission of the act[s]." COLJI-Crim. B:01, Comment 4 (2014). Indeed, the Court anticipates that defense counsel will state in their opening statement that the defendant committed the acts charged in this case, but that he was insane at the time of the commission of those acts.

Significantly, the Court has taken extraordinary steps to protect the defendant's constitutional right to a fair trial by a fair and impartial jury. The Court "has suppressed virtually all of the pleadings filed in connection with [the insanity] issue." Motion to Seal Petition (filed with Colorado Supreme Court on May 5, 2014) at pp. 1-2. The Court has also "heavily redacted its orders pertaining to [the insanity defense] that are publicly posted on its website." *Id.* at p. 2. The Court has even *sua sponte* redacted mental health information in pleadings submitted by the defendant, to which the defendant responded by criticizing the Court. *See generally* Order D-203.[10] Additionally, in January 2014, the Court

[10] Throughout the proceedings, the parties have been required to file, for public posting purposes, a redacted version of every pleading submitted. However, the Court reviews the redacted filings and alters the redactions as appropriate.

took the extraordinary step of "closing the 4-day hearing on the prosecution's motion for a further [sanity] examination." Motion to Seal Petition at p. 2. Thus, there has been no media coverage whatsoever on the most important aspects of the issue that will be at the heart of the parties' dispute at trial, and the public and the media know almost nothing about that issue. In other words, the publicity, while pervasive, has included "[n]o evidence of the smoking-gun variety" that would "invite[] prejudgment of [the defendant's] culpability." *Skilling*, 561 U.S. at 383, 130 S.Ct. 2896.

In *Skilling*, while conceding that "news stories about Skilling were not kind," the Court stated that "they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Id.* at 382, 130 S.Ct. 2896. The Court concluded that "[p]retrial publicity about Skilling was less memorable and prejudicial" than the defendant's "dramatically staged admission of guilt" in *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), which "was likely imprinted indelibly in the mind of anyone who watched it." *Id.* at 382-83, 130 S.Ct. 2896.

If, as the defense asserts, the publicity connecting the defendant to the commission of the acts were sufficient to warrant a change of venue, this case could never proceed to trial. There is no county in Colorado, with a sufficiently large jury pool and adequate facilities, where prospective jurors have not been

exposed to this publicity. In fact, there is likely no such county in the United States. After all, when the incident was reported nationally and internationally, it was made clear that the defendant was the only suspect, that he was apprehended wearing ballistic gear at the scene of the shooting, and that he had rigged his apartment with explosives and incendiary devices. Moreover, this shooting was perhaps the largest mass shooting in Colorado history and one of the largest in the history of the United States. Twelve people lost their lives, including a six-year-old child, dozens were injured, and a midnight premier of a blockbuster film was interrupted. News reports regarding the defendant's actions, and of the proceedings in this case, have been disseminated on a statewide, nationwide, and even worldwide basis. As such, a prospective juror's news consumption habits are likely to have a far greater impact on his or her exposure to pretrial publicity, and its effect, than the county in which he or she resides.

As the Supreme Court observed more than a century ago, every high profile case in America inevitably comes to the attention of the intelligent people in the area, and almost no one can be found among those best fitted to be jurors who has not read or heard news reports about the case, and who has not formed "some impression or opinion in respect to its merits." *Reynolds*, 98 U.S. at 155-156, 25 L.Ed. 244. It is not surprising that nearly everyone in the State of Colorado, and likely in the United States, has read or heard something about this case, and that

prospective jurors in other counties in Colorado, no less than those who reside in Arapahoe County, have "some impression or opinion in respect to its merits." *Id.*[11]

Given the reality of this case, the Court agrees with the People that the most effective way to address the issues raised by the defendant is not to transfer the trial to another county; it is to adopt extensive, painstaking measures to ensure the jury will be fair and impartial. Motion D-206a Response at p. 3; *see, e.g., Botham*, 629 P.2d at 596 (the trial court may take measures short of a venue change to protect the defendant's right to a fair trial). That is precisely what the Court did. The jury selection process, which spanned over a period of three months, resoundingly demonstrates that the publicity this case has received could be ignored by thousands of Arapahoe County prospective jurors and will be ignored by all 24 selected jurors.[12]

The Court utilized an unprecedentedly extensive jury selection process to address the publicity this case has generated. The Court ordered 9,000 jury summonses. By the time the trial started on January 20, there were approximately 7,000 individuals in the jury pool. For a period of three weeks, the Court brought

[11] Of the hundreds of prospective jurors questioned during individual *voir dire*, only one had not heard or read about this case.

[12] Because the Court selected 12 alternates, there are 24 jurors.

in groups of 125 to 150 prospective jurors twice a day.[13] Each prospective juror was carefully checked in and provided a folder with information related to his or her jury service in this case. The Court made 30-minute introductory remarks to each group. As the Court did so, it asked each prospective juror to follow along on a copy of its remarks in the folder. The prospective jurors were then required to watch a 20-minute jury orientation video and to fill out a lengthy 75-question questionnaire jointly developed by the parties and the Court. If any prospective juror had a question while here, he or she was required to write it on a special form. The Court gave the parties copies of every question submitted by a prospective juror, and then informed the parties about the response provided to each question. Each such response was approved by the Court before it was communicated by a staff member to the prospective juror.

After giving the parties ample time to review the questionnaires, research prospective jurors, and consult with each other, they stipulated to release hundreds of prospective jurors. The Court then scheduled 407 prospective jurors for individual *voir dire*. Prospective jurors who reported and completed a questionnaire were allowed to email or call the Jury Commissioner's Office, and all substantive messages were shared with the parties. Before responding to any

[13] The Court cancelled the introductory sessions scheduled the fourth week, which would have included more than 1,200 additional prospective jurors, because the Court concluded it already had plenty of prospective jurors from which to select a fair and impartial jury. The defense agreed with this conclusion.

such message, the Court discussed it with the parties and sought their proposed response.

During individual *voir dire*, six prospective jurors were generally scheduled each morning and five or six prospective jurors were generally scheduled each afternoon. Upon reporting to the courthouse, each group of five or six prospective jurors watched a 22-minute video recorded by the undersigned that focused on the procedures the jury would have to follow in a sentencing hearing and the factors that would have to be considered during the hearing. The Court explained in detail the law applicable in a sentencing hearing.

Following the video, the Court brought each group of five or six prospective jurors into the courtroom and made remarks that lasted 30 to 40 minutes. During these remarks, the Court went over the material covered in the video again and discussed what it means to be a fair and impartial juror for purposes of a sentencing hearing. As the Court made its remarks, it questioned the prospective jurors regarding their understanding of the video and the concepts discussed in the courtroom, their ability and willingness to fairly and impartially consider and decide the facts in a sentencing hearing, and their ability and willingness to conscientiously follow and apply the law in a sentencing hearing.

The Court then questioned each prospective juror individually for approximately 30 to 45 minutes about all pertinent answers in the questionnaire,

including those related to publicity. The Court devoted a lot of time to the following areas: exposure to pretrial publicity; personal connection to the events; and preconceived views about the defendant's guilt, mental illness, and the potential penalties. Each party subsequently had 20 minutes to question each prospective juror individually about publicity, hardship (including ability to concentrate and graphic images), mental illness (including the insanity defense), and the potential penalties available in the event of a guilty verdict on a charge of first degree murder. If there was a challenge for cause or undue hardship, the Court had a discussion with counsel outside the prospective juror's presence. The Court usually brought the prospective juror back into the courtroom, provided additional explanations about the law, and asked additional questions, sometimes for up to 30 or 40 minutes. In the event the Court determined that a prospective juror could be fair and impartial, it made a credibility judgment based on the prospective juror's words, tone of voice, demeanor, and body language, among other things.

Notably, during individual *voir dire*, publicity was generally not an issue because most prospective jurors were confident in their willingness and ability to set aside whatever information they had learned about the case from news reports. In fact, the defense did not question the vast majority of prospective jurors about

the publicity this case has attracted.[14] Instead, the defense elected to use almost all 20 minutes allotted to ask prospective jurors questions about mental illness (including insanity) and the death penalty. Against this backdrop, the defense's insistence to transfer this case to another county is unpersuasive.

There is an additional observation that undermines the defense's motion. The Court did not need to schedule for individual *voir dire* any prospective jurors who attended an introductory session after the sixth such session. In other words, although the Court held 28 introductory sessions (two per day for 13 work days and single sessions on two other work days), the 407 prospective jurors who were scheduled for individual *voir dire* attended the first six introductory sessions, or approximately 21% of all the introductory sessions held. Thus, there were prospective jurors in 22 introductory sessions who were never even scheduled for individual *voir dire* because they were not needed to select a fair and impartial jury.

When the Court had qualified 115 qualified prospective jurors through individual *voir dire*, it held a group questioning session, during which it instructed them at length about all of the legal principles applicable. The Court took the better part of a day to explain these rules to the prospective jurors. The Court then further questioned the prospective jurors as a group and individually questioned 27

[14] The Court's notes reflect that only two of the parties' 276 stipulated excusals during individual *voir dire* were based solely on exposure to publicity.

of those prospective jurors. The following day, each party was given an opportunity to question the venire of 68 prospective jurors for 75 minutes. At each turn throughout the process, the Court went out of its way to repeatedly and emphatically remind the prospective jurors of the detailed advisements related to their conduct when they are not in the courtroom.

Through this excruciatingly circumspect process, the Court has "differentiate[d] between those individual jurors who have been exposed to publicity but are able to put that exposure aside and those who have developed an opinion they cannot put aside." *In re Tsarnaev*, 780 F.3d 14, 26 (1st Cir. 2015). "[V]oir dire has long been recognized as an effective method of rooting out [publicity-based] bias, especially when conducted in a careful and thoroughgoing manner." *Patton v. Yount*, 467 U.S. 1025, 1038 n.13, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) (quotation omitted). "The best way to ensure that jurors do not harbor biases for or against the parties is for the trial court to conduct a thorough voir dire examination." *Correia v. Fitzgerald*, 354 F.3d 47, 52 (1st Cir. 2003) (citation omitted). If prospective jurors "pass through this screen, the trial court thereafter may operate on the presumption that the chosen jurors will obey the judge's instructions to put extraneous matters aside and decide each case on its merits." *Id.* (citations omitted). "[I]t is a premise of [our] system that jurors will set aside their

preconceptions when they enter the courtroom and decide cases based on the evidence presented." *Skilling*, 561 U.S. at 399 n.34, 130 S.Ct. 2896.

"Together, the careful process employed . . . including the 'face-to-face opportunity to gauge demeanor and credibility,' and the 'information from the questionnaires regarding jurors' backgrounds, opinions, and sources of news' have afforded the [Court] a 'sturdy foundation to assess fitness for jury service.'" *Tsarnaev*, 780 F.3d at 26 (quoting *Skilling*, 561 U.S. at 395, 130 S.Ct. 2896). "The honesty" of the answers provided by prospective jurors, "conscious and subconscious, has been probed by extensive voir dire, as the Supreme Court approved in *Skilling*." *Id.* at 27.

In *Skilling*, the Court rejected the defendant's assertion that juror prejudice should be presumed from the case's pretrial publicity, and therefore, the Court "need not pause to examine the screening questionnaires or the *voir dire* before declaring his jury's verdict void." 561 U.S. at 381, 130 S.Ct. 2896.[15] The Court commended the trial court for utilizing an "extensive screening questionnaire and follow-up *voir dire*." *Id.* at 384, 130 S.Ct. 2896. The Court explained that these jury selection methods "were well suited" to the task of carefully identifying and inspecting prospective jurors' connection to Enron. *Id.* The Court added that

[15] *Skilling* involved the prosecution of a longtime executive of Enron Corporation, the seventh highest-revenue-grossing company in the nation, for crimes committed before the corporation's collapse into bankruptcy. 561 U.S. at 367, 130 S.Ct. 2896.

"hindsight" demonstrated "the efficacy of these devices," as "jurors' links to Enron were either nonexistent or attenuated." *Id.* As a result, "the sheer number of [Enron] victims" did not "trigger a presumption of prejudice." *Id.*

The Court also observed that the trial judge took appropriate steps to reduce the risk of juror prejudice that may have resulted from a codefendant's "well-publicized decision to plead guilty." *Id.* at 384-85, 130 S.Ct. 2896. In addition to delaying the proceedings by two weeks to lessen "the immediacy" of that development, "during *voir dire*, the [judge] asked about prospective jurors' exposure to recent publicity, including news regarding [the codefendant]." *Id.* at 385, 130 S.Ct. 2896. The Court noted that only two prospective jurors were aware of the plea, and neither ultimately served on the jury. *Id.*

This Court used a much more extensive jury selection process than the one the Supreme Court complimented in *Skilling*, which only took ***five hours***. *See Tsarnaev*, 780 F.3d at 28. The Court cannot imagine a more scrutinizing method of screening prospective jurors. If this is not sufficient to ensure that the jury is fair and impartial, no method ever will be.

The Court finds unpersuasive the defense's reliance on "allegedly 'representative' juror responses in an effort to demonstrate that the jury pool [was] rife with disqualifying prejudice that requires [the Court] to doubt the avowals of impartiality from all members of the venire." *Id.* at 26. "[T]he reality of the record

is that those comments, selectively plucked from the questionnaire responses . . . are nothing close to representative." *Id.* at 26-27. "It is a disservice to the judicial system to claim otherwise." *Id.* at 27.[16]

Likewise, "the putative 'personal connections' proffered" by the defense are "mischaracterizations of the record" or are "attenuated or tangential." *Id.* Therefore, they are not convincing.

In any event, the Court cannot consider the responses in the jury questionnaires in a vacuum, as the defense does. Experience has shown that during follow-up questioning, prospective jurors often reveal different opinions and sentiments than those expressed in their questionnaires, or may have a more open mind than their written responses indicate. The Supreme Court has repeatedly observed that when prospective jurors are questioned in person during *voir dire*—particularly about unfamiliar legal concepts such as the burden of proof or the presumption of innocence—they sometimes change some of the answers provided in the questionnaire:

> [T]he question is whether there is fair support in the record for the state courts' conclusion that the jurors here would be impartial. The testimony of each of the three challenged jurors is ambiguous and at

[16] The defendant selected quotes from 228 questionnaires out of more than 3,500 questionnaires completed (approximately 6.2% of the questionnaires). Motion D-206a Ex. JJJJJ. Contrary to the defense's contention, this is not a "representative sample." Motion D-206a at p. 4. Rather, this is a skewed sample of the most inflammatory responses in the questionnaires. The majority of the prospective jurors quoted by the defense (approximately 80%) were excused by stipulation of the parties. The defense's quotes prove nothing more than the fact that a small portion of all the prospective jurors provided problematic responses in the questionnaire.

> times contradictory. This is not unusual on voir dire examination, particularly in a highly publicized criminal case . . . . Prospective jurors represent a cross section of the community, and their education and experience vary widely. Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. ***Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially. The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading.***

Yount, 467 U.S. at 1038-39, 104 S.Ct. 2885.

The Court in *Yount* recognized that "[d]emeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying." *Id.* at 1038 n.14. The Court explained that any complicated jury selection process "calls upon lay persons to think and express themselves in unfamiliar terms, as a reading of any transcript of such a proceeding will reveal." *Id.* The Court added that "[d]emeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensible." *Id.*

This was borne out by the individual *voir dire* in this case. Prospective jurors frequently exhibited a misunderstanding of issues that require some legal instruction. For example, many prospective jurors who referred to the defendant as being "guilty" of the charges were simply communicating that they were aware that, according to news reports, he was the only suspect arrested at the shooting.

Many others explained that, given the not guilty by reason of insanity plea entered in this case, the defendant has already admitted he is "guilty" of the "acts," and that the only question that remains is whether he was insane at the time of the commission of the acts. Thus, these prospective jurors did not use the term "guilty" in the legal sense.

These impressions and opinions are not surprising, since they were articulated before anyone informed the prospective jurors about the elements of the actual crimes charged, the prosecution's burden to prove beyond a reasonable doubt each element of each crime charged, the defendant's presumption of innocence (even in a case in which a not guilty by reason of insanity plea is entered), and other legal matters. Following the Court's extensive instructions of law, most prospective jurors stated that they understood them and assured the Court that they would conscientiously follow and apply the law. In fact, some prospective jurors specifically stated that the Court's instructions made a significant difference in their ability and willingness to be fair and impartial jurors in this trial. Such prospective jurors admitted to the Court that some of the responses in the questionnaires were based on a misunderstanding of the law.

The United States Supreme Court has routinely expressed great confidence in the efficacy of *voir dire*. Where appropriate *voir dire* is conducted, the Court has virtually never found that the publicity preceding a trial warranted a finding of

presumed prejudice. In fact, the Supreme Court has not made such a finding in more than half a century, and it has never determined that prejudice should be presumed in a case in which the county's population and the number of summoned jurors even approaches the size of Arapahoe County or the 9,000 prospective jurors summoned in this case.

Under all the circumstances present, the Court concludes that the defendant has failed to show that the pretrial publicity in this case is so massive, pervasive, and vituperative as to create a presumption that most jurors in the community could not ignore its influence. This is not one of those exceedingly rare cases in which the publicity surrounding the case is so massive, pervasive, and prejudicial as to create a presumption that the defendant cannot receive a fair trial as a result of public bias. *Cf. Sheppard v. Maxwell*, 384 U.S. 333, 355, 358, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) ("bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom;" calling the court a "carnival atmosphere"); *Rideau*, 373 U.S. at 726, 83 S.Ct. 1417 (describing the trial as "kangaroo court proceedings").

The Court emphasizes that "juror impartiality . . . does not require ignorance." *Skilling*, 561 U.S. at 381, 130 S.Ct. 2896 (emphasis omitted). "The fact that many of the jurors have been exposed to some measure of publicity, alone, is not probative of any 'pervasive prejudice.'" *Tsarnaev*, 780 F.3d at 28.

C. Actual Prejudice

"In the absence of presumed prejudice, the defendant must show actual prejudice—a nexus between pretrial publicity and a panel of partial jurors." *Hankins*, 2014 WL 2525838, at *3 (citing *Harlan*, 8 P.3d at 470). "Courts do not find actual prejudice if an extensive voir dire reveals that jurors can set aside their opinions." *Id.* (citing *Harlan*, 8 P.3d at 470). This is so because "[s]uch a finding satisfies 'the constitutional requirement of impartiality.'" *Id.* (quoting *Harlan*, 8 P.3d at 470); *see also United States v. McVeigh*, 153 F.3d 1166, 1184 (10th Cir. 1998) (the parties' comprehensive *voir dire*, including two screening questionnaires, individual questioning by the court, and questioning by both counsel, produced an impartial jury), *partially overruled on other grounds*, *Hooks v. Ward*, 184 F.3d 1206, 1227 (10th Cir. 1999). Although prospective jurors may have a difficult time "setting aside their opinions," courts nevertheless "give due deference" to their "declarations of impartiality and the trial court's credibility determination that those declarations are sincere." *Hankins*, 2014 WL 2525838, at *3 (quoting *McVeigh*, 153 F.3d at 1181).

The Court discussed earlier the meticulous and considerable jury selection methods it utilized in this case. Most of the prospective jurors were not aware of "highly inflammatory information," *Harlan*, 8 P.3d at 470, or any information,

related to the central issue in dispute in this case—the defendant's mental health. Nor could they be, as such information has not been publicized.

Further, the vast majority of prospective jurors expressed skepticism about the accuracy and reliability of news reports. Most importantly, time and again, prospective jurors "expressed a willingness to set aside what they had learned." *Id.*

By the defense's own calculation, even before they came in for individual *voir dire*, well over 60% of prospective jurors stated in their questionnaires that they could set aside any publicity and base their decisions on the evidence presented in the courtroom and the law provided by the Court. Motion D-206a, Ex. FFFFF. Further, approximately 65% of prospective jurors who completed questionnaires either expressed no opinion about the defendant's guilt or indicated that they could set aside any such opinion. Even more damning to the defense's position, over 61% of prospective jurors stated that they held an opinion about the defendant's mental health that is favorable to him or did not have an opinion about the defendant's mental health at all. Lastly, of the prospective jurors mentioned in Defense Exhibit HHHHH of Motion D-206a, only about 30% opined that the defendant should receive a death sentence, and a full 40% of those represented that they could set aside their opinions. Thus, the defense's own statistics establish that only about 18% of prospective jurors who completed questionnaires have a strong belief that the defendant should receive the death penalty.

The Court had calculated that it would take at least five months, including four months of individual *voir dire*, to select a jury. Instead, it took less than three months. And the Court essentially selected two juries because it is using 12 alternates. Had the Court only been selecting 12 jurors, jury selection would have been completed in less than two months. If pretrial publicity were as large of an issue as the defense makes it out to be, it presumably would have required much more time and effort to select 24 fair and impartial jurors.

Each of the 115 prospective jurors qualified for group questioning, the last part of jury selection, assured the Court that he or she could and would set aside whatever information he or she had learned about the case from news reports. These prospective jurors also assured the Court that they would make decisions in this case based only upon the evidence and information presented in the courtroom and the instructions of law from the Court. The Court found these prospective jurors—who were tested in the crucible of questioning by counsel—credible and their assurances reliable.

The Court acknowledges that almost all of the prospective jurors had heard or read stories about this case. However, that "does not automatically mean" that they "could not be fair and impartial jurors capable of casting aside any preconceived opinions or knowledge of the case." *McCrary*, 549 P.2d at 1326. It is worth noting that, despite individually questioning hundreds of prospective

jurors, the defense only made 34 challenges for cause in individual *voir dire*.[17] Therefore, the majority of the 115 prospective jurors who participated in group questioning were prospective jurors whom the defense, either expressly or impliedly, agreed could be fair and impartial. Nor did the examination of the prospective jurors portray a "community-wide prejudice or resentment against the defendant." *Id.* To the contrary, the Court was able to impanel a fair and impartial jury.

Because the defendant's efforts to show a nexus between publicity and a panel of partial jurors fall woefully short, his "actual prejudice" argument fails. This is not "a situation where it must be concluded that it would be improbable that a fair and impartial jury could be selected from the panel as a whole." *Id.*

D. Affidavits

The defense has submitted affidavits from Dr. Bryan Edelman. In light of the extensive record before it, the Court finds these affidavits of little use and unpersuasive.

In deferring ruling on Motion, D-206, the Court spoke as follows:

> *Voir dire* will be a far superior barometer of prejudice than the exhibits on which Motion D-206 relies. Following *voir dire*, the Court will have the information necessary to conduct the due process

[17] The defense subsequently made two additional challenges for cause with respect to prospective jurors 396 and 1029, both of whom were excused by stipulation of the parties before group *voir dire*. Consequently, neither prospective juror was a member of the group of 115 prospective jurors questioned by the lawyers as a group shortly before the exercise of peremptory challenges.

> analysis called for by the United States Supreme Court in *Beck v. Washington*, namely, whether the pretrial publicity is so intensive and extensive or the examination of the entire panel reveals such prejudice that a court could not believe the answers of the jurors regarding their impartiality and would be compelled to find bias or preformed opinion as a matter of law.

Order D-206 at p. 11 (quotation omitted). The Court reiterates this point as it concludes that the affidavits submitted deserve little weight.

In any event, the prosecution also submitted expert affidavits, from Drs. Bruschke and Loges, which contradict Dr. Edelman's assertions. The Court finds the attestations of Drs. Bruschke and Loges to be more persuasive. But in the end, the Court focuses on the record before it, not on what an expert retained by a party thinks.[18]

Now that *voir dire* is over and the Court has conducted the required due process analysis, there is no basis to conclude that pretrial publicity has been so intense, extensive, and vituperative, or that the examination of the entire panel reveals such prejudice, that the Court cannot believe the answers of the prospective jurors regarding their ability and willingness to be fair and impartial. Indeed, defense counsel, themselves, believe most of the prospective jurors, as they did not assert a challenge for cause with respect to the majority of them, and, in some instances, actually opposed the prosecution's attempts to excuse them. If the

[18] Given the record before it, the Court concluded that an evidentiary hearing would have been a waste of everyone's time. Since the Court did not hold an evidentiary hearing, it assumes, for purposes of this Order, that the defense's expert is credible.

defense genuinely believed that every potential juror in Arapahoe County is automatically disqualified, it presumably would have challenged every prospective juror for cause.

The truth is that the citizens of Arapahoe County are eminently qualified to be fair and impartial jurors in this trial. In particular, the 24 jurors selected are fair and impartial.

CONCLUSION

For all the foregoing reasons, the request to supplement Motion D-206 is granted without objection, but the request to change venue is denied on the merits. The Court is confident that the jury selected in this case is fair and impartial and that the defendant will receive a fair trial. There is no basis in the record or the law to change the venue of this trial.

Dated this 23nd day of April of 2015.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2015, a true and correct copy of the Court's **Order Regarding Defendant's Motion to Supplement Motion for Change of Venue and Reply in Support of Motion for Change of Venue (D-206a)** was served upon the following parties of record:

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