

DISTRICT COURT, ALAMOSA COUNTY, COLORADO, 8955 Independence Way Alamosa, CO 81101 THE PEOPLE OF THE STATE OF COLORADO Plaintiff, v. BARRY LEE MORPHEW, Defendant.	DATE FILED June 22, 2026 4:21 PM ▲ COURT USE ONLY ▲
JANE FISHER-BYRIALSEN, #49133 FISHER & BYRIALSEN, PLLC 4600 S. Syracuse Street, 9 th Floor Denver, CO 80237 (202)256-5664 Jane@fblaw.org DAVID BELLER, #35767 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1400 Denver, CO 80202 (303)573-1900 Fax: (303) 446-9400 david@rklawpc.com	Case Number: 25 CR 128
[D-012] REPLY - MOTION TO CLARIFY COURT ORDER REGARDING NOTICE OF INTENT TO INTRODUCE CHARACTER EVIDENCE	

The prosecution does not oppose the substance of Mr. Morphey's request that the prosecution's CRE 404(b) notice must include evidence of other acts they deem to be "intrinsic" to the offense under *Rojas v. People*, 2022 CO 8, 504 P.3d 296. In fact, the prosecution does not address the issue at all.

Thus, this Court should enter an order clarifying that (1) its prior orders include any evidence the prosecution seeks to introduce under the theory it is "intrinsic" to the alleged offense (see motion, ¶¶ 14-17), and (2) no such evidence will be admitted if the prosecution has failed to provide said notice. If the prosecution provides a notice, it is up to this Court – not the prosecution – to make the determination whether the proffered evidence is intrinsic.

The prosecution appears to disagree that its evidentiary notices should be filed as a protected attachment or provided directly to defense counsel, rather than filed unprotected in the

court file. Contrary to the procedure generally used in such cases, the prosecution appears to want to file its various notices of unadjudicated conduct in the public court file, rather than providing it to the defense only or filing it as a suppressed attachment to its notice. The prosecution offers no reason for doing so.

The prosecution implicitly admits that its preferred procedure – filing evidentiary allegations in the court file prior to admission of the evidence – risks prejudicing the jury. The prosecution suggests this Court permit them to cause the damage, and then that this Court should attempt to cure the damage by simply conducting a more probing voir dire. (Response, unnumbered ¶ 5, citing change-of-venue cases).

Mr. Morphew agrees that extensive voir dire will be necessary in this case. However, voir dire alone is not a panacea. A change of venue could be necessitated even with a probing voir dire. See § 16-6-101 (1)(a) (“When a fair trial cannot take place in the county or district in which the trial is pending”). See also e.g. *People v. Botham*, 629 P.2d 589 (Colo. 1981), where the court found that voir dire was “not dispositive of a defendant's claim that he was denied his constitutional right to a fair trial.” *Id.*, at 599. The question is not whether the potential jurors’ exposure was caused by judicial or extra-judicial information. “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.” *Ibid.* In *Botham*, the Supreme Court reversed a conviction because, among other reasons, the trial court should have granted the motion to change venue based on animus in the community. Voir dire did not salvage Botham’s conviction.

The prosecution’s cases do not support the position that the prosecutor should file unadjudicated conduct or allegations in the public court file, on the theory that voir dire is a panacea. Their cases are decades old and not on the topic before the court.

- A. In *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983), extensive voir dire was provided, but even then, the jury pool was too contaminated and a change of venue was required. After the venue was changed, the press coverage was not “inordinate” and was “neither sensational nor inflammatory.” *Id.*, at 240.
- B. *People v. McCrary*, 549 P.2d 1320 (Colo. 1976) is a 55-year-old venue case upholding the trial court’s refusal to change venue. The Court affirmed that, while voir dire is a useful tool, “a juror's assurances that he is equal to the task cannot be dispositive[.]” *Id.*, 549 P.2d at 1327. “[A] juror's exposure to highly inflammatory information that is inadmissible at trial can, in some cases, be sufficient to disbelieve a juror's assurances that he can lay it aside.” *Id.*, at 1328. This case has nothing to do with CRE 807 (having been decided years before the Colorado Rules of Evidence were adopted).

- C. *People v. Gardenhire*, 903 P.2d 1165 (Colo. App. 1995) has nothing to do with the issue in D-011. There, during jury deliberations at a 1992 trial, a juror reported seeing a news article about a different case (not the case at bar). The judge inquired of the entire panel but didn't poll the jury. The court of appeals found no error in this procedure. This case was decided a decade before Colorado's seminal case on extraneous information – *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005) – so it is of limited utility even if it had anything to do with court filings.

WHEREFORE, Mr. Morpew requests that this Court clarify that (1) its prior orders include any evidence the prosecution seeks to introduce under the theory it is "intrinsic" to the alleged offense, (2) no such evidence will be admitted if the prosecution has failed to provide notice, and (3) the notice should not be filed in the public court file.

Respectfully submitted this 22nd day of June, 2026.

FISHER & BYRIALSEN, PLLC

/s/ Jane Fisher-Byrialsen

Jane Fisher-Byrialsen, #49133

RECHT & KORNFELD, P.C.

/s/ David Beller

David Beller, #35767

Certificate of Service

I hereby certify that on June 22, 2026, I caused the foregoing to be filed with the Alamosa County District Court and a copy of the same to be served on the Alamosa County District Attorney's office via CCE-File Service.

/s/ Abby Clement

Paralegal at Fisher & Byrialsen PLLC