

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-017] REPLY - MOTION TO REQUIRE NOTICE OF STATEMENTS BY MR. MORPHEW	

The prosecution devotes most of its response to an argument that, if the defense moves to compel the prosecution to admit Mr. Morpew's statements under the Rule of Completeness (CRE 106), this Court should deny his motion. This puts the cart before the horse.

Mr. Morpew's motion is about notice. Only after notice is provided can Mr. Morpew identify any omitted statements he seeks to compel the government to introduce, and only at that point would this Court take up the substantive issues and determine which of the omitted statements it will require the government to introduce contemporaneously with its selected portions. See Motion D-017, ¶¶ 19-22.

In this Reply, Mr. Morpew will address the notice issue first.

This Court has the authority and obligation to require notice

Citing *People v. Kilgore*, 2020 CO 6, 455 P.3d 746 (Colo. 2020), the prosecution asserts the absence of specific language in Crim. P. Rule 16 prohibits this Court from entering an order for notice, therefore, providing notice would unfairly reveal their trial strategy. This is the prosecution's only argument and *Kilgore* its only cited authority.

Mr. Morphew anticipated and addressed this argument in Motion D-017, in ¶¶ 5, 6, and 23. The prosecution is wrong about *Kilgore* and Rule 16.

In *Kilgore*, the defect in the district court's order was that it required disclosure of an item – an exhibit list – not mentioned in Rule 16. In *People v. Dye*, 2024 CO 2, 541 P.3d 1167 – the case about disclosure of alternate suspect information to the court – the Supreme Court distinguished *Kilgore* on the grounds that the rules contemplate disclosure of some alternate suspect information. Like the alternate suspect information at issue in *Dye*, the information sought here is contemplated in the discovery rules. If “[s]imply advancing the timing of defense disclosures from the middle of trial to earlier in the proceedings does not violate a defendant's constitutional rights[.]” *Dye*, ¶ 62, it certainly doesn't violate any constitutional privileges of the prosecution, who have no constitutional rights and who are already obligated to disclose Mr. Morphew's statements.¹

The prosecution does not deny that, without notice, mid-trial chaos is guaranteed. The prosecution's approach guarantees long interruptions and recesses during trial to litigate the CRE 106 issues. The prosecution offers no suggestions to avoid the train wreck its proposed procedure guarantees. It ignores the *People v. Banks*, where the court of appeals expressly commented that mid-trial redaction of lengthy videotapes is not a feasible solution and matters concerning redactions should be handled pretrial.²

In contrast, Mr. Morphew offers a path that enables this Court to control the chaos, minimize disruptions, and better ensure correct evidentiary rulings and avoid error. It is a path well contemplated by Rule 16.

Mr. Morphew's request is consistent with Crim. P. Rule 16, Part IV (e)(1)(II), (III), and (XIV). This Court is expressly authorized to hold a pretrial conference at which the court may “consider such matters as will promote a fair and expeditious trial” and which will avoid delays and inconvenience to jurors, including:

¹ The Bill of Rights protects the accused from the government, not the government from the accused. As James Madison eloquently stated, the purpose of constitutional rights is not only to protect against majority tyranny but also to “guard the society against the oppression of its rulers.” The Federalist No. 51 (James Madison), at 321.

² *People v. Banks*, 2012 COA 157, ¶¶ 63, 412 P.3d 417, 431, *aff'd in part, rev'd in part (on other grounds related to sentencing) sub nom. People v. Tate*, 2015 CO 42, 352 P.3d 959.

(II) Marking for identification various documents and other exhibits of the parties,

(III) Excerpting or highlighting exhibits.

...

(XIV) Resolution of any motions or evidentiary issues in a manner least likely to inconvenience jurors to the extent possible.

Crim. P. Rule 16, Part IV (e)(1)(II), (III), and (XIV).

Perhaps the prosecution's concern is not with strategy, but with tactics. The interruptions the prosecution's proposal causes will be interminable. Each time the prosecution offers a statement that is incomplete or misleading, the defense will object, invoke CRE 106, and thus necessitate removal of the jurors from the courtroom while the court views the offered portion(s) in light of the prosecution's portion, make a ruling, and then resolve practical problems such as how to edit, revise and supplement the prosecution's portions – all of this to resolve only one statement. As soon as the jury returns, and the prosecution introduces another incomplete or misleading portion, the process will repeat itself. The jurors will no doubt grow irritated, trial will be needlessly delayed, and (because the defense will be the side appearing to cause the interruptions) Mr. Morphew and his attorneys will be blamed. The fact that the prosecution might benefit as a tactical matter from this infuriating chain of events doesn't make it an issue about revealing their trial strategy.

This court is not helpless to avoid this train wreck. Because the prosecution has offered no real reason to deny the motion, and its only cited authority (*Kilgore*) does not prohibit the order, this Court should require the prosecution to identify the snippets/portions of Mr. Morphew's statements it intends to introduce.

The CRE 106 issues are complex and cannot be ruled upon in the abstract.

The fact that the prosecution and defense have already devoted some seven pages of briefing to the CRE 106 subject itself shows why these issues must be litigated pretrial, not during trial during multiple interruptions. This Court cannot resolve these issues through back-and-forth abstract briefing on the law, without context grounded in specific facts. No specific statement portions have been offered by the prosecution, and no completing portions have been offered by the defense.

Mr. Morphew vehemently disputes the prosecution's limited reading of CRE 106 and the interpretations and arguments it offers about the caselaw. However, we are here on Mr. Morphew's motion for notice only. Mr. Morphew reserves the right to fully litigate applicability

of CRE 106 in the context of specific completing statements being offered to specific statements offered by the prosecution.

The prosecution cannot be allowed to transform Mr. Morphew's motion for notice into its own objection for introduction of completing statements. No such objection is properly before the court at this time.

Request that notice of unadjudicated evidentiary material be provided as a protected attachment rather than simply filed in the court file unprotected.

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 material 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 ¶ 6, 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 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. Morphey requests that this Court grant his request for an order compelling the prosecution to provide notice, as a protected attachment or notice provided directly to the defense, of the portions of Mr. Morphey’s statements the prosecution intends to introduce.

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