

<p>DISTRICT COURT, FREMONT COUNTY,          COLORADO          Court Address: 136 Justice Center Rd., Rm. 103          Canon City, CO 81212          Court Phone: (719) 269-0100</p>	<p style="text-align: right;">DATE FILED: March 27, 2022</p>
<p>THE PEOPLE OF THE STATE OF COLORADO,            v.            BARRY LEE MORPHEW, Defendant.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/>
<p>Iris Eytan, #29505          Eytan Nielsen LLC          3200 Cherry Creek South Drive, Suite 720          Denver, CO 80209          Telephone: (720) 440-8155          Facsimile: (720) 440-8156  <a href="mailto:iris@eytan-nielsen.com">iris@eytan-nielsen.com</a></p> <p>Jane Fisher-Byrialsen, #49133          Fisher &amp; Byrialsen, PLLC          4600 South Syracuse St., 9th Floor,          Denver, Colorado 80237  <a href="mailto:jane@fblaw.org">jane@fblaw.org</a></p> <p>Hollis Whitson, #32911          Samler and Whitson, PC          1600 Stout Street, Suite 1400          Denver, CO 80202 303-670-0575  <a href="mailto:Hollis@SamlerandWhitson.com">Hollis@SamlerandWhitson.com</a></p> <p><i>ATTORNEYS FOR DEFENDANT BARRY LEE          MORPHEW</i></p>	<p>Case Number: 22CR47            Division: 1</p>
<p><b>MOTION TO LIMIT PUBLIC ACCESS [D-71]</b></p>	

Pursuant to Crim. P. Rule 55.1, Mr. Morphew requests that this Court limit public access to the Notice and Exhibits 1 and 2 attached to the “Notice of People’s Intent to Introduce Statements Pursuant to CRE 807 and Section 13-25-139, C.R.S.,” submitted for filing on March 25, 2022.

Pursuant to Rule 55.1(a)(2), upon receipt of this motion, **the Clerk “shall make the subject court record inaccessible to the public pending the court’s resolution of the motion....”**

Pursuant to Rule 55.1(b), Mr. Morpew states:

**1. Identify court record.** The court records were all submitted by the prosecution for filing on March 25, 2022:

- (1) “Notice of People’s Intent to Introduce Statements Pursuant to CRE 807 and Section 13-25-139, C.R.S.,”
- (2) Exhibit 1 submitted with the motion.
- (3) Exhibit 2 submitted with the motion.

**2. Reasons for the request.** The documents contain 98 total pages of intricately detailed information that the prosecution seeks to introduce at trial. The admissibility of this material will be hotly contested. *This Court has already excluded some of this information from being introduced at trial*, yet the prosecution has included it anyway. *For example, see xxii* appearing on the prosecution’s unnumbered page 15 of its Notice.<sup>1</sup>

The reason that an inflammatory, inadmissible document should not be accessible to the public is that, this close to trial when juror summons have already gone out, there is a substantial risk of tainting the jury pool. There is no doubt that everything in the document – particularly the portions on pages 11-15, will be splattered all over social media instantly and within reach of the prospective jurors. Much of this material will be inadmissible at trial.

As evidence for this claim, Mr. Morpew’s counsel can report to the court that at least one prospective juror on the summons list made a social media post broadcasting the fact she received a juror summons for this case, immediately after she received it. In this post, she took a picture of the summons and described her strong feelings that Barry Morpew is guilty. Putting out inflammatory, highly prejudicial, information and speculation that will certainly never be

---

<sup>1</sup> Notably, when the prosecution initially filed its notice of proposed CRE 404(b) evidence, it requested that public access be limited because “The interests in the Defendant having a fair trial and a fair jury override the presumptive public access.” See Motion P-34a (filed Dec. 7, 2021 in Chaffee County 21CR78). Venue was changed to Fremont County. This Court eventually disallowed admission of the evidence. Now, in a public pleading, the prosecution inserts such material its latest filing, without seeking limitation on public access.

ruled admissible will substantially risk Mr. Morphew's right to a fair trial and will jeopardize the ability to empanel a jury in this County.

The prosecution was not required to file its Notice in the court file and under these circumstances should not have. CRE 807 reads in pertinent part: "a statement may not be admitted under this exception unless the proponent of it *makes known* to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant." The prosecution's decision to file 98 pages of inflammatory, inadmissible material – and in some cases material that has already been ruled inadmissible – is worthy of sanctions but certainly worthy of limiting public access.

3. **Length of inaccessibility.** At a very minimum, the Notice and Exhibits 1 and 2 should be inaccessible until after the trial of this case, at which point this court can make a decision about public access at that time.

4. **Court hearing.** This Court has the authority to close the hearing on this motion to limit access if this Court "finds that doing so is necessary to prevent the public from accessing the information that is the subject of the motion under consideration." Rule 55.1(a)(5). Such closure is necessary to prevent the public from accessing the material in the Notice and Exhibits 1 and 2.

It is possible that a partial closure of the hearing would prevent the material from reaching the public until a ruling, if the parties were ordered to refrain from discussing the actual material except at the bench.

5. **Redactions.** Mr. Morphew has considered whether redacted documents could be released to the public without contaminating the jury pool. This Court would have to exclude both Exhibits 1 and 2 and redact out of the Notice all of the factual allegations, leaving the legal arguments only. Because this was not Mr. Morphew's filing, he had no opportunity to redact the document in advance. If this Court orders the prosecution to redact the document, Mr. Morphew requests that he be given notice and an opportunity to be heard on the redactions before any of the documents are made accessible to the public.

6. **Court order and findings requested.** Rule 55.1(a)(6).

The substantial interests that would be served by making the court records inaccessible to the public or by allowing only a redacted copy of it to be accessible to the public include Mr.

Morphew's constitutional right to a fair and impartial jury and the interests of all parties and the court in being able to seat a jury that has not been contaminated by pretrial exposure. Substantial interests would be severely impaired if it becomes impossible to seat a jury, because it would cause a mistrial, a delay in resolution of this case, and quite probably a change of venue.

No less restrictive means than making the record inaccessible to the public exists to achieve or protect the substantial interests identified. As mentioned above, a redaction process would be cumbersome, time consuming, and most probably ineffective.

The substantial interests identified override the presumptive public access to the court records. Restricting access only until the trial is concluded does not deprive the public of the filing forever but places a reasonable restriction on its dissemination at this critical point prior to trial. This Court has been very expansive with access to the public in this case. This minimal restriction – a delay only, not a complete bar – is necessitated by the closeness to trial, the fact that the juror summons have already been issued, and the fact that the documents contain information that has already been excluded as evidence and additional material that this Court will exclude from trial once a hearing on the prosecution's Notice is held.

7. **Duration of Order Granting Request.** Rule 55.1(a)(7). Mr. Morphew requests that access be limited until the trial is concluded, and then a decision can be made whether this document may be disclosed.

Mr. Morphew requests that the Clerk immediately limit public access to the prosecution's Notice and its two Exhibits and that this Court grant the motion to limit public access. Mr. Morphew requests that, if this Court does not grant this motion outright, this Court hold a hearing on this motion.

Respectfully submitted this 27th day of March 2022.

**EYTAN NIELSEN LLC**

*s/ Iris Eytan*  
Iris Eytan, #29505

**FISHER & BYRIALSEN, PLLC**

*s/ Jane Fisher-Byrialsen*  
Jane Fisher-Byrialsen, #49133

**SAMPLER AND WHITSON**

*s/ Hollis Whitson*

Hollis Whitson, #32911

**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of March 2022, a true and correct copy of the foregoing **MOTION TO LIMIT PUBLIC ACCESS [D-71]** was served via CCE as follows: 11<sup>th</sup> Judicial District Attorney's Office, 101 Crestone Ave., Salida, CO 81201

*s/ Hollis Whitson*

Hollis Whitson