DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 Sixth Street Boulder, CO 80302	DATE FILED: May 24, 2024 4:39 PM
PEOPLE OF THE STATE OF COLORADO v. **AHMAD AL ALIWI ALISSA** Defendant	▲ **COURT USE ONLY** ▲
Michael T. Dougherty, District Attorney Ken Kupfner, Assistant District Attorney 1777 Sixth Street Boulder, CO 80302 Phone Number: (303)441-3700 FAX Number: (303)441-4703 E-mail: kkupfner@bouldercounty.org Atty. Reg. #29924	Case No. 21CR497 Div.: 13
Response to [Defendant's] Motion to Change Venue (D-051)	

This matter has been pending since March 22, 2021, when Ahmad Al Aliwi Alissa (the "Defendant") murdered 10 people at the King Soopers at Table Mesa in south Boulder. Defendant is charged with ten counts of Murder in the First Degree (F1), forty-seven counts of Attempted Murder in the First Degree (F2), one count of Assault in the First Degree (F3), six counts of Possession of a Large-Capacity Magazine During the Commission of a Felony (F6), and forty-seven counts of Crime of Violence with a Semiautomatic Assault Weapon as a Sentence Enhancer.

The People have endorsed 353 witnesses at this time. The majority of the witnesses, lay and law enforcement, reside locally in or near Boulder County. A change of venue without good cause would create significant hardship and cost.

Defendant has filed pleading D-51, titled [Defendant's] Motion to Change Venue (the "Motion"). The Motion requests this Court enter an order changing venue to another county. The main basis for the Motion is an assertion that pretrial media publicity concerning the facts of this case and Defendant's circumstances would make it impossible for Defendant to have a fair trial in

Boulder County. Neither the Motion, affidavit, nor exhibits, provide adequate grounds for a change of venue at this time. As argued below, the proper time for the Court to consider these issues is during jury selection. If it is not possible to select a fair and impartial jury, then, and only then, should the Court enter an order changing venue in this case.

First, this is not a case where the presumption of prejudice requiring a change of venue applies. "Only when the publicity is so ubiquitous and vituperative that most jurors in a community could not ignore its influence is a change of venue required before voir dire." *People v. McCrary*, 190 Colo. 538, 545, 549 P.2d 1320, 1326 (1976). Presumptive prejudice cannot be predicated exclusively on news accounts of a crime. *Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 2914 (2010). Defendant has not and cannot satisfy this requirement. Second, this is not a case where, at this stage, Defendant can demonstrate actual prejudice requiring a change of venue. As a general matter, actual prejudice can only be demonstrated by an unsuccessful attempt to obtain a fair and impartial jury during voir dire. Third, the affidavit in support of the Motion is insufficient under Crim.P. Rule 21(a) to demonstrate either presumptive or actual prejudice. The People do not stipulate to a change of venue. The Motion should be denied.

Legal Standards

Venue is based first upon constitutional provisions. The United States Constitution in Article III, § 2, cl. 3 and the Sixth Amendment require that a crime be tried where "the crime shall have been committed." The Colorado Constitution, Article II, § 16 provides for an "impartial jury of the county or district in which the offense is alleged to have been committed."

In Colorado, a Change of Venue is regulated by both statute and court rule. Motions for Change of Venue are governed by C.R.S § 16-6-102, with appropriate grounds enumerated in C.R.S §16-6-101. The sole ground upon which the defendant relies is C.R.S §16-6-101(l)(a) which provides, "When a fair trial cannot take place in the county or district in which the trial is pending."

Defendant has not demonstrated he cannot receive a fair trial in Boulder County.

Crim. P. 21(a)(l) provides that the Court can order a change of venue if it determines that "a fair or expeditious trial cannot take place in the county or district in which the trial is pending." Under some circumstances, a defendant might establish he is entitled to a change of venue because holding a trial in the county where the offense was committed could deprive him of his right to due process of law.

Regarding the constitutional challenges, there are two ways a defendant seeking a change of venue can establish he is entitled to this relief-either the publicity is so massive, pervasive, and prejudicial that it can be presumed that the defendant cannot get a fair jury or during jury selection it is impossible to select a fair jury because the potential jurors themselves indicate they cannot be fair and impartial. *See generally, Irvin v. Dowd*, 366 U.S. 717 (1961); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *People v. Botham*, 629 P.2d 589 (Colo. 1981); *People v. McCrary*, 549 P.2d 1320 (Colo. 1976); *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983).

However, transfer of venue, as a constitutional matter, may only be had where there is extraordinary local prejudice that will prevent a fair trial as a basic due process right of the defendant. *See Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896 (2010). "The theory of our (trial) system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Id.* at 2913, citing *Patterson v. Colorado ex rel Attorney General of Colo*., 205 U.S. 454, 462 (1907).

At the time Defendant was alleged to have committed the murders and other crimes charged in this case, there was pervasive publicity on both a state and worldwide basis. Now, however, more than three years has elapsed since the media coverage in this case even came close to being pervasive. The People submit even if media coverage were still pervasive, and

even if it were found that most of the citizens of Boulder County knew about this case, "mere familiarity with a case due to publicity does not, in itself, create a constitutionally defective jury." *People v. Loscutoff,* 661 P.2d 274, 276 (Colo. 1983). Indeed, "a showing of complete ignorance of the facts by potential jurors is not required and is seldom possible in this day and age." *Id.* The general law on this issue is outlined in *People v. Harlan, 8* P.3d 448, 469 (Colo. 2000):

> The existence of extensive pretrial publicity does not alone trigger a due process entitlement to a change of venue. Rather, we will presume prejudice only in extreme circumstances. As this court observed in *People v. McCrary,* 190 Colo. 538, 545, 549 P.2d 1320, 1235-36 (1976): "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."

The *Harlan* court indicated a number of a factors, previously identified by the *McCrary* court, that this Court should consider in making the determination as to whether Defendant is entitled to a change of venue under this standard: (1) The size and type of locale; (2) The reputation of the victim; (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 to the time of trial; and (9) The publication of highly incriminating facts not admissible attrial.

Even if members of the community have formed an opinion about the guilt or innocence of Defendant, the General Assembly has determined that community members should have the opportunity to serve as jurors as long as they can set that opinion aside and give Defendant a fair trial:

> [N]o person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and evidence submitted to the jury at the trial.

C.R.S. § 16-10-103(l)(j).

According to the bureau of the United States Census, Boulder County has the ninth largest population of the sixty-four Colorado counties. On July 1, 2023, the Boulder County population was estimated at 326,831. Boulder County covers 740 square miles of diverse terrain and a variety of municipalities. This constitutes an extremely large and robust jury pool, indeed one of the larger in the state. Courts in Boulder County have been able to select juries in cases with extreme publicity that continued up to and including the trial. Additionally, a long time has elapsed since the pretrial publicity associated with Defendant or the allegations in this case could be considered extensive or pervasive. By the time this case proceeds to trial, over three and a half years will have elapsed since the crime. Even if exposed to extensive pretrial publicity, it is likely that a substantial portion of the potential jury pool will have forgotten most, if not all, of the specific information they have heard.

Whether a change of venue is appropriate is analyzed through a two-step process: first, whether there has been massive, pervasive and prejudicial publicity such that there should be a presumption of prejudice, and second, whether there was actual prejudice. *Skilling* at 2914-15; *McCrary*, at 1326 (1976) (holding that where only eight out of 100 jurors impaneled stated they had not heard or read about the case, and where 68 jurors were individually questioned, 28 of whom were dismissed for cause there was neither presumptive prejudice nor actual prejudice); *People v. Bartowsheski*, 661 P.2d 235, 240-41 (Colo. 1983) (finding neither a presumption of prejudice or actual prejudice where there was "extensive publicity" including articles in the Rocky

Mountain News and the Denver Post.[1]); *People v. Harlan,* 8 P.3d 448, 469 (Colo. 2000) (holding that where there was "an impressive amount of publicity created by the defendant's offenses, their investigation, and the trial itself" but, "[a] significant passage of time between the occurrence of publicity and the trial decreases the prejudicial effect of pretrial publicity."); *People v. Munsey*, 232 P.3d 113, 121 (Colo.App. 2009) (denial of change of venue on presumption of prejudice not found to be an abuse of discretion where case was tried in a small county having a population of less than 23,000 people, local newspaper distribution of 2800 copies each week, and defendant attached 90 articles to the motion).

I. Under Federal Law
There Is No Presumption of Prejudice Applicable in This Case

United States Supreme Court cases that discuss the presumption of prejudice begin with *Rideau v. Louisiana*, 373 U.S. 723 (1963). Rideau was charged with robbing a bank and the kidnapping of three employees, one of which he murdered. The police filmed the confession of the defendant. On three occasions shortly before trial the local television station broadcast the confession. Rideau moved for a change of venue. The population of the parish was approximately 150,000. The Supreme Court reversed the defendant's conviction, holding that what was broadcast "was Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder." *Id.* at 725.

The *Rideau* case was followed by *Estes v. Texas*, 381 U.S. 532 (1965), where during pretrial proceedings reporters and television crews overran the courtroom and bombarded the community with a media blitz. The Court held that the "judicial serenity and calm to which (the

[1] It should be noted jury selection first began in Elbert County, the jurisdiction where the crime was comitted. After four days of selection and the questioning of ninety-seven prospective jurors the process had produced only five jurors that could serve. A change of venue motion was granted, and the case was transferred to Arapahoe County. The findings of the Court in the opinion are related to the jury selection in Arapahoe County.

defendant) was entitled" was denied. *Id.* at 536.

In *Sheppard v. Maxwell*, 384 U.S. 333, 355 (1966), the courthouse was so rife with media personnel that it thrust the jurors "into the role of celebrities." The verdict was overturned because of the "carnival atmosphere" that pervaded the trial. *Id.* at 358. Of these three presumption cases, only *Rideau* has any application to the current motion before this Court as it deals pretrial media coverage.

The *Rideau-Estes-Sheppard* line of cases "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." *Skilling*, 130 S.Ct. at 2914, (emphasis added) citing *Murphy v. Florida*, 421 U.S.794, 798-99 (1975). "Prominence does not necessarily produce prejudice, and juror impartiality . . . does not require ignorance." *Skilling* at 2914-15 referencing *Irvin v. Dowd*, 366 U.S. 717 (1961) (where "a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against (the defendant) during the six or seven months preceding his trial," but holding that jurors are not required to be totally ignorant of facts and issues at trial and that the voir dire by the judge was constitutionally sufficient); *Reynolds v. United States*, 98 U.S. 145, 155-56 (1879) (holding "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 of some opinion in respect to its merits"). Adverse pervasive pretrial publicity does not inevitably lead to an unfair trial. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554 (1976) (the trial court order of prior restraint on the press to prevent massive, pervasive pretrial publicity was found an unconstitutional restraint on the press).

The United States Supreme Court established criteria for determining when a presumption of prejudice arises. First, the size and characteristics of the community. *Skilling* at 2915. Second,

whether there is a confession or "other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Id.* at 2916. Third, the elapsed time between the publicity and the trial. *Id.* And, fourth, for purposes of appellate review, the jury's verdict. *Id.* In this case a large and diverse jury pool is present, there has been no publicity concerning a "confession" or "other blatantly prejudicial information," and the majority of the articles were written at the time of the murders or shortly thereafter, and a significant passage of time will have occurred prior to the trial.

In *Skilling*, a criminal case against the former chief operating officer of Enron, the Supreme Court found that a presumption of prejudice was not appropriate even though there had been massive publicity concerning Enron's downfall. *Id.* at 2916-17. Appropriate steps at trial may reduce the risk of the impact of prejudicial pretrial publicity. Included among those possible steps: a continuance of the trial to a later, less-immediate time, and the trial court's inquiry to the prospective jurors both in a questionnaire and in individual sequestered voir dire of jurors who had indicated exposure to pervasive publicity. *Id.* In reviewing the steps in *Skilling* to reduce the impact of pretrial publicity, no continuance is necessary based on the passage of over three years since the crime and height of the publicity, the parties have stipulated to the use of a juror questionnaire, and fully anticipate individual sequestered voir dire of jurors indicating exposure to pervasive publicity.

II. Under Colorado Law There Is No Presumption of Prejudice Applicable In This Case

"Only when the publicity is so ubiquitous and vituperative that most jurors in a community could not ignore its influence is a change of venue required before voir dire." *People v. McCrary*, 190 Colo. 538, 545, 549 P.2d 1320, 1326 (1976). Factors to consider in determining whether there is massive, pervasive, and prejudicial pretrial publicity as to bias a community include: the size

and type of locale, reputation of the victim, revealed sources of news stories, specificity of newspaper accounts, volume and intensity of coverage, extent of comment by the news reports on the facts, the manner of presentation, the proximity to the time of trial, and the publication of highly incriminating facts not admissible at trial. *Id.* at 545, 549 P.2d at 1326 and as cited in *People v. Harlan*, 8 P.3d 448, 469 (Colo. 2000). The court in McCrary found that there was not sufficient publicity as to raise a presumption of bias.

The Colorado Supreme Court addressed the presumption of prejudice from "massive, pervasive, and prejudicial publicity" in *People v. Botham*, 629 P.2d 589 (Colo. 1981). Botham was charged with killing four people in Grand Junction. The local newspaper published approximately 100 articles specifically related to the case, the arrest, and every step of the investigation. The case was also massively covered by local television and radio. Thirteen of the fourteen jurors seated had been exposed to pretrial publicity. Despite these facts, the Colorado Supreme Court held that "this was not a case where there was such massive, pervasive, and prejudicial publicity that the denial of a fair trial can be presumed." *Id.* at 597. The Court later determined that despite the presumption not applying, actual prejudice had occurred and reversed the conviction. This case will be discussed further in the actual prejudice section.

In *Walker v. People*, 169 Colo. 467, 458 P.2d 238 (Colo. 1969), the Colorado Supreme Court did apply the presumption of prejudice. A recitation of the pretrial publicity in that case runs over 10 pages in the opinion. A careful reading, however, of the publicity and occurrences pretrial and during trial is essential to a full understanding of the reasons the Court did so. The court stated, "to sum up, we conclude that the publicity only meagerly described in this opinion was so extensive, so slanted and prejudicial, so calculated to inflame, and so all-pervasive as to posit this case within the holding of *Sheppard*." *Id.* at 485.

However, the Colorado Supreme Court ruled shortly after *Walker* that "it was the intent of

Walker that the rule (concerning the presumption of prejudice) should be applied only when the publicity is so extensive and pervasive as was the case in *Sheppard* and *Walker*." *Small v. People*, 173 Colo. 304, 310, 479 P.2d 386 (Colo. 1970). The Court reaffirmed the rule that "in order to reverse the refusal of a court to grant a motion for change of venue by reason of publicity it must be shown that this publicity had an adverse effect upon the jury panel or a portion thereof," i.e. actual prejudice. *Id.* at 309.

"In rare cases, a denial of a change of venue will also be reversed upon a showing of 'massive, pervasive and prejudicial publicity' where a denial of a fair trial could have been 'presumed,' or, in other words, where a reasonable likelihood existed that a fair trial could not be had." *McCrary,* 190 Colo. 538, 545, 549 P.2d 1320, 1325 (Colo. 1976).

The Colorado Supreme Court found no presumption of prejudice from pretrial publicity in a murder case, despite "highly inflammatory information" concerning a heinous murder contained in 64 newspaper articles and extensive television coverage. *People v. Harlan,* 8 P.3d 448, 468-69 (Colo. 2000).

Here, the number of newspaper articles and the content of the articles are not sufficient to create a presumption of prejudice. A review of the significant "*McCrary* Factors" reveals the defense has failed to meet their burden to show "massive, pervasive and prejudicial publicity." In examining the "size and type of locale" it must be considered that Boulder County covers over 740 square miles and has a variety of diverse municipalities and population exceeding 325,000. The significant population and land area prospective jurors will be drawn from favors being able to find impartial jurors in Boulder County.

Further, the District Attorney has worked closely with law enforcement to restrict the flow of prejudicial information to the media. As this court is aware, extensive, horrific video of the crime is massive in this case. The District Attorney and law enforcement have not released the

highly impactful and inflammatory video in order to prevent a prejudicial impact to the prospective jury pool. The revealed sources of news stories, specificity of facts provided, and manner of presentation in the media accounts are factors favoring the ability to seat a fair and impartial jury in Boulder County.

The People encourage the Court to examine the "volume and intensity of news coverage" and "proximity to the time of trial" factors in conjunction with one another. In examining defense exhibits A-BI it is clear a substantial amount of media coverage occurred in March of 2021 and the months following the commission of the crime. In examining the exhibits provided by the defense, the People urge the Court to consider the date of publication for each exhibit. As noted in the defense affidavit, over 180 stories were published within one week of Defendant's arrest. The vast majority of the attached media coverage occurred over three years ago. At the time jury selection is scheduled to begin, over three and a half years will have passed since the commission of the crime and massive media coverage.

Perhaps most significantly of the factors, no highly incriminating facts have been released publicly that are not admissible at trial. The defense affidavit points to inadmissible information about a fight the defendant was involved in during high school, defendant being of Syrian decent and speculation about the motive for the crime. These are not highly incriminating inadmissible facts sufficient to justify a change of venue.

III. Under Federal Law
There Has Been No Demonstration of Actual Prejudice In This Case

Where the trial court during voir dire finds prejudicial pretrial publicity the trial judge may use a variety of remedies including: (1) cause extensive voir dire examination of prospective jurors; (2) change the trial venue to a place less exposed to intensive publicity; (3) postpone the trial to allow public attention to subside; (4) empanel veniremen from an area that has not been

exposed to intense pretrial publicity; (5) enlarge the size of the jury panel and increase the number of peremptory challenges; or (6) use emphatic and clear instructions on the sworn duty of each juror to decide the issue only on the evidence presented in open court. *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *Botham*, 629 P.2d 589, 596 (Colo. 1981). "The critical inquiry is whether the chosen means did in fact preserve the accused's right to a fair trial." *Botham*, at 596.

In *Irvin v. Dowd*, 366 U.S. 717 (1961), the defendant was tried for six murders that received extensive publicity in a small rural community. The defendant sought a change of venue to an adjoining county, but was denied a second request to move the trial out of the district. The voir dire examination lasted four weeks, began with 430 perspective jurors with excusal of 268 for cause as having fixed opinions as to the defendant's guilt. Almost 90% of those examined had some opinion as to guilt. Two-thirds of the jurors selected had an opinion that the defendant was guilty and were familiar with the materials facts and circumstances of the case, including the fact that other murders were attributed to the defendant. The Supreme Court stated: "with such an opinion (of guilt) permeating (the jurors' minds) it would be difficult to say that each could exclude this preconception of guilt from his deliberations." *Id.* at 727.

As discussed above, precautionary steps will be taken to assure a fair and impartial jury. Actual prejudice cannot be determined until jury selection begins and the Court and parties have an opportunity to discuss the impact of pretrial publicity with the jurors summoned.

IV. Under Colorado Law There Has Been No Demonstration of Actual Prejudice In This Case

A defendant is required to show actual prejudice. This actual prejudice is usually shown during voir dire examination of prospective jurors from the venue. For example, In *McCrary*, 190 Colo. 538, 549 P.2d 1320 (1976), the Court looked to the actual voir dire that was conducted and held that there was no actual prejudice. There were 68 jurors individually questioned, 13 were

dismissed for cause on the defendant's motion and 15 were dismissed by the court, for a total of 28 dismissals. These facts were held to be insufficient to demonstrate that "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.* at 546, 549 P.2d at 1326.

In *Botham*, 629 P.2d 589 (Colo. 1981), the court found no facts supporting a presumption of prejudice, but then reviewed the matter for actual prejudice. "Where a defendant has not demonstrated the existence of massive, pervasive, and prejudicial publicity, which would create a presumption that he was denied a fair trial, (citations omitted), he must establish the denial of a fair trial based upon a nexus between extensive pretrial publicity and the jury panel. (citations omitted)." *Id.* at 597. The court concluded after a review of both the pretrial publicity and the voir dire examination that the defendant was denied a fair trial. *Id.* The court held that "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." *Id.* at 599. Actual voir dire resulted in a finding that more than 50% of the panel were inclined to believe in defendant's guilt; 50% of the jurors selected believed, at one time or another, that the defendant was guilty; more than 90% of the jury panel had been exposed to pretrial publicity; thirteen of the fourteen jurors selected to hear the case were exposed to pretrial publicity; approximately 50% possessed detailed knowledge of the crime; and all jurors selected to hear the case knew some of the details of the crime.

The holding in *Small*, 173 Colo. 304, 309, 479 P.2d 386 (Colo. 1970) is that a reversal of a conviction because of a denial of a motion for change of venue based upon publicity will be granted only if the defendant can show that "the publicity had an adverse effect upon the jury panel or a portion thereof."

The Colorado Supreme Court continued its application of the *Small* rule in *Sergent v.*

People, 177 Colo. 354, 497 P.2d 983 (Colo. 1972). News reports covered the disappearance of the victim and the arrest and trial of the defendant. Publicity was by newspapers, radio, television, and even in a detective magazine. The articles were based on information from news releases, both by the defense and the prosecution, and by the defendant granting interviews to reporters for the Denver Post. The court held that there was no presumption of prejudice and the defendant had to establish a "nexus between the publicity and the alleged denial of a fair trial." *Id.* at 361, 497 P.2d at 986-87. The court looked to the actual voir dire in determining that there was no prejudice.

The trial court looks to the media coverage as contained in the record. *People v. Dore*, 997 P.2d 1214, 1220 (Colo.App. 1999). The trial court should consider whether the pretrial publicity was "prejudicial." Prejudicial pretrial publicity can be balanced out by publicity that is favorable to the accused. Consideration of the coverage is reviewed to determine whether it was balanced. *Id.* Consideration should also be given to whether any of the articles conveyed sympathy towards the defendant. *Id.* The significant delay in this case was caused by defendant's mental status. Defendant's mental illness has been covered extensively over the last three years as part of the pretrial publicity and is not necessary prejudicial given defendant is asserting an insanity defense.

In *People v. Munsey*, 232 P.3d 113 (Colo.App. 2009), the Colorado Court of Appeals addressed this issue. Approximately 90 newspaper articles were attached to the defendant's motion. First, the trial court excused prospective jurors for statutory reasons unrelated to publicity. Second, those remaining filled out a jury questionnaire. The attorneys reviewed the responses and agreed to excuse 75 to 80 people. Third, 55 prospective jurors were examined outside the presence of the rest of the venire. Fourth, voir dire examination was held concerning the remaining prospective jurors. The court found that there was no "daily barrage" of articles and television and radio news reports concerning the murders. The court held that the defendant had not shown actual prejudice that required a new trial.

The Supreme Court emphasized the importance of making the determination at the trial level, due to the trial court's unique evaluation and perception of the community atmosphere. *Mu'Min v. Virginia*, 500 U.S. 415, 427 (1991). The Court will be in a better position to evaluate the community atmosphere once the jury selection process is underway. Whether or not there is actual prejudice awaits voir dire.

It is anticipated this Court will follow the *Munsey* procedure and the People urge the Court to do so. The Court will call in a sufficiently large number of prospective jurors. Any statutory challenges for cause will be explored and those jurors released. The remaining jurors will then fill out a juror questionnaire. The attorneys will be given a sufficient period of time to review the questionnaires. Any stipulated challenges for cause will then be made. Individual sequestered voir dire concerning publicity will occur next. Finally, voir dire in open court would take place. At any time during this procedure, a trial court would have the opportunity to make a determination whether there is sufficient actual prejudice to require a change of venue.

V. The Affidavit Supporting the Motion is Legally Insufficient to Require a Change of Venue at This Time

Crim. P. Rule 21(a) provides the procedure for a motion for change of venue. Crim. P. Rule 21(a)(2)(I) requires the filing of a motion in writing "accompanied by one or more affidavits setting forth the facts upon which the moving party relies . . . ." Defendant has complied with the obligation to provide an affidavit in support of the motion to change venue. In the affidavit and supporting exhibits, it supports the position that the greatest saturation of media coverage took place over three and a half years before jury selection is scheduled to begin. Defendant presents several events or circumstances in the affidavit to support the change of venue motion. All are indications of a strong community in the process of healing from the damage caused by Defendant. None of the events or circumstances included in the affidavit legally support the need to change

venue prior to beginning the jury selection process.

Defendant argues that the existence of temporary and permanent memorials created to honor and remember the victims of the King Soopers shootings mandates a change of venue. He provides no reference to any appellate precedent for the proposition that memorials established for victims of a mass murder mandate a change in venue, especially in a circumstance where the temporary memorials will have been removed for more than three by the time jury selection begins. The appellate precedent that the People have been able to find on this question would argue that the presence of memorials, or community desire for a memorial, would not necessitate a change in venue.

In *Chambers v. State,* 644 So. 2d 1294, 1298 (Ala. Crim. App.1994), the defendant was charged and convicted of reckless manslaughter of a Birmingham police officer. She argued that she was entitled to a change in venue due to the presence of a law enforcement memorial directly across the street from the courthouse. According to the court:

> The memorial depicts a wounded and downed Roman centurion atop a granite base upon which are engraved the names of the deceased officers. Included in that list of names is the name of the victim and the date of his death. A bronze marker on the side of the base states: "This memorial is dedicated to all members of law enforcement who gave their lives in the line of duty." The base also bears the prominent inscription "Endowed by Fraternal Order of Police Birmingham Lodge One." C.R. 19, 25.

644 So.2d at 1297-98. The name of the victim was inscribed in the memorial. 644 So.2d at 1098. The trial court addressed the issue of the memorial with the jury during voir dire, and the appellate court found no error in the denial of the motion for a change of venue. *See also Lucero v. Sup. Court,* 176 Cal. Rptr. 62, 65-66 (Cal. App. 4th Dist. 1981) (Defendant presented 7,000 signatures from members of the community signing a petition requesting that a local park be renamed to honor the victims of a murder as a memorial park did not necessitate a change in

venue). The fact of memorials dedicated to the victims of the King Soopers shootings does not mandate a change in venue.

Defendant argues that the Boulder Strong Resource Center providing mental health and trauma services to the community with somehow would mandate a change in venue. He provides no appellate precedent for this authority for this proposition. The establishment of community-based resources to help the community heal has nothing to do with Defendant's ability to get a fair trial in the jurisdiction he committed the offenses. To the extent that this issue is relevant at all, it is an issue that can be discussed with potential jurors during jury selection to determine if potential jurors have visited the resource center or been provided services that would impact their ability to be fair and impartial jurors.

Additionally, the affidavit includes a number of facts about the District Attorney's Office providing information to the public about the criminal justice process and community support for the victims and their families. The Court will find in examining the attached media publications the District Attorney has been careful not to discuss specific facts of the case. The fact the District Attorney has provided information to the community and community support for victims is not the type of media coverage courts have found to create an environment necessitating a change of venue. This is not the massive prejudicial information that the courts refer to in finding the required presumption.

VI. The People Do Not Stipulate to a Change of Venue

Crim. P. Rule 21(a)(2) also provides that, with approval of the court, a stipulation for a change of venue may be found appropriate. The People do not stipulate to a change of venue.

For the foregoing reasons, the People respectfully request that the defendant's motion for change of venue be denied prior to starting the jury selection process.

Respectfully submitted,

MICHAEL T. DOUGHERTY
District Attorney

By: /s/ Kenneth E. Kupfner
Kenneth E. Kupfner
Assistant District Attorney
Registration No. 29924

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing served via the Colorado e-filing system/hand-delivered on May 24, 2024, and addressed as follows:

Kathryn Herold
Sam Dunn
Office of the Colorado State Public Defender – Boulder
2555 55th Street Suite. D-200
Boulder, CO 80301

s/Adam D. Kendall
Adam D. Kendall