Combined Courts, Chaffee County P. O. Box 279 142 Crestone Avenue Salida, CO 81201	DATE FILED: July 6, 2021
THE PEOPLE OF THE STATE OF COLORADO **vs.** **BARRY LEE MORPHEW,** Defendant	☐ **COURT USE ONLY** ☐
Linda Stanley Eleventh Judicial District District Attorney, # 45298 District Attorney's Office 104 Crestone Avenue P. O. Box 699 Salida, CO 81201 Phone Number: (719)539-3563 Fax: (719)539-3565	Case No: D0082021CR000078 Div: 2 Courtroom:
PEOPLE'S RESPONSE TO MOTION FOR DISCOVERY AND SANCTIONS [D-16]	

COME NOW, the People of the State of Colorado, by and through Linda Stanley, District Attorney for the Eleventh Judicial District by and through her appointed Senior Deputy District Attorney, Jeffrey D. Lindsey hereby tenders their response to the above captioned Motion.

1. The instant Motion was filed on June 24, 2021. Most local rules and practice allow for responses on motions to be filed 15 days after filing. This motion is being filed 12 days after the instant Motion.

2. The People have been working on providing discovery since counsel entered their appearance. On June 2, 2021, counsel's investigator was given a hard drive with nearly a terabyte of data. "A single TB is a lot of space. It would take 728,177 floppy disks or 1,498 CD-ROM discs to store just 1 TB worth of information. As of 2020, most new, average priced computer hard drives are in the 1 to 5 TB range." Terabytes, Gigabytes, & Petabytes: How Big Are They? (lifewire.com). At the time, that was the extent of the discovery the People had received from the various law enforcement agencies. Prior to the arrest of the Defendant, most agencies had not compiled the discovery in a central location. The discovery was transferred to the Records Department at the Chaffee County Sheriff's Office and upon receipt, the People transferred it to an external hard drive. Since then, the People have been providing discovery through the state system of e-discovery operated by the Colorado District Attorney's Council (CDAC).

3. As stated above and in open court, this is a huge case. The case has been investigated and assisted by numerous agencies amongst others, Chaffee County Sheriff's Office, Salida Police Department, Buena Vista Police Department, Colorado Department of Corrections, Colorado Bureau of Investigations, Rocky Mountain Regional Computer Forensic Laboratory (RMRCFL), Chaffee County Search and Rescue, Colorado Springs Police Department, Colorado Parks and Wildlife, Colorado State Patrol, Office of the District Attorney Investigations, Gunnison Police Department, Fremont County Sheriff's Office and Federal Bureau of Investigation. The case has spanned across the State of Colorado and further into states such as Indiana, Florida, Arizona, Louisiana, Tennessee, Michigan, Texas and the Republic of Mexico. Investigators have been working on this case daily since Suzanne was murdered. They have generated thousand upon thousands of pages of discovery.

4. Suzanne Morphew is deceased. She has been missing since May 9, 2020. She has not been in contact with any of her loved ones or acquaintances since the afternoon of May 9, 2020. Investigators have not found her body. The Defendant engaged in suspicious behavior the days leading to and after her disappearance indicating consciousness of guilt.

5. Multiple media devices have been seized and searched pursuant to search warrants. The warrants limit what and where can be searched. When a phone is seized and searched, the agency conducting the search makes a mirror copy of the device and then conducts a search of the mirrored copy. Searching the mirrored image changes the file. The mirrored copy is retained by the searching agency. The search warrants define the limitations on what can be viewed, and analysts are careful to abide by the search warrant.

6. The results of the search warrants have been provided to counsel for Mr. Morphew. It is important to note that the searches of the many devices were limited to the permission granted by the search warrant. Counsel requests all mirror images of these devices and while counsel may be entitled to the Defendant's phone, the People do not believe that counsel for the Defendant should have unfettered access to the mirror images of the other devices. The People believe that there are privacy interests attached to devices that do not belong to the Defendant and without a court order cannot be searched. The People request a protective order preventing the search of devices that do not belong to the Defendant.

7. The UFDR file (which is the mirror image) of the Defendant's phone was delivered to a defense investigator on July 6, 2021. It also includes the mirror image of [redacted]. In order to get copies of the phone the agency had to start over

and create a new mirrored copy since the copy they created had changed due to the search. The People had to make a special request and have that agency make said copy. This process is a time-consuming task, and the agency has other deadlines and work it conducts. The People made this file available the first business day after it was received.

8. The People request protective orders enter regarding [redacted] UFDR phone files preventing anyone from accessing these files beyond what is provided by the search warrants. The Court entered the seal order largely based on privacy interests of [redacted]

9. In D16, counsel refers to the following files that they cannot open or access. Over the past 10 days the People have provided the following information as listed below. The list is directly from the email and pleading filed by the Defense. The People's response to their request is in purple.

"The following Text files cannot be opened:

"2020-109 CBI File\Reports_341-360 [ZIP Extract]\CaseReport_2020-109_360\360-2 KJ srmorphew_YMF_2020.01.01-2020.05.19.430629.txt" – **Provided through Action discovery.**

"2020-109 CBI File\Reports_361-380 [ZIP Extract]\CaseReport_2020-109_373\373-3 KJ morphewsunsetfarms Google Gmail Content.txt" – **Provided through Action discovery.**

"Morphew Inv. AW Reports\1 Morphew May 2020\May 22, 2020\srmorphew@aol.com\OATH-IR-451166 [ZIP Extract]\Production Files\srmorphew@aol.com\EMAIL\srmorphew_YMF_2020.01.01-2020.05.19.430629.txt" – **Viewable through downloadable reader provided to counsel.**

"Morphew Inv. AW Reports\3 Morphew July 2020\July 16, 2020\AT&T Tower Dump Return\5 [ZIP Extract]\ReportTOWER_3017674.txt" – **Appears to be error on counsel's end this file was able to open on the People's end and may have been another file that needed a downloadable reader file.**

"Morphew Inv. AW Reports\10 Morphew February 2021\February 16, 2021\Shoshona Darke AT&T CDR SW\Shoshona AT&T Records\Shoshona AT&T Records Email 3\5 (1) [ZIP Extract]\ReportAU_3155342.txt" **Appears to be error on counsel's end this file was able to open on the People's end and may have been another file that needed a downloadable reader file.**

The following document files are corrupt:

"2020-109 CBI File\Reports_181-200 (ZIP Extract)\CaseReport_2020-109_198\198-1_Screen shots from Holiday Inn.pdf" – could not open **Provided through Action discovery.**

The following Spy pen audio-Co springs audio files are corrupt and have a Zero-Byte file size: - all of these are 0 bit files/have nothing, also have thumb drive with EO1 file etc. showing same – to be rediscovered

See original copy – spy pen audio-Co springs – Audio files – audio files.elxs – doc that shows that they have 0 bits. The People have provided an email to counsel from the forensic investigator indicating even though the file names exist, the data appears to have been deleted.

"Spy pen audio-Co springs\Audio Files\Files\R-00001_2001120055.MP3"

"Spy pen audio-Co springs\Audio Files\Files\R-00001_2002030013.MP3"

"Spy pen audio-Co springs\Audio Files\Files\R-00001_2002030013[1].MP3"

"Spy pen audio-Co springs\Audio Files\Files\R-00002_2002030017.MP3"

"Spy pen audio-Co springs\Audio Files\Files\R-00003_2001010023.MP3"

"Spy pen audio-Co springs\Audio Files\Files\R-00004_2001190737.MP3"

"Spy pen audio-Co springs\Audio Files\Files\R-00004_2001190737[1].MP3"

"Spy pen audio-Co springs\Audio Files\Files\R-00007_2002150851.MP3"

"Spy pen audio-Co springs\Audio Files\Files\R-00007_2002150852.MP3"

"Spy pen audio-Co springs\Audio Files\Files\R-00007_2002150852[1].MP3"

"Spy pen audio-Co springs\Audio Files\Files\R-00008_2001010003.MP3""

10. The People have been in contact with counsel for the Defendant and have been responding to their requests. The People have not failed to provide the information but have endeavored to provide it as quickly as possible. Moreover, the People intend on continuing to provide discovery as contemplated by the Rules.

Dated: July 6, 2021

Respectfully submitted,
LINDA STANLEY
/s/ Jeffrey D. Lindsey
Jeffrey D. Lindsey, #24664
Senior Deputy District Attorney

CERTIFICATE OF SERVICE

I certify that on July 6, 2021, a true and correct copy of the foregoing Pleading was served via Colorado Courts E-Filing on all parties who appear of record and have entered their appearance herein according to Colorado Courts E-Filing.

By: /s/ Jeffrey Lindsey

DISTRICT COURT, CHAFFEE COUNTY, COLORADO Court Address: 142 Crestone Ave. Salida, CO 81201 Court Phone: (719) 539-2561	DATE FILED: July 6, 2021
THE PEOPLE OF THE STATE OF COLORADO, v. BARRY LEE MORPHEW, Defendant. In re Contempt Proceeding of Linda Stanley, District Attorney for the 11th Judicial District, Jeffrey D. Lindsey, Senior Deputy District Attorney for the 11th Judicial District, and Aaron Pembleton, Deputy District Attorney for the 11th Judicial District, Pursuant to C.R.C.P. 107.	▲ COURT USE ONLY ▲ Case Number: 21CR78 Courtroom/Division: 2

CONTEMPT CITATION

TO: LINDA STANLEY, DISTRICT ATTORNEY FOR THE 11TH JUDICIAL DISTRICT, JEFFREY D. LINDSEY, SENIOR DEPUTY DISTRICT ATTORNEY FOR THE 11TH JUDICIAL DISTRICT, AND AARON PEMBLETON, DEPUTY DISTRICT ATTORNEY FOR THE 11TH JUDICIAL DISTRICT.

You are ordered to appear before this Court at the place, date and time listed below to show cause, if any, for the failure and refusal to comply with the Orders of this Court entered and, to vindicate the dignity of this Court, to show cause why sanctions and/or imprisonment should not be imposed.

You Linda Stanley, District Attorney for the 11th Judicial District, Jeffrey D. Lindsey, Senior Deputy District Attorney for the 11th Judicial District, and Aaron Pembleton, Deputy District Attorney for the 11th Judicial District are hereby ordered to appear at:

Court Location: District Court, Chaffee County, Colorado, Court 142 Crestone Ave., Salida, CO 81201

Date: _____ Time: _____

If you fail to appear in Court at the time, date and place specified, a bench warrant will be issued for your arrest without further notice and you may be further sanctioned according to the law for your failure to appear.

Date: _____

By: _____
Clerk/Deputy Clerk

District Court, Chaffee County, Colorado 142 Crestone Ave Salida, CO 81201	DATE FILED: June 8, 2021 3:26 PM CASE NUMBER: 2021CR78
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **BARRY MORPHEW**, Defendant	JUN - 8 2021 CHAFFEE COUNTY COLORADO ☐ COURT USE ONLY ☐
	Case No. 2021CR78 Division 2

ORDER RE MOTION TO LIMIT PRE-TRIAL PUBLICITY

This matter comes before the Court on Defendant's Motion to Limit Pretrial Publicity. The Court has reviewed Defendant's Motion and the applicable authorities. Having heard argument from the parties on May 27, 2021, the Court FINDS and ORDERS as follows:

Defendant has sought an Order restricting pretrial publicity. Defendant's case has already received attention from the media. The case is likely to continue to generate media attention. In light of such anticipated publicity and the difficulty in anticipating all possible scenarios, this Order is meant to provide guidelines to all involved in this case.

Counsel involved in this matter will no doubt conduct themselves in a professional way. However, the nature of this case and the pretrial publicity that has already occurred, together with the anticipated publicity from the trial, demonstrate the need for Court intervention to guide the conduct of counsel and those associated with them to avoid lowering the level of advocacy in this case.

Without suggesting that there have been any violations of general ethical principles, it is necessary for the Court to articulate the following to be followed in this litigation in the form of this Order for future guidance in all forms of extrajudicial statements about this litigation.

Colorado Rules of Professional Conduct 3.6 and 3.8 provide the basis for this Order.

Exhibit 1

I. Extrajudicial Statements by Attorneys:

A. Any lawyer, law firm or legal representative (investigators of any firm) associated with the prosecution or defense participating in or associated with the investigation or litigation of this criminal matter shall not, from the filing of a complaint, information or indictment, the issuance of an arrest warrant or arrest, until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state, without elaboration:

(1) The claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) Information contained in the public record;

(3) That an investigation of a matter is in progress;

(4) The scheduling or result of any step in litigation;

(5) A request for assistance in obtaining evidence and information necessary thereto;

(6) A warning of danger considering the behavior of a person involved, when there is reason to believe there exists the likelihood of substantial harm to an individual or to the public interest;

(7) The identity, residence, occupation, and family status of the accused;

(8) If the accused has not been apprehended, information to aid in apprehension of that person; and

(9) The facts, time and place of an arrest as well as the identity of the investigating and arresting officers or agencies and the length of the investigation.

B. A lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

C. No lawyer associated in a firm or government agency with a lawyer subject to Section I (A) above shall make a statement prohibited by Section I (A) (1)-(9).

D. Any lawyer, law firm or legal representative (investigators of any firm) associated with the prosecution or defense participating in or associated with the investigation or litigation of this criminal matter shall not, from the filing of a complaint, information or indictment, the issuance of an arrest warrant or arrest, until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would

expect to be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter and that relates to:

(1) The character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation or witness, or identity of a witness, or the expected testimony of a party or witness;

(2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) Information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

E. During the selection of a jury or trial of this criminal matter, any lawyer or law firm associated with the prosecution or defense of this criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the Court in this case.

F. Any lawyer or law firm associated with the prosecution or defense of this criminal matter shall exercise reasonable care to prevent his or her employees and associates from making an extrajudicial statement that he or she would be prohibited from making under this Order.

II. Releases of Information by Law Enforcement Agencies:

A. From the date of this Order until the completion of the trial or disposition without trial, law enforcement officers shall not release or authorize the release of any extrajudicial statement or evidence for dissemination by means of public communication or to individuals other than those working for the parties, if the law enforcement officers know or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding. Law enforcement officers and agencies are subject to the same restrictionsas set forth above for attorneys in Section I regarding extrajudicial statements.

B. Law enforcement officers and agencies shall not exercise their custodial authority over an accused individual in a manner that is likely to result in either:

(1) The deliberate exposure of a person in custody for the purpose of photographing or televising by representatives of the news media; or

(2) The interviewing by representatives of the news media of a person in custody except upon request or consent by that person to an interview after being informed adequately of the right to consult with counsel and of the right to refuse to grant an interview.

C. Nothing in this Order is intended to preclude any law enforcement officer or agency from replying to charges of misconduct that are publicly made against him or her from participating in any legislative, administrative, or investigative hearing.

III. Disclosure by Court Personnel:

Court personnel shall not disclose, to any unauthorized person, information relating to this pending criminal case that is not a matter of public records of the Court and that may be prejudicial to the right of the People or the Defendant to a fair trial.

IV. Dissemination of Discovery and Evidence to individuals other than the Parties.

Attorneys of record and all law enforcement officers and agencies shall not release to anyone, other than a party or to each other, any discovery materials or investigative materials of any kind, except as and used by them for purposes of furthering the investigation or for the preparation and trial of the case.

V. Applicability:

Attorneys of record will be served a copy of this Order and this will constitute service upon the District Attorney's Office and defense counsel. The Court Orders the District Attorney's Office to comply with Colorado Rule of Professional Conduct 3.8(f) in exercising reasonable care to ensure all applicable law enforcement agencies including Chaffee County Sheriff's Office, the Colorado Bureau of Investigation, the Federal Bureau of Investigation and any other agencies who have participated in the investigation of this matter all receive prompt notice of this Order and comply with this Order accordingly.

DATED this 3 day of June, 2021.

PATRICK W. MURPHY
DISTRICT COURT JUDGE

DISTRICT COURT, CHAFFEE COUNTY, COLORADO Court Address: 142 Crestone Ave. Salida, CO 81201 Court Phone: (719) 539-2561	DATE FILED: July 6, 2021
THE PEOPLE OF THE STATE OF COLORADO, v. BARRY LEE MORPHEW, Defendant. In re Contempt Proceeding of Linda Stanley, District Attorney for the 11th Judicial District, Jeffrey D. Lindsey, Senior Deputy District Attorney for the 11th Judicial District, and Aaron Pembleton, Deputy District Attorney for the 11th Judicial District, Pursuant to C.R.C.P. 107.	▲ COURT USE ONLY ▲
Iris Eytan, #29505 Dru Nielsen, #28775 Eytan Nielsen LLC 3200 Cherry Creek South Drive, Suite 720 Denver, CO 80209 Telephone: (720) 440-8155 Facsimile: (720) 440-8156 Email: iris@eytan-nielsen.com dru@eytan-nielsen.com *ATTORNEYS FOR DEFENDANT BARRY LEE MORPHEW*	Case Number: 21CR78 Courtroom/Division: 2

MOTION FOR AN ORDER TO SHOW CAUSE
C.R.C.P. 107

Mr. Morphew states the following in support of this Motion to enter an Order directing Linda Stanley, District Attorney for the 11th Judicial District, Jeffrey D. Lindsey Senior Deputy District Attorney for the 11th Judicial District, and Aaron Pembleton, Deputy District Attorney for the 11th

Judicial District (hereinafter "Contemnors") to show cause as to why they failed to comply with this Court's May 27, 2021 Orders for Discovery memorialized in the Court's June 3, 2021 Written Order to produce all identified discovery to Mr. Morphew by June 2, 2021. (Exhibit 1, Paragraph 4).

Mr. Morphew suffers undisputed harms and violations of his Constitutional Rights to Due Process, Bail, and Effective Assistance of Counsel when he spends months in jail for the Contemnors outlandish and bold accusation of Murder in the First Degree because:

1. Mrs. Morphew went missing on May 10, 2020, and to this date she remains missing. There is no proof that Mrs. Morphew is deceased, much less murdered. Mr. Morphew had been in regular and frequent contact with law enforcement officers for the year following Mrs. Morphew's disappearance; therefore, there was no immediate or urgent need to arrest Mr. Morphew on May 5, 2021.

2. However, on May 5, 2021 Mr. Morphew was arrested pursuant to the Contemnors' investigator's penned Affidavit for Arrest where they elected to charge Mr. Morphew with Murder in the First Degree. These Contemnors requested that Mr. Morphew be held without bond, forcing him to remain jailed until at least the Proof Evident Presumption Great Hearing set to occur throughout the month of August 2021.

3. Despite the Contemnors rush to charge Mr. Morphew and create a media frenzy, they have not produced the discovery that has been in their possession for a year, and the discovery they used to draft the Affidavit to Arrest Mr. Morphew that their office authored. Being understaffed, overworked, or incompetent is no excuse to have Mr. Morphew arrested and held without bond, without proof of murder, and then fail to provide the court-ordered discovery.

4. The Contemnors have an obligation to produce this discovery, but have

intentionally withheld this discovery subsequent to the:

- May 27, 2021 Court Order for Discovery Production to Produce Records by June 2, 2021 (memorialized in June 3, 2021 written order). (*See* Exhibit 1, paragraph 4, *citing* to Defense Motion for Discovery [D-10], Sections I(1)(c) and VIII, noting the Legal Support in Section IX);
- June 11 and 17, 2021 Emails from undersigned counsel attached to Defense Motion for Discovery Sanctions [D-16] requesting that the Contemnors produce the withheld discovery. (*See* Exhibit 2);
- The Defense Motion for Discovery Sanctions [D-16] filed on June 24, 2021 (Mr. Morphew is concurrently seeking alternative remedies/sanctions pursuant to Rule 16 violations); and
- July 1, 2021 email request on for the intentionally withheld discovery. (*See* Exhibit 3).

5. The Contemnors themselves sought and obtained most of the withheld discovery through search warrants the Court signed in May and June of 2020. And, the Contemnors heavily relied on the withheld search warrant returns when they assured this Court that the Affidavit for Arrest their office authored was truthful and based on real and reliable evidence to support this Court signing a No Bond Arrest Warrant for Murder in the 1st Degree on May 4, 2021.

6. Many of the following search warrants were issued by the Contemnors more than a year ago, but the records returned from these search warrants appears to have been intentionally withheld from the Mr. Morphew. The returns of these search warrants include most of the alleged movement and activity of the Morphews and the Morphews' children, and most, if not all, of the forensic images of the phones (including Mr. Morphew's), Mrs. Morphew's image of her iCloud account (as her phone is still missing), and computers seized, and results of the forensic searches have not been produced. Cellebrite forensics reports do not contain all of the data that was extracted from phones/computers. For judicial economy, counsel requests the Court takes Judicial Notice of the Search Warrants as they are not being attached hereto as exhibits but are

identified by their file names as they are in the online court filing system (CCES) (This is not a fully inclusive list). :

a. 2020-05-23_Search_Warrant_20SW98.
b. 2020-06-19_Return_and_Inventory_for_Search_Warrant_20SW117.
c. 2020-07-13_Return_and_Inventory_for_Search_Warrant_20SW68.
d. 2020-06-30_Return_and_Inventory_for_Search_Warrant_20SW13.
e. 2020-06-08_Return_and_Inventory_for_Search_Warrant_20SW51.
f. 2020-06-08_Return_and_Inventory_for_Search_Warrant_20SW69.
g. 2020-10-23_Return_and_Inventory_for_Search_Warrant_20SW128.
h. 2020-08-18_Return_and_Inventory_for_Search_Warrant_20SW148.
i. 2020-10-01_Return_and_Inventory_for_Search_Warrant_20SW161.
j. 2020-12-28_Return_and_Inventory_for_Search_Warrant_20SW206.
k. 2021-01-25_Return_and_Inventory_for_Search_Warrant_20SW215.
l. 2021-02-19_Return_and_Inventory_for_Search_Warrant_20SW132.

7. Additionally, no emails have been produced pursuant to the June 2, 2021 Court Order. *See* Exhibit 1, Paragraph 3, Granting D-6 in part.

8. Mr. Morphew does not want to continue this hearing and delay his hopeful release from jail and dismissal of the charges. But he is without this material evidence to prove definitively to the Court what the Contemnors have left out, exaggerated, and misstated in the Affidavit for Arrest.

9. With each passing day, Mr. Morphew's defense team is increasingly hampered in their ability to meaningfully and effectively prepare for the August hearings. And, at the same time, the Contemnors in their willful and inexcusable disobedience of the Court Order, and violations of their obligations and Rule 16, are attempting to use this to their advantage to wrongly and unfairly to keep Mr. Morphew jailed.

10. Every day these items are not produced is another day Mr. Morphew suffers harm being unjustly jailed and costing him thousands of dollars for his defense team to visit him in the

jail, working with experts without all of the data, and having increasingly limited time to review and analyze the discovery that the prosecution has failed to produce.

11. In order to vindicate the dignity of the Court, counsel is seeking punitive sanctions for Contemnors Stanley, Lindsey and Pembleton's failure to comply with this Court's May 27, 2021 Order for Discovery Production by June 2, 2021. Counsel is seeking punitive sanctions in the form of a meaningful fine calculated for every day the Contemnors have failed and continue to fail to produce the Court Ordered Discovery. Counsel is not seeking punitive sanctions in the form of imprisonment.

12. DA's Stanley, Lindsey and Pembleton are also on notice that counsel is also seeking remedial sanctions as a result of their pattern of misconduct that unreasonably interrupts the due course of judicial proceedings, obstructs the administration of justice, and disobeys the Court's Order and the Rule of Law. *See* Colo. R. Civ. P. 107. *See* Exhibit 4, Motion for Show Cause pending against Elected District Attorney Linda Stanley for failure to produce accessible discovery pursuant to Court Order in *People v. Nelson-Bonilla Jr.*, 20CR52.

13. Mr. Morphew is seeking the following remedial sanctions to remedy the untenable situation that has developed, which has permitted the DA to intentionally hold Mr. Morphew hostage, and ensure that in the future, the Court's Orders will be followed.

a. Immediate production of all records (and all other outstanding discovery) no later than July 7, 2021; and

b. Contemnors and involved law enforcement opening their file storage on this case to the defense team; and

c. A discovery hearing wherein prosecution witnesses respond to questions

regarding what discovery exists, the location of the discovery including file names, and what has been produced.

d. hearing on Defense Motion for Sanctions [D-16] where Mr. Morphew is seeking a bond be set or in the alternative, the exclusion of the introduction of any evidence not produced to the defense resulting from the inexcusable Rule 16 Violations.

14. The Court may, in its discretion, award costs and reasonable attorney's fees to counsel in connection with this contempt proceeding. This includes investigatory and expert costs.

WHEREFORE as a result of the Contemnors' failure to comply with this Court's Discovery Order, counsel respectfully requests that this Court issue an Order to Show Cause and Contempt Citation as to why the Contemnors should not be held in contempt, issue punitive and remedial sanctions and award the attorneys costs and reasonable attorney's fees associated with this contempt proceeding.

Respectfully submitted under penalty of perjury this 6th day of July, 2021

By: *s/Iris Eytan*

Iris Eytan
Dru Nielsen
Eytan Nielsen, LLC
3200 Cherry Creek South, Suite 720
Denver, CO 80209
Phone: (720) 440-8155
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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2021, a true and correct copy of the foregoing **MOTION FOR AN ORDER TO SHOW CAUSE** was served via CCE as follows:

Ms. Linda Stanley
Mr. Jeffrey Lindsey
Mr. Aaron Pembleton
11th Judicial District Attorney's Office
101 Crestone Ave.
Salida, CO 81201

s/ Tonya Holliday
Tonya Holliday

DISTRICT COURT, CHAFFEE COUNTY, COLORADO Court Address: 142 Crestone Ave. Salida, CO 81201 Court Phone: (719) 539-2561	DATE FILED: July 7, 2021
THE PEOPLE OF THE STATE OF COLORADO, v. BARRY LEE MORPHEW, Defendant.	▲ COURT USE ONLY ▲ Case Number: 21CR78
Iris Eytan, #29505 Dru Nielsen, #28775 Eytan Nielsen LLC 3200 Cherry Creek South Drive, Suite 720 Denver, CO 80209 Telephone: (720) 440-8155 Facsimile: (720) 440-8156 Email: iris@eytan-nielsen.com dru@eytan-nielsen.com *ATTORNEYS FOR DEFENDANT BARRY LEE MORPHEW*	Courtroom/Division: 2

REPLY RE: MOTION FOR DISCOVERY AND SANCTIONS AND REQUEST FOR FORTHWITH HEARING [D-16(a)]

Mr. Barry Morphew, by and through undersigned counsel, hereby replies to the District Attorney's response to his June 24, 2021 Motion for Discovery and Sanctions [D-16] and asserts the following:

1. The 11th Judicial District Attorney's Office made the decision to seek the arrest of Mr. Morphew on the charge of First-Degree Murder on May 4, 2021. Their decision necessarily triggered their Rule 16 obligations to obtain and provide all discovery pursuant to the law and court orders, regardless of the volume and the extent of the investigation.

2. The documents produced to the District Attorney's Office by law enforcement agencies investigating the case (hereinafter the "Prosecution"), most of which were generated more than a year

ago as a result of search warrants that they authored and returns that they used in their Affidavit to Arrest, should have already been produced.

3. The forensic images of Barry Morphew's, [redacted] phones, contain some of the critical evidence on which the Prosecution bases their accusation, were just produced yesterday, July 6, 2021, a mere 30 days from the Preliminary Hearing and Proof Evident Presumption Great Hearing, and more than a month after the Court ordered discovery be produced.

4. It appears that these forensic phone extractions were obtained pursuant to Amended and Third Amended Search Warrants authored on May 23, 2020 by DA Investigator Alex Walker IV. On May 24, 2020, RMRCFL Jim Stevens placed the data on a 1TB USB and turned it over the FBI SA Jonathan Grusing. The Return and Inventory for these phones was filed with the Chaffee County Combined Courts on July 30, 2020.

5. There is no valid excuse, nor does the Prosecution identify a reason in their Response, as to why the forensic images of these phones that the Prosecution has had for nearly a year, were just produced after numerous requests, two defense motions, and a Court Order. Contrary to their filed response, during the hearing on May 27, 2021, the Prosecution did not discuss that they did not have the discovery to produce, that they would be seeking protective orders, or state that there was any other barrier to the failure to provide discovery.

6. While the Prosecution appears to have now turned over the forensic images of Barry Morphew's, [redacted] phones and an Apple iPad which total 539 GB, the defense only has 30 days to download and analyze the data. However, without the remaining forensic data that the Prosecution has in its possession (see below), but not produced, it may be futile.

7. The prosecution has failed to produce the forensic images from the vast majority of the devices that they seized and examined, and many other pieces of material evidence. *See* Defense Motion for an Order to Show Cause, para. 6. Importantly, the Prosecution has still not produced the forensic images from the warrant return of Suzanne Morphew's iCloud account, and the items/images seized from Search Warrant 20SW98 which include:

ITEM	MODEL	SERIAL NUMBER	STATUS
HP Laptop	14m-dh0001dx	8CG9315JS7	RMRCFL – RMR-032270
Amazon Kindle	SV98LN		
Apple Laptop	A1278	C02FRV8LDH2G	RMRCFL – RMR032271

8. While the Prosecution has proven to be quick in downloading data for their own purposes and ferreting out the data they deem inculpatory, they have been dragging their feet in producing material discovery in an attempt to sandbag Mr. Morphew's chances of a fair hearing where he has the ability to request that the Court dismiss the charges and/or have bond set.

9. Mr. Morphew requests the following sanctions (included two additional requests in italics):

- A reasonable bond amount to be set forthwith; or
- *Exclude testimony and introduction of evidence related to the discovery not provided by June 2, 2021 which was in the Prosecution's possession prior to June 2, 2021.*
- An order for the Prosecution to produce all discovery and material and information outlined above *by July 8, 2021* (previously requested June 30, 2021); and
- *Request for Forthwith Hearing on the Motion for Discovery and Sanc*tions.

WHEREFORE, Mr. Morphew makes all of these motions, and all other motions and objections during all proceedings in this case, whether or not explicitly stated at the time of the making of the motion or objection, under the Due Process, Right to Counsel, Confrontation, Right to Remain Silent, Privilege Against Self Incrimination, Bail, Compulsory Process, Ex Post Facto, Trial by Jury, Equal Protection, Right to Appeal and Cruel and Unusual Punishment Clauses of the Federal and Colorado Constitutions, and Article II, § 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28, of the Colorado Constitution, and Article I, § 9, and the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the U.S. Constitution. All prior authorities and citations noted apply to and support all requests for relief herein.

Respectfully submitted this 7th day of July, 2021.

EYTAN NIELSEN LLC

s/ Iris Eytan
Iris Eytan, #29505

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 2021, a true and correct copy of the foregoing **REPLY TO MOTION FOR DISCOVERY AND SANCTIONS AND REQUEST FOR FORTHWITH HEARING [D-16(a)]** was served via CCE as follows:

Mr. Jeffrey Lindsey
11th Judicial District Attorney's Office
101 Crestone Ave.
Salida, CO 81201

s/ Tonya Holliday
Tonya Holliday

DISTRICT COURT, CHAFFEE COUNTY, COLORADO Court Address: 142 Crestone Ave. Salida, CO 81201 Court Phone: (719) 539-2561	DATE FILED: July 8, 2021
THE PEOPLE OF THE STATE OF COLORADO, v. BARRY LEE MORPHEW, Defendant.	▲ COURT USE ONLY ▲ Case Number: 21CR78
Iris Eytan, #29505 Dru Nielsen, #28775 Eytan Nielsen LLC 3200 Cherry Creek South Drive, Suite 720 Denver, CO 80209 Telephone: (720) 440-8155 Facsimile: (720) 440-8156 Email: iris@eytan-nielsen.com dru@eytan-nielsen.com *ATTORNEYS FOR DEFENDANT BARRY LEE MORPHEW*	Courtroom/Division: 2

REQUEST FOR FORTHWITH HEARING ON MOTION FOR DISCOVERY AND SANCTIONS – INOPERABLE DRIVE [D-16(b)]

Mr. Barry Morphew, by and through undersigned counsel, hereby requests that the Court set a hearing as soon as possible regarding Mr. Morphew's Motion for Discovery and Sanctions [D-16] and states the following as additional grounds:

1. The prosecution provided the forensic images of Barry Morphew's, [redacted] phones, and of an iPad, which contain some of the critical evidence on which the prosecution bases their accusation. The hard drive that purports to contain these forensic images was not received by the defense until July 6, 2021. The prosecution has had the forensic images from these devices since May 24, 2020.

2. On July 7, 2021, the defense, with the assistance of an experienced expert, attempted to open and access the files on the hard drive that was provided. The hard drive provided is not functional. The expert tasked with downloading and processing the discovery attests to the hard drive's lack of functionality in the attached affidavit. *See* Exhibit 1, Affidavit of Richard Demarest.

3. The prosecution's repeated failures in this case to provide timely, operable, and functional discovery pursuant to Rule 16 and Orders of this Court do not appear to be isolated to this case. Upon information and belief, the Public Defender's Office and private counsel have advised undersigned counsel that this District Attorney's Office has failed to produce timely discovery in violation of Crim.P.16 and court orders in many of their cases as well. *See* Exhibit 2, *People v. Nelson Bonilla Jr.*, Custer County, CO 20CR52, Motion for Show Cause against District Attorney Linda Stanley for failure to produce accessible discovery. Just before the filing of this D-16(b) Motion, Custer County District Court Judge L. Wenner issued the attached Order to Show Cause for failure to Comply with Court Orders in *People v. Nelson Bonilla Jr.*, 20CR52. *See* Exhibit 3.

4. The prosecution's misconduct is inexcusable and justifies sanctions as previously requested by Mr. Morphew. But this District Attorney's Office patterned failure to provide timely and operable discovery justify the imposition of a more significant sanction than originally requested to prevent this misconduct from reoccurring and continuing to prejudice Mr. Morphew. The significant and meaningful sanction requested is a dismissal or reduction of the First-Degree Murder charge.

WHEREFORE, Mr. Morphew requests a forthwith hearing on Defense Motion for Discovery and Sanctions [D-16]. This motion and all other motions and objections during all proceedings in this case, whether or not explicitly stated at the time of the making of the motion or objection, under the Due Process, Right to Counsel, Confrontation, Right to Remain Silent, Privilege Against Self Incrimination, Bail, Compulsory Process, Ex Post Facto, Trial by Jury, Equal Protection, Right to Appeal and Cruel and Unusual Punishment Clauses of the Federal and Colorado Constitutions, and Article II, § 3, 6, 7, 10, 11, 16, 18, 19, 20, 23, 25, and 28, of the Colorado Constitution, and Article I, § 9, and the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the U.S. Constitution. All prior authorities and citations noted apply to and support all requests for relief herein.

Respectfully submitted this 8th day of July, 2021.

EYTAN NIELSEN LLC

s/ Iris Eytan
Iris Eytan, #29505

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2021, a true and correct copy of the foregoing **REQUEST FOR FORTHWITH HEARING ON MOTION FOR DISCOVERY AND SANCTIONS – INOPERABLE DRIVE [D-16(b)]** was served via CCE as follows:

Mr. Jeffrey Lindsey
11th Judicial District Attorney's Office
101 Crestone Ave.
Salida, CO 81201

s/ Tonya Holliday
Tonya Holliday

District Court, Chaffee County, COLORADO 142 Crestone P.O. Box 279 Salida, Colorado 81201 (719) 539-2561	DATE FILED: July 16, 2021 1:53 PM
Plaintiff(s): THE PEOPLE OF THE STATE OF COLORADO, v. **Defendant(s): MORPHEW, BARRY LEE**	**▲COURT USE ONLY▲** Case No.: 2021CR78 Division: 2
ORDER ON MOTION TO LIMIT PUBLIC ACCESS TO ARREST WARRANT AFFIDAVIT FILED MAY 5, 2021 (D-7)	

This matter is before the Court on nonparty Media Consortium's Response to and Request for Reconsideration of the Court's Order Granting Defendant's Motion to Limit Public Access to Arrest Warrant Affidavit Filed May 5, 2021. No Responses were filed. The Court issues the following Order affirming its June 4, 2021 Order and denying the Motion for Reconsideration.

The Media Consortium questions the legitimacy of denying public access to the entire Affidavit based upon the length and details contained within it and also questions the likelihood that this information can't be redacted. However, it wasn't merely the details and length of the Affidavit that resulted in the Court's decision to restrict public access. It was also the Court's desire that efforts at redaction be done meaningfully and with reliable input from the parties, which cannot occur until the parties have had time to familiarize themselves with the investigation. To the extent the Media relies on *People v. Thompson*, 181 P.3d 1143 (Colo. 2008), that case is distinguishable since it involved a record of official action. *Id.* at 1146.

The Media Consortium maintains there are multiple alternatives to restricting public access to the Affidavit in its entirety, but the alternatives suggested only respond to abuse or harassment and do nothing to prevent it. There may be information contained in the 130-page Affidavit that remains forever inaccessible to the public but that may be released if efforts at redaction are done before the parties understand the case. Therefore, in furtherance of protecting the Morphew

daughters from abuse or harassment, the Court will allow time for meaningful efforts at redaction to be made.

The Media Consortium also discusses Mr. Morphew's right to a fair trial. Aside from the Court's concerns that the Media Consortium lacks standing to assert Mr. Morphew's right to a fair trial, the Court does not agree with the argument that it is "required by C.R.C.P 55.1(a)(6), [to find] that 'no less restrictive means . . . exists to achieve or protect' the Defendant's fair trial rights…" (Mot., p. 2, fn 1). This is because Mr. Morphew's fair trial rights were not identified by the Court as a substantial interest in its Order. Therefore, there is no requirement that the Court consider less restrictive means or balance Mr. Morphew's fair trial rights against the presumption of public access.

Finally, the Court sealed the Media Consortium's Response consistent with the language in C.R.C.P. 55.1(2) requiring that the clerk "make the motion [to limit public access] and the response inaccessible to the public pending the court's resolution of the motion." Since the Motion was granted, the Response was kept sealed. However, the Court can unseal this document in its discretion and make it accessible to the public during the time the motion is pending resolution. This implies that these documents could also be unsealed after the Court has granted the motion. Given the content of the Media Consortium's Response, the Court will unseal it. As well as the Media's Motion for Reconsideration.

Conclusion

The Media Consortium's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

By the court, this 16th day of July, 2021.

/s/ Patrick W. Murphy, District Court Judge

Combined Courts, Chaffee County P. O. Box 279 142 Crestone Avenue Salida, CO 81201	DATE FILED: July 30, 202
THE PEOPLE OF THE STATE OF COLORADO **vs.** **BARRY LEE MORPHEW,** Defendant	☐ **COURT USE ONLY** ☐
Linda Stanley Eleventh Judicial District District Attorney, # 45298 District Attorney's Office 104 Crestone Avenue P. O. Box 699 Salida, CO 81201 Phone Number: (719)539-3563 Fax: (719)539-3565	Case No: D0082021CR000078 Div: 2 Courtroom:
MOTION REQUESTING WEB EX ACCESS FOR SUZANNE MORPHEW'S FAMILY (P-17)	

COME NOW, the People of the State of Colorado, by and through Linda Stanley, District Attorney for the Eleventh Judicial District request the Court allow for limited Web Ex access to the currently scheduled preliminary hearing for the Victim, Suzanne Morphew's family.

AS GROUNDS for this Motion, the People inform this Court as follows:

1. At the last court date, July 22, 2021, the court informed the parties that it would not allow for the hearing to be broadcast over Web Ex. The court stated that it needed to pay full attention to the evidence and that Web Ex can be a distraction.

2. The People have been in contact with Ms. Morphew's family. They expressed a desire to view the hearing over Web Ex. Ms. Morphew's family lives in Indiana and Tennessee.

3. The People are requesting limited Web Ex viewing for Ms. Morphew's family, primarily her siblings, David Moorman, Andrew Moorman and Melinda Moorman. The People have left messages to Ms. Morphew's daughters ( ) and are awaiting call backs to see if they would want to also hear the case on Web Ex.

4. A severely limited amount of Web Ex viewers would not distract the Court. At most, it would be five. The Moorman family would respect the dignity of the Court and are aware that they could not record or photograph anything broadcast on the screen.

5. This Court recently allowed Web Ex broadcasting in a preliminary hearing People v. Labosky, 21CR94, so the Defendant's family could listen to the hearing. There was otherwise no purpose for allowing Web Ex; i.e. all the parties, the Defendant and the witnesses were present in Court. The limited number of viewers at this preliminary hearing did not distract the Court.

6. The People are aware the Court has mechanisms to limit the participants in Web Ex, in fact, the court routinely does so in juvenile cases and specialty courts.

7. Allowing for the victims to participate via Web Ex in the preliminary hearing would further the rights protected by the Victims Right's Amendment to the Colorado Constitution, § 16a of Article II and C.R.S. § 24-4.1-302.5(1) and (1)(b), "In order to preserve and protect a victim's rights to justice and due process, each victim of a crime has the following rights: …The right to be informed of and present for all critical stages of the criminal justice process as specified in section 24-4.1-302(2)[1]

8. This would assist them in hearing the preliminary hearing, especially since the probable cause affidavit is sealed.

Dated: July 30, 2021

Respectfully submitted,

LINDA STANLEY
/s/ Jeffrey D. Lindsey
Jeffrey D. Lindsey, #24664
Senior Deputy District Attorney

[1] C.R.S. § 24-4.1-302(2)(b) lists "the preliminary hearing" as a critical stage.

CERTIFICATE OF SERVICE

I certify that on July 30, 2021, a true and correct copy of the foregoing Motion was served via Colorado Courts E-Filing on all parties who appear of record and have entered their appearance herein according to Colorado Courts E-Filing.

By: /s/ Jeffrey Lindsey

DISTRICT COURT, CHAFFEE COUNTY, COLORADO Court Address: 142 Crestone Ave. Salida, CO 81201 Court Phone: (719) 539-2561	DATE FILED: August 2, 2021
THE PEOPLE OF THE STATE OF COLORADO, v. BARRY LEE MORPHEW, Defendant.	▲ COURT USE ONLY ▲ Case Number: 21CR78
Iris Eytan, #29505 Dru Nielsen, #28775 Eytan Nielsen LLC 3200 Cherry Creek South Drive, Suite 720 Denver, CO 80209 Telephone: (720) 440-8155 Facsimile: (720) 440-8156 Email: iris@eytan-nielsen.com dru@eytan-nielsen.com ATTORNEYS FOR DEFENDANT BARRY LEE MORPHEW	Courtroom/Division: 2

RENEWED MOTION FOR DISCOVERY AND CONTEMPT SANCTIONS AND FORTHWITH HEARING
[D-17]

Mr. Morphew, by and through undersigned counsel, renews and supplements his Motion for Discovery Sanctions and for Punitive Contempt Sanctions, resulting from the prosecution's most recent and egregious violations of Colorado Rule of Criminal Procedure 16, the Court's June 2, 2021 Order, and the Colorado and United States Constitutions. The prosecution just produced and has seemingly buried evidence of innocence dating back to October 2020. In support of Mr. Morphew's motions, he states the following:

I. FACTS AND PROCEDURAL HISTORY

1. On May 27, 2021, Mr. Morphew appeared on the filing of charges and the Court ordered the DA to produce all mandated and other discovery by June 2, 2021. The prosecution did not indicate any barriers to making this timely production other than needing to bates stamp the discovery.

2. Also on May 27, 2021, the Court set Mr. Morphew's Preliminary Hearing and Proof Evidence Presumption Great Hearing to commence on August 9, 2021 and be completed on August 24, 2021.

3. On June 2, 2021, the prosecution produced a hard drive. The defense was led to believe that all the mandated and court ordered discovery were produced on the hard drive.

4. However, due the prosecution's failure to produce the forensic image of Barry Morphew's cell phone and the Cellebrite Reader, amongst a few other items noticed by the defense, the defense filed Motion for Discovery Sanctions [D-16] on June 24, 2021. On July 6, 2021, the defense filed a Motion for Contempt Citation. The Court held a discovery sanction hearing on July 22, 2021.

5. At the July 22, 2021 hearing, the Court determined the prosecution violated Crim P. Rule 16 and ordered the prosecution to produce the documents that the defense had been able to identify which had not been produced.

6. Since July 22, 2021, the prosecution has inundated the defense by producing massive amounts of new and what could be duplicative discovery, most of which existed in 2020 and certainly prior to the Court's May 27, 2021 Order. Not including the discovery produced on Saturday, July 31, 2021 and the morning of August 2, 2021, this deluge of late discovery received **between July 22 through July 29, 2021** includes more hard drives, flash drives, CD's, and **30 discovery receipts, representing 7,000 thousand pages of discovery, hundreds of Gigabytes of media, Cellebrite files (Sheila Oliver's cell phone download/Cellebrite image which was collected in June 2020), 500 hours of video, and more than 30,000 photographs**. *See* Exhibit 1, Photographs of Discovery, Defense constructed Matrix of Discovery Production up to July 29, 2021, and CDAC Discovery Receipts.

7. **On Saturday, July 31, 2021, the prosecution dumped over 900 pages of discovery on defense. Already as of this morning August 2, 2021 by 11:59 a.m., the prosecution has provided 4 additional discovery receipts comprising of another 1190 pages of new discovery.** At first glance, the source of this newly produced discovery is Detective Robin Burgess. Yet, it appears that all this discovery has been in existence and should have been produced on June 2, 2021.

8. Much of this deluge of untimely produced and mandated Rule 16 and court-ordered discovery was in the possession of and utilized by the prosecution, their investigator, and multiple

law enforcement agents who participated in the drafting of the May 4, 2021 Affidavit for Arrest. *See* Affidavit, p. 2. Despite having this material for months, the prosecution produced this mass of discovery nearly two months after the court-ordered discovery deadline while Mr. Morphew remains held without bail. Because of this late, immense dump of discovery production, it is difficult on the eve of the Preliminary Hearing to ascertain what has been produced, what has not been produced, what is in their possession but has not been produced, and what is operable.

9. In addition to this massive withholding of discovery in violation of the Court's Orders, the prosecution has still failed to produce the 26 exhibits that FBI Agents placed "in front of Barry, including photos Suzanne sent to Libler, cell phone data, search photos, timelines of his activities on May 9th and May 10th, and surveillance photos." *See* Affidavit, p. 92. And the prosecution has not produced the data from the computers identified in 20SW98. Additionally, it does not appear that the prosecution has produced any recent reports detailing law enforcements ongoing search efforts for Ms. Morphew or bodycam footage or related reports from the search of the Morphew residence from May 11 to May 15, 2020.

10. In one of the discovery productions since July 22, 2021, the prosecution produced a critical letter buried amongst the mass. The letter is dated May 19, 2021 and is from CBI CODIS Administrator Duge to CBI Agent Christopher Adams, CBI Agent Joseph Cahill and Chafee County Sheriff's Office Detective Robin Burgess and is titled "CODIS DNA Casework Match." *See* Exhibit 2. (Emphasis added).

11. This CODIS DNA Match letter from CBI's CODIS unit states that DNA profile from the swabs taken from Suzanne Morphew's car's glove compartment matches the DNA profile of three other unsolved Sexual Assaults that occurred in Tempe, AZ, Phoenix, AZ, and Chicago, Il. ***Id.***

12. It is outrageous that this undeniably exculpatory letter was not produced until July 23, 2021.

13. Even more egregious is that law enforcement has had this exculpatory information since October 2020. The prosecution withheld this information from Mr. Morphew and from the Court when they submitted the lengthy Affidavit for Arrest of Mr. Morphew on First Degree Murder. Affidavit p. 44. The May 4, 2021 Affidavit authored by then Chief Investigator Alex Walker was "reviewed by the following attorneys with the 11th Judicial District Attorney's Office: District Attorney Linda Stanley and Senior Deputy District Attorney Jeff Lindsey." *See* Affidavit, p. 126. Additionally, **the Affidavit indicates that it was edited and reviewed by CBI Agent Joseph Cahill.** Affidavit, p. 2. (Emphasis added).

14. Instead of including this material and exculpatory information in the Affidavit, the prosecution chose to include irrelevant, inflammatory, and speculative statements and hypotheses.

15. As background, on May 10, 2020, the day Suzanne Morphew was discovered missing, her car was found parked in the garage of the residence. Law enforcement immediately secured the Morphew house and the garage. The glove compartment was swabbed. The swab

revealed a DNA mixture of three contributors, including at least one male donor. Barry Morphew, and numerous males, both lay people and law enforcement officers, were excluded from the DNA profile lifted from the glove compartment.

16. The Combined DNA Index System, "CODIS," is the FBI's program to provide support for criminal justice DNA databases across the country. CODIS is designed to compare a target DNA record against the DNA record contained in the database. Many unsolved/cold cases are solved using CODIS and CODIS hits are often a means to establishing probable cause to obtain an evidentiary DNA sample from a suspect. There are approximately 20 million DNA profiles included in the CODIS database.

17. Upon defense counsel's discovery of this needle in the haystack and subsequent review of this May 19, 2021 letter, the defense waded through the deluge of discovery produced in late July to try to find any additional information regarding the three matching CODIS hits and information the prosecution may have collected about the modus operandi and the suspect in those cases.

18. The defense has organized for the Court what the defense has been able to find in the discovery related to the CODIS Matches from the Foreign/Unknown Male DNA found on Suzanne Morphew's glove compartment to an unknown male(s) involved in three prior sexual assaults in two other states:

a. **Tempe CODIS Match. October 22, 2020, Letter from CBI Administrator Duge titled "CODIS DNA Casework Match"** to Debbie Kennedy at Arizona Department of Public Safety, identifying the October 12, 2020 match from the DNA Profile found on Suzanne' Morphew's car/glove compartment, to an unsolved sexual assault in Arizona. *See* Exhibit 3.

    i. Ms. Duge identified **Detective Robin Burgess and CBI Agent Cahill** as contacts. See Exhibit 2, letter and other correspondence between CBI Megan Duge and the Arizona Department of Public Safety.

b. **Phoenix CODIS Match. On November 19, 2020, Letter from CBI Admin. Duge titled "CODIS DNA Casework Match"** to Jennifer Palmer at Phoenix PD Crime Lab, identifying the October 16, 2020 match from the DNA Profile found on Suzanne Morphew's car/glove compartment to a "sperm fraction of underwear" in an unsolved sexual assault in Phoenix, Arizona. *See* Exhibit 4.

    i. Ms. Duge identified **Detective Robin Burgess and CBI Agent Cahill** as contacts. See Exhibit 2, letter and other correspondence between CBI Megan Duge and the Phoenix PD Crime Lab.

c. **Illinois CODIS Match. On April 28, 2021, Letter from CBI Admin. Duge titled "CODIS DNA Casework Match"** to Karen Abbinati of the Illinois State Police identifying the March 18, 2021 match from the DNA profile found on Suzanne Morphew's car/glovebox to an unsolved sexual assault in Illinois. *See* Exhibit 5.

i. Ms. Duge identified **Detective Robin Burgess and CBI Agent Cahill** as contacts. See Exhibit 3, letter and other correspondence between CBI Megan Duge and the Illinois State Police.

19. Despite being aware of the CODIS matches, the prosecution has not produced the police reports or DNA packages from these unsolved sexual assaults wherein the DNA of the individual involved in those cases matches the foreign/unknown male DNA on Suzanne's car's glove compartment. Looking deeper in the late discovery production, the prosecution is rightly concerned about the unknown male DNA profiles identified on the glove compartment and the other evidence. But it does not appear the prosecution has produced the follow up investigation conducted on the CODIS matches or the unknown male DNA profiles found on the bike, the bike helmet and the vehicles.

20. This evidence of innocence was hidden amongst the droves of discovery dumps the defense has been receiving since the last hearing on July 22, 2021. The defense did not know about and therefore could not ask about this withheld discovery. This is exactly the reason why the defense should not have the burden to request discovery. Given the prosecution's untimely and unorganized "procedure" and misconduct, the defense cannot be held to know what other exculpatory information the prosecution possesses but has buried and not identified.

21. The masses of late discovery dumps, the failure to produce what was ordered on July 22, 2021, and the failure to timely reveal or indicate the CODIS matches while an innocent man remains locked in jail constitute outrageous governmental misconduct.

II. ARGUMENT FOR SANCTIONS

A. OUTRAGEOUS GOVERNMENTAL CONDUCT

22. Mr. Morphew's Constitutional Rights to Due Process, Effective Assistance of Counsel, and Bail have been violated due to outrageous governmental conduct. The United States Supreme Court has recognized the existence of the legal defense of outrageous governmental conduct. *United States v. Russell*, 411 U.S. 423 (1973). Colorado has specifically recognized the due process claim of outrageous governmental conduct. *Effland v. People*, 240 P.3d 868, 879 (Colo. 2010). Outrageous governmental conduct is conduct that violates fundamental fairness and is shocking to the universal sense of justice. *People v. Johnson*, 987 P.2d 855 (Colo.App.1998).

23. Exercise "of a court's supervisory powers in dismissing a criminal case may be proper if the government's conduct has violated fundamental fairness and is shocking to the

universal sense of justice." *People v. Auld*, 815 P.2d 956, 957 (Colo. App. 1991); *Bailey v. People*, 630 P.2d 1062 (Colo. 1981).

24. The Colorado Court of Appeals further held that "when the integrity of the court is compromised, as here, by overzealous prosecution, dismissal of the case is an appropriate remedy." *Id.* at 259. Such action is predicated on the Due Process Clause of the Fifth Amendment to the United States Constitution and has generally been characterized as the defense of "outrageous government conduct." This defense was first recognized by the United States Supreme Court in *United States v. Russell*, 411 U.S. 423, 431-32 (1973).

25. Outrageous government conduct may be invoked in any case that challenges the actions of government officials. This defense protects defendants from government action that is so overreaching or otherwise offensive as to contravene the values implicit in a concept of ordered liberty. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

26. Here, the discovery (mal)practices, and prosecution's withholding of material and favorable evidence, is outrageous, and the case should be dismissed. If Mr. Morphew were not being held in jail without a bond and waiting another four weeks for the Court to make a determination on probable cause, the prosecution's misconduct would still be egregious. But in this circumstance, the prosecution rushed to arrest Mr. Morphew without evidence of murder, when they were not ready to fulfill their prosecutorial duties. After Mr. Morphew had been in jail without bond for nearly three months, the prosecution produced, in a mass production and without note, the previously withheld material evidence of three CODIS matches between an unknown male in three unsolved sexual assault cases and an unknown male's DNA found in Suzanne Morphew's car. Law enforcement has been aware of a CODIS match since October of 2020.

27. If the Court finds that a dismissal is not the appropriate remedy for the prosecution's violation of Mr. Morphew's Constitutional Due Process Rights, then Mr. Morphew requests the Court set reasonable bail, or reduce the charge to Second Degree Murder. If the Court is authorized to dismiss a case entirely, then it must be authorized to set reasonable bail on a case. *See People v. Holloway*, 649 P.2d 318 (Colo. 1982) (courts have discretion to dismiss criminal cases upon a finding of a Due Process Violation).

B. RULE 16 AND BRADY VIOLATIONS AND REQUEST FOR CONTEMPT SANCTIONS

28. The prosecution continues to violate Rule 16 and the May 27, 2021 Court Order. The prosecution's late and withheld productions of discovery are further proof of a pattern of neglect and intentional withholding of evidence of innocence.

29. The purpose of discovery is to ensure fair process, aid the accuracy and efficiency in the search for the truth, reduce the risk of trial by ambush, and to protect innocence. *People v. Arapahoe County Court*, 74 P.3d 429, 431 (Colo. App. 2003), *Lanari v. People*, 827 P.2d 495, 499 (Colo. 1992), and *People v. Edgar*, 578 P.2d 666 (Colo. App. 1978).

30. Surely mandatory discovery and court-ordered discovery should be produced on time and in an orderly fashion. All exculpatory evidence must be disclosed before any critical stage in the proceeding, which includes a preliminary hearing or proof evident presumption great hearing. *In re Attorney C.*, 47 P.3d 1167, 1172 (Colo. 2002). The July 28, 2021 email from DA Lindsey stating "Most of the discovery was not part of the order, but we will have him deliver it tomorrow" illustrates that the prosecution still does not understand its mandatory Rule 16 obligations. *See* Exhibit 6.

31. Mere negligence or ignorance does not negate a claim that discovery was not provided, or exculpatory evidence was concealed or delayed. The fact that the prosecuting attorney does not have any actual knowledge of the information withheld does not absolve the Rule 16 violation. *People v. District Court*, 793 P.2nd 163 (Colo. 1990).

32. The defense does not have to prove that the prosecution had malintent or bad faith in the delayed production. *Id*; *Wearry v. Cain*, 13 Sup. Ct. 1002 (2016).

33. Proof of materiality is not required for the Court to find a Rule 16 violation, although it is for the Court to find a *Brady* violation. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Here the withheld and delayed production of the CODIS matches from the DNA profile from Suzanne Morphew's glove compartment to three unsolved sexual assaults is material and exculpatory and not produced in violation of Mr. Morphew's due process rights. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Wearry v. Cain*, 13 Sup. Ct. 1002 (2016).

34. Rule 16 and case law specifically designates that the prosecutors' obligations extends to material information in the control of any others who have participated in the investigation or evaluation of the case. Crim. P. 16(I)(a)(3), (I)(b)(4); *People v. District Court*, 793 P.2nd 163 (Colo. 1990); *People v. Bueno*, 409 P.3d 320, 328 (2018).

35. The prosecution not only has a duty to learn and retrieve from law enforcement any evidence favorable to the defense they also have to produce it. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); Crim. P. 16 (I)(b)(4); *People v. Morphew*, 21CR78, June 4, 2021 Court Order re Hearing on May 27, 2021.

36. In this case, it is apparent that the prosecution does not know what it has, nor what has not been produced. At the same time, the prosecution has withheld evidence of innocence. All the while Mr. Morphew remains in jail.

37. Placing the burden on Mr. Morphew is inconsistent with *Brady* and its progeny of cases. What is happening here is that the "defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *People v. Bueno*, 409 P.3d 320, 328 (2018), citing *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004).

38. Rule 16 addresses sanctions for violations and states, "If at anytime during the course of the proceedings it is brought to the attention of the Court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the Court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit the

party from introducing in evidence the material not disclosed **or enter such other order as it deems just under the circumstances**. C.R.C.P. 16(III)(g)(emphasis added).

39. In this case the prosecution failed to produce critical exculpatory evidence until July 23, 2021. And, on Monday, August 2, 2021, the prosecution continues to produce thousands of files that predated Mr. Morphew's arrest. It seems that without the defense motions, requests for sanctions, and court orders, that this discovery and evidence of innocence may never have been produced.

40. Because of the prosecution's late discovery of critical information that needs follow up analysis and investigation, Mr. Morphew is being denied his rights to effective assistance of counsel, to adequately prepare and present a defense, to face and cross examine his accusers, to call expert witnesses on his behalf, and to due process of law under the United States and Colorado Constitutions. Due to the exculpatory evidence being produced so late, the defense is unable to conduct necessary independent and reasonable examination with experts, obtain necessary reports and information about the three matching unsolved sexual assaults, or conduct follow up investigation prior to the Preliminary and Proof Evident Presumption Great Hearings. *Brady vs. Maryland*, 373 U.S. 83, 87 (1963), U.S. Const. Amend. IV, XIV; Colo. Const. Art II § 16; *People v. Harmes*, 560 P.2d 470 (1976); *People v. Sheppard*, 701 P.2d 49 (1985); *Hutchinson v. People*, 742 P.2d 875; *Cuyler v. Sullivan*, 446 U.S. 335 (1980); U.S. Const. Amend. IV, XIV; Colo. Const. Art II § 16.

41. The Court has broad and absolute discretion to impose sanctions when a party has failed to comply with the rule. Sanctions should be imposed that will cure the prejudice, protect the integrity of the truth-finding process and deter discovery related future misconduct. *People v. District Court*, 793 P.2d 163 (Colo. 1990).(emphasis added); *People v. Grant*, 2021 COA 53 (April 21, 2021). The Court may impose discovery sanctions that will adequately remedy the violation and level the playing field. *People v. Daley*, 97 P.3d 295 (Colo. App. 2004).

42. In doing so, among the factors the Court should consider: (1) the reason for the delay in providing the requisite discovery; (2) any prejudice a party suffered because of the delay; and (3) the feasibility of curing any prejudice through a continuance. *People v. Dunlap*, 975 P.2d 723, 755 (Colo.1999); *People v. Castro*, 854 P.2d 1262, 1265 (Colo.1993); *People v. District Court*, 793 P.2d at 168.

43. However, when there is willful misconduct **or a pattern of neglect demonstrating a need for modification of a party's discovery practices**, harsher sanctions may be imposed. Otherwise, a court should use sanctions only as a means to cure the prejudice resulting from the discovery violation. *People v. Daley*, 97 P.3d at 198; *People v. Lee*, 18 P.3d 192 (Colo. 2001)(emphasis added).

44. The 11th Judicial District Attorney's Office has shown a pattern of neglect reflected by the numerous discovery violations. *See* Exhibit 7, Defense created chart of known Rule 16 violations recently issued against the 11th Judicial District Attorney's Office.

45. The pattern of neglect in this case and in this DA's office continues. In this short and critical time period leading up to the critical stage of the Preliminary Hearing and Proof

Evident Presumption Great Hearing, the prosecution has exhibited willful misconduct and a pattern of neglect which requires the Court to cure the extreme prejudice to Mr. Morphew.

46. This Court has the authority to issue any sanction, unless it is manifestly arbitrary, unreasonable, or unfair. *People v. Lee*, 18 P.3d at 196. Mr. Morphew requests the Court dismiss this case or reduce the charges.

47. The Court has the authority to dismiss a case (1) when exercising its supervisory authority to dismiss on constitutional grounds (e.g., infringement of defendant's due process rights); (2) when exercising its supervisory authority to protect the integrity of the judicial process (e.g., prosecutorial misconduct that interferes with grand jury's independent function); (3) upon determination that the evidence is insufficient to support prosecution; **or** (4) when authorized by statute that is consistent with constitutional separation of powers (e.g., General Assembly amended § 16–8–114.5(2) to transfer from the courts to the prosecutor the power to dismiss pending criminal proceedings against incompetent defendants). *People v. Renander*, 151 P.3d 657, 660 (Colo. App. 2006)(superseded on other grounds)(emphasis added); also s*ee People v. Zapotocky,* 869 P.2d 1234, 1243–44 (Colo.1994); *People v. Dennis,* 164 Colo. 163, 166, 433 P.2d 339, 340 (1967) (trial court's power to approve People's dismissal of charges under Crim. P. 48(a) does not grant court authority to sua sponte initiate dismissal); *U.S. v. Turner,* 620 F.Supp. 525, 527 (D.Colo.1985).

48. The Court has the authority to reduce charges in a case and can do so here as a sanction for violation of the Constitution and Rule 16. *Hunter v. Dist. Ct.*, 184 Colo. 238, 240-41, 519 P.2d 941, 943 (1974) (district court has authority at preliminary hearing to bind over a defendant on a lesser included charge); *People v. Houser*, 337 P.3d 1238 (Colo. App. 2013)(district court may instruct jury on lesser included offense if there is supporting evidence); *People v. Carey*, 198 P.3d 1223, 1234 (Colo. App. 2008) (district court may instruct jury on lesser nonincluded offense if the defendant requests or consents to it); *People v. Scott*, 10 P.3d 686, 688 (Colo. App. 2000) (district court has authority to submit jury instruction on lesser included offense after granting judgment of acquittal on greater offense).

49. Understanding that the Court may consider dismissing this case or reducing the Murder in the First Degree charge as an extreme request, Mr. Morphew alternatively requests that the Court set a reasonable bond in light of the egregious Rule 16 and Constitutional violations. As Rule 16 and the Constitution authorize the Court to dismiss a case, and to reduce charges which would then mandate a bond being set, the defense asserts that the Court has the authority to set a reasonable bond.

50. Setting a reasonable bond is not arbitrary, unreasonable, or unfair, but an attempt to remedy the prejudice to Mr. Morphew.

51. Further, Mr. Morphew requests that the Court find that the prosecutors as identified in the Contempt Citation are in contempt of court by violating the court order to produce all mandated discovery by June 2, 2021. Mr. Morphew requests this Court issue a contempt sanction to reimburse Mr. Morphew for attorney's fees and costs for the enormous amount of time and expense incurred by the defense to organize and decipher mass amounts of untimely discovery and to draft and argue discovery motions.

III. INVENTORY

52. Mr. Morphew also requests as a *non-sanction* that the prosecution present the defense with an inventory of all discovery that exists and the discovery that has been produced. The prosecution has produced and reproduced multiple items in this case by various individuals in various forms (via the CDAC eDiscovery website, via CDs, via hard drives and via thumb drives). Mr. Morphew requests the Court enter an Order directing the prosecution to provide a list of the items (i.e., the specific documents, audio recordings, video recordings, photographs, etc.) the prosecution has in this case and has produced in this case. Given the haphazard and inconsistent way the prosecution has produced discovery in this case, an inventory should be required. The Court and defense counsel have spent considerable time addressing these issues rather than the substantive case itself. It would streamline and simplify matters and the expenditure of unnecessary time and resources to have an inventory of the prosecution's production.

IV. DISTRICT ATTORNEY'S WITNESS LIST FOR THE AUGUST HEARINGS

53. At the last hearing on July 22, 2021, the Court directed the prosecution to provide a witness list to the defense. That has not been provided. The defense has requested of the prosecution to provide a list of witnesses they intend to call on August 9 and 10, 2021. So far, they have not agreed to provide a witness list. Given the mass amounts of discovery being dumped on the defense and that there was a previous indication of eighteen (18) witnesses, the defense cannot be expected to be prepared to effectively cross examine eighteen witnesses one week from today. As such, Mr. Morphew also requests as a *non-sanction* that the Court order the prosecution to produce by close of business on August 2, 2021, the witnesses and the order of witnesses they intend to call on August 9 and 10, 2021.

WHEREFORE, Mr. Morphew requests a forthwith in-person hearing on this Motion. At that hearing the defense requests that the prosecution and law enforcement officers be required to answer to what they knew about the CODIS matches. This Motion and all other motions and objections during all proceedings in this case, whether or not explicitly stated at the time of the making of the motion or objection, under the Due Process, Right to Counsel, Confrontation, Right to Remain Silent, Privilege Against Self Incrimination, Bail, Compulsory Process, Ex Post Facto, Trial by Jury, Equal Protection, Right to Appeal and Cruel and Unusual Punishment Clauses of the Federal and Colorado Constitutions, and Article II, § 3, 6, 7, 10, 11, 16, 18, 19, 20, 23, 25, and 28, of the Colorado Constitution, and Article I, § 9, and the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the U.S. Constitution. All prior authorities and citations noted apply to and support all requests for relief herein.

Respectfully submitted this 2nd day of August, 2021.

EYTAN NIELSEN LLC

s/ Iris Eytan
Iris Eytan, #29505

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2021, a true and correct copy of the foregoing **RENEWED MOTION FOR DISCOVERY AND CONTEMPT SANCTIONS AND FORTHWITH HEARING [D-17]** was served via CCE as follows:

Mr. Jeffrey Lindsey
11th Judicial District Attorney's Office
101 Crestone Ave.
Salida, CO 81201

s/ Tonya Holliday
Tonya Holliday

DISTRICT COURT, CHAFFEE COUNTY, COLORADO Court Address: 142 Crestone Ave. Salida, CO 81201 Court Phone: (719) 539-2561	DATE FILED: August 3, 2021
THE PEOPLE OF THE STATE OF COLORADO, v. BARRY LEE MORPHEW, Defendant.	▲ COURT USE ONLY ▲ Case Number: 21CR78
Iris Eytan, #29505 Dru Nielsen, #28775 Eytan Nielsen LLC 3200 Cherry Creek South Drive, Suite 720 Denver, CO 80209 Telephone: (720) 440-8155 Facsimile: (720) 440-8156 Email: iris@eytan-nielsen.com dru@eytan-nielsen.com ATTORNEYS FOR DEFENDANT BARRY LEE MORPHEW	Courtroom/Division: 2

SUPPLEMENT TO RENEWED MOTION FOR DISCOVERY AND CONTEMPT SANCTIONS AND FORTHWITH HEARING
[D-17(a)]

Mr. Morphew, by and through undersigned counsel, supplements his Renewed Motion for Discovery Sanctions and for Punitive Contempt Sanctions (D-17), resulting from the prosecution's most recent and egregious violations of Colorado Rule of Criminal Procedure 16, the Court's June 2, 2021 Order, and the Colorado and United States Constitutions.

In the past 24 hours, since filing D-17 yesterday, August 2, 2021, at 12:38 p.m., the defense has received an additional 16 discovery productions comprising of 4,936 files, which include both

PDF and non-PDF files such as Excel files and .JPG images. *See* Exhibit A - DA Discovery Receipts received in the last 24 hours since filing the Renewed Motion for Discovery and Contempt Sanctions [D-17].

We were also notified yesterday afternoon, Augusts 2, 2021, after the filing of the Renewed Motion, that the defense would be receiving yet another discovery production via FedEx for delivery today, August 3, 2021, containing "the surveillance dump" and "phone dumps from search warrants executed at the time of the arrest of the Defendant." *See* Exhibit B – August 2, 2021 email regarding additional discovery production. This delivery has not been received as of the filing of this Supplement.

Additionally, this morning, August 3, 2021, we were notified that yet another hard drive containing video files is being sent via FedEx which is scheduled to arrive prior to 10:30 am on August 4, 2021. *See* Exhibit C – August 3, 2021 email notification of additional hard drive production.

WHEREFORE, This Motion and all other motions and objections during all proceedings in this case, whether or not explicitly stated at the time of the making of the motion or objection, under the Due Process, Right to Counsel, Confrontation, Right to Remain Silent, Privilege Against Self Incrimination, Bail, Compulsory Process, Ex Post Facto, Trial by Jury, Equal Protection, Right to Appeal and Cruel and Unusual Punishment Clauses of the Federal and Colorado Constitutions, and Article II, § 3, 6, 7, 10, 11, 16, 18, 19, 20, 23, 25, and 28, of the Colorado Constitution, and Article I, § 9, and the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the U.S. Constitution. All prior authorities and citations noted apply to and support all requests for relief herein.

Respectfully submitted this 3rd day of August, 2021.

EYTAN NIELSEN LLC

s/ Iris Eytan
Iris Eytan, #29505

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2021, a true and correct copy of the foregoing **SUPPLEMENT TO RENEWED MOTION FOR DISCOVERY AND CONTEMPT SANCTIONS AND FORTHWITH HEARING [D-17(a)]** was served via CCE as follows:

Mr. Jeffrey Lindsey
11th Judicial District Attorney's Office
101 Crestone Ave.
Salida, CO 81201

s/ Tonya Holliday
Tonya Holliday

DISTRICT COURT, CHAFFEE COUNTY, COLORADO Court Address: 142 Crestone Ave. Salida, CO 81201 Court Phone: (719) 539-2561	DATE FILED: August 3, 2021
THE PEOPLE OF THE STATE OF COLORADO, v. BARRY LEE MORPHEW, Defendant.	▲ COURT USE ONLY ▲ Case Number: 21CR78 Courtroom/Division: 2
Iris Eytan, #29505 Dru Nielsen, #28775 Eytan Nielsen LLC 3200 Cherry Creek South Drive, Suite 720 Denver, CO 80209 Telephone: (720) 440-8155 Facsimile: (720) 440-8156 Email: iris@eytan-nielsen.com dru@eytan-nielsen.com *ATTORNEYS FOR DEFENDANT BARRY LEE MORPHEW*	

MOTION TO DRESS OUT FOR THE PRELIMINARY/PROOF EVIDENT PRESUMPTION GREAT HEARING
[D-18]

Mr. Barry Morphew, by and through undersigned counsel, respectfully requests that he be afforded the opportunity to dress out in a non-jail uniform for the Preliminary and Proof Evident Presumption Great Hearing.

If the Court allows this, the defense will provide Mr. Morphew's clothes to the jail in advance of the hearing.

WHEREFORE, Mr. Morphew respectfully requests the Court issue an order allowing Mr. Morphew to dress out for the upcoming Preliminary and Proof Evident Presumption Great Hearing.

Respectfully submitted this 3rd day of August, 2021.

EYTAN NIELSEN LLC

s/ Iris Eytan
Iris Eytan, #29505

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2021, a true and correct copy of the foregoing **MOTION TO DRESS OUT FOR THE PRELIMINARY/PROOF EVIDENT PRESUMPTION GREAT HEARING [D-18]** was served via CCE as follows:

Mr. Jeffrey Lindsey
11th Judicial District Attorney's Office
101 Crestone Ave.
Salida, CO 81201

s/ Tonya Holliday
Tonya Holliday

Combined Courts, Chaffee County P. O. Box 279 142 Crestone Avenue Salida, CO 81201	DATE FILED: August 3, 2021
THE PEOPLE OF THE STATE OF COLORADO **vs.** **BARRY LEE MORPHEW,** Defendant	☐ **COURT USE ONLY** ☐
Linda Stanley Eleventh Judicial District District Attorney, # 45298 District Attorney's Office 104 Crestone Avenue P. O. Box 699 Salida, CO 81201 Phone Number: (719)539-3563 Fax: (719)539-3565	Case No: D0082021CR000078 Div: 2 Courtroom:
RESPONSE TO DEFENSE MOTION FOR CONTEMPT	

COME NOW, the People of the State of Colorado, by and through Linda Stanley, District Attorney for the Eleventh Judicial District, hereby tenders the following response to the Motion for Contempt filed by the Defendant.

AS GROUNDS for this Motion, the People inform this Court as follows:

1. Shortly after the hearing the People met with all law enforcement agencies involved in this case. At that time, the undersigned ordered all agencies to conduct an audit of their files and evidence being held. Undersigned trusted all agencies to do the audit/inventory.

2. In response to the audit, all agencies undertook a submission that brought forth the discovery. In order to ensure all discovery has been provided, the discovery was provided to the Defense. It was done so through an investigator who made two separate trips to the office of the Attorney for the Defendant.

3. The majority of the discovery (largest amount of data) provided over the past week is from two sources. First, the Colorado Bureau of Investigations (CBI) received a large number of YouTube videos from an independent filmmaker, Tyson Draper. All of the videos provided to CBI were subsequently provided to the Defendant last week. The videos were on YouTube and were available to the

defense. Since CBI had them and provided them this office in turn provided them to the defense. Second, the week of May 5 through May 10, 2020, investigators obtained videos from several surveillance cameras throughout the area. The files recovered were viewed by Chaffee County Sheriff's Office personnel and various stills were identified and captured. The still have been provided in discovery in multiple formats. The raw video had not been provided and is not being provided.

4. The remaining discovery is the continuing discovery flow that is typical in all cases. The discovery is the searches of the Defendant's condo, Shoshona Darke's residence, multiple storage units and the reports of those occurrences. There is likely duplicative discovery and while that may frustrate the defense, it is going to go out in discovery, nonetheless. If the Office of the District Attorney receives case submission from a law enforcement agency it will be released in discovery.[1]

5. Regarding the alleged "exculpatory" issues cited by the defense, the People have provided these details over the course of the investigation.

6. CODIS leads;

    a. Tempe CODIS; this was referred to CBI Agent Joseph Cahill and a report was generated, CBI report 546; attached as exhibit 1 to this Response. Agent Cahill's report references the CODIS referral, the contact in Tempe, AZ, the agency and the case number. This report was released in the initial round of discovery on June 2, 2021.

    b. Phoenix CODIS; upon receipt of the Motion on August 2, 2021, the undersigned inquired of Agent Joseph Cahill and Detective Burgess. It does not appear that either did any work on this alert. Undersigned directed both the Agent and the Detective to inquire and get information from this alert immediately. Undersigned inquired regarding this information and is aware that both Agent Cahill and Detective Burgess have contacted the authorities in Phoenix. Today, August 3, 2021, CCSO received documents from Phoenix alert. They have been pushed out in discovery and are attached as Exhibit 2.

    c. Chicago CODIS; this was referred to CCSO Detective Robin Burgess who upon receipt of the letter from CBI, obtained reports from the Chicago Police Department, attached as exhibit 2 to this Response.

[1] In the case of duplicative discovery, the file names are the same so it is not difficult to ascertain that it may have been previously provided.

This was attached to report # 99 authored by Detective Burgess and placed in the discovery cue.[2] Report # 99 was released to the defense on August 2, 2021.

7. Regarding the search warrants for the three devices, please see attached Detective Robin Burgess supplemental report documenting these devices. We have provided in discovery what we have been provided by RMRCFL reference these devices. Detective Burgess's report is attached as Exhibit 4.

Dated: August 03, 2021

Respectfully submitted,
LINDA STANLEY
/s/ Jeffrey D. Lindsey
Jeffrey D. Lindsey, #24664
Senior Deputy District Attorney

[2] The People (until very recently) have been having trouble getting the discovery uploaded into the cloud through the CDAC Action server. The IT company hired by the People and CDAC personnel believe there is a "bottleneck" preventing the swift release of discovery. The problem was remedied yesterday 8/3/2021.

CERTIFICATE OF SERVICE

I certify that on August 03, 2021, a true and correct copy of the foregoing Motion was served via Colorado Courts E-Filing on all parties who appear of record and have entered their appearance herein according to Colorado Courts E-Filing.

By: /s/ Jeffrey Lindsey

District Court, Chaffee County, COLORADO 142 Crestone P.O. Box 279 Salida, Colorado 81201 (719) 539-2561	DATE FILED: August 4, 2021 10:19 AM
Plaintiff(s): THE PEOPLE OF THE STATE OF COLORADO, v. **Defendant(s): MORPHEW, BARRY LEE**	**▲COURT USE ONLY▲** Case No.: 2021CR78 Division: 2
ORDER REGARDING PROTOCOL FOR PRELIMINARY/PROOF EVIDENT HEARING	

This matter is set for a four-day combined preliminary hearing/proof evident presumption great hearing. The hearing is set for all day on August 9, August 10, August 23 and August 24, 2021.

PUBLIC WEBEX

As stated on the record on July 22, 2021, the Court does not intend to broadcast these proceedings to the public via WebEx. The Court made this decision for several reasons.

First, the Court does not believe it has the legal authority to do so. Pursuant to Colorado Court Rules, only certain pre-trial hearings are eligible for expanded media coverage in criminal cases. Preliminary hearings are not included on that list. (See Colorado Court Rules Chapter 38, Rule 3)

While Colorado Courts have utilized the WebEx platform extensively during the pandemic and continue to do so, the Court views this particular case in a different manner. This case has generated enormous public interest and broadcasting the proceedings via WebEx would very likely result in thousands of people viewing the hearing. This would seem to thwart the purpose of limiting expanded media coverage in criminal cases. Those purposes include not interfering with the rights of the parties to a fair trial, not detracting from the decorum and dignity of the Court and not creating adverse effects that would be greater than those caused by traditional media coverage.

By way of illustration, at a prior non-evidentiary hearing over 1,100 devices joined the WebEx meeting and viewed the proceedings. Numerous messages, many of which were inappropriate, were posted in the "chat" feature. The Court is aware that despite a prohibition on recording and rebroadcasting, the proceedings were recorded and rebroadcast.

The fact that it would be the Court broadcasting the proceedings, and not the media, does not alter the Court's thinking. The same rationale applies.

Additionally, on July 8, 2021, Colorado Governor Jared Polis declared an end to the public health emergency created by the pandemic. Therefore, broadcasting the hearing via WebEx due to an ongoing public health emergency is no longer a valid rationale.

Finally, the Court is the trier of fact at a preliminary/proof evident hearing. The Court needs to focus all of its attention on the proceedings. Monitoring the WebEx meeting during the hearing would divide the Court's attention and create a distraction.

PUBLIC ACCESS TO HEARING

The Chaffee County Combined Courts have received the approval of the Chaffee County Department of Public Health to conduct in person hearings. The Courts agreed to limit capacity in courtrooms by adhering to three feet of social distancing. The Courts also agreed to mandating masks in courtrooms for participants, judicial employees and observers.

These rules will allow for approximately twenty-four members of the public or media representatives to view the hearing in person.

The Court understands that without the distancing requirement, more members of the public would be able to view to proceedings (approximately twice as many). The Court also understands that significantly more than twenty-four people or members of the media will want to view the proceedings.

Therefore, with the help of Chaffee County, the Court will live stream the proceedings into the main hall of the Chaffee County Fairgrounds. This should provide seating for approximately 40 or 50 additional people. The live stream will only be accessible to the judicial laptop at the fairgrounds building and to immediate members of the Morphew/Moorman families. The public will not have access to the livestream.

FAMILY OF VICTIM

The prosecution has requested that Suzanne Morphew's siblings be able to view to proceedings via the live stream. The prosecution has also asked that the Morphew children be able to view the proceeding via the live stream but does not know their intention.

Siblings and children of a victim are considered victims for purposes of Colorado's Victims Right Amendment. (C.R.S. 24-4.1-302(5))

Under the V.R.A., the Court has an obligation to ensure that victims are informed of and be present for all critical stages of a criminal case. (C.R.S. 24-4.1-302.5(1)(b))

A preliminary hearing is a "critical stage" of a criminal proceeding. (C.R.S. 24-4.1-302(2))

Because the siblings reside in another state and are otherwise unaware of the facts supporting Mr. Morphew's arrest due to the Court's suppression of the arrest affidavit, the Court will allow them to view the proceedings via the live stream. Similarly, if the Morphew children desire to watch the proceeding via live stream, the Court will allow this as well.

The Court believes that this will satisfy the Court's responsibilities under the V.R.A. without leading to some of the concerns noted above regarding the general public viewing the proceedings via live stream.

ORDER

All participants, judicial employees and observers must maintain social distancing of at least three feet and must wear masks. Masks may be removed by participants when speaking and by witnesses when testifying.

There will be approximately twenty-four people admitted into the courtroom to observe. Seven of those seats will be reserved for the media, the rest will be reserved for the general public. The media seats will be apportioned by Deputy Public Information Officer Jon Sarche. Please contact Mr. Sarche for details. (jon.sarche@judicial.state.co.us) Public seating will be on a first come, first serve basis.

Additional seating and a live stream will be provided at the Chaffee County Fairgrounds main building, 10165 County Road 120, Poncha Springs, Colorado.

Live tweeting or reporting of the proceedings will be allowed unless disruptful to the process. Recording of the proceedings is prohibited.

The siblings and children of Suzanne Morphew may view the proceedings via WebEx. The Court will need the email address and device name for each member of the family who intends to view the proceedings via live stream.

IT IS SO ORDERED.

By the court, this 4th day of August, 2021.

/s/ Patrick W. Murphy,

Chief Judge, 11th J.D.

DISTRICT COURT, CHAFFEE COUNTY, COLORADO Court Address: 142 Crestone Ave. Salida, CO 81201 Court Phone: (719) 539-2561	DATE FILED: August 4, 2021
THE PEOPLE OF THE STATE OF COLORADO, v. BARRY LEE MORPHEW, Defendant.	▲ COURT USE ONLY ▲ Case Number: 21CR78 Courtroom/Division: 2
Iris Eytan, #29505 Dru Nielsen, #28775 Eytan Nielsen LLC 3200 Cherry Creek South Drive, Suite 720 Denver, CO 80209 Telephone: (720) 440-8155 Facsimile: (720) 440-8156 Email: iris@eytan-nielsen.com dru@eytan-nielsen.com *ATTORNEYS FOR DEFENDANT BARRY LEE MORPHEW*	

FORTHWITH MOTION TO PROVIDE GOOD FAITH LIST AND ORDER OF WITNESSES FOR THE AUGUST 9 AND 10 HEARING BY CLOSE OF BUSINESS [D-19]

Mr. Barry Morphew, by and through undersigned counsel, moves this Court for an Order directing the prosecution to provide a good faith, realistic list and order of the witnesses they intend to call at the August 9-10, 2021 hearing. As grounds, Mr. Morphew asserts the following:

1. After several requests to the prosecution to provide a witness list for the hearing, the prosecution provided an eighteen-person witness list on July 21, 2021. Their list includes eight Chaffee County Sherriff deputies, five Colorado Bureau of Investigation agents, two Federal Bureau of Investigation agents, and three lay witnesses.

2. Given the time constraints on the hearing and in an effort to be prepared to cross examine the witnesses who will actually be called, the defense raised this issue to the Court at the hearing on July 22, 2021. While it is not reflected in the minute order, it is defense counsels'

recollection that the Court did order the prosecution to provide an updated good faith list of witnesses.

3. Not having received a narrowed-down, good faith list of witnesses, undersigned counsel again contacted Mr. Lindsey on August 1, 2021 requesting that the prosecution provide the witness list and order that they anticipate calling the witnesses for the August 9 and 10 hearing. Mr. Lindsey indicated that he would "consult with his team and let us know whether we can provide such. It might be closer to Friday before we do so." *See* Exhibit A – Email correspondence between counsel regarding the witness list.

4. Defense counsel again followed up with Mr. Lindsey on August 3, 2021 requesting a witness list. As of the filing of this Motion, no response has been received to the latest request. *Id.*

5. Given the voluminous, untimely, and on-going discovery production, the length of the investigation in this case, and the number of potential witnesses (18), in the interest of fairness, the defense requests that the Court order the prosecution to disclose to the defense by close of business today, August 4, 2021, a good faith list and order of witnesses. This will allow the defense to focus and prepare for those witnesses who will actually be called the first two days of the hearing. This will promote Mr. Morphew's constitutional rights to effective assistance of counsel and ability to confront and cross-examine the witnesses against him. This request does not unfairly prejudice the prosecution, nor is it burdensome.

6. Colorado Rule of Criminal Procedure 57(a) gives the court the authority to order the good faith list and order of witnesses: "If no procedure is specifically prescribed by the rule, the court may proceed in any lawful manner not inconsistent with the Rules of Criminal Procedure…."

WHEREFORE, the defense requests that the Court order the prosecution to disclose to the defense by close of business today, August 4, 2021 a good faith list and order of witnesses.

Respectfully submitted this 4th day of August, 2021.

EYTAN NIELSEN LLC

s/ Dru Nielsen
Dru Nielsen, #28775

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2021, a true and correct copy of the foregoing **FORTHWITH MOTION TO PROVIDE GOOD FAITH LIST AND ORDER OF WITNESSES FOR THE AUGUST 9 AND 10 HEARING BY CLOSE OF BUSINESS [D-19]** was served via CCE as follows:

Mr. Jeffrey Lindsey
11th Judicial District Attorney's Office
101 Crestone Ave.
Salida, CO 81201

s/ Tonya Holliday
Tonya Holliday

DISTRICT COURT, CHAFFEE COUNTY, COLORADO Court Address: 142 Crestone Ave. Salida, CO 81201 Court Phone: (719) 539-2561	DATE FILED: August 4, 2021
THE PEOPLE OF THE STATE OF COLORADO, v. BARRY LEE MORPHEW, Defendant.	▲ COURT USE ONLY ▲ Case Number: 21CR78
Iris Eytan, #29505 Dru Nielsen, #28775 Eytan Nielsen LLC 3200 Cherry Creek South Drive, Suite 720 Denver, CO 80209 Telephone: (720) 440-8155 Facsimile: (720) 440-8156 Email: iris@eytan-nielsen.com dru@eytan-nielsen.com ATTORNEYS FOR DEFENDANT BARRY LEE MORPHEW	Courtroom/Division: 2

SECOND SUPPLEMENT TO RENEWED MOTION FOR DISCOVERY AND CONTEMPT SANCTIONS AND FORTHWITH HEARING
[D-17(b)]

Mr. Morphew, by and through undersigned counsel, supplements his Renewed Motion for Discovery Sanctions and for Punitive Contempt Sanctions (D-17), resulting from the prosecution's most recent and egregious violations of Colorado Rule of Criminal Procedure 16, the Court's June 2, 2021 Order, and the Colorado and United States Constitutions.

Since filing D-17 on August 2, 2021, and D-17(a), filed on August 3, 2021, the defense has received an additional 4 discovery productions comprising of 173 files. And, at 10:26 a.m. today,

August 4, 2021, the defense received via FedEx one hard drive containing 203 gigabytes of data. *See* Exhibit A - DA Discovery Receipts and photos of hard drive and content received in the last 24 hours. While we just received the hard drive, from the file descriptions it appears that this is not newly acquired discovery, but discovery that existed and should have been produced on June 2, 2021.

WHEREFORE, This Motion and all other motions and objections during all proceedings in this case, whether or not explicitly stated at the time of the making of the motion or objection, under the Due Process, Right to Counsel, Confrontation, Right to Remain Silent, Privilege Against Self Incrimination, Bail, Compulsory Process, Ex Post Facto, Trial by Jury, Equal Protection, Right to Appeal and Cruel and Unusual Punishment Clauses of the Federal and Colorado Constitutions, and Article II, § 3, 6, 7, 10, 11, 16, 18, 19, 20, 23, 25, and 28, of the Colorado Constitution, and Article I, § 9, and the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the U.S. Constitution. All prior authorities and citations noted apply to and support all requests for relief herein.

Respectfully submitted this 4th day of August, 2021.

EYTAN NIELSEN LLC

s/ Iris Eytan
Iris Eytan, #29505

s/ Dru Nielsen
Dru Nielsen, #28775

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2021, a true and correct copy of the foregoing **SECOND SUPPLEMENT TO RENEWED MOTION FOR DISCOVERY AND CONTEMPT SANCTIONS AND FORTHWITH HEARING [D-17(b)]** was served via CCE as follows:

Mr. Jeffrey Lindsey
11th Judicial District Attorney's Office
101 Crestone Ave.
Salida, CO 81201

s/ Tonya Holliday
Tonya Holliday

DATE FILED: August 4, 2021

District Court, Chaffee County, Colorado Chaffee County Combined Courts P. O. Box 279, 142 Crestone Avenue Salida, CO 81201 (719) 539-6031	
THE PEOPLE OF THE STATE OF COLORADO **vs.** **Barry Lee Morphew,** **Defendant**	
Linda Stanley DISTRICT ATTORNEY BY: Jeffrey D. Lindsey Senior Deputy District Attorney 104 Crestone Avenue P. O. Box 699 Salida, CO 81201 Telephone: (719) 539-3563 Fax: (719) 539-3565 Attorney Registration No.: 24664	☐ COURT USE ONLY ☐ Case No:D0082021CR000078 Division 2

NOTICE OF ENDORSEMENT OF WITNESS

LINDA STANLEY, District Attorney in and for the Eleventh Judicial District, State of Colorado, hereby notifies the defense and court of the endorsement of the following witnesses in the above entitled case.

Alex Walker
Chaffee County Sheriff'S Office
P O Box 699
Salida, CO 81201

Robin Burgess
Chaffee County Sheriff'S Office
P O Box 699
Salida, CO 81201

Claudette Hysjulien
Chaffee County Sheriff'S Office
P O Box 699
Salida, CO 81201

Andy Rohrich
Chaffee County Sheriff'S Office
P O Box 699
Salida, CO 81201

Damon Brown
Chaffee County Sheriff'S Office
P O Box 699
Salida, CO 81201

Scott Himschoot
Chaffee County Sheriff'S Office
P O Box 699
Salida, CO 81201

Lamine Mullenax
Chaffee County Sheriff'S Office
P O Box 699
Salida, CO 81201

Derek Graham
Colorado Bureau of Investigations-Denver
690 Kipling Street, 4th Floor
Denver, CO 80215

Joseph Cahill
Colorado Bureau of Investigations-Denver
690 Kipling Street, 4th Floor
Denver, CO 80215

Tanya Atkinson
Colorado Bureau of Investigations-Pueblo
79 N Silicon Drive
Pueblo West, CO 81007

Dennis Honeycutt
Colorado Bureau of Investigations-Pueblo
79 N Silicon Drive
Pueblo West, CO 81007

Jonathan Grusing
Federal Bureau of Investigation
8000 E 36th Avenue
Denver, CO 80238

Kenneth Harris
Federal Bureau of Investigation
8000 E 36th Avenue
Denver, CO 80238

Miles Harvey
[redacted]

Jeanne Ritter
[redacted]

Martin Ritter
[redacted]

Randy Carricato
[redacted]

Kevin Koback
Colorado Bureau of Investigations-Pueblo
79 N Silicon Drive
Pueblo West, CO 81007

William Plackner
Chaffee County Sheriff'S Office
P O Box 699
Salida, CO 81201

Respectfully submitted this 4 day of August, 2021.

By: /s/ Jeffrey D. Lindsey Date: 08/04/2021
Jeffrey D. Lindsey #: 24664
Senior Deputy District Attorney

CERTIFICATE OF SERVICE

I certify that on this 4th day of August, 2021, a true and correct copy of the foregoing Notice To Endorse was served via Colorado Courts E-Filing on all parties who appear of record and have entered their appearances herein according to Colorado Courts E-Filing.

By: /s/ Crystal Keim

☐ Salida Municipal Court 448 E 1st ST Salida, Co 81201	☐ Buena Vista Municipal Court 715 E. Main St Buena Vista, Co 81211	☐ County Court ☒ District Court 142 Crestone Ave Salida, Co 81201 Chaffee County, Colorado	DATE FILED: September 20, 2021 FILED IN COMBINED COURTS SEP 20 2021 CHAFFEE COUNTY, COLORADO COURT USE ONLY
STATE OF COLORADO v. **BARRY LEE MORPHEW**			Case Number:20000911 Arrest Number: Warrant Number:D0082021CR000078 Division Courtroom

APPEARANCE BOND FELONY

Bond Type: ☐ Bail Bonding Agent * ☐ Cash/Self** ☒ Cash/Surety *** ☐ PR/Self ☐ PR/Surety ☐ Property

Bond Posted For: ☒ Defendant ☐ Respondent ☐ Plaintiff ☐ Petitioner ☐ Child

Name of Party (print or type): Barry Lee Morphew (first middle last) **Date of Birth 10-17-1967**

The Party, as principal, and (print or type): . as surety, acknowledge that we are jointly and severally bound to the People of the State of Colorado, in the penal sum of Five Hundred Thousand($ 500,000.00) DOLLARS, if there is a default upon the primary condition of this Bond. The bail agent charged a premium in the amount of $ N/A. The primary condition of this Bond is that the Party shall personally appear in the Chaffee County Combined Courts 142 Crestone Ave, Salida, CO 81201 (Court name and address):

on November 9 2021 (return date), at 1 30 P M (time) and at each place, and upon each date, to which this proceeding is transferred or continued, until entry of an order for deferred prosecution or deferred judgment, plea of guilty, *nolo contendere* or conviction; ☐ I agree to a continuance of this bond through sentencing; to answer charges of:
C.R.S. 18-3-102 Murder in 1st Degree, C.R.S. 18-8-605 Tampering With Physical Evidence, C.R.S. 18-8-306 Attemp To Influence A Public Servant

NOTE: If the return date and time is a legal holiday or a weekend, the return date is a mandatory appearance on the first business day thereafter.
Additional Conditions: (1) Party shall not commit a felony while at liberty on bail;**(2)** Party shall immediately notify the Court of any change of mailing address or residence.

☐ Pursuant to §16-3-503, C.R.S. you shall execute a waiver that states you understand that the bond or fees shall be forfeited if the Defendant is removed from the country.

☐ Pursuant to §16-4-103, C.R.S. If you have been arrested for a Felony offense, you shall sign a written waiver of extradition indicating you waive all formal proceedings in the event you are arrested in another state and you agree to be returned to Colorado.

☐ Party may not leave the state; ☐ Party acknowledges the existence of a Mandatory Protection order under §18-1-1001, C.R.S.; ☐ No Weapons ☐ No Alcohol ☐ No Drugs ☐ No Driving Without a Valid License ☐ Random UA's ☐ Random BA's ☐ Daily BA's ☐ GPS Monitoring ☐ Substance Abuse Monitoring ☐ Electronic Substance Abuse Monitoring ☒ Electronic Home Monitoring ☒ Other Comply With No Contact Protection Orders-(Copies Provided)

☐ Pre-trial Supervision (contact information) ☒ Other Surrender Passport. Will not be able to post bond until passport is turned in. Appear to every court hearing, defendant to reside in Chaffee County and is not allowed

to leave Chaffee County overnight. ☐ No Contact with ☒ OtherWear an ankle Monitor at the expense of the defendant. Not to possess any firearms or weapons. Complete a firearm affidavit. Defendant will post bond no earlier than noon on 9-20-2021. Report to probation/ intervention upon release.

Defendant's Name (Printed): Barry Lee Morphew

Case Number: 20000911

If the Party fails to comply with any of the conditions of this Bond, the Court may revoke the Party's release on bail, increase the amount of bail or modify bond conditions. This Bond will be forfeited if the party does not appear in Court as required by the primary bond condition.

You are not required to agree to apply the cash bond deposited in this case toward any amount owed as a condition of release. Use of the deposit for such purpose may only occur if you voluntarily agree in writing to such use. Please choose one of the following:

☐ **I consent and authorize the court to apply the cash bond deposited in this case to any and all court costs, restitution, fines, fees and surcharges owed by me at the time I am discharged from all liability under the terms of the bond. Any funds remaining must be returned to me as defendant at the address provided below.**

☒ **I do not consent or authorize the court to apply the cash bond deposited in this case toward any amount owed by me.**

Party Signature **Address (Street, City, State, & Zip Code)** **Telephone Number**

Surety/Bonding Agent * /Bonding Commissioner/Judge Signature

Address (Street, City, State, & Zip Code) **Telephone Number**

Bonding Agent License No: _____ **Power of Attorney No.:** _____

Surety Other than Bonding Agent ** Signature Address (Street, City, State, & Zip Code) Telephone Number

*** Bonding Agent Certification:** Agent, by executing this Bond, warrants and represents to the Court, under oath, and under penalty of perjury: **(1)** that agent is not currently in default in payment of any final judgment upon any bail bond forfeited in any Colorado jurisdiction; **(2)** that agent is duly licensed by the State of Colorado to execute this Bond; **(3)** that agent, if a non-cash agent, is currently appointed by the corporate surety whose power of attorney accompanies this Bond.

Executed and Acknowledged by the above named in the presence of the undersigned at:

Chaffee County Detention Center.

By: _____ D5 _____ A.Pugh D5
Deputy Clerk/Sheriff (As to Surety/Bonding Agent)

Date: 9-20-2021 Time: 12:15 P.M.

District Court Chaffee County, Colorado Court Address: 142 Crestone Avenue Salida, CO 81201	
PEOPLE OF THE STATE OF COLORADO v. **Defendant: Barry Lee Morphew**	▲ **COURT USE ONLY** ▲ Case Number:20000911 Arrest Number: Warrant Number:D0082021CR000078
Attorney or Party Without Attorney (Name and Address) Phone number: Email: FAX number: Atty. Reg. #:	Division Courtroom

WAIVER OF EXTRADITION AS A CONDITION OF BAIL BOND PURSUANT TO §16-4-103, C.R.S

I Barry Lee Morphew (NAME OF Defendant) have been arrested for a Felony offense on 5-5-2021 (date) and as a condition of my bail bond consent to the following:

1. I understand that it is a violation of my bond to leave Colorado without the approval of the Court and the surety and that if I am arrested in another state, I can be returned to Colorado through the extradition process.
2. I will not resist or fight any effort by any state to return me to Colorado and waive all formal extraditions proceedings.
3. I understand I shall not be admitted to bail in any other state pending extradition to Colorado.
4. I agree to waive any right I may have to contest my extradition and I waive this right freely, voluntarily and intelligently.

Date: 9-20-2021

_____
Signature of Defendant

Barry Morphew
Printed Full Name

I certify the foregoing Waiver of Extradition as a Condition of Bail Bond was executed and subscribed before me.

Date: 9-20-2021

_____
Signature

Colorado
_____

DISTRICT COURT, CHAFFEE COUNTY, COLORADO Court Address: 142 Crestone Ave. Salida, CO 81201 Court Phone: (719) 539-2561	GRANTED BY COURT 08/06/2021 PATRICK W MURPHY District Court Judge ▲ COURT USE ONLY ▲
THE PEOPLE OF THE STATE OF COLORADO, v. BARRY LEE MORPHEW, Defendant.	Case Number: 21CR78
	Division: 2

ORDER RE: MOTION TO DRESS OUT FOR THE PRELIMINARY/PROOF EVIDENT PRESUMPTION GREAT HEARING [D-18]

This matter, having come before the Court on Mr. Morphew's **MOTION TO DRESS OUT FOR THE PRELIMINARY/PROOF EVIDENT PRESUMPTION GREAT HEARING [D-18]** and being fully advised in the premises, the Court hereby ORDERS:

_____ Granted:

_____ Denied.

_____ _____

Date Judge

DISTRICT COURT, CHAFFEE COUNTY, COLORADO Court Address: 142 Crestone Ave. Salida, CO 81201 Court Phone: (719) 539-2561	DATE FILED: August 7, 2021
THE PEOPLE OF THE STATE OF COLORADO, v. BARRY LEE MORPHEW, Defendant.	▲ COURT USE ONLY ▲ Case Number: 21CR78 Courtroom/Division: 2
Iris Eytan, #29505 Dru Nielsen, #28775 Eytan Nielsen LLC 3200 Cherry Creek South Drive, Suite 720 Denver, CO 80209 Telephone: (720) 440-8155 Facsimile: (720) 440-8156 Email: iris@eytan-nielsen.com dru@eytan-nielsen.com *ATTORNEYS FOR DEFENDANT BARRY LEE MORPHEW*	

MOTION FOR PROSECUTION TO INVENTORY DISCOVERY PRODUCED AFTER JUNE 2, 2021
[D-20]

Mr. Barry Morphew, by and through undersigned counsel, respectfully requests that the Court order the prosecution to produce a discovery inventory, instead of the defense, and in support states the following:

1. On August 6, 2021, pursuant to defense motions for sanctions, the defense was required to choose to conduct a discovery sanctions hearing which would extend the completion of the Preliminary Hearing/Proof Evident Presumption Great Hearing into November, or to proceed to the commence with the Preliminary and Proof Evident Presumption Great Hearings on August 9, 2021 without a ruling on the discovery motions. With discovery still pouring in and while the defense prepares for this critical hearing, the defense will not know what is hidden in the discovery when the hearings commence on August 9, 2021. With Mr. Morphew being held without bond, it is unconscionable for Mr. Morphew to remain in jail for another three months due to the prosecution's misconduct. Mr. Morphew was forced to choose between his Constitutional Rights to Due Process, Fair Hearing, and Effective Assistance of Counsel and the Right to Bail. Mr.

Morphew chose to proceed with the Preliminary and Proof Evident Presumption Great Hearings on August 9, 2021.

2. On August 6, 2021, the Court requested the defense provide the Court with an inventory of the discovery. The defense agreed. However, upon reflection and review of the mass of discovery, the defense contends this obligation should be on the prosecution, who has the ability to provide such an inventory to the Court, as it is the discovery that they are producing. Requiring the defense to index the prosecution's haphazard, unorganized discovery, which is neither indexed nor contains file bates stamps, places an undue and expensive burden on Mr. Morphew.

3. The defense has a good faith belief that much of the late produced discovery was in possession of the prosecution prior to June 2, 2021, but produced in late July and early August 2021. This includes, but is not limited to, Sheila Oliver's Cellebrite download that was just produced a week ago (in possession of the prosecution since July 2020), the 26 exhibits the FBI used in its April 2020 interview with Mr. Morphew, and the CODIS DNA Match exculpatory information (in possession of the prosecution since October 2020).

4. The Court has already found the prosecution has committed discovery violations. Requiring the prosecution, who should be able now to identify for the Court and the defense the files, hard drives, discs, and paper discovery it has provided to the defense since June 2, 2021, is a more fair and cost efficient solution. Mr. Morphew should not have to incur the cost of the prosecution's disorganization, Rule 16 and Court Order violations. The defense asks that the prosecution have to identify the dates the drives, discs, flash drives and paper discovery were produced, what is contained in those devices or files, what if anything were duplicates previously provided on June 2, 2021, and the dates that those files/documents originated and were in possession of the prosecution.

5. The defense will supplement the prosecution's inventory, if necessary, after review.

WHEREFORE, Mr. Morphew incorporates all prior motions and supplements to its Motion for Discovery Sanctions and Contempt and respectfully requests the Court order the prosecution to provide such an inventory described above by a date certain.

Respectfully submitted this 7th day of August, 2021.

EYTAN NIELSEN LLC

s/ Iris Eytan
Iris Eytan, #29505

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2021, a true and correct copy of the foregoing **MOTION FOR PROSECUTION TO INVENTORY DISCOVERY PRODUCED AFTER JUNE 2, 2021 [D-20]**was served via CCE as follows:

Mr. Jeffrey Lindsey
11th Judicial District Attorney's Office
101 Crestone Ave.
Salida, CO 81201

s/ Tonya Holliday
Tonya Holliday

DISTRICT COURT, CHAFFEE COUNTY, COLORADO Court Address: 142 Crestone Ave. Salida, CO 81201 Court Phone: (719) 539-2561	DATE FILED: August 20, 2021
THE PEOPLE OF THE STATE OF COLORADO, v. BARRY LEE MORPHEW, Defendant.	▲ COURT USE ONLY ▲ Case Number: 21CR78
Iris Eytan, #29505 Dru Nielsen, #28775 Eytan Nielsen LLC 3200 Cherry Creek South Drive, Suite 720 Denver, CO 80209 Telephone: (720) 440-8155 Facsimile: (720) 440-8156 Email: iris@eytan-nielsen.com dru@eytan-nielsen.com *ATTORNEYS FOR DEFENDANT BARRY LEE MORPHEW*	Courtroom/Division: 2

MOTION TO SET BOND AND DISMISS MURDER CHARGES FOR LACK OF CORPUS DELICTI, PROOF EVIDENT, AND PROBABLE CAUSE [D-21]

Introduction

The hearing has confirmed that prosecutors, lacking a corpus delicti ("body of a crime"), additionally lack proof evident and probable cause. This brief discusses the requisite legal elements and the standard by which prosecutors must prove them. The Court not only should set reasonable bond but should dismiss murder charges because prosecutors cannot prove there was: (1) a death of Suzanne Morphew (Suzanne), (2) caused by criminal conduct, (3) of Defendant Barry Morphew (Barry).

I. Prosecutors must prove (1) Suzanne's death, (2) from criminal conduct, (3) of Barry.

To "establish guilt in a criminal case, the prosecution must prove the corpus delicti, or 'body of the crime.'" *People v. LaRosa*, 2013 CO 2, ¶ 14. Technically, "corpus delicti consists of two components, an injury and unlawful conduct causing that injury." *Id.* n.4 (citing *Lowe v. People*, 234 P. 169, 173 (Colo. 1925)). In a homicide case, corpus delicti means the first two of three elements: "First, the death; second, the criminal agency of another as the cause; [and] third, the identity of the accused as that other." *Lowe*, 234 P. at 173.

Only rarely is corpus delicti an issue, because typically there is a dead body with fatal wounds. Where corpus delicti is an issue, however, the "difficulty" is "either (a) that, the victim having simply disappeared, no dead body can be produced ...or (b) that ... [any death was caused] by someone's foul play." Wayne R. LaFave, *Substantive Criminal Law* § 1.4(b). Proving corpus delicti does not invariably require a dead body, and murder convictions have been upheld where there was a confession, eyewitness testimony, or physical evidence that the victim was dead.[1]

The facts here—no dead body, no confession, and no eyewitness testimony or physical evidence of death—were held insufficient, even when a defendant with motive and opportunity had threatened to kill the victim. *See People v. Fisher*, 483 N.W.2d 452 (Mich. Ct. App. 1992). *Fisher* found no persuasive authority upholding conviction "involving a missing body where there was no direct admission, no physical evidence, and no witness to some part of the killing or the disposal of the body." *Id.* at 453; *accord Ramsammy v. State*, 43 So.3d 100 (Fla. Ct. App. 2010) (evidence insufficient where "victim's body has not been recovered, no evidence of the manner of death was presented, no physical evidence like blood, DNA, or any other type of forensics was found, no confession to homicide was made, and no witnesses to the crime testified").

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[1] *E.g.*, *Gov't of Virgin Islands v. Harris,* 938 F.2d 401 (3d Cir. 1991) (blood on defendant's pants and found in his apartment, and "highly incriminating" statements made to his children and law enforcement); *State v. Edwards*, 767 N.W.2d 784 (Neb. 2009) (bloodstains consistent with victim's DNA found throughout defendant's bedroom, in his car, and on equipment including shovel); *Fisher v. State*, 851 S.W.2d 298 (Tex. Ct. Crim. App. 1993) (defendant's confession to murder corroborated by multiple facts including blood found in his and victim's homes); *State v. Nicely,* 529 N.E.2d 1236 (Ohio 1988) (human blood of victim's type on defendant's pants and other items, as well as in and around the victim's car, which the defendant had abandoned); *State v. Lung*, 423 P.2d 72 (Wash. 1967) (victim's car containing the coat, shoes, and purse she wore the night before was found across the street from her work, the middle of the coat had bullet hole with blood stains, victim's rings and watch found in defendant's house, and human blood stains were on the defendant's floor and television).

II. Prosecutors have failed to prove corpus delicti and Barry Morphew's guilt.

A. Proof evident and probable cause must pass adversarial scrutiny.

The two burdens of proof at this stage differ in degree—proof evident requires more than probable cause—but share a procedural commonality. Unlike an arrest warrant, both must withstand adversarial scrutiny.

First, to justify continued no-bond detention, prosecutors must show the "proof is evident or the presumption great" that a first-degree murder was committed by Barry Morphew. *Goodwin v. Dist. Ct.*, 586 P.2d 2, 3 (1978). This "burden of proof" is "greater than probable cause but less than the standard of beyond a reasonable doubt required for conviction." *Yording v. Walker*, 683 P.2d 788, 791 n.1 (Colo. 1984). In deciding whether prosecutors carried that burden, trial courts must resolve issues of weight and credibility. *Gladney*, 535 P.2d at 191.

Second, and similarly, unlike one-sided warrants issued without adversarial testing, a preliminary hearing considers probable cause after "an open and adversary hearing [where the prosecution] must establish that there is sufficient evidence supporting its charge." *Wayne R. LaFave*, 4 Crim. Proc. § 14.1(a), cited in *People v. Subjack*, 2021 CO 10, ¶ 22. That hearing "protects the accused by ensuring that the prosecution can at least sustain the burden of proving probable cause, specifically probable cause to believe that a crime was committed and that the defendant committed it." *People v. Vigil*, 2021 CO 46, ¶ 37. It acts "as a screening device by testing the sufficiency of the prosecution's case before an impartial judge and "weeding out the fatally weak case." *Subjack*, 2021 CO 10, ¶ 21 (internal punctuation omitted). This requires evidence "sufficient to induce a person of ordinary prudence and caution to entertain a reasonable belief that the defendant committed the crimes charged." *People v. Williams*, 628 P.2d 1011, 1014 (Colo. 1981); *People v. Johnson*, 618 P.2d 262, 265 (Colo. 1980).

The trial court's fact-finding role differs in the two contexts: a proof evident hearing resolves credibility issues and conflicting evidence, while a preliminary hearing resolves credibility only if the evidence is "implausible or incredible" and resolves evidentiary conflicts in favor of prosecutors. *Compare Gladney*, 535 P.2d at 191, *with Hunter v. Dist. Ct.*, 543 P.2d 1265, 1268 (Colo.1975). Here, however, that distinction does not matter because the evidence is insufficient under either standard. The case against Mr. Morphew is fatally weak.

B. The prosecutors' case, admittedly based on "supposition," does not pass scrutiny.

From the outset, using the words of the arrest warrant, this case depends on "supposition." The arrest warrant tried to establish the corpus delicti through the circular argument that, "*Based upon legal supposition*, Suzanne Morphew, based on this lack of proof of life, is presumed dead." 5/4/21 Aff. p.2 (emphasis added; citing *People v. Scott*, 176 Cal.App.2d 458 (1959)).

Prosecution "supposition" is the antithesis of "proof." By definition, supposition is an "assumption that something is true, *without proof of its veracity*; the act of supposing." *Black's Law Dictionary* (11th ed. 2019) (emphasis added; defining SUPPOSITION).

Supposition not only cannot be proof but also contrasts with evidentiary inferences. An "'inference' is a conclusion drawn by reason from *facts* established by *proof*" but a "supposition is a *conjecture* based on the *possibility* that a thing could have happened." *State v. McMullin*, 136 S.W.3d 566, 573 (Mo. Ct. App. 2004) (emphases in original; internal punctuation omitted). Criminal findings cannot rest on supposition. *See, e.g.*, *State v. Waller*, 163 S.W.3d 593, 595-97 (Mo. Ct. App. 2005). Specifically, a husband cannot be convicted of murdering his wife where the corpus delicti and crime require supposition. *See Ex Parte Bailey*, 590 So.2d 354, 359 (1991) (overturning husband's murder conviction and ordering acquittal).

This prosecution would fail even if recast as drawing inferences rather than supposition. As for inferences, our Supreme Court holds they (a) "must be supported by a logical and convincing connection between the facts established and the conclusion inferred"; and (b) not "by guessing, speculation, conjecture, or a mere modicum of relevant evidence." *People v. Donald,* 2020 CO 24, ¶ 19 (internal punctuation omitted). While "the presence of stacked inferences is not alone dispositive of a sufficiency of the evidence claim," the fact that prosecutors need to stack inference upon inference is "one factor that a court may consider in determining whether the evidence presented" sufficed to prove an element. *Id.* ¶ 43. Prosecutors' "reliance on stacked inferences is pertinent to the analysis of [the] sufficiency of the evidence" because "a chain of inferences can become so attenuated that reliance on it to sustain a conviction would be unreasonable and would amount to speculation." *Id.* ¶ 30 (citing extensive case law).

Prosecutors here offer only supposition and stacked inferences that do not prove corpus delicti or Barry Morphew's guilt. There is no non-speculative evidence that (1) Suzanne died on May 9 or May 10, 2020; (2) her death was a murder; and (3) Barry Morphew was the murderer. Finding those elements "would be unreasonable and would amount to speculation." *Id.*

Speculation on how the killing might have been committed and the body might have been buried defies the lack of physical evidence, including not just of the body but also of any blood or other physical evidence of murder. This absence of physical evidence is itself evidence from which this Court can draw contrary inferences rendering prosecutors' speculative suppositions implausible. *See Leopold v. CIA*, 987 F.3d 163, 167 (D.C. Cir. 2021) ("The absence of particular evidence may sometimes provide clues as important as the presence of such evidence.") (citing Sherlock Holmes' logical inferences from dog that did not bark).

Each prosecution supposition fails on its own and is implausible given the lack of physical evidence. Consider just the following prosecution suppositions:

— Maybe, prosecutors suppose, Barry was enraged to commit murder by Suzanne's Wednesday, May 6, 2020 text that she was "done" and wanted to "handle this civilly." But that supposition defies Suzanne's pleasant messages later that week and her going to Moonlight Pizza with Barry on Friday, May 8, 2020, which she told her secret paramour was a fine, quiet evening.

— Maybe, prosecutors suppose, Barry shot Suzanne with a dart gun loaded with a dart filled with tranquilizer serum. But that supposition is implausible without any physical evidence (including blood resulting from the impact of the shot) or indication that a tranquilizer dart or gun was used.

— Maybe, prosecutors suppose, Barry somehow buried Suzanne with a shovel that hid her body so deeply from trained dogs and frequent and highly trained search teams. But that supposition is implausible on its face and even more so given lack of physical evidence and of any plausible way one man could do this within a short period on hard, largely frozen, and rocky mountain terrain.

These deficiencies are only highlighted by comparing our facts with the 1959 California case of *People v. Scott*, which was relied on in the arrest warrant affidavit. Understandably, prosecutors like that case because it admittedly was "without precedent in this country." *Scott*, 176 Cal.App.2d at 465. As *Scott* acknowledged, in "reported cases of murder there was almost invariably proof of death consisting of (1) direct evidence of the use of the means of death upon the body of the missing person, as in some cases of death at sea, (2) production of a body or part of a body identified as that of the missing person, or (3) incriminating circumstances sufficient to prove the corpus delicti and an admission or confession of the fact of death." *Id.* *Scott* detailed seven extremely incriminating facts showing the wife was indeed dead and that her death occurred at the hands of the defendant husband. *See id.* at 498-99. In *Scott*, there was "no rational explanation of the disappearance of [the wife] other than her murder by" the husband. *Id.* at 500.

The distinctions between *Scott* and our case are clear. Consider just the following distinctions:

— The wife in *Scott* was "leading a tranquil domestic life" and had "apparent satisfaction with her way of life," showing the "extreme improbability that [she] would have voluntarily left her home, her husband and her friends." *Id.* at 466. In contrast, Suzanne was living a lie, desperate during a time of Covid-forced absence to be reunited with her out-of-state paramour, with whom she had discussed relocating to Ecuador.

— There, "Every act, every statement of [the husband] after the disappearance of his wife was consistent only with knowledge that [she] was dead." *Id.* at 499. In contrast, every action taken by Barry, including his cooperation with investigators and his statements, shows his hope she could be found, hopefully alive.

No reported case upholds homicide charges against a husband for supposedly killing his missing wife based on prosecution suppositions contradicted by physical evidence. Our undisputed facts show there is no proof evident or probable cause that there was (1) a death of Suzanne (2) caused by criminal conduct (3) of Barry. The Court should find there is no proof evident to continue the no-bond hold and no probable cause to proceed on homicide charges.

WHEREFORE, Mr. Morphew respectfully requests the Court set a bond and dismiss the murder charge against him.

Respectfully submitted this 20th day of August, 2021.

EYTAN NIELSEN LLC

s/ Iris Eytan
Iris Eytan, #29505

s/ Dru Nielsen
Dru Nielsen, #28775

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2021, a true and correct copy of the foregoing **MOTION TO SET BOND AND DISMISS MURDER CHARGES FOR LACK OF CORPUS DELICTI, PROOF EVIDENT, AND PROBABLE CAUSE [D-21]** was served via CCE as follows:

Mr. Jeffrey Lindsey
11th Judicial District Attorney's Office
101 Crestone Ave.
Salida, CO 81201

s/ Tonya Holliday
Tonya Holliday

Combined Courts, Chaffee County P. O. Box 279 142 Crestone Avenue Salida, CO 81201	DATE FILED: August 24, 2021
THE PEOPLE OF THE STATE OF COLORADO **vs.** **BARRY LEE MORPHEW,** Defendant	☐ **COURT USE ONLY** ☐
Linda Stanley Eleventh Judicial District District Attorney, # 45298 District Attorney's Office 104 Crestone Avenue P. O. Box 699 Salida, CO 81201 Phone Number: (719)539-3563 Fax: (719)539-3565	Case No: D0082021CR000078 Div: 2 Courtroom:
PEOPLE'S MEMORANDUM CONCERNING THE LIMITATIONS OF A PRELIMINARY HEARING AND PROOF EVIDENT /PRESUMPTION GREAT PRINCIPLES	

COME NOW, the People of the State of Colorado, by and through Linda Stanley, District Attorney for the Eleventh Judicial District provide the Honorable Court the foregoing Memorandum regarding preliminary hearings and proof evident presumption great. .....

AS GROUNDS for this Motion, the People inform this Court as follows:

I. PRELIMINARY HEARING

1. The purpose of a preliminary hearing is to determine whether there is probable cause to support the charges brought by the People. *People v Weaver*, 182 Colo. 221, 511 P.2d 908 (1973). It is not necessary to introduce evidence sufficient to prove defendant's guilt beyond a reasonable doubt but only evidence sufficient to permit a person of ordinary prudence to reasonably believe a defendant's guilt as to the crimes charged. *People v Walker*, 675 P.2d 304 (Colo. 1984). The evidence must be viewed in the light most favorable to the People. *People v Hall*, 999 P.2d 207 (Colo. 2000). The bulk of the evidence at the preliminary hearing need not be admissible at trial and may consist of hearsay and other inadmissible evidence. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973).

2. Justice Martinez in the Colorado Supreme Court's opinion in *People v. Fry*, 92 P.3d 970 (Colo. 2004), aptly set out the limitations concerning a preliminary hearing. In the *Fry* case itself, the Colorado Supreme Court was addressing the issue of whether a preliminary hearing transcript could be used at trial when the witness testified at the preliminary hearing but was unavailable for trial. However, Justice Martinez skillfully set out the parameters of a preliminary hearing when explaining why the preliminary hearing transcript could not be used at trial.

3. The Court held that the following principles applied at a preliminary hearing. First, a preliminary hearing is limited to matters necessary to a determination of probable cause. *Fry*, 92 P.2d at 977. Next, the rights of the defendant are curtailed: evidentiary and procedural rules are relaxed, and the rights to cross-examine and to introduce evidence are limited to the question of probable cause. *Fry*, 92 P.2d at 977. More specifically:

(1) a defendant has no constitutional right to unrestricted confrontation of witnesses, *Id.*;

(2) a defendant has not constitutional right to introduce evidence at a preliminary hearing. *Id.*;

(3) a preliminary hearing is not intended to be a mini trial, *Id.*;

(4) a preliminary hearing is not intended to afford the defendant the opportunity to effect discovery, *Id.*;

(5) a judge "may not engage in credibility determinations unless the testimony is incredible as a matter of law," at a preliminary hearing, *Id.*; (testimony is incredible as a matter of law if it "in conflict with nature or fully established or conceded facts. It is testimony as to facts which the witness physically could not have observed or events that could not have happened under the laws of nature.") *Id.*;

(6) "defense counsel has no legitimate motive to engage in credibility inquires and may be prohibited from doing so," Id.;

(7) "the right to cross-examination may be curtailed by the judge in all but the most unusual circumstances." *Id.*

II. PROOF EVIDENT/ PRESUMPTION GREAT PRINCIPLES

1. Defendant must request a bond, proof/presumption, hearing

People v. Blagg, 2015 CO 2, 340 P.3d 1137

Article II, section 19 of the Colorado Constitution gives the criminally accused the right to a bail bond, pending adjudication of the charges against him: "All persons shall be bailable by sufficient sureties pending disposition of charges." This right, however, does not apply in capital cases "if the prosecution establishes that the proof is evident or the presumption great that the accused committed the crime charged." *Yording v. Walker*, 683 P.2d 788, 791 (Colo.1984); *see also* Colo. Const. art. II, § 19(1)(a) ("All persons shall be bailable by sufficient sureties pending disposition of charges except ... [f]or capital offenses when the proof is evident or presumption is great."); *Orona v. Dist. Court*, 184 Colo. 55, 58, 518 P.2d 839, 840 (1974) ("The mere fact that an information has been filed—or for that matter that the defendant has been bound over for trial—is not equivalent to a determination that the proof of guilt is evident or the presumption is great."). First degree murder is a capital offense, even in a case where the death penalty is not at issue. *See Tribe v. Dist. Court*, 197 Colo. 433, 434–35, 593 P.2d 1369, 1370–71 (1979).

It is incumbent upon a defendant charged with a capital offense to request that *1141 the court set bail. *See* § 16–4–101(3), C.R.S. (2014) ("In any capital case, the *defendant* may make a written motion for admission to bail upon the ground that the proof is not evident or that presumption is not great, and the court shall promptly conduct a hearing upon such motion." (emphasis added)). Once the defendant requests admission to bail, the court must hold a hearing to set bond, and at that hearing, if the district attorney objects to bail being set, the prosecution must establish that the proof is evident or presumption great. *Id.; see also Shanks v. Dist. Court*, 153 Colo. 332, 337, 385 P.2d 990, 992 (1963) (holding that where a defendant charged with a capital offense requests that the court set bail, the court has a duty to hold a proof evident/presumption great hearing and rule on the evidence presented). Thus, the court must hold a defendant charged with a capital offense without bond until he requests bond in writing and the bond hearing takes place.

2. The Victim Rights Act applies to proof/presumption hearings

People v Blagg, 2015 CO 2, 340 P.3d 1137

The VRA provides that "[a]ny person who is a victim of a criminal act, or such person's designee, legal guardian, or surviving immediate family members if such person is deceased, shall have the right to be heard when relevant, informed, and present at all critical stages of the

criminal justice process." Colo. Const. art. II, § 16a (emphasis added). The VRA empowers the General Assembly to define "[a]ll terminology, including the term 'critical stages.' "3 Id.

The term "critical stages" includes the stage at which, "[i]n a case involving a capital offense, the court grants the defendant's motion for admission to bail pursuant to section 16–4–101(3), C.R.S." § 24–4.1–302(2)(c)(I)(E), C.R.S. (2014). The General Assembly also established that "[i]n order to preserve and protect a victim's rights to justice and due process, each victim of a crime shall have" a number of specified rights, including "[t]he right to be heard at any court proceeding ... [i]nvolving the defendant's bond as specified in section 24–4.1–302(2)(c)." § 24–4.1–302.5(d)(I), C.R.S. (2014) (emphasis added). Therefore, under the VRA, the alleged victim's family in a first-degree murder case has the right to be present and heard when the court contemplates setting bail.

3. Purpose of the provision is that risk of flight is great
People v Spinuzzi, 369 P.2d 427, 430 (Colo. 1962)

The purpose of confining the defendant before trial is not for punishment but to insure his presence at the trial. The historical reason for denying bail in a capital case is because temptation for the defendant to leave the jurisdiction of the court and thus avoid trial is particularly great in such case. Courts should therefore proceed with extreme caution in permitting bail in a capital case and in the determination of whether the proof is evident or the presumption great.

4. Burden is upon the People
Goodwin v District Court, 586 P.2d 2, 3 (Colo. 1978)

The People bear the burden of proving that the proof is evident and the presumption great. The fact that charges have been made that the offense allegedly committed by the defendant is a capital offense which meets the constitutional standard for denial of bail does not satisfy the prosecution's burden. Shanks v. District Court, 153 Colo. 332, 385 P.2d 990 (1963).

5. May not be based on hearsay alone
Gladney v District Court, 535 P.2d 190, 192 (Colo. 1975)

We rule that in bail hearings, hearsay evidence is admissible. See Bail Reform Act of 1966, 18 U.S.C. s 3146(f), and Uniform Rules of Criminal Procedure (1974), 341(f).

5 We hold that Denial of bail may not be predicated upon hearsay alone. There must be competent, direct evidence to support the denial. The hearsay evidence may be admitted in corroboration. We are moved to so hold because, except for the exception, a defendant has a constitutional right to bail in this state. A variance of that right should not be made lightly.

6. Proof/presumption is greater than probable cause but less than beyond a reasonable doubt
Orona v District Court, 518 P.2d 839, 840 (Colo. 1974)

Our constitution establishes that the right to bail is absolute except where a capital crime has been committed and 'the proof is evident or the presumption great' that the one charged committed the crime. Colo.Const. Art. II, s 19. The burden of proof, of course, rests with those

opposing bail. Our prior decisions indicate that the implementation of this guarantee must be determined by a hearing where the People's proof of guilt is presented. Palmer v. District Court, 156 Colo. 284, 398 P.2d 435 (1965); Shanks v. District Court, 153 Colo. 332, 385 P.2d 990 (1963). The mere fact that an information has been filed-or for that matter that the defendant has been bound over for trial-is not equivalent to a determination that the proof of guilt is evident or the presumption great. By definition, the standard which the constitution requires before bail may be denied is greater than probable cause-though less than that required for a conviction. See In Re Losasso, 15 Colo. 163, 24 P. 1080 (1890).

7. Credibility in issue.

Unlike at a preliminary hearing, credibility is an issue at a proof/presumption hearing

Gladney v District Court, 535 P.2d 190, 191 (Colo. 1975)

The weight to be accorded the testimony of the witnesses, as well as questions of credibility are solely for the finder of fact, in this case, the court. The judge was free to believe or disbelieve the testimony of the witnesses

8. The defendant may call witnesses and put on a defense

Gladney v District Court, 535 P.2d 190, 191 (Colo. 1975)

The questions of who shot first, and of the existence of an affirmative defense, I.e., self-defense, are questions of fact, which cannot be finally resolved at the bail hearing. The weight to be accorded the testimony of the witnesses, as well as questions of credibility are solely for the finder of fact, in this case, the court. The judge was free to believe or disbelieve the testimony of the witnesses

9. Early statement of the rule

In re Losasso, 24 P. 1080, 1082 (Colo. 1890)

This burden should be so discharged as to satisfy the following test, laid down in Ex parte McAnally, 53 Ala. 495: 'If the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offense has been committed, that the accused is the guilty agent, and that he would probably be punished capitally if the law is administered, bail is not a matter of right.' By the concluding clause the learned judge undoubtedly means that bail should be denied in the absence of some special ground such as those above mentioned, wherein all courts exercise a judicial discretion.

10. On appeal, trial judge must be upheld if there is evidence in the record to support the trial judge's finding

Goodwin v District Court, 586 P.2d 2, 4 (Colo. 1978)

If there is evidence in the record to support the findings of the trial judge, an appellate court must uphold those findings. "The weight to be accorded the testimony of the witnesses, as well as questions of credibility, are solely for the finder of fact in this case, the court." The trial court is entrusted with the responsibility of judging the credibility of the witnesses.

Dated: August 24, 2021

Respectfully submitted,
LINDA STANLEY
/s/ Jeffrey D. Lindsey
Jeffrey D. Lindsey, #24664
Senior Deputy District Attorney

CERTIFICATE OF SERVICE

I certify that on August 24, 2021, a true and correct copy of the foregoing Motion was served via Colorado Courts E-Filing on all parties who appear of record and have entered their appearance herein according to Colorado Courts E-Filing.

By: /s/ Jeffrey Lindsey

Combined Courts, Chaffee County P. O. Box 279 142 Crestone Avenue Salida, CO 81201	DATE FILED: August 24, 2021
THE PEOPLE OF THE STATE OF COLORADO **vs.** **BARRY LEE MORPHEW,** Defendant	☐ **COURT USE ONLY** ☐
Linda Stanley Eleventh Judicial District District Attorney, # 45298 District Attorney's Office 104 Crestone Avenue P. O. Box 699 Salida, CO 81201 Phone Number: (719)539-3563 Fax: (719)539-3565	Case No: D0082021CR000078 Div: 2 Courtroom:
NOTICE OF DEPOSIT	

COME NOW, the People of the State of Colorado, by and through Linda Stanley, District Attorney for the Eleventh Judicial District hereby tender to the Court People v. LaRosa, 293 P. 3d 567 (Colo. 2013); whereby the Colorado Supreme Court overturns the legal principle of "Corpus Delecti".

Dated: August 24, 2021

Respectfully submitted,
LINDA STANLEY
/s/ Jeffrey D. Lindsey
Jeffrey D. Lindsey, #24664
Senior Deputy District Attorney

CERTIFICATE OF SERVICE

I certify that on August 24, 2021, a true and correct copy of the foregoing Motion was served via Colorado Courts E-Filing on all parties who appear of record and have entered their appearance herein according to Colorado Courts E-Filing.

By: /s/ Jeffrey Lindsey

293 P.3d 567
Supreme Court of Colorado,
En Banc.

The PEOPLE of the State of Colorado, Petitioner
v.
Jason LaROSA, Respondent.

No. 11SC664.
|
Jan. 14, 2013.
|
Rehearing Denied Feb. 11, 2013.

Synopsis
Background: Defendant was convicted in the District Court, Douglas County, Vincent R. White, J., of sexual assault on child, sexual assault on child by one in position of trust, and aggravated incest. Defendant appealed. The Court of Appeals reversed, based on determination that State had not corroborated defendant's confession with evidence that established corpus delicti of offenses. Certiorari review was granted.

Holdings: The Supreme Court, Bender, C.J., held that:

[1] corpus delicti rule, which required State to present evidence to corroborate defendant's confession in order to establish that crime has been committed, was originally erroneous, as justification for abandoning precedent applying rule;

[2] corpus delicti rule was no longer sound due to changed conditions;

[3] application of corpus delicti rule would do more harm than good;

[4] under trustworthiness standard, conviction could be based on defendant's confession if prosecution presented sufficient independent evidence which tended to establish trustworthiness of confession; abrogating *People v. Rankin*, 191 Colo. 508, 510, 554 P.2d 1107, *People v. Smith*, 182 Colo. 31, 510 P.2d 893, *Neighbors v. People*, 168 Colo. 319, 322, 451 P.2d 264, *Meredith v. People*, 152 Colo. 69, 380 P.2d 227, *Downey v. People*, 121 Colo. 307, 319, 215 P.2d 892;

[5] defendant did not have fair warning that Supreme Court would abandon corpus delicti rule and would hold that trustworthiness standard would apply, and thus, application of trustworthiness standard in defendant's trial would violate due process.

Judgment of the Court of Appeals affirmed; remanded with directions to return to District Court to enter judgment of acquittal.

Coats, J., filed dissenting opinion in which Eid, J., joined.

West Headnotes (17)

[1] **Criminal Law** Criminal act or omission

To establish guilt in a criminal case, the prosecution must prove the "corpus delicti," or body of the crime, which means that the prosecution must prove that the crime occurred.

[2] **Criminal Law** Weight and Sufficiency to Convict

Criminal Law Corpus delicti

The standard to determine the trustworthiness of a defendant's confession, for the purposes of determining whether the conviction can be premised on the confession, is different in its focus than the corpus delicti rule requiring the State to present corroborating the defendant's confession which establishes that a crime has been committed; it focuses on whether corroborating evidence establishes the trustworthiness or reliability of the confession, whereas the corpus delicti rule focuses on whether corroborating evidence establishes that the crime occurred.

12 Cases that cite this headnote

[3] **Courts** ⬅ Previous Decisions as Controlling or as Precedents

"Stare decisis" is a judge-made doctrine that promotes uniformity, certainty, and stability of the law; it requires a court to follow the rule of law it has established in earlier cases unless sound reasons exist.

6 Cases that cite this headnote

[4] **Courts** ⬅ Previous Decisions as Controlling or as Precedents

Stare decisis is not an inflexible or immutable rule, but it requires the court to apply precedent unless it is convinced that it was originally erroneous or is no longer sound due to changed conditions, and more good than harm will come from departing from it.

5 Cases that cite this headnote

[5] **Courts** ⬅ Erroneous or injudicious decisions

Corpus delicti rule which required State to present evidence to corroborate defendant's confession in order to support conviction was originally erroneous, as justification for abandoning precedent applying rule, despite doctrine of stare decisis; purpose of rule was to prevent against false confessions, yet it applied only to confessions to imaginary crimes and not to confession for crime committed by other, and therefore, did not serve purpose.

1 Cases that cite this headnote

[6] **Courts** ⬅ Erroneous or injudicious decisions

Corpus delicti rule which required State to present evidence to corroborate defendant's confession in order to support conviction was no longer sound due to changed conditions, as justification for abandoning precedent applying rule, despite doctrine of stare decisis; although rule was designed to protect against false confessions, *Miranda* and similar constitutional doctrines existed to protect defendants from overzealous interrogation techniques of police officers, rule had become difficult, if not impossible, to apply to certain crimes, and value of corroboration requirement was sect in view insubstantial quantum of proof necessary to establish corpus delicti.

1 Cases that cite this headnote

[7] **Courts** ⬅ Erroneous or injudicious decisions

Application of corpus delicti rule, which required State to present evidence to corroborate defendant's confession in order to support conviction, would do more harm than good, as justification for abandoning precedent applying rule, despite doctrine of stare decisis; rule worked to bar convictions in cases involving vulnerable victims, such as infants, young children, and mentally infirm, and rule operated disproportionately in cases where no tangible injury results, such as cases involving inappropriate sexual contact with very young child, or where criminal agency was difficult or impossible to prove, such as cases involving infanticide or child abuse.

5 Cases that cite this headnote

[8] **Criminal Law** ⬅ Weight and Sufficiency to Convict

Under trustworthiness standard, conviction could be based on defendant's confession if prosecution presented sufficient independent evidence which tended to establish trustworthiness of confession; abrogating *People v. Rankin*, 191 Colo. 508, 554 P.2d 1107, *People v. Smith*, 182 Colo. 31, 510 P.2d 893, *Neighbors v. People*, 168 Colo. 319, 451 P.2d 264, *Meredith v. People*, 152 Colo. 69, 380 P.2d 227, and *Downey v. People*, 121 Colo. 307, 215 P.2d 892.

[9] **Criminal Law** ⬅ Suspicion or conjecture; reasonable doubt

Criminal Law ⬅ Hearing and determination

Under *People v. Bennett*, a court, when ruling on a motion for a judgment of acquittal, is

required to analyze the evidence in the light most favorable to the prosecution and determine whether it is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt.

1 Cases that cite this headnote

[10] **Criminal Law** ← Reasonable Doubt

The "sufficiency of the evidence" test is constitutionally mandated to ensure that the prosecution proves every element of an offense beyond a reasonable doubt.

1 Cases that cite this headnote

[11] **Criminal Law** ← Reasonable Doubt

The sufficiency of the evidence test is an elemental test: its focus is on the substantive elements of the criminal offense and it requires the reviewing court to consider whether a reasonable mind could conclude that each material element of the offense was proven beyond a reasonable doubt.

1 Cases that cite this headnote

[12] **Criminal Law** ← Corroboration

Some corroboration requirement is necessary to protect defendants from false confessions.

[13] **Criminal Law** ← Corroboration

Criminal Law ← Corpus delicti

Under the trustworthiness standard, the prosecution is not required to present evidence other than a defendant's confession to establish the corpus delicti; rather, the prosecution must present evidence that proves the trustworthiness or reliability of a confession, and in this context, the evidence is "sufficient" if the corroborating evidence supports the essential facts admitted sufficiently to justify a jury inference of their truth.

3 Cases that cite this headnote

[14] **Criminal Law** ← Corroboration

To determine whether corroborating evidence proves the trustworthiness or reliability of a confession, under the trustworthiness standard, the trial court must find that corroboration exists from one or more of the following evidentiary sources: facts that corroborate facts contained in the confession, facts that establish the crime which corroborate facts contained in the confession, or facts under which the confession was made that show that the confession is trustworthy or reliable.

4 Cases that cite this headnote

[15] **Criminal Law** ← Corroboration

The trustworthiness standard for requiring the prosecutor to present evidence sufficient to demonstrate the trustworthiness of a defendant's confession upon which a conviction could be based should be treated, at least for procedural purposes, like a rule affecting the sufficiency of the evidence to be analyzed by the court following a motion for a judgment of acquittal, and not as a rule affecting the admissibility of the evidence.

[16] **Constitutional Law** ← Determination and disposition

Criminal Law ← Effect of change in law or facts

Defendant did not have fair warning that Supreme Court, on his direct appeal from convictions for sexual assault on child, sexual assault on child by one in position of trust, and aggravated incest, would abandon corpus delicti rule, which required prosecutor to present corroborating evidence to establish corpus delicti of offenses independent of his confession, and that Supreme Court would hold that trustworthiness standard would apply to determine whether prosecutor presented sufficient evidence to establish trustworthiness of defendant's confessions, and thus, application of trustworthiness standard to determine whether confession was sufficiently trustworthy to serve

as basis for convictions would violate due process; although widely criticized, corpus delicti rule was still followed in many state jurisdictions, corpus delicti rule has been applied as substantive principle of Colorado law for over 100 years, and it has been regularly invoked to bar convictions. U.S.C.A. Const.Amend. 14.

11 Cases that cite this headnote

[17] Constitutional Law Retroactive laws and decisions; change in law

The due process principle of fair warning is violated when a judicial alteration of a common law doctrine of criminal law is unexpected and indefensible. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

Attorneys and Law Firms

*569 John W. Suthers, Attorney General, Paul Koehler, First Assistant Attorney General, Denver, Colorado, Attorneys for Petitioner.

Forrest W. Lewis, P.C., Forrest W. Lewis, Denver, Colorado, Attorneys for Respondent.

Chief Justice BENDER delivered the Opinion of the Court.

I. Introduction

¶ 1 Jason LaRosa, the defendant, confessed to his wife, his mother, his pastor, a police dispatcher, and an investigating police officer *570 that he had sexually assaulted his two-and-a-half-year-old daughter. He was charged with various crimes, and a jury convicted him of all charges. On appeal, a division of the court of appeals reversed LaRosa's convictions under the corpus delicti rule.[1] That rule requires the prosecution to prove that a crime occurred using evidence other than a defendant's confession. The court of appeals reasoned that the prosecution had presented only opportunity evidence (other than the confessions) establishing that LaRosa had an opportunity to commit a crime, not that the crimes in fact occurred. The People appealed to this court, and we granted certiorari to address the viability of the corpus delicti rule.

¶ 2 This case requires us to decide whether to abandon our judicially created corroboration requirement, the corpus delicti rule, and with it over one hundred years of precedent. If we abandon the corpus delicti rule, then we must decide another issue: what corroboration requirement, if any, to articulate in its place. The People argue that we should abandon the corpus delicti rule in favor of the trustworthiness standard, which requires corroborating evidence that proves that a confession is reliable, or, in the alternative, the sufficiency of the evidence test, which requires no corroborating evidence. Instead, the sufficiency of the evidence test would treat confessions like any piece of evidence to be analyzed in the light most favorable to the prosecution during a motion for a judgment of acquittal.

¶ 3 We abandon the corpus delicti rule because we hold that sound reasons exist for doing so. In its place, we articulate the trustworthiness standard, which requires the prosecution to present evidence that proves that a confession is trustworthy or reliable. To determine whether corroborating evidence proves the trustworthiness or reliability of a confession, we hold that the trial court must find that corroboration exists from one or more of the following evidentiary sources: facts that corroborate facts contained in the confession; facts that establish the crime which corroborate facts contained in the confession; or facts under which the confession was made that show that the confession is trustworthy or reliable.

¶ 4 Applying the trustworthiness standard to this case raises another issue. We must decide whether applying the trustworthiness standard here would violate LaRosa's due process right to have fair warning of any judicial decision altering a common law doctrine of criminal law. We hold that, because we have consistently applied the corpus delicti rule as a substantive principle of law for over one hundred years, LaRosa did not have fair warning of our decision to abandon it. Thus, we are constitutionally prohibited from applying the trustworthiness standard in this case.

¶ 5 Hence, we affirm the court of appeals' decision reversing LaRosa's convictions. We remand the case to that court with directions to return it to the trial court to enter a judgment of acquittal.

II. Facts and Proceedings Below

¶ 6 While in Florida, LaRosa called an emergency dispatch operator in Douglas County and told her that he had had inappropriate sexual contact with his two-and-a-half-year-old daughter. LaRosa explained that he had already called his wife, mother, and pastor and told them the same thing. The dispatcher told LaRosa that an investigating officer would call him back. When called back, LaRosa told the investigating officer that he had taken his daughter swimming at a community recreation center and had performed oral sex on her in a private family shower while he masturbated. LaRosa told the investigating officer that he would return to Colorado and turn himself in to authorities, which he did. Upon arrival, LaRosa was arrested and charged with sexual assault on a child, sexual assault on a child by one in a position of trust, and aggravated incest. [2]

*571 ¶ 7 Before trial, LaRosa filed a motion to dismiss the charges under the corpus delicti rule. He argued that his confessions to the dispatcher and the investigating officer were insufficient evidence to sustain a conviction because there was no physical evidence that a crime had occurred. There were no eyewitnesses, and his daughter could not remember the incident. The prosecution contended that it would present evidence at trial corroborating LaRosa's confessions, including medical evidence and the daughter's statements to a social worker. Ultimately, the prosecution presented neither. The trial court denied LaRosa's motion, and the case went to trial.

¶ 8 The prosecution's case depended on LaRosa's confessions to the dispatcher and the investigating officer, both of which were admitted into evidence. The dispatcher testified that she had training and experience dealing with callers who suffer from mental illness, and LaRosa had seemed "very lucid" during their conversation. The investigating officer testified that he also had experience dealing with mentally ill callers, and during his confession LaRosa had provided a coherent story, explained his motivation for confessing, described his expectations of what would happen to him, and at no point suggested "he was out of touch with reality." The prosecution's other evidence consisted of the recreation center's visitor logs, which showed that LaRosa had visited the center several times, and photographs of the family shower rooms.

¶ 9 Following the prosecution's case-in-chief, LaRosa moved for a judgment of acquittal, again based on the corpus delicti rule. LaRosa argued that the prosecution's evidence was opportunity evidence showing only that he had the opportunity to commit a crime, not that the crimes occurred. The trial court denied LaRosa's motion.

¶ 10 The trial continued, and LaRosa testified that, when he confessed, he was suffering from marital and financial problems, was "extremely tired," and had confessed to fictitious events. The jury convicted him of all charges.

¶ 11 On appeal, a division of the court of appeals reversed LaRosa's convictions based on the corpus delicti rule. That court reasoned that the prosecution had not presented evidence other than his confessions to establish that the crimes occurred. Rather, the prosecution's evidence established that LaRosa had an opportunity to sexually assault his child, "which every custodial parent has on a virtually continuing basis." The court of appeals therefore reversed LaRosa's convictions and directed the trial court to enter a judgment of acquittal. The People appealed to this court, and we granted certiorari to examine the viability of the corpus delicti rule in Colorado. [3]

III. Applicable Law

¶ 12 Before addressing the parties' contentions, we provide an overview of the applicable law. Specifically, we discuss the judicially created corroboration requirement and its two formulations at issue here, the corpus delicti rule and the trustworthiness standard.

¶ 13 Almost all courts adhere to a corroboration requirement, which requires the prosecution to present corroborating evidence of a defendant's confession to either allow for its admission into evidence or sustain a conviction. Kenneth S. Broun, *McCormick on Evidence* § 145, at 592–93 (6th ed. 2006). We adhere to the conventional formulation of the corroboration requirement, the corpus delicti rule. *See* *Downey v. People*, 121 Colo. 307, 319, 215 P.2d 892, 898 (1950). Federal courts and a growing number of state jurisdictions adhere to a newer formulation of the corroboration requirement, the trustworthiness standard. *See* *State v. Mauchley*, 2003 UT 10, ¶ 19, 67 P.3d 477, 482–83.

The Corpus Delicti Rule

[1] ¶ 14 To establish guilt in a criminal case, the prosecution must prove the corpus delicti, or "body of the crime." This

means *572 that the prosecution must prove that the crime occurred. [4]

¶ 15 From this corpus delicti concept, we have derived the corpus delicti rule. That rule requires the prosecution to present evidence other than a defendant's confession that proves that the crime occurred. *Downey*, 121 Colo. at 320, 215 P.2d at 899. Without corroborating evidence, a defendant's confession is insufficient evidence to sustain a conviction. *Roberts v. People*, 11 Colo. 213, 216, 17 P. 637, 639 (1888). The corroborating evidence "need only be slight," but it must be sufficient "to convince the jury that the crime is real and not imaginary." *Neighbors v. People*, 168 Colo. 319, 322, 451 P.2d 264, 265 (1969).

¶ 16 The People state, and our independent research confirms, that the earliest reported case applying the corpus delicti rule in Colorado is from 1872. *See* *Dougherty v. People*, 1 Colo. 514, 524 (1872). Since then, we have consistently applied this rule. *See* *People v. Rankin*, 191 Colo. 508, 510, 554 P.2d 1107, 1108 (1976); *People v. Smith*, 182 Colo. 31, 33, 510 P.2d 893, 894 (1973); *Meredith v. People*, 152 Colo. 69, 71, 380 P.2d 227, 227–28 (1963).

¶ 17 There seems to be little consensus concerning the rationale behind the rule, but courts typically rely on some amalgam of the following: protecting defendants from conviction based on confessions to imaginary crimes; avoiding reliance on coerced confessions extracted under police pressure; and promoting better police investigations by ensuring that they "extend beyond the words of the accused." *Smith v. United States*, 348 U.S. 147, 153, 75 S.Ct. 194, 99 L.Ed. 192 (1954); *People v. McMahan*, 451 Mich. 543, 548 N.W.2d 199, 204 (1996) (Boyle, J., dissenting); *see also McCormick on Evidence* § 145, at 595–96. The rule's objective is "relatively modest": to reduce the possibility that a person is convicted based on a confession to a crime that never happened. *McCormick on Evidence* § 145, at 595; *see also* *People v. Jones*, 17 Cal.4th 279, 70 Cal.Rptr.2d 793, 949 P.2d 890, 902–03 (1998).

¶ 18 Due in part to its "extremely limited function," *Smith*, 348 U.S. at 153, 75 S.Ct. 194, the rule has been subject to widespread criticism. [5] This criticism has led federal courts and a growing number of state jurisdictions to abandon the corpus delicti rule in favor of the trustworthiness standard.

The Trustworthiness Standard

¶ 19 The trustworthiness standard derives from three United States Supreme Court cases announced the same day in 1954. *Opper v. United States*, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954); *Smith v. United States*, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 (1954); *United States v. Calderon*, 348 U.S. 160, 75 S.Ct. 186, 99 L.Ed. 202 (1954).

¶ 20 In *Opper*, the Court rejected the corpus delicti rule and adopted, without extensive explanation, the "better rule" that "corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti." *Opper*, 348 U.S. at 93, 75 S.Ct. 158. Instead, the prosecution must "introduce substantial independent evidence which would tend to establish the trustworthiness *573 of the statement." *Id.* *Smith* elaborated on the quantum of evidence necessary to establish the trustworthiness of a confession, noting that "[a]ll elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused." *Smith*, 348 U.S. at 156, 75 S.Ct. 194.

[2] ¶ 21 What these cryptic pronouncements mean is unclear. Not surprisingly, federal courts have struggled to interpret *Opper* and *Smith*'s trustworthiness standard consistently. What is clear is that the trustworthiness standard is different in its focus than the corpus delicti rule. It focuses on whether corroborating evidence establishes the trustworthiness or reliability of the confession, whereas the corpus delicti rule focuses on whether corroborating evidence establishes that the crime occurred. *See* *United States v. Johnson*, 589 F.2d 716, 718–19 (D.C.Cir.1978).

IV. Analysis

¶ 22 Having outlined the applicable law, we now turn to the parties' contentions. LaRosa contends, and the court of

appeals agreed, that this case involves opportunity evidence that does not corroborate his confessions under the corpus delicti rule, which has been a substantive principle of this court's precedent for more than a century. On that basis, he urges us to affirm the court of appeals. The People argue that we should abandon the corpus delicti rule because it does not serve the purposes justifying its original existence. LaRosa counters that we should retain the corpus delicti rule because it still operates to protect defendants from the consequences of false confessions and because stare decisis compels us to. If we abandon the corpus delicti rule, the People argue that we should do so in favor of the trustworthiness standard, or, in the alternative, the sufficiency of the evidence test. Under either alternative, the People urge us to reverse the court of appeals and reinstate LaRosa's convictions.

¶ 23 To analyze the parties' contentions, we first examine the corpus delicti rule and its criticisms, consider whether we can abandon the corpus delicti rule in light of stare decisis principles, and conclude that we can. We next discuss the People's alternative arguments in favor of the trustworthiness standard and the sufficiency of the evidence test and conclude that the trustworthiness standard is the better rule because it provides defendants with some minimal protection from convictions based on false confessions. We then turn to articulating the trustworthiness standard, conclude it is confusing, and articulate our own version.

A.

¶ 24 The People contend that we should abandon the corpus delicti rule and with it over one hundred years of precedent, despite the doctrine of stare decisis. In support, the People refer us to the rising tide of criticism directed at the rule.

¶ 25 The rule has been criticized for inadequately serving its admittedly "limited function." *See* *Smith*, 348 U.S. at 153, 75 S.Ct. 194. It exists to detect false confessions but does so in only one circumstance: when a person confesses to an imaginary crime. It does nothing to protect a person who confesses to a crime committed by someone else. *See* *Mauchley*, ¶ 22, 67 P.3d at 483. Courts have questioned the logic of that distinction. *See* *id.*; *State v. Lucas*, 30 N.J. 37, 152 A.2d 50, 60 (1959) (stating that "[t]here seems to be little difference in kind between convicting the innocent where no crime has been committed and convicting the innocent where a crime has been committed, but not by the accused").

¶ 26 The rule has also been criticized as outdated. Since its inception, the United States Supreme Court has recognized additional constitutional and procedural safeguards concerning the voluntariness of confessions that have led some courts to question whether the rule is obsolete. *See* *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487, 494 (1985) (noting that the rule's concern with coercive police tactics in obtaining confessions has been undercut by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). Additionally, *574 since courts first began applying the corpus delicti rule, criminal statutes have become more numerous and complex, making the corpus delicti difficult, if not impossible, to define for certain crimes. *See* *Mauchley*, ¶ 31, 67 P.3d at 485 n. 4.

¶ 27 Finally, the rule has been criticized for its potential to obstruct justice in cases where, as here, the victim is too young to testify and no tangible injury results from the alleged criminal act. *See* *State v. Ray*, 130 Wash.2d 673, 926 P.2d 904, 905, 907 (1996) (applying the corpus delicti rule to reverse the conviction of a defendant who confessed to forcing his three-year-old daughter to fondle his penis). In such situations, the rule may operate to reward defendants who target young or mentally infirm victims who are unable to testify and commit crimes that do not result in tangible injuries or do so carefully and leave no evidence. *See* *McMahan*, 548 N.W.2d at 207 (Boyle, J., dissenting) (criticizing the rule for creating this "socially aberrant result"). That the rule may operate to bar conviction for crimes committed against the most vulnerable victims, such as infants, young children, and the mentally infirm, and for crimes that are especially egregious, such as sexual assault and infanticide, has been described as "especially troublesome." *See* *Mauchley*, ¶ 29, 67 P.3d at 485; *see also* Maria Lisa Crisera, Comment, *Reevaluation of the California Corpus Delicti Rule: A Response to the Invitation of Proposition 8*, 78 Calif. L. Rev. 1571, 1583 (1990) (discussing the rule's potential to obstruct justice in cases involving child abuse and infanticide because it can be difficult, if not impossible, to establish that such injuries resulted from criminal acts).

[3] [4] ¶ 28 With these criticisms in mind, we must analyze whether to abandon the corpus delicti rule in light of stare

decisis. Stare decisis is a judge-made doctrine that promotes uniformity, certainty, and stability of the law. *Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 644 (Colo.2005). It requires a court to follow the rule of law it has established in earlier cases unless "sound reasons exist." *People v. Blehm*, 983 P.2d 779, 789 (Colo.1999). Stare decisis is not an inflexible or immutable rule, but it requires us to apply precedent (here, the corpus delicti rule) unless we are convinced that it was originally erroneous or is no longer sound due to changed conditions, and more good than harm will come from departing from it. *See* *Friedland*, 105 P.3d at 644; *Blehm*, 983 P.2d at 788.

[5] ¶ 29 Determining whether the rule was originally erroneous requires us to examine if the rule accomplishes its purpose of protecting defendants from false confessions. As noted, the corpus delicti rule seeks to accomplish this purpose by requiring the prosecution to prove the corpus delicti with evidence other than a defendant's confession. By focusing on the corpus delicti, however, the rule draws an untenable distinction between defendants who confess to imaginary crimes and those who confess to crimes committed by others. Because the rule operates to protect defendants in only one specific circumstance, when a defendant confesses to an imaginary crime, it fails to comport with its purpose of detecting false confessions. This incongruity has existed since the rule's inception by virtue of its inherently flawed design. Thus, we conclude that the corpus delicti rule was originally erroneous. *See* *Mauchley*, ¶¶ 27, 46, 67 P.3d at 484, 488.

[6] ¶ 30 In the alternative, we may also consider whether the rule is no longer sound due to changed conditions. As noted, *Miranda* and similar constitutional doctrines now exist to protect defendants from the overzealous interrogation techniques of police officers. Thus, insofar as one of its original purposes was to protect defendants from coercive police tactics, the rule is no longer necessary. Further, the rule has become difficult, if not impossible, to apply to certain crimes, in part because statutory crimes have proliferated and become more complex. *See* *People v. Trujillo*, 860 P.2d 542, 545 (Colo.App.1992) (noting that no tangible injury can be isolated as the corpus delicti for inchoate crimes such as conspiracy, attempt, or solicitation). Finally, our cases have stressed the insubstantial quantum of proof necessary to establish the corpus delicti, rendering its value as a corroboration requirement suspect. *See Hampton*, 146 Colo. at 574, 362 P.2d at 866 (stating that the corroborating evidence *575 "need be only slight"). Given these legal developments, we conclude that the rule is no longer sound.

[7] ¶ 31 Last, we must determine whether abandoning the rule will do more good than harm. We are troubled that the rule works to bar convictions in cases involving the most vulnerable victims, such as infants, young children, and the mentally infirm. We are also aware that the rule operates disproportionately in cases where no tangible injury results, such as in cases involving inappropriate sexual contact, or where criminal agency is difficult or impossible to prove, such as in cases involving infanticide or child abuse. Indeed, in Colorado, LaRosa's case is not the first of its type in which the rule has been invoked to bar conviction for sexual assault against a young child. *See* *Meredith*, 152 Colo. at 72, 380 P.2d at 228 (applying corpus delicti rule to reverse the conviction of a defendant who confessed to molesting a five-year-old boy); *Robson*, 80 P.3d at 913–14 (applying corpus delicti rule to affirm the trial court's dismissal of charges against a defendant who confessed to sexually assaulting his infant daughter). Because the rule may operate to obstruct justice, we conclude that abandoning it will do more good than harm. We are convinced that the corpus delicti rule is too rigid in its approach, too narrow in its application, and too capable of working injustice in cases where, as here, evidence of the corpus delicti is not only non-existent but impossible to uncover. *See* *Parker*, 337 S.E.2d at 494; *Mauchley*, ¶ 46, 67 P.3d at 488. Thus, we abandon the corpus delicti rule because we hold that sound reasons exist for doing so.

B.

[8] ¶ 32 Having agreed with the People that we should abandon the corpus delicti rule, we next address what corroboration requirement, if any, we should articulate in its place. On this issue, the People present alternative arguments. The People argue in favor of the trustworthiness standard because it better accomplishes the purpose that the corpus delicti rule is meant to serve. In the alternative, the People argue that any corroboration requirement, including the trustworthiness standard, conflicts with the sufficiency of the evidence test announced in *People v. Bennett*, 183 Colo. 125, 515 P.2d 466 (1973), because it treats confessions as inherently unreliable and prohibits the trial court from considering confessions in the light most favorable to the prosecution. As such, the People argue that we

should abandon any corroboration requirement and analyze confessions under the sufficiency of the evidence test articulated in *Bennett*.

[9] ¶ 33 There is support for the People's contention that *Bennett* conflicts with the corroboration requirement. *Bennett* requires a court, when ruling on a motion for a judgment of acquittal, to analyze the evidence in the light most favorable to the prosecution and determine whether it is "substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt." *Bennett*, 183 Colo. at 130, 515 P.2d at 469. A corroboration requirement, by contrast, would require a reviewing court to invalidate a conviction that satisfies *Bennett* if it rested solely on an uncorroborated confession. *See* *United States v. Brown*, 617 F.3d 857, 862 (6th Cir.2010). The People's contention highlights the substantive and procedural overlap between the sufficiency of the evidence test and the corroboration requirement, but they are not in irreconcilable conflict.

[10] ¶ 34 For one, they serve different purposes. The sufficiency of the evidence test is constitutionally mandated to ensure that the prosecution proves every element of an offense beyond a reasonable doubt. *People v. Gonzales*, 666 P.2d 123, 127 (Colo.1983). By contrast, the corroboration requirement is not constitutionally mandated but requires the prosecution to present corroborating evidence of a defendant's confession to assuage our long-standing concern about false confessions.

[11] ¶ 35 Further, both doctrines are satisfied by different evidentiary requirements. The sufficiency of the evidence test is an elemental test. Its focus is on the "substantive elements of the criminal offense." *576 *Jackson v. Virginia*, 443 U.S. 307, 324 n. 16, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). It requires the court to consider whether a reasonable mind could conclude that "each material element of the offense was proven beyond a reasonable doubt." *Bennett*, 183 Colo. at 132, 515 P.2d at 470; *see also* *Gonzales*, 666 P.2d at 128 (applying the *Bennett* test to the specific statutory elements of possession of contraband). By contrast, the corroboration requirement is not an elemental test because it does not require the court to review the evidence as it relates to the specific elements of the crime. Instead, it focuses on whether the prosecution presented evidence to corroborate a confession.

¶ 36 These differences are best illustrated by considering the facts of this case. LaRosa's confessions, when viewed in the light most favorable to the prosecution, would invariably support a conclusion by a reasonable person of guilt beyond a reasonable doubt. This is so because, by definition, a "confession" is an admission of guilt. Any confession would therefore meet *Bennett*'s sufficiency of the evidence test, irrespective of its reliability. As such, a corroboration requirement may require the prosecution to present additional and different evidence than that required under *Bennett* if it seeks to rely on a defendant's confession to secure a conviction. Although similar, the sufficiency of the evidence test and the corroboration requirement are not in irreconcilable conflict. Thus, *Bennett* does not prohibit us from articulating a different corroboration requirement if necessary to protect defendants from false confessions.

[12] ¶ 37 Without engaging in an empirical battle over the frequency with which false confessions occur, we recognize that some defendants on occasion do confess to non-existent crimes or crimes committed by others.[6] Despite its "extremely limited function," *Smith*, 348 U.S. at 153, 75 S.Ct. 194, the corroboration requirement thus serves a valid purpose: to prevent "errors in convictions based upon untrue confessions alone," *Warszower v. United States*, 312 U.S. 342, 347, 61 S.Ct. 603, 85 L.Ed. 876 (1941). This problem, though possibly overstated in the caselaw, is compounded by the fact that confessions "stand high in the probative hierarchy of proof." *See* *Lucas*, 152 A.2d at 61; *see also* Stephen A. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 Stan. L. Rev. 271, 293 (1975). Given the persuasive power a confession may hold over a jury, courts have imposed safeguards, including various corroboration requirements, to restrict the jury's power to convict on the basis of a confession alone.[7] To this end, we *577 are persuaded that some corroboration requirement is necessary to protect defendants from false confessions.

¶ 38 As our analysis has shown, the corpus delicti rule inadequately addresses that problem by focusing on the corpus delicti rather than on the confession itself. The trustworthiness standard is more effective than the corpus delicti rule because its focus comports with its purpose: it seeks to detect false confessions by focusing on whether a confession is true or false. The trustworthiness standard also responds to the criticisms of the corpus delicti rule. It is easier to apply to complex or inchoate crimes because the corpus delicti does not have to be defined, and it is

less likely to work injustice in cases where no evidence of the corpus delicti exists. *See* *Opper*, 348 U.S. at 93, 75 S.Ct. 158; *McCormick on Evidence* § 148, at 605. Finally, the trustworthiness standard is not duplicative of *Miranda* and similar constitutional safeguards because it protects defendants from false confessions, not involuntary ones.[8] Thus, because the trustworthiness standard better accomplishes the objectives the corpus delicti rule seeks to accomplish, we abandon the corpus delicti rule in favor of the trustworthiness standard.

C.

¶ 39 We now turn to articulating that standard. Although easy to repeat in principle, "[t]he doctrinal nature and procedural concomitants of the trustworthiness requirement announced in *Opper* are not entirely clear." *Singleterry*, 29 F.3d at 737. Courts have not interpreted *Opper* and *Smith* consistently, resulting in different approaches to the trustworthiness standard that can be confusing, complicated, or at odds with the flexibility that is one of its hallmarks.[9] Our task, then, is to articulate a standard that is both comprehensible and capable of consistent application.

[13] ¶ 40 Under the trustworthiness standard, the prosecution is not required to present evidence other than a defendant's confession to establish the corpus delicti. Rather, the prosecution must present evidence that proves the trustworthiness or reliability of a confession. *See* *Opper*, 348 U.S. at 93, 75 S.Ct. 158. The evidence is sufficient if the corroborating evidence "supports the essential facts admitted sufficiently to justify a jury inference of their truth." *Id.* "[T]he corroborating facts may be of *any sort whatever*, *578 provided only that they tend to produce a confidence in the truth of the confession." *Wigmore on Evidence* § 2071, at 511 (emphasis in original).

[14] ¶ 41 To determine whether corroborating evidence proves the trustworthiness or reliability of a confession, we hold that the trial court must find that corroboration exists from one or more of the following evidentiary sources: facts that corroborate facts contained in the confession; facts that establish the crime which corroborate facts contained in the confession; or facts under which the confession was made that show that the confession is trustworthy or reliable.

[15] ¶ 42 A related but different issue arises as to when the trial court should make this determination. There is confusion in the caselaw as to whether the trustworthiness standard is a rule affecting the admissibility of evidence or the sufficiency of the evidence.[10] We think the better approach is to treat the trustworthiness standard, at least for procedural purposes, like a rule affecting the sufficiency of the evidence to be analyzed by the court following a motion for a judgment of acquittal. This approach is consistent with the United States Supreme Court's treatment of the trustworthiness standard[11] and our treatment of our previous corroboration requirement, the corpus delicti rule. *See Robson*, 80 P.3d at 913–14 (noting that we have consistently "treated the [corpus delicti rule] as a substantive rule of law relating to the quantum of proof necessary to sustain a conviction" and not a rule affecting admissibility). As a practical matter, this procedure also makes sense because the trial court will be better equipped to evaluate the evidence and make its determination after the prosecution has presented its case.

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This should be helpful to us and the defense's supposed motion hearing. Basically, judge evaluates sufficiency of evidence, including challenge to trustworthiness of confession, at conclusion of prosecution's case. That way the judge can determine whether corroboration exists.

V. Application

[16] ¶ 43 Having outlined the trustworthiness standard, we would ordinarily apply it to this case. LaRosa contends, however, that applying the trustworthiness standard here would violate the constitutional prohibition against ex post facto laws. The People counter that the Ex Post Facto Clause applies to legislative acts, not judicial decision making. As such, the People argue that LaRosa's contention should be analyzed under the Due Process Clause and rejected because he had "fair warning" of our decision to abandon the corpus delicti rule.

[17] ¶ 44 The parties' contentions reflect confusion about whether the United States Supreme Court's Ex Post Facto Clause jurisprudence applies to judicial decision making. In *Rogers v. Tennessee*, 532 U.S. 451, 121 S.Ct. 1693, 149

L.Ed.2d 697 (2001), the Supreme Court held that it does not. The Court held that judicial ex post facto claims must be analyzed under the Due Process Clause and "in accordance with the more basic and general principle of fair warning." *Id.* at 452, 121 S.Ct. 1693. The principle of fair warning is violated when a "judicial alteration of a common law doctrine of criminal law" was "unexpected and indefensible." *Id.* at 462, 121 S.Ct. 1693 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964)). Before *Rogers* was decided, we similarly held that the "key test in determining whether the due process clause precludes the retrospective application of a judicial decision in a criminal case is whether the decision was sufficiently foreseeable so that the defendant had fair warning." *Aue v. Diesslin*, 798 P.2d 436, 441 (Colo.1990). Accordingly, we analyze LaRosa's *579 contention under the Due Process Clause and its guarantee of fair warning.

¶ 45 Because *Rogers* involved similar facts, it provides guidance for our analysis. In *Rogers*, the Court considered whether retroactive application of the Tennessee Supreme Court's decision abolishing the common law "year and a day rule" violated the Due Process Clause. *Rogers*, 532 U.S. at 453, 121 S.Ct. 1693. The Court concluded that it did not because the rule was "widely viewed as an outdated relic of the common law" dating back to the thirteenth century. *Id.* at 462, 121 S.Ct. 1693. Perhaps most importantly, the Court described the paucity of Tennessee caselaw applying the rule, noting that it had never served as a ground of decision in any homicide prosecution in the state and had only been mentioned in three cases, each time in dicta. *Id.* at 464, 121 S.Ct. 1693. Although the rule was a "substantive principle" of Tennessee law, the Court characterized it as "a principle in name only" because it had never been enforced. *Id.* at 466, 121 S.Ct. 1693. The Court therefore concluded that the Tennessee Supreme Court's decision was a routine exercise in common law decision making so that applying its decision retroactively did not violate due process. *Id.* at 467, 121 S.Ct. 1693.

¶ 46 The corpus delicti rule, although widely criticized, is still followed in many state jurisdictions. Indeed, several state courts have reaffirmed it, presumably rejecting similar arguments to those we have found persuasive here. *See McMahan*, 548 N.W.2d at 201; *Ray*, 926 P.2d at 906. Further, unlike the "year and a day rule" in *Rogers*, we have applied the corpus delicti rule as a substantive principle of Colorado law for over one hundred years. *See Smith*, 182 Colo. at 34, 510 P.2d at 895. The rule has been regularly invoked to bar convictions, occasionally in cases similar to this one. *See Robson*, 80 P.3d at 914. Thus, we conclude that LaRosa did not have "fair warning" of our decision to abandon the corpus delicti rule in favor of the trustworthiness standard. Because LaRosa did not have fair warning of our decision, we hold that applying the trustworthiness standard here would violate his due process rights.

¶ 47 Hence, because we are constitutionally prohibited from applying the trustworthiness standard here, and because the People concede that the evidence is insufficient to sustain LaRosa's convictions under the corpus delicti rule, we affirm the court of appeals' decision reversing LaRosa's convictions.

VI. Conclusion

¶ 48 For the reasons stated, we affirm the court of appeals and remand the case to that court with directions to return it to the trial court to enter a judgment of acquittal.

Justice COATS dissents, and Justice EID joins in the dissent.

Justice COATS, dissenting.

¶ 49 While I agree that a failure to independently prove the commission of the defendant's crimes affects neither the admissibility nor the sufficiency of his confession, I consider that proposition to have been effectively settled decades ago. And unlike the majority, I would not now, under the guise of relaxing an even more burdensome restriction, create a wholly new exception to our well-established substantial evidence standard for court-ordered judgments of acquittal. Because I believe the jury in this case was presented, under existing law, sufficient evidence to find all of the elements of the defendant's offenses beyond a reasonable doubt, I would reverse the judgment of the court of appeals and order reinstatement of all of the defendant's sexual-assault-on-a-child related convictions. I therefore respectfully dissent.

¶ 50 Apart from our disagreement over the propriety of a new court-made confession rule (dictated neither by constitution, statute, nor existing rules of evidence or

procedure) for any purpose, much less "to assuage our long-standing concern about false confessions," maj. op. at 575, I question the majority's treatment of the scope and history of the common-law rule in the first place. Prior to the enactment of our Criminal and Criminal Procedure Codes, which expressly abolish common-law crimes and defenses, *see* *Oram v. People*, 255 P.3d 1032, 1036 (Colo.2011); the Colorado Rules of Evidence (effective Jan. 1, 1980), which expressly define hearsay to exclude the out-of-court statements of criminal defendants; and a host of constitutional developments concerning the use of ***580** confessions and the sufficiency of evidence, we, much like the federal courts, had acknowledged the existence of a common-law rule requiring proof of a crime by evidence separate and apart from a confession; however, neither we nor the United States Supreme Court had attempted a comprehensive exegesis of the scope and applicability of this common-law rule, or the extent to which corroboration was required by it, before the middle of the last century. Rather than rejecting and replacing this common-law corroboration requirement, maj. op. at 572–73, the Supreme Court, in a group of tax cases reported in seriatim in 1954, resolved various disputes among the lower federal courts by finding for the first time that the rule applied even to crimes having no tangible corpus delicti and even to subsequent statements of defendants not even purporting to be inculpatory, much less qualifying as confessions. *Smith v. United States*, 348 U.S. 147, 156, 75 S.Ct. 194, 99 L.Ed. 192 (1954); *see also* *Opper v. United States*, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954). Integral to this expansive ruling on applicability, however, the Court simultaneously found, with regard to "the quantum of corroboration necessary to substantiate the existence of the crime charged," that "one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused." *Smith*, 348 U.S. at 156, 75 S.Ct. 194.

¶ 51 What the majority describes as the "trustworthiness standard" was therefore not a new restriction on the effect of confessions at all, but rather the Court's definitive interpretation of the common-law rule, for the federal courts. As a number of federal courts have since recognized, subsequent developments in the constitutional jurisprudence of the Supreme Court, particularly those related to confessions and the sufficiency of evidence to satisfy due process requirements, raise at the very least serious questions whether the Court's pronouncements of the mid–1950's retain any vitality today. *See, e.g.*, *United States v. Brown*, 617 F.3d 857 (6th Cir.2010). While lower courts are bound not only by the results of the Supreme Court's opinions but also by those portions of its opinions necessary to those results, *see* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), it nevertheless remains the prerogative of the Supreme Court alone to overrule one of its precedents, which must therefore continue to be followed, even if they have been significantly undermined by subsequent changes in judicial doctrine, *see* *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *see also* *United States v. Hatter*, 532 U.S. 557, 567, 121 S.Ct. 1782, 149 L.Ed.2d 820 (2001). In the absence of some more express statement by the Supreme Court overruling these ancient pronouncements, the federal courts appear to consider themselves obligated to continue to follow them. *See, e.g.*, *Brown*, 617 F.3d at 862.

¶ 52 Unlike inferior federal tribunals, however, whether or not these precedents have merely been undermined rather than overruled by necessary implication, this court has no similar obligation to follow them. Because there is no suggestion that these precedents are based on constitutional provisions applicable to the states, we find ourselves positioned relative to the lower courts of this state precisely the same as the United States Supreme Court relative to the federal courts. That being the case, I would now make clear (as I believe the Supreme Court will do when faced squarely with the question in the federal context) that even if it were considered appropriate to judicially impose new, non-constitutional limitations on the role of juries in criminal cases, the majority's policy concerns about confessions have long-since been "assuage[d]" by other, more directed constitutional developments and statutory limitations; that the new "trustworthiness standard" it creates is a prime example of the "open-ended balancing tests" exhaustively disparaged and ultimately rejected as constitutionally inadequate by the Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); and that any special exception for confessions flies in the face of both the express language of our substantial evidence standard and this jurisdiction's evolving views of the greater independence of juries in both civil and criminal cases. *See* *Frasco v. People*, 165 P.3d 701, 704 (Colo.2007).

¶ 53 With regard to the substantial evidence standard in particular, nearly four decades *581 ago this court rejected any artificial distinction between the effect of direct and circumstantial evidence in establishing a prima facie case and articulated our current substantial evidence test, reserving for jury resolution any charge in which "the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt." *People v. Bennett*, 183 Colo. 125, 131, 515 P.2d 466, 469 (1973); *see also* *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (recounting the history of the similar federal standard); *Clark v. People*, 232 P.3d 1287 (Colo.2010) (rejecting any requirement that in order to make a prima facie case the prosecution must exclude alternative explanations for the presence of defendant's semen). The clear thrust of our decision in *Bennett* was to reject the designation of any particular class of admissible evidence as insubstantial or insufficient on its face, requiring instead that the court determine sufficiency in each case based on the evidence as a whole. We certainly did not reserve a special rule for confessions. Whether the "corpus delicti rule" was implicitly overruled or merely substantially undermined by the court's rationale and the specific language with which it expressed itself in *Bennett*, in light of that holding and its nearly forty years of subsequent constructions, ever reserving credibility determinations to the jury, it cannot seriously be argued that a failure to apply the corpus delicti rule in this case amounts to a judicial alteration of a common law doctrine that was unexpected and indefensible. *See* *Rogers v. Tennessee*, 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001).

¶ 54 Because I believe the corpus delicti rule has been effectively overruled in this jurisdiction at least since our adoption of the substantial evidence standard in Bennett, and the evidence before the jury in this case clearly meets that standard, I would reverse the court of appeals judgment and order reinstatement of the defendant's convictions. Whether or not the majority creates a new "trustworthiness" exception to the substantial evidence standard solely for confessions by criminal defendants in the future, which I consider to be not only inappropriate but a flagrant departure from the very choice that led to adoption of that standard in the first place, I believe the defendant's case to be governed solely by the substantial evidence standard.

¶ 55 I therefore respectfully dissent.

I am authorized to state that JUSTICE EID joins in this dissent.

All Citations

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Footnotes

* Justice Coats and Justice Eid would grant the petition.

1 *People v. LaRosa*, No. 10CA926, 2011 WL 3505530 (Colo.App. Aug. 11, 2011) (not selected for official publication).

2 § 18–3–405(1), C.R.S. (2012) (sexual assault on a child); § 18–3–405.3(1), (2)(a) C.R.S. (2012) (sexual assault on a child by one in a position of trust); § 18–6–302(1)(a), C.R.S. (2012) (aggravated incest).

3 We granted certiorari review of the following issue:

> 1. Whether the court of appeals erred when it reversed a conviction based on the corpus delicti doctrine, which prevents convicting a defendant based on his uncorroborated confession alone.

4 Cases and criminal law treatises abound with technical descriptions of the corpus delicti. *See, e.g.*, *Lowe v. People*, 76 Colo. 603, 611, 234 P. 169, 173 (1925) (stating that the corpus delicti consists of two components, an injury and unlawful conduct causing that injury); Wayne R. LaFave, *Substantive Criminal Law* § 1.4(b), at 29 (2d ed. 2003) (same); Charles E. Torcia, *Wharton's Criminal Law* § 28, at 172–73 (15th ed. 1993) (same). These technical descriptions comport with our simplified description above. *See Hampton v. People*, 146 Colo. 570, 574, 362 P.2d 864, 866 (1961); *People in Interest of T.A.O.*, 36 P.3d 180, 181 (Colo.App.2001).

5 *See, e.g.*, Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delicti as a Condition of Admitting an Extrajudicial Confession*, 27 U.S.F. L. Rev. 385, 385 (1993) (arguing that the rule has "dwindling vitality" and is supported by little else but "judicial inertia"); Maria Lisa Crisera, Comment, *Reevaluation of the California Corpus Delicti Rule: A Response to the Invitation of Proposition 8*, 78 Calif. L. Rev. 1571, 1573–74 (1990) (arguing that the corpus delicti rule is impractical and unnecessary). In *People v. Robson*, 80 P.3d 912, 914 (Colo.App.2003), a division of the court of appeals, citing these authorities, noted that they presented "sound arguments" for abolishing the corpus delicti rule but stated that it was bound to apply our corpus delicti precedent.

6 As an example, consider the Central Park jogger case. In that case, five teenagers were accused of assaulting and raping a female jogger in New York City's Central Park. They all falsely confessed, despite several having been accompanied by adult family members during the interrogations, despite there being no evidence of physical police coercion, and despite having no apparent motive for doing so. A jury convicted them based on their confessions. Their convictions were eventually vacated when a serial rapist and murderer confessed to the crimes, and DNA evidence corroborated his confession. Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, N.Y.U. Rev. L. & Soc. Change, 218–19 (2006); *see also The Central Park Five* (IFC Films 2012).

Moreover, there are numerous cases containing statements regarding the frequency with which defendants falsely confess. *See* *Smith*, 348 U.S. at 153, 75 S.Ct. 194 ("[T]he experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made."); *Brown*, 617 F.3d at 861 ("False confessions ... have not disappeared, and they provide a modern justification for continuing to respect the [trustworthiness standard]."); *United States v. Singleterry*, 29 F.3d 733, 737 n. 4 (1st Cir.1994) (noting that courts are "wary of individuals who, as a result of mental illness, a fit of passion, a misplaced sense of sacrifice, or sheer mendacity, falsely incriminate themselves in order to spare another"); *Mauchley*, ¶ 21, 67 P.3d at 483 (stating that "[i]t is beyond dispute" that some defendants falsely confess). *But see* 7 *Wigmore on Evidence* § 2070, at 510 (Chadbourn rev. 1978) (characterizing false confessions as "exceedingly rare").

7 *See* *Smith*, 348 U.S. at 153, 75 S.Ct. 194 (noting that the "average juror" has little experience with the circumstances under which confessions are extracted, which in turn "justif[ies] a restriction on the power of the jury to convict"); *United States v. Bryce*, 208 F.3d 346, 354 (2d Cir.1999) ("Jurors find [confessions] inherently powerful, however, and may vote to convict based upon such statements alone."); *Singleterry*, 29 F.3d at 737 (noting that "there is a danger that the jury will rush to credit a confession without seriously considering whether the defendant confessed to a crime he did not commit").

This rationale is not novel. Our rules of evidence reflect, in part, a fear that juries will put too much stock in certain types of evidence and come to unwarranted conclusions. *See, e.g.*, CRE 404(b) (excluding character evidence to prove propensity); CRE 407 (excluding evidence of subsequent remedial measures); CRE 409 (excluding evidence of payments of medical and similar expenses); CRE 410 (excluding evidence of plea bargaining).

8 As such, *Miranda* and the corroboration requirement serve different ends. The protections of *Miranda* apply only when a sect is subjected to custodial interrogation, and it rests on the constitutional principle that a waiver of a constitutional right must be voluntary. *See* *People v. Humphrey*, 132 P.3d 352, 356 (Colo.2006). In contrast, any corroboration requirement, including the corpus delicti rule, is concerned with whether evidence exists that corroborates a confession. This concern has little to do with whether a confession is voluntary and, as can be illustrated by the facts of this case, applies irrespective of whether a person is in custody. *See* *United States v. Dalhouse*, 534 F.3d 803, 806 (7th Cir.2008) (noting that *Miranda* seeks to protect defendants from coercive police tactics, whereas the trustworthiness standard seeks to protect

defendants from false confessions given voluntarily); *McMahan*, 548 N.W.2d at 206 (Boyle, J., dissenting). *But see* *Brown*, 617 F.3d at 861 (questioning whether the trustworthiness standard should be treated as a "quaint, though now irrelevant, reminder of the Court's pre-*Miranda* days"); *United States v. Dickerson*, 163 F.3d 639, 641 n. 2 (D.C.Cir.1999) ("[P]ost–*Miranda*, the need for the rule, especially insofar as it protects against involuntary confessions, is even more questionable.").

9 *See, e.g.*, *Brown*, 617 F.3d at 863 (explaining that, under *Smith*, if "a defendant admits that he drove a car that had an illegal sawed-off shotgun in its trunk, it is sufficient for the independent corroborating evidence to show that he drove that particular car"); *Bryce*, 208 F.3d at 355 (dividing trustworthiness issues "into two categories" depending on whether a confession is inherently reliable so as to be "self-corroborating"); *United States v. Lopez–Alvarez*, 970 F.2d 583, 591–92 (9th Cir.1992) (announcing a "two-pronged" corroboration requirement that includes a "modern corpus delicti rule" and requires the prosecution to present evidence that the "criminal conduct at the core of the offense has occurred").

10 *Compare* *Brown*, 617 F.3d at 860 (noting that "corroboration goes to sufficiency"), *and* *Dalhouse*, 534 F.3d at 806 (stating that the trustworthiness standard "does not affect the *admissibility* of a confession, at least not in this circuit") (emphasis in original), *with* *Landsdown v. United States*, 348 F.2d 405, 409 (5th Cir.1965) (requiring corroboration before the confession can be "admi[tted] into evidence against the accused"), and *Mauchley*, ¶¶ 58–60, 67 P.3d at 490 (treating the trustworthiness standard as a rule governing the admissibility of confessions); *see also McCormick on Evidence* § 145, at 593 ("Probably all versions of [the corroboration requirement] impose a limit on the evidence that will support a criminal conviction. Some versions at least purport to limit admissibility of such statements.").

11 In *Opper*, although the Court likened a confession to hearsay, it also noted that the statement, without corroboration, was "competent" evidence, *see* *Opper*, 348 U.S. at 90, 75 S.Ct. 158, and, in *Smith* and *Calderon*, the Court assumed that the statements, without corroboration, were admissible, *see* *Smith*, 348 U.S. at 155, 75 S.Ct. 194; *Calderon*, 348 U.S. at 161, 75 S.Ct. 186.

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