

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

October 28, 2010  
Elisabeth A. Shumaker  
Clerk of Court

In re:

BRIAN DAVID MITCHELL,  
Petitioner.

No. 10-4186  
(D.C. No. 2:08-CR-00125-DAK)  
(D. Utah)

**ORDER**

Before **TACHA, TYMKOVICH, and HOLMES**, Circuit Judges.

Brian David Mitchell has filed a petition for a writ of mandamus seeking an order from this court directing the district court to transfer his case to another venue. He also has filed a motion to stay his trial pending this court's consideration of the petition. Mr. Mitchell's petition challenges the district court's orders denying his request for a transfer of venue. He contends he cannot get a fair trial in the District of Utah because of prejudicial pretrial publicity and other prejudicial circumstances surrounding his case. We deny the petition as premature and the stay as moot.

"[A] writ of mandamus is a drastic remedy, and is to be invoked only in extraordinary circumstances." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (quotations omitted). "[T]he party seeking issuance of the writ must have no other adequate means to attain the relief he desires." *Id.* at

1187 (quotation omitted). Accordingly, “the writ is not to be used as a substitute for appeal, even though hardship may result from delay and perhaps unnecessary trial.” *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (citations omitted).

Orders denying a request for a transfer of venue involving allegations of prejudicial pretrial publicity are generally reviewed on direct appeal from conviction. *See, e.g., United States v. Pedraza*, 27 F.3d 1515, 1525 (10th Cir. 1994); *United States v. Abello-Silva*, 948 F.2d 1168, 1176 (10th Cir. 1991), *abrogated on other grounds by United States v. Bagley*, 473 U.S. 667 (1985).

Interlocutory review of the district court’s ruling on venue pursuant to a writ of mandamus is therefore disfavored. But we decline to categorically foreclose the possibility of mandamus review for these types of cases.

For the purposes of this case, however, we conclude that any consideration of this matter prior to voir dire would be premature and uninformed. *See Pedraza*, 27 F.3d at 1525 (“Whether a jury harbors prejudice related to pretrial publicity is best determined during voir dire examination.”); *Abello-Silva*, 948 F.2d at 1177 (“The proper occasion for determining juror partiality is upon *voir dire* examination.” (quotation omitted)); *In re Cohn*, 332 F.2d 976, 977 (2d Cir. 1964) (“Only upon the voir dire of the prospective jurors can it be determined whether an impartial jury can be selected.”).

We understand Mr. Mitchell is arguing that the district court has an improper view of what constitutes an impartial juror and therefore intervention

prior to voir dire is necessary, but even Mr. Mitchell acknowledges the speculative nature of his claim at this point in time. *See* Pet. at 24 (“[T]he district court finds it perfectly acceptable to *possibly* empanel jurors who have concluded

Mr. Mitchell’s factual guilt.” (emphasis added)). Further, the district court stated

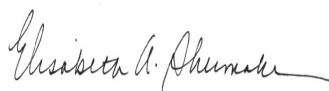
in its October 21 order that “even if the court were to agree with Defendant’s extremely restrictive method for determining which jurors to excuse for cause, over one hundred potential jurors would still be available for individual voir dire.”

Dist. Ct. Order of Oct. 21, 2010, at 4. Without expressing any opinion on the merits of Mr. Mitchell’s argument, we note that it is possible that a jury could be seated where all of the jurors would satisfy Mr. Mitchell’s view of impartiality.

As voir dire has yet to take place, we decline to consider Mr. Mitchell’s petition at this time.

Accordingly, the petition is DENIED. The motion for stay is DENIED as moot.

Entered for the Court,



ELISABETH A. SHUMAKER, Clerk