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DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 8011	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**

ORDER REGARDING DEFENDANT'S MOTION FOR SEQUESTRATION ORDER AND PROSECUTION'S MOTION FOR VICTIMS TO BE PRESENT AT ALL CRITICAL STAGES OF THE CRIMINAL JUSTICE PROCESS AND TO BE EXEMPT FROM SEQUESTRATION (D-54B AND P-44)

INTRODUCTION

The defendant is charged with shooting, and killing or injuring, numerous people inside two adjacent Aurora movie theatres during the early morning hours of July 20, 2012. The prosecution has filed 166 charges naming 82 different victims. Pursuant to Rule 615 of the Colorado Rules of Evidence, the defendant moves for sequestration of all the prosecution's endorsed witnesses from every pretrial hearing and trial. Motion D-54 at p. 1. The prosecution objects, largely because the motion seeks to exclude the victims from all critical stages of the

proceedings. Motion D-54 Response at p. 9.[1] Through a separate motion, the prosecution requests that the Court allow the victims to be present during the critical stages of the criminal justice process, including but not limited to, pretrial motions hearings, trial, and any sentencing hearing. Motion P-44 at p. 8.

These motions present a difficult question involving important, but conflicting, interests: in this mass shooting case in which the prosecution seeks the death penalty, should the Court exclude hundreds of victims from all the critical stages of the judicial proceedings? For the reasons articulated in this Order, on the record before it, the Court must answer "no."

RULING

The Court concludes that article II, § 16a of the Colorado Constitution ("section 16a" or "§ 16a") and the legislation implementing that amendment, § 24-4.1-301, *et. seq.*, C.R.S. (2012), grant victims of a crime an unqualified right to be present at all critical stages of the judicial process, including the trial, any hearing on motions concerning evidentiary matters or pre-plea or post-plea relief, and any sentencing hearing. To the extent that Rule 615 of the Rules of Evidence is inconsistent with the mandate contained in section 16a and section 24-4.1-

[1] The defendant is presumed innocent. The use of the word "victim" in this Order, therefore, necessarily refers to any victim of the defendant's *alleged* acts. The term should not be understood as undermining in any way the defendant's presumption of innocence.

302.5(1)(b), the Court resolves the conflict by giving effect to the mandate. Rule 615 does not provide authority to depart from the Constitution and the statute.

The Court recognizes, as does the General Assembly, that a victim's constitutional right to attend judicial proceedings, no matter how unqualified, may never be enforced at the expense of the defendant's constitutional right to a fair trial. However, the Court holds that the record does not support the conclusion that excluding the victims from the critical stages of the proceedings is necessary to protect the defendant's constitutional right to a fair trial. Significantly, the defendant's deficient briefs do not demonstrate, or even assert, that granting the prosecution's motion would prevent him from receiving a fair trial.

Lastly, the Court determines that the word "victim," as used in the constitutional amendment and its enacting legislation, is not limited to an individual named as a victim in a charge. Rather, the definition of "victim" in section 24-4.1-302(5) is broader. In this case, the term "victim" includes anyone who was inside one of the two adjacent movie theaters at the time of the shooting.

Accordingly, the defendant's motion is granted in part and denied in part, and the prosecution's motion is granted in its entirety. Every "victim," as that term is defined in this Order, shall have the right to be present at all critical stages of these proceedings. The prosecution's witnesses are otherwise sequestered in accordance with this Order.

ANALYSIS

Pursuant to CRE 615, the defendant requests the sequestration of all endorsed witnesses from pretrial hearings and trial. Motion D-54 at p. 1. Relying on sections 16a and 24-4.1-302.5(1)(b), the prosecution objects in part because the motion seeks to exclude the victims from critical stages of the proceedings. Motion D-54 Response at pp. 2-4, 9. The prosecution urges the Court to allow the victims to be present during all critical stages of the criminal justice process, including but not limited to, pretrial motions hearings, trial, and any sentencing hearing. Motion P-44 at p. 8.[2]

The Court examines CRE 615 and sections 16a and 24-4.1-302.5(1)(b) in turn. The Court then discusses whether the constitutional amendment and the statutory provision apply where, as here, they are in conflict with Rule 615. Given its conclusion that Rule 615 may not override sections 16a and 24-4.1-302.5(1)(b), the Court next considers whether exclusion of the victims from all critical stages of the case is nevertheless necessary to protect the defendant's constitutional right to a fair trial. Finally, because the Court rules that the record does not support a finding that such exclusion is required in order to afford the defendant his right to a

[2] In a separate motion, Motion D-56, the defendant similarly requested to have his parents exempt from any sequestration order even though they may testify at trial. Motion D-56 at p. 1. The People did not oppose Motion D-56, although they characterized it as ironic given the defendant's Motion D-54 to exclude the victims from all the proceedings. Motion D-56 Response at p. 1. The Court granted Motion D-56 in Order D-56.

fair trial, it determines who should be considered a "victim" under sections 16a and 24-4.1-302.5(1)(b).

A. CRE 615

CRE 615 is part of the Colorado Rules of Evidence, which are published in Chapter 33 of the Colorado Revised Statutes. "The Rules of Evidence are the product of six years of work by a select committee of the Colorado Bar Association, chaired by Professor Francis W. Jamison." *See* CRE Chapter 33 Introductory Paragraph. "The Rules parallel the Federal Rules of Evidence and the Uniform Rules of Evidence." *Id.* The drafting committee submitted the Rules to the Colorado Supreme Court and was involved in the presentation and complete review of the Rules at three public hearings. *Id.* The Colorado Supreme Court adopted the Rules on October 23, 1979, and the Rules became effective on January 1, 1980.[3]

Rule 615 provides that, at the request of a party, "the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." The Rule contains three exceptions, none of which mentions crime victims. CRE 615. It does not authorize the exclusion

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[3] The legislature enacted a statute, effective July 3, 1979, which grants the Colorado Supreme Court "the power to prescribe general rules of evidence for the courts of record in the state of Colorado." § 13-25-128, C.R.S. (2012). "Such rules of evidence shall be construed to be rules of practice and procedure and shall not be construed in such manner that such rules would . . . enlarge, modify, or diminish any substantive rights." *Id.* The legislature has "specifically reserve[d] to itself the power to enact laws relating to substantive rights including, but not limited to, laws modifying or eliminating said rules of evidence." *Id.*

of: (1) a natural person who is a party, (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the prosecution of his cause. *Id.*

The purpose of Rule 615 "is to prevent the testimony of one witness from being influenced by that of another . . . ." *People v. Brinson*, 739 P.2d 897, 899 (Colo. App. 1987); *see also People v. Melendez*, 102 P.3d 315, 319 (Colo. 2004) ("Sequestration orders are meant to prevent witnesses from tailoring their testimony to that of other witnesses and to aid the court in the detection of false testimony"); *People v. Villalobos*, 159 P.3d 624, 629 (Colo. App. 2006) ("The purpose of a sequestration order is to prevent a witness from conforming his . . . testimony to that of other witnesses and to discourage fabrication and collusion") (quotation marks and citation omitted). This purpose "is accomplished under the rule's terms by ordering witnesses to withdraw from the courtroom until called." *Brinson*, 739 P.2d at 899. However, a trial court "may also direct witnesses not to discuss the case with each other." *Id.*; *see also Melendez*, 102 P.3d at 319 (same); *Villalobos*, 159 P.3d at 629 (same).

Rule 615 does not state whether sequestration applies to all phases of the trial or just during testimony. Nor does it indicate whether it may be extended to pretrial hearings. However, courts have discretion to sequester witnesses at all

phases of the trial, as well as during pretrial hearings, upon a showing that a sequestration order is appropriate under the circumstances. *See generally* 3 *Weinstein's Evidence*, 615-19 (1987) (a request for sequestration which is not specifically within the purview of Rule 615 nevertheless lies within the discretion of the court to further the truth-finding process).

B. Section 16a and section 24-4.1-302.5(1)(b)

Colorado's Constitution was amended, effective January 14, 1993, in part to provide crime victims with the right to be present at all critical stages of the criminal justice process. *See* § 16a. Section 16a, titled "Rights of crime victims," provides:

> ***Any 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.*** All terminology, including the term "critical stages," shall be defined by the general assembly.

Id. (emphasis added).

To implement section 16a, "the General Assembly enacted various statutes, including the Guidelines for Assuring the Rights of Victims of and Witnesses to Crimes." *People v. Herron*, 874 P.2d 435, 437 (Colo. App. 1993) (citing §§ 24-4.1-302 through 24-4.1-304). The enabling legislation includes this declaration:

> The general assembly hereby finds and declares that the full and voluntary cooperation of victims of and witnesses to crimes with state and local law enforcement agencies as to such crimes is imperative for

> the general effectiveness and well-being of the criminal justice system of this state. ***It is the intent of this [legislation], therefore, to assure that all victims of and witnesses to crimes are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protection afforded criminal defendants.***

§ 24-4.1-301 (emphasis added). *See also* § 24-4.1-302.5(1)(a) ("each victim of a crime shall have . . . [t]he right to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process").

The legislative implementation of the constitutional amendment also "provides definitions in § 24-4.1-302, enumerates rights afforded to victims in § 24-4.1-302.5, sets forth procedures for protecting the rights of crime victims in § 24-4.1-303, and delineates provisions applicable to child victims or witnesses in § 24-4.1-304." *Gansz v. People*, 888 P.2d 256, 257 n.1 (Colo. 1995). Some of these statutory provisions, which became effective at the same time as the amendment, provide "additional rights to crime victims." *People v. Daly*, --- P.3d ---, 2011 WL 2308587, at *4 (Colo. App. 2011) (citing Ch. 77, secs. 3 and 9, § 24-4.1-302.5, 1992 Colo. Sess. Laws 418-21 (effective upon the governor's proclamation of the approval of the constitutional amendment by the voters)).

As relevant here, section 24-4.1-302.5, titled "Rights afforded to victims," states that "[i]n order to preserve and protect a victim's rights to justice and due process, each victim of a crime shall have the following rights: . . . [t]he right to be

. . . present for all critical stages of the criminal justice process as specified in section 24-4.1-302(2) . . . ." § 24-4.1-302.5(1)(b). Section 24-4.1-302(2), in turn, defines "[c]ritical stages." That definition includes: "[a]ny hearing on motions concerning evidentiary matters or pre-plea or post-plea relief," *see* 24-4.1-302(2)(e); "[t]he trial," *see* 24-4.1-302(2)(g); and "[a]ny sentencing hearing," *see* § 24-4.1-302(2)(h). Law enforcement, prosecutorial, judicial, and correctional agencies are all charged with ensuring "that victims of crimes are afforded the rights described in section 24-4.1-302.5." § 24-4.1-303(1). More specifically, the Court has an obligation to ensure that crime victims are afforded their constitutional right to attend all critical stages of the criminal justice process. *See id.*; § 24-4.1-302.5(1)(b), (b.5).

C. Discussion

1. CRE 615 Does Not Trump Sections 16a and 24-4.1-302.5

"When construing a constitutional amendment courts must ascertain and give effect to the intent of the electorate adopting the amendment." *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996) (citations omitted). To determine the electorate's intent, the Court must initially examine the language of the amendment "and give words their plain and commonly understood meaning." *Id.* (citations omitted). The Court may not "engage in a narrow or technical reading of language contained in an initiated constitutional amendment if to do such would defeat the

intent of the people." *Id.* (citing *People in the Interest of Y.D.M.*, 197 Colo. 403, 407, 593 P.2d 1356, 1359 (1979)).

The language in the constitutional amendment "conveys a clear and definite meaning involving no absurdity or internal contradiction." *Herron*, 874 P.2d at 437. Therefore, the Court is required to interpret it as written. *Id.* Giving the words in section 16a their plain and common meaning, it is clear that the electorate intended to grant the victim of a criminal act an unqualified right to be present at all critical stages of judicial proceedings held in connection with that act. Indeed, the amendment states in no uncertain terms that a victim of a crime "shall" have the right to attend all critical stages of the judicial proceedings. § 16a. "[T]he word 'shall' . . . involves a 'mandatory connotation' and hence is the antithesis of discretion or choice." *Hernandez v. Dist. Court*, 814 P.2d 379, 381 (Colo. 1991) (quoting *People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987)). *See also Allison v. Indus. Claim Appeals Office of Colo.*, 884 P.2d 1113, 1119 (Colo. 1994) ("The phrasing of [a] mandate in the terms of 'shall' provides a mandatory constitutional right").

Likewise, the plain and common meaning of the language employed to enact the amendment clearly and unambiguously conveys the legislature's intent: crime victims "shall" have the right to attend all critical stages of the judicial proceedings. § 24-4.1-302.5(1)(b). "[T]he use of the word 'shall' in a statute

usually is deemed to involve a mandatory connotation." *People v. Dist. Court*, 713 P.2d 918, 921 (Colo. 1986) (citations omitted). The Court must effectuate the legislative intent in section 24-4.1-302.5(1)(b). *See Fifield v. Pitkin Cnty. Bd. of Comm'rs*, 292 P.3d 1207, 1208 (Colo. App. 2012) (when construing a statute, the Court's "primary objective is to effectuate the intent of the General Assembly by looking to the plain meaning of the language used, considered within the context of the statute as a whole") (quotation omitted); *People v. Morales*, 298 P.3d 1000, 1011 (Colo. App. 2012) ("we must give [statutory] phrases their ordinary and plain meaning") (citation omitted); *People v. Zweygardt*, 298 P.3d 1018, 1022 (Colo. App. 2012) (a court "must give effect to the plain meaning of each and every word and phrase unless the result is ambiguous or nonsensical") (citation omitted).

The electorate expressly delegated to the legislature the responsibility of defining "[a]ll terminology, including the term 'critical stages.'" § 16a. "The word 'terminology' is defined as referring to the technical or special terms or expressions used in a written instrument." *Herron*, 874 P.2d at 437 (citing *Webster's Third New International Dictionary* 2359). Thus, "all of the technical or special terminology used in [§ 16a], including 'critical stages' . . . is subject to definition by the General Assembly." *Id.* at 437-38.

As part of its efforts to enable the constitutional amendment, and pursuant to the electorate's mandate, the legislature defined "critical stages" in section 24-4.1-

302(2) as applying to certain "stages of the criminal justice process," including any hearing on motions concerning evidentiary matters, pre-plea or post-plea motions hearings, the trial, and any sentencing hearing. *See* § 24-4.1-302(2)(e), (g), (h). The legislature defined other terms as well, including: "[c]rime," "[l]awful representative," "[v]ictim," and "[v]ictim's immediate family." § 24-4.1-302(1), (3), (5), (6). These terms are unambiguous, as they are not "reasonably susceptible to more than one interpretation." *See Zaner*, 917 P.2d at 283 (citations omitted).

Because Rule 615 requires the Court, upon a party's request, to exclude from trial victims who intend to testify, it is incongruous with sections 16a and 24-4.1-302.5(1)(b). For several reasons, the Court resolves this conflict by giving effect to the constitutional provision and the statute.

First, in general, when an evidentiary rule conflicts with a constitutional amendment, the amendment should be given preeminence over the rule. *See, e.g., Commonwealth v. Barroso*, 122 S.W.3d 554, 558 (Ky. 2003) ("As a general proposition, constitutional rights prevail over conflicting statutes and rules"); *McGlothlin v. State*, 260 S.W.3d 124, 130 (Tex. App. 2008) ("the Confrontation Clause will prevail if there is a conflict between it and the Rules of Evidence") (quotation omitted); *Cuesta-Rodriguez v. State*, 241 P.3d 214, 229 (Okla. Crim. App. 2010) ("evidence rules cannot trump the Sixth Amendment's right of confrontation"); *People v. Fackelman*, 489 Mich. 515, 802 N.W.2d 552, 568

(Mich. 2011) (citing *Crawford v. Washington*, 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and explaining that "the rules of evidence do not trump the Confrontation Clause").[4]

Second, the Court's research revealed that the cases that have addressed the tension that may exist between a constitutional or statutory provision granting crime victims the right to attend judicial proceedings and an evidence rule governing the sequestration of witnesses have given priority to the former, not the latter. *See, e.g., People v. Coney*, 98 P.3d 930, 935 (Colo. App. 2004) ("CRE 615 does not provide authority for departing" from section 16a of the Colorado Constitution); *State v. Uriarte*, 194 Ariz. 275, 981 P.2d 575, 578 (Ariz. Ct. App. 1998) (resolving the conflict between Rule 615 of the Arizona Rules of Evidence and the Victim's Bill of Rights "by giving effect to the Arizona Constitution"); *Booker v. State*, 773 So.2d 1079, 1095 (Fla. 2000) (where the victim's next of kin had a constitutional right to be present in court if such right did not interfere with

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[4] *Cf. Garcia v. Dist. Court*, 157 Colo. 432, 403 P.2d 215, 219 (Colo. 1965) ("It has long been the rule that where both a statute and the constitution apply to a particular case, and the two are in conflict and repugnant one to the other, the statute must give ground because the constitution is the paramount law"); *State v. Duheart*, --- So.3d ---, 2012 WL 5275493, at *2 (La. 2012) ("A constitutional provision is a more basic, fundamental provision than a statutory enactment"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ("an act of the legislature, repugnant to the constitution, is void"); *People v. Meconi*, 277 Mich. App. 651, 746 N.W.2d 881, 885 (Mich. Ct. App. 2008) (Sawyer, J., concurring) (quoting Justice Taylor's dissenting opinion in *People v. Moore*, 470 Mich. 56, 679 N.W.2d 41, 56 n.23 (2004), for the proposition that it is "a fundamental axiom of American law, rooted in our history as a people and requiring no citations to authority, that the requirements of the Constitution prevail over a statute in the event of a conflict").

the defendant's constitutional rights, "it is clear that the general rule should elevate the constitutional right above the rule of sequestration"); *United States v. Turner*, 367 F. Supp. 2d 319, 332 (E.D.N.Y. 2005) (describing a victim's right, under the federal Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(3) (2004), "not to be excluded" from public court proceedings except in limited circumstances as "effectively trump[ing] Federal Rule of Evidence 615"); *see also People v. Meconi*, 277 Mich. App. 651, 746 N.W.2d 881, 885 (Mich. Ct. App. 2008) (Sawyer, J., concurring) (the state constitutional provision granting victims the right to be present at trial to the same extent that the defendant is so entitled takes precedence over Rule 615 of the Michigan Rules of Evidence and the statute enforcing that constitutional provision).

In *Coney*, the defendant was convicted of murder in the first degree following a jury trial. 98 P.3d at 932. On cross-appeal, the prosecution contended that the trial judge erred in barring, pursuant to CRE 615, the deceased victim's father from remaining in the courtroom after he testified. *Id.* at 935. In support of its position, the prosecution relied on sections 16a and 24-4.1-302.5(1)(b). *Id.* A panel of the Colorado Court of Appeals disapproved the trial court's ruling, reasoning that "[t]he mandate contained in article II, § 16a and § 24-4.1-302.5 permitted the victim's father to remain in the courtroom." *Id.* Rule 615 did not

alter the Court's conclusion because "CRE 615 does not provide authority for departing from the constitution and statute." *Id.*

The Court acknowledges that the circumstances in *Coney* are distinguishable from those present in this case. As the Court of Appeals explained, the victim's father was the prosecution's first witness, his brief testimony was only relevant to peripheral issues, and the prosecution did not plan to call him again. *Id.* Nevertheless, *Coney* is persuasive because the Court's decision did not hinge on those factors. *See id.* Instead, it was premised on the plain and common meaning of the language employed in sections 16a and 24-4.1-302.5(1)(b) and the lack of authority within Rule 615 to allow the trial court to disregard those provisions. *Id.*

Third, "[t]he electorate, as well as the legislature, must be presumed to know the existing law at the time [it] amend[s] or clarif[ies] that law." *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1254 (Colo. 2012) (quoting *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000)); *see also People v. Cross*, 127 P.3d 71, 76 (Colo. 2006) ("We presume that the General Assembly is aware of our construction of a statute when it proceeds to enact subsequent legislation"); *Vaughan v. McMinn*, 945 P.2d 404, 409 (Colo. 1997) ("The legislature is presumed to be aware of the judicial precedent in an area of law when it legislates in that area"). When the electorate passed amendment 16a

and the legislature enacted section 24-4.1-302.5(1)(b), they are presumed to have been aware of CRE 615.

Section 16a and section 24-4.1-302.5(1)(b) amended the law in Colorado on the sequestration of witnesses as set forth in Rule 615. Had the electorate and the legislature intended for sections 16a and 24-4.1-302.5(1)(b) to be subordinate to CRE 615, or to otherwise be limited in scope by Rule 615, they presumably would have said so. Indeed, that is precisely what other jurisdictions did when they enacted similar Victims' Bill of Rights legislation.[5]

Despite Rule 615, the electorate and the legislature nevertheless granted crime victims the right to be present at all critical stages of judicial proceedings. In so doing, they made clear their intent to exempt crime victims from Rule 615.

Lastly, the plain and common meaning of the language used by the electorate and the legislature demonstrates that they intended to give crime victims an unqualified right to attend all critical stages of the judicial process. While most, if not all, states have enacted some form of Victims' Bill of Rights legislation,

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[5] *See, e.g.*, *State v. Beltran-Felix*, 922 P.2d 30, 33 n.3 (Utah Ct. App. 1996) (the Victims' Rights Act in Utah provides that "[t]he right of a victim or representative of a victim to be present at trial is subject to Rule 615 of the Utah Rules of Evidence") (quoting Utah Code Ann. § 77-38-4(3) (Supp. 1995)); Vt. Stat. Ann. Tit. 13, § 5309 (2013) ("The victim of a listed crime shall be entitled to be present during all court proceedings subject to the provisions of Rule 615 of the Vermont Rules of Evidence"); *see also State v. Williams*, 404 N.J. Super. 147, 960 A.2d 805, 813 (N.J. Super. Ct. App. Div. 2008) (the Victims' Rights Amendment to the New Jersey Constitution prevents a crime victim from being denied the right to be present at public judicial proceedings "except when . . . the victim is properly sequestered in accordance with law or the Rules Governing the Courts of the State of New Jersey").

Colorado is among those jurisdictions that have granted crime victims an unqualified right to be present at critical stages of the proceedings.[6]

In *Uriarte*, the Arizona Court of Appeals affirmed the trial court's decision to allow the parent of a minor child witness to attend trial proceedings even though the parent's testimony was required. 981 P.2d at 579. The Court relied on the Victims' Rights provision in the state constitution, as implemented by lawful statute, granting victims the unqualified right to attend "all criminal proceedings where the defendant has the right to be present." *Id.* at 578 (quoting Ariz. Const. art. 2, § 2.1(A)(3)). After acknowledging that the constitutional mandate and Arizona Rule of Evidence 615 could not be reconciled, the Court resolved the conflict by giving "effect to the constitutional guarantee." *Id.* at 579.

Similarly, in *Proctor v. Alaska*, 236 P.3d 375, 380 (Alaska Ct. App. 2010), the Alaska Court of Appeals rejected the defendant's contention that his due process rights were violated because, over his objection, one of the victims was allowed to testify with diagrams she created after observing the other victim

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[6] *See, e.g.*, La. Const., art. 1, § 25 ("Any person who is a victim of crime . . . shall have the right . . . to be present . . . during all critical stages of preconviction and postconviction proceedings"); Ariz. Const. art. 2, § 2.1(A)(3) (a crime victim has the right "[t]o be present at . . . all criminal proceedings where the defendant has the right to be present"); Mich. Const. 1963, art. 1, § 24(1) (crime victims have "[t]he right to attend trial and all other court proceedings the accused has the right to attend"); Alaska Const. art. 1, § 24 (a crime victim has the right "to be present at all criminal or juvenile proceedings where the accused has the right to be present"); Utah Const. art. 1, § 28(1)(b) (victims of crimes have the right to "be present at . . . important criminal justice hearings related to the victim"); *see generally*, Wayne R. LaFave et al., 6 *Criminal Procedure* § 24.4(d) (3d ed. 2007) ("Some state victim provisions absolutely prohibit judges from excluding certain victims or their relatives").

testify.[7] The Court reasoned that "the Alaska Constitution expressly grants crime victims 'the right to . . . be allowed to be present at all criminal or juvenile proceedings where the accused has the right to be present.'" *Id.* (citing Alaska Const. art. 1, § 24). The Court held that as long as the defendant has an opportunity to cross-examine the victim regarding any potential influence her presence throughout the trial may have had on her testimony, the trial judge may allow her "to remain in the courtroom while other witnesses are testifying (even though the victim has not yet testified)." *Id. See also Beltran-Felix*, 922 P.2d at 32 (observing that the trial court permitted the victim to remain in the courtroom throughout the trial under the "declaration of the rights of crime victims in the Victims' Rights Amendment to the Utah Constitution," which grants victims the unqualified right to attend "important criminal justice hearings related to the victim," and its implementing legislation).[8]

Like the trial courts in *Uriarte*, *Proctor*, and *Beltran-Felix*, among others, this Court must give effect to the victims' unqualified right to be present at all critical stages of judicial proceedings. Had the Colorado electorate and General

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[7] Both victims were deaf and communicated through sign language. 236 P.3d at 376.

[8] The constitutional provision at issue in *Beltran-Felix* was enacted through the Rights of Crime Victims Act, which states that "[t]he right of a victim . . . to be present at trial is subject to Rule 615 of the Utah Rules of Evidence." Utah Code Ann. § 77-38-4(3) (1995). However, Utah's Rule 615 does not authorize exclusion of "a victim in a criminal or juvenile delinquency proceeding where the prosecutor agrees with the victim's presence." Utah R. Evid. 615(d).

Assembly intended to qualify or otherwise restrict a crime victim's right to attend the critical stages of a case, they presumably would have done so. The constitutional amendments and legislative enactments in other states contain such limitations.[9] So does the federal Crime Victims' Rights Act. *See* 18 U.S.C. § 3771(a)(3) (2004) (guaranteeing crime victims the right to attend judicial proceedings "unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding").

The Court cannot impose restrictions on a crime victim's right to be present when neither the Colorado electorate nor the Colorado General Assembly deemed it fit to do so. The voters and the legislature in Colorado have spoken loud and clear, and the Court is required to effectuate their mandate.

In sum, the Court concludes that the Colorado Constitution and section 24-4.1-302.5(1)(b) grant the victim of a crime an unqualified right to be present at all critical stages of judicial proceedings related to that crime. To the extent that Rule

[9] *See, e.g.*, Ill. Const. art. 1, § 8.1(a)(8) ("Crime victims . . . shall have . . . the right to be present at the trial and all other court proceedings on the same basis as the accused, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at trial"); Md. Const., Decl. of Rights, art. 47(b) (a victim shall have the right to attend "if practicable"); S.D. Codified Laws § 23A-28C-1(6) (victims of a crime have the right to be present "except where otherwise ordered by the judge hearing the case or by contrary policy of the presiding circuit judge"); Wash. Const. art. 1, § 35 (a victim of crime has the right to attend all court proceedings the defendant has the right to attend "subject to the discretion of the individual presiding over the trial or court proceedings"); Wyo. Stat. Ann. § 1-40-206 (West 1977) ("Unless the court for good cause shown shall find to the contrary, the victim . . . shall have the right to be present at all trial proceedings which may be attended by the defendant").

615 is in disaccord, it must yield to the constitutional amendment and the statutory provision.

2. The Defendant's Constitutional Right to a Fair Trial

Section 24-4.1-303(6)(a), which establishes "[p]rocedures for ensuring rights of victims of crimes," provides that a crime victim "may be present at all critical stages of a criminal proceeding regarding any crime against such victim ***unless the court or the district attorney determines that exclusion of the victim is necessary to protect the defendant's right to a fair trial.***" § 24-4.1-303(6)(a) (emphasis added).[10] At first blush, this subsection may appear inconsistent with sections 16a and 24-4.1-302.5(1)(b).[11] It is not. After all, regardless of how unqualified a crime victim's right to be present at judicial proceedings may be, it can never be enforced at the expense of the defendant's constitutional right to a fair trial. "The due process clauses of the Colorado and United States Constitutions ***guarantee*** every criminal defendant the right to a fair trial." *Dunlap v. People*, 173 P.3d 1054, 1081

[10] Other jurisdictions have adopted a similar constitutional or statutory provision. *See, e.g.*, Ohio Rev. Code Ann. § 2930.09 (a crime victim has the right to be present "whenever the defendant . . . is present during any stage of the case against the defendant . . . . unless the court determines that exclusion of the victim is necessary to protect the defendant's . . . right to a fair trial"); Fla. Const. art. 1, § 16(b) ("Victims of crime . . . are entitled to the right . . . to be present . . . at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused"); *see also* Ga. Code Ann. § 17-17-9(a) ("A victim . . . shall not be excluded . . . . unless it is established that such victim . . . is a material and necessary witness . . . and the court finds that there is a substantial probability that such person's presence would impair the conduct of a fair trial").

[11] Neither party's filings discuss section 24-4.1-303(6)(a).

(Colo. 2007) (emphasis added). Thus, rather than create a conflict with sections 16a and 24-4.1-302.5(1)(b), section 24-4.1-303(6)(a) is consistent with, though more specific than, those provisions.[12]

The record before the Court does not support the conclusion that sequestration of the victims from the critical stages of the case is necessary to protect the defendant's constitutional right to a fair trial. As a preliminary matter, there is a plethora of authority that makes clear that "[a] criminal defendant has no constitutional right to exclude witnesses from the courtroom." *See, e.g., United States v. Edwards*, 526 F.3d 747, 758 (11th Cir. 2008). As the Seventh Circuit Court of Appeals eloquently explained in *Bell v. Duckworth*:

> A refusal to exclude ("separate") witnesses until they testify is not a denial of due process. Separation or sequestration of witnesses . . . is a long-established and well-recognized measure designed to increase the likelihood that testimony will be candid. But the due process clause does not incorporate every refinement of legal procedure designed to make trials fairer or more accurate—not even one

[12] "[I]nitiative provisions are expressly declared to be self-executing, and, as such, only legislation which will further the purpose of the constitutional provision or facilitate its operation is permitted." *Colo. Project-Common Cause v. Anderson*, 178 Colo. 1, 5, 495 P.2d 220, 221-22 (Colo. 1972) (citations omitted). It follows that "[a]ny legislation which directly or indirectly limits, curtails or destroys the rights given by those provisions is invalid as violative of the rights reserved by the people to themselves." *Id.* at 222 (citations omitted). *See also Meconi*, 746 N.W.2d at 886 (Sawyer, J., concurring) (because the constitutional amendment gave victims an unqualified right to be present and expressly charged the legislature with enforcement of that provision, the legislature could not diminish the constitutional right by allowing the exclusion of victims upon a showing of good cause). In contrast to the legislative action taken in Michigan, *see id.*, section 24-4.1-303(6)(a) properly attempts to enforce, not diminish, the constitutional right created by section 16a. Section 24-4.1-303(6)(a) expresses that which, pursuant to the due process clauses of the Colorado and United States Constitutions, must necessarily be inferred in sections 16a and 24-4.1-302.5(1)(b).

> hallowed by time. It forbids only egregious departures from accepted standards of legal justice.

861 F.2d 169, 170 (7th Cir. 1988) (internal citations omitted), *cert. denied*, 489 U.S. 1088, 109 S.Ct. 1552, 103 L.Ed.2d 855 (1989).[13]

Furthermore, the defendant has not provided the Court any basis to think that the presence of the victims at the proceedings will interfere with his constitutional right to a fair trial. In fact, the defendant has not even advanced this allegation. In their exhaustive eight-page motion, the People acknowledge the general purposes of a sequestration order, but argue that "there is no risk that any of the victim-witnesses' testimony will be materially affected by overhearing the testimony of other witnesses." Motion P-44 at p. 5. The People represent that "[t]he victim-witnesses have all given prior written statements, which are available to the

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[13] *See also Larson v. Palmateer*, 515 F.3d 1057, 1065 (9th Cir. 2008) ("Neither this court nor the Supreme Court has ever held that the failure to exclude witnesses can violate due process"); *Mathis v. Wainwright*, 351 F.2d 489 (5th Cir. 1965) (refusal to sequester witnesses "does not amount to a deprivation of [a defendant's] constitutional rights"), *cert. denied*, 384 U.S. 1009, 86 S.Ct. 1960, 16 L.Ed.2d 1021 (1966); *Proctor*, 236 P.3d at 380 ("This court has previously recognized that the Due Process Clauses of the state and federal constitutions do not grant a general right to exclude witnesses from the courtroom during the testimony of other witnesses"); *Williams*, 960 A.2d at 813 ("A criminal defendant has no federal constitutional right to exclude witnesses from the courtroom"); *Beltran-Felix*, 922 P.2d at 34 ("because there is no constitutional right to require exclusion or sequestration of witnesses, the Victims' Rights provisions do not, on their face, violate the Fifth Amendment"); *Stephens v. State*, 290 Ark. 440, 720 S.W.2d 301, 303 (Ark. 1986) ("Nothing in the constitution touches on the exclusion of witnesses during criminal trials"); *State v. Harrell*, 67 N.C. App. 57, 312 S.E.2d 230, 236 (N.C. Ct. App. 1984) ("Due process does not automatically require separation of witnesses who are to testify to the same set of facts"); *Rucker v. Tollett*, 4 Tenn. Crim. App. 672, 475 S.W.2d 207, 208 (Tenn. Crim. App. 1971) (refusal to exclude witnesses "raises no constitutional question"); *Wheeler v. State*, 88 Md. App. 512, 596 A.2d 78, 88 n.16 (Md. Ct. Spec. App. 1991) ("We have found no federal or state constitutional provisions establishing sequestration as a constitutional right under either [the state or federal] constitution").

[d]efendant to use for impeachment in the event that a victim-witness's testimony differs significantly from that of her statement." *Id.* The People add that "the victim-witness's [sic] may be cross-examined regarding the fact that they were permitted to be present in Court to listen to the proceedings prior to testifying." *Id.* Importantly, these contentions and representations are uncontroverted.

In his response, the defendant simply "objects to the People's request and asks this Court to follow the law regarding sequestration and its requirements." Motion P-44 Response at p. 1.[14] Accordingly, the record is barren of an assertion, never mind evidence, that the presence of the victims at the critical stages of the proceedings will prevent the defendant from receiving a fair trial. But the inquiry does not end there. Although the defense's submissions fall woefully short, the Court nevertheless remains partially responsible for ensuring that the defendant's constitutional rights are given effect. Moreover, the legislature has specifically charged the Court with determining whether exclusion of the victims "is necessary to protect the defendant's right to a fair trial." § 24-4.1-303(6)(a). Therefore, the Court must consider whether the totality of the circumstances present in this case necessitates such exclusion. The Court finds that multiple factors militate against a

[14] The defendant's motion is equally terse. He moves for sequestration and asks for a hearing "if the Court is not inclined to grant" the motion. Motion D-54 at p. 1. The Court does not hold a hearing because the defendant's skeletal submissions do not provide a basis under Colorado law to sequester the victims from all proceedings and do not otherwise warrant a hearing. Counsel have been on notice since April 1 that hearings—or, in this case, oral argument following written argument—would not be automatically scheduled on all motions filed and issues raised or upon request. *See* April 1, 2013 Tr. at p. 18.

finding that the defendant will be deprived of a fair trial unless the victims are sequestered from the critical stages of the proceedings.

First, it is undisputed that the victims the People anticipate calling at trial have all provided recorded statements that have been disclosed to the defendant. *See* Motion P-44 at p. 5. These victims will be subject to impeachment if their testimony differs from the contents of their statements or if they add details never before disclosed.

Second, the defendant will not be limited in his ability to extensively cross-examine every victim who testifies, and to present evidence. Thus, there will be no limitation on his "basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Krutsinger v. People*, 219 P.3d 1054, 1061 (Colo. 2009) (internal quotation marks and citation omitted).

Third, during cross-examination of the victims, the defendant will be able to challenge the veracity and reliability of their testimony by highlighting the fact that they were able to listen to the testimony of other witnesses before testifying. Hence, the defense will have an additional, otherwise unavailable, basis to attack the testimony of the victims.

Fourth, the defendant did not move to sequester the victims from the lengthy two-and-a-half-day preliminary hearing during which the prosecution set out its case in some detail. *See* Jan. 2, 2013 Tr. at pp. 13-14; Jan. 7, 2013 Tr. at p. 5. As a

result, the victims who attended that hearing have already acquired substantial knowledge about the prosecution's evidence.[15]

Fifth, the victims have been exposed to the extensive publicity that has surrounded this case from the beginning. The media coverage of the case has included reports related to the content of affidavits and other documents that have been disclosed to the public, the pleadings filed, and the evidence and arguments presented at the preliminary hearing and other pretrial hearings.

Sixth, there is no indication in the record that, absent a sequestration order, a victim's testimony will be influenced by another witness's testimony or that the victims will tailor their testimony to that of other witnesses or otherwise engage in collusion or fabrication. Nor does the record raise any concerns that enforcement of every victim's constitutional right to be present at critical judicial proceedings will hinder the Court's or the jury's ability to detect false testimony.

Seventh, the defendant has pled not guilty by reason of insanity, and the defense's position in this case is that he "suffers from a severe mental illness and was in the throes of a psychotic episode when he committed the acts that resulted in the tragic loss of life and injuries sustained by moviegoers on July 20, 2012." *See* Motion D-76a at p. 2. The prosecution will have to establish that the defendant

[15] The Court recognizes that no victims testified at the preliminary hearing. However, the prosecution presented extensive testimony and more than 80 exhibits. Furthermore, the defendant's motion to sequester includes all pretrial hearings, and the evidence presented at such hearings will be more akin to the evidence introduced at the preliminary hearing than to the evidence at trial.

was the perpetrator of the acts charged, but the focus of the trial is likely to be on whether the prosecution can prove beyond a reasonable doubt the defendant's sanity at the time of the shooting. The Court recognizes that some of the testimony provided by the victims about the circumstances surrounding the shooting may well bear on this issue. But by and large the question of the defendant's sanity will be addressed more directly through the mental health experts and other evidence. If this were primarily an identification case involving multiple victims who were the only eyewitnesses, the Court may feel less comfortable concluding that sequestration of the victims is not necessary to ensure a fair trial.

Under these circumstances, and given the lack of substance and legal analysis in the defendant's scant briefs, the Court cannot in good conscience find that the exclusion of the victims from the critical stages of the judicial process is required in order to afford the defendant his constitutional right to a fair trial. Accordingly, the Court rules that sequestration of the victims is unnecessary.[16]

3. Definition of "Victim"

In their reply, the People ask the Court to "consider every person who was present in Theater 9 and Theater 8 as victims, either *de jure* or *de facto*, as . . . they

[16] Neither party has proposed any reasonable alternatives to sequestration of *all* the victims from *all* the critical stages of the litigation. In a typical criminal case, the Court might order the prosecution to call the victim as its first witness at trial in order to allow her to remain in the courtroom thereafter. The large number of victims who may testify in this case, however, renders this option less useful.

deserve to be present at this trial." Motion P-44 Reply at p. 3. The People explain that, in an attempt to "allow for a manageable trial," they did not file charges related to victims who did not suffer "some kind of physical injury inside the theater[s]." *Id.* Otherwise, they would have ended up with "over 750 counts of attempted murder." *Id.*

Although this contention is untimely because it was advanced for the first time in the reply, the Court addresses it for two reasons: (1) the People timely raised the issue in their response to Motion D-54, *see* Motion D-54 Response at pp. 8-9;[17] and (2) as the Court indicated in a previous Order, it cannot adequately resolve Motion P-44 without determining who qualifies as a "victim," *see* Order D-54A at p. 2.

The Court agrees with the People's uncontested position on this point, but for a different reason. The Court concludes that the legislature's definition of "victim" is sufficiently broad to include every person who was inside one of the two adjacent movie theaters at the time of the shooting.

Section 24-4.1-302(5) defines "Victim," in pertinent part, as follows:

> [A]ny natural person against whom any crime has been perpetrated or attempted . . . or, if such person is deceased or incapacitated, the person's spouse, parent, child, sibling, grandparent, grandchild, significant other, or other lawful representative.

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[17] Although the prosecution filed an extensive nine-page response, the defendant chose not to file a reply.

The plain and common meaning of the language employed in this definition shows that the legislature did not intend to limit "victim" status to someone named in a charge. Rather, it is clear that the legislative intent was to include as a "victim" anyone against whom a crime was committed or attempted. § 24-4.1-302(5).

Of course, as the Court mentioned earlier, the defendant is presumed innocent; therefore, no crime may be presumed to have been committed or attempted in this case. Taken to its logical conclusion, however, this would mean that no one may ever fit the definition of "victim" in any criminal case before a conviction enters. The Court must avoid such an irrational result. As the United States District Court for the Eastern District of New York pointed out in *Turner*, "[t]hat syllogism—which renders the [federal Crime Victims' Rights Act] inapplicable to this or any other criminal case unless and until the defendant is proved guilty beyond a reasonable doubt—produces an absurd result that [the Court] must presume Congress did not intend." 367 F. Supp. 2d at 326. Like the Court did in *Turner*, and consistent with the language in section 24-4.1-302(5), this Court adopts an inclusive approach, albeit not as inclusive as the one approved in *Turner*. *See* 367 F. Supp. 2d at 327 ("absent an affirmative reason to think otherwise, I will presume that any person whom the government asserts was harmed by conduct attributed to a defendant, as well as any person who self-identifies as such," is a victim under the Crime Victims' Rights Act). In this case,

as long as the prosecution has a good faith basis to assert that the defendant perpetrated or attempted a crime against a person on July 20, 2012, the Court considers that person a "victim" for purposes of sections 16a and 24-4.1-302.5(1)(b).

In contrast to the situation in *Turner*, *see id.*, applying an inclusive standard does not present practical difficulties here because the prosecution has a good faith basis to assert that anyone who was inside one of the two adjacent movie theaters during the shooting had a crime or an attempted crime perpetrated against him or her. Therefore, each such person shall be considered a victim for purposes of sections 16a and 24-4.1-302.5(1)(b).

CONCLUSION

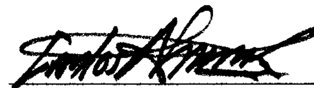
For all the foregoing reasons, Motion D-54 is granted in part and denied in part, and Motion P-44 is granted in its entirety. Every "victim," as that term is defined in this Order, shall have the right to be present at all critical stages of these proceedings, including the trial, pretrial hearings on motions concerning evidentiary matters or pre-plea or post-plea relief, and any sentencing hearing. The victims may not attend any stage of the case which is not deemed "critical" under section 24-4.1-302(2). All other prosecution witnesses are sequestered from the pretrial hearings and the trial, and are ordered: (1) to withdraw from the courtroom except for when they are called to testify; and (2) not to discuss their testimony or

anticipated testimony with each other or in each other's presence before or after taking the witness stand or during a recess in the middle of their testimony.[18]

If a party wishes to have any witnesses, including experts, exempt from sequestration during a particular pretrial hearing or during part of the trial, an oral motion to that effect may be made. At trial, such a motion should be made outside the presence of the jury. The parties may also designate advisory witnesses who shall be exempt from sequestration. *See* CRE 615; *People v. Cheeks*, 682 P.2d 484, 486 (Colo. 1984) (it is error for the Court to exclude a police officer who has been duly designated by the prosecution as its advisory witness; such an officer witness qualifies as a "designated representative" of the State).

Dated this 28th day of August of 2013.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

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[18] The Court has considered the requests in the People's response to Motion D-54: (1) to limit sequestration with respect to pretrial proceedings to testimonial hearings; (2) to limit sequestration of any given witness to the hearing or hearings at which he or she may testify; and (3) to prohibit witnesses from discussing with each other their testimony or anticipated testimony, not the case in general. Motion D-54 Response at pp. 1-2, 9. The Court agrees with the third request because the Court understands that witnesses may need to talk to each other about hearing dates, scheduling issues, transportation plans, and other such matters. However, the Court disagrees with the first two requests for the reasons stated in Order D-54 at p. 3 and Order D-54A at p. 2 n. 2. To the extent that, despite this Order, the People still seek to have sequestration determined on a witness-by-witness, hearing-by-hearing, and trial stage-by-trial stage basis, the request is denied as unworkable and unnecessary. *See* Order D-54A at p. 2. n. 2.

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2013, a true and correct copy of the **Order regarding defendant's motion for sequestration order and prosecution's motion for victims to be present at all critical stages of the criminal justice process and to be exempt from sequestration (D-54B and P-44)** was served upon the following parties of record:

Karen Pearson
Amy Jorgenson
Rich Orman
Dan Zook
Jacob Edson
Lisa Teesch-Maguire
George Brauchler
Arapahoe County District Attorney's Office
6450 S. Revere Parkway
Centennial, CO 80111-6492
(via e-mail)

Sherilyn Koslosky
Rhonda Crandall
Daniel King
Tamara Brady
Kristen Nelson
Colorado State Public Defender's Office
1290 S. Broadway, Suite 900
Denver, CO 80203
(via e-mail)