DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**

ORDER REGARDING DEFENDANT'S MOTION TO CLOSE EVIDENTIARY HEARING ON MOTIONS P-67 AND P-68 (D-191-A)

INTRODUCTION

The defendant is charged with shooting, and killing or injuring, numerous people inside two adjacent Aurora movie theatres at approximately 12:30 a.m. on July 20, 2012, during the midnight premiere of "The Dark Knight Rises." The prosecution has filed 166 charges naming 82 different victims.[1] The defendant has pled not guilty by reason of insanity.

Following completion of the Court-ordered sanity examination by the Colorado Mental Health Institute at Pueblo ("CMHIP"), the prosecution filed

[1] There are two counts of Murder in the First Degree for each of twelve deceased victims, two counts of Criminal Attempt to Commit Murder in the First Degree for each of seventy injured victims, one count of Possession of Explosive or Incendiary Devices, and one sentence-enhancing Crime of Violence count.

Motion P-68, which seeks further examination of the defendant on the grounds that the examination was inadequate and unfair. Motion P-68 is set for a three-day evidentiary hearing starting January 27, 2014 ("the hearing").

This Order addresses the defendant's Motion D-191, which asks the Court to close the hearing to the media and the public. The prosecution and the media petitioners[2] oppose the motion, arguing that, under the First Amendment, the media and the public have the right to attend the hearing. The prosecution further asserts that article II, section 16a of the Colorado Constitution ("section 16a") and the legislation implementing that amendment, section 24-4.1-301, *et. seq.*, C.R.S. (2013), grant the victims[3] the right to be present at all critical stages of the judicial process, including any hearing on a motion concerning evidentiary matters or for pre-plea relief.

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[2] The media petitioners are the following nonparties: ABC, Inc.; The Associated Press; Cable News Network, Inc.; CBS News, a division of CBS Broadcasting Inc.; CBS Television Stations, Inc., a subsidiary of CBS Corporation; *The Denver Post*; Dow Jones & Company; Fox News Network, LLC; Gannett; KCNC-TV, Channel 4; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KUSA-TV, Channel 9; *Los Angeles Times*; National Public Radio Company; NBC Universal Media, LLC; The New York Times Company; The E.W. Scripps Company; Tribune Company; and *The Washington Post.*

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

For the reasons articulated in this Order, the defendant's motion is granted. Accordingly, the hearing is closed to the media, the victims, and the rest of the public.[4]

The Court finds that there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity of the hearing and that there are no reasonable alternatives to complete closure. However, mindful of the critical value of openness in this nation's system of justice, the vital role the press plays in criminal proceedings, and the victims' right to attend the critical stages of this litigation, the Court provides the press and the public as much information as possible about the prosecution's request for further examination, the defendant's objection, and the anticipated evidence at the hearing. The Court concludes that this Order strikes an appropriate balance of all the interests involved.

PROCEDURAL BACKGROUND

On June 4, 2013, defense counsel entered a plea of not guilty by reason of insanity on the defendant's behalf, and the Court-ordered a sanity examination of the defendant at CMHIP. Pursuant to Colorado statutory law, CMHIP was required to evaluate: (1) the defendant's competency to proceed to trial; (2) the defendant's sanity on the date of the offenses charged; and (3) how any mental

[4] The media petitioners requested a hearing. Given the media petitioners' extensive written argument, the Court finds that oral argument would not be of assistance. Accordingly, the Court denies the request for a hearing.

disease or defect or the condition of mind caused by such mental disease or defect affects any mitigating factor in the death penalty statute. *See* §§ 16-8-102(8), 16-8-106(7), C.R.S. (2013). Dr. Jeffrey Metzner conducted the examination and subsequently submitted a 69-page report on September 6.[5] On November 15, the prosecution filed Motion P-68, seeking further examination of the defendant.[6]

Motion P-68 relies on section 16-8-106(1), C.R.S. (2013), which, as relevant here, provides that, upon a party's motion or on its own motion, the Court may, "[f]or good cause shown . . . order such further or other examination" of a defendant who has undergone a sanity evaluation. Motion P-68 at p. 2. "Although the [good cause] standard is not an onerous one, there must be some basis, other than counsel's opinion, for showing that the first examination was inadequate or unfair." *People v. Garcia*, 87 P.3d 159, 163 (Colo. App. 2003), *aff'd in part and rev'd in part on other grounds*, 113 P.3d 775 (Colo. 2005). The determination of whether good cause has been shown is a matter committed to the sound discretion of the trial court. *People v. Galimanis*, 765 P.2d 644, 646 (Colo. App. 1988). "[I]n order to effectuate the purpose behind [section 16-8-106(1)] . . . it is a better

[5] Drs. Rose Manguso and B. Thomas Gray assisted Dr. Metzner by administering some tests as part of CMHIP's examination.

[6] Contemporaneous with Motion P-68, the prosecution filed Motion P-67, requesting leave to file Motion P-68. The Court granted Motion P-67 on December 9, 2013. *See* Order P-67.

practice to afford both parties the opportunity to present evidence regarding the good cause [requirement]." *Id.*

Based on a lengthy interview they conducted with Dr. Metzner on September 27, the People contend that at least one aspect of the CMHIP examination is unfair because Dr. Metzner had "an unfair bias." Motion P-68 at p. 2. The prosecution further maintains that the examination is inadequate because its experts "found numerous deficiencies" in Dr. Metzner's report. *Id.* To support its argument of "good cause," the prosecution intends to call two expert witnesses at the hearing: Dr. Kris Mohandie and Dr. Phillip J. Resnick. These experts' curricula vitae and extensive affidavits were attached to Motion P-68. Additionally, Motion P-68 was accompanied by a lengthy investigative report summarizing the prosecution's interview of Dr. Metzner regarding his evaluation of the defendant.[7] The prosecution urges the Court to order further examination of the defendant by Drs. Mohandie and Resnick with respect to the defendant's sanity on the date of the offenses charged and/or how any mental disease or defect or the condition of mind caused by such mental disease or defect affects any mitigating

[7] There are two versions of the investigative report because after the report was completed, it was sent to Dr. Metzner for his review. The second version of the report includes Dr. Metzner's changes.

factor in the death penalty statute. The prosecution is not contesting the finding by Dr. Metzner that the defendant is competent to proceed to trial.[8]

The defendant objects to the prosecution's motion. He takes issue with the prosecution's allegation of bias, and he maintains that the CMHIP examination is adequate. The defense has informed the Court that it intends to present the testimony of Dr. Metzner and its own expert, Dr. Robert Hanlon.

On December 6, the defendant filed Motion D-191, asking the Court to close the hearing to the media and the public. The prosecution and the media petitioners filed timely responses opposing the motion. Thereafter, the defendant filed a reply to each response.

ANALYSIS

The defendant asserts that the hearing must be closed to the media and the public "due to the nature of the subject matter being discussed and the irreparable harm that the dissemination of this information would cause to [his] right to a fair trial by an impartial jury." Motion at p. 1. The Court agrees.

The Court first analyzes whether there is a First Amendment right of public access to the type of hearing in question. Because the Court concludes that such a right exists, it examines whether the defendant has advanced an overriding and

[8] The Court discloses this conclusion in the CMHIP examination because, considering the lack of an order to restore the defendant to competency and the proceedings that have been held since completion of the examination, it should hardly come as a surprise that CMHIP found the defendant competent to proceed to trial. Moreover, this disclosure does not threaten to prejudice the defendant's constitutional right to a fair trial.

compelling interest that is likely to be prejudiced, whether closure of the hearing is necessary to protect that interest, and whether there are any reasonable alternatives to closing the hearing. The Court finds that this is one of those rare situations in which a careful balance of interests requires that the qualified First Amendment right of access must yield to the defendant's constitutional right to a fair trial. There is a substantial likelihood that publicity of the hearing will prejudice the defendant's constitutional right to a fair trial, and there are no reasonable alternatives to complete closure of the hearing.

A. Qualified First Amendment Right of Public Access

"[T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). This is not a "quirk of history," as "it has long been recognized as an indispensible attribute of an Anglo-American trial." *Id.*

The United States Supreme Court concluded more than three decades ago "that the press and public have a qualified First Amendment right to attend a criminal trial." *Waller v. Georgia*, 467 U.S. 39, 44, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers*, 448 U.S. at 573, 100

S.Ct. 2814). As the Court noted in *Richmond Newspapers*, "[f]ree speech carries with it some freedom to listen," which, in the context of trials, means "that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." 448 U.S. at 576, 100 S.Ct. 2814. In 1984, the Court "extended that right not only to the trial as such but also to the voir dire proceeding in which the jury is selected." *Waller*, 467 U.S. at 45, 104 S.Ct. 2210 (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) ("*Press-Enterprise I*")). Later that year, in *Waller*, the Court observed that the "aims and interests" of a public criminal trial "are no less pressing in a hearing to suppress wrongfully seized evidence." *Id.*[9]

Waller was resolved under the Sixth Amendment right to a public trial, which is not involved here, as it is the defendant who requests a closed hearing. *Presley v. Georgia*, 558 U.S. 209, 212-13, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). However, the Court in *Waller* relied heavily upon the holding in *Press-Enterprise I*, which was decided "under the First, not the Sixth, Amendment." *Id.* (citation omitted).

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[9] Five years earlier, in *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), the Court had considered whether the media and the public had a qualified right to attend a pretrial suppression hearing. Although "the Court's opinion did not reach the question, a majority of the Justices concluded that the public had a qualified constitutional right to attend such hearings." *Waller*, 467 U.S. at 45, 104 S.Ct. 2210 (internal citations omitted). Justice Powell did so based on the First Amendment; Justices Brennan, White, and Marshall relied on the Sixth Amendment. *Id.* (citations omitted).

The defendant contends "that a pretrial proceeding in which matters related to the . . . sanity examination that was conducted as a result of his entry of a not guilty by reason of insanity plea is not one to which the public enjoys a qualified First Amendment right of access." Motion at p. 2. The defendant cites no authority for this proposition and the Court's research unearthed none.

In cases such as this, "dealing with the claim of a First Amendment right of access to criminal proceedings," the Supreme Court's decisions have focused on "two complementary considerations." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) ("*Press-Enterprise II*"). First, since "a tradition of accessibility implies the favorable judgment of experiences," the Court has considered "whether the place and process have historically been open to the press and general public." *Id.* (quotation and citation omitted). Second, "the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* (citation omitted). Where a "particular proceeding . . . passes [the] test[] of experience and logic, a qualified First Amendment right of public access attaches." *Id.* at 9, 106 S.Ct. 2735.

Based on the experience and logic test, the Court in *Press-Enterprise II* determined that preliminary hearings have traditionally been open to the public, and since the hearings were "sufficiently like a trial," public access was as

"essential to the[ir] proper functioning" as it was to the proper functioning of a trial. *Press-Enterprise II*, 478 U.S. at 10-12, 106 S.Ct. 2735. Relying on *Press-Enterprise II*, the Court in *El Vocero de Puerto Rico (Caribbean International News, Corp.) v. Puerto Rico* likewise found that the privacy provision of Rule 23(c) of the Puerto Rico Rules of Criminal Procedure violated the First Amendment because it required hearings to determine whether an accused felon shall be held for trial to be conducted privately. 508 U.S. 147, 149, 113 S.Ct. 2004, 124 L.Ed.2d 60 (1993). The Court found that Rule 23 hearings were "[a]t best . . . a subspecies" of the preliminary hearings involved in *Press-Enterprise II*, which have traditionally been open to the public throughout the United States. *Id.* at 149-51, 113 S.Ct. 2004. The Court added that the logic prong of the test was also established because, like preliminary hearings, Rule 23 hearings were sufficiently like a trial to justify the conclusion that public access to them was essential to the proper functioning of the criminal justice system:

> The decision below is irreconcilable with [*Press Enterprise II*]: for precisely the reasons stated in that decision, the privacy provision of Rule 23(c) is unconstitutional. The distinctions drawn by the court below are insubstantial. In fact, *each* of the features cited by [*Press Enterprise II*] in support of the finding that California's preliminary hearings were 'sufficiently like a trial' to require public access is present here. Rule 23 hearings are held before a neutral magistrate; the accused is afforded the rights to counsel, to cross-examination, to present testimony, and, at least in some instances, to suppress illegally seized evidence; the accused is bound over for trial only upon the magistrate's finding probable cause; in a substantial portion of

> criminal cases, the hearing provides the only occasion for public observation of the criminal justice system; and no jury is present.

Id. at 149-50, 113 S.Ct. 2004 (emphasis in original) (citation omitted).

1. Experience

The defendant avers that the experience prong of the analysis cannot be satisfied here because, to his counsel's knowledge, there has never been a public hearing of this precise nature in the State of Colorado. Motion at p. 2. However, the experience requirement "does not look to the particular practice of any one jurisdiction." *El Vocero de Puerto Rico*, 508 U.S. at 150, 113 S.Ct. 2004. Rather, it considers "the experience in that *type* or *kind* of hearing throughout the United States." *Id.* (emphasis in original) (quotation omitted). In *El Vocero de Puerto Rico*, the Court found unpersuasive the Puerto Rico Supreme Court's reliance on "the unique history and traditions" of Puerto Rico, which purportedly "display a special concern for the honor and reputation of the citizenry." *Id.* at 149-50, 113 S.Ct. 2004. The Court noted that "[t]he established and widespread tradition of open preliminary hearings among the States . . . [was] controlling." *Id.* at 150-51, 113 S.Ct. 2004 (citation omitted).

The defendant does not dispute that pretrial criminal proceedings, both in Colorado and elsewhere in the country, are generally open to the press and the public. To be sure, there may not be a "longstanding historical tradition of allowing public access" to the type of pretrial evidentiary hearing in question.

Motion at p. 2. But, contrary to the defendant's implication, this does not mean that such a hearing has historically been closed to the public. Rather, the lack of tradition is merely a reflection of the rarity of the prosecution's motion.

The defendant's inability to cite any cases in which public access to such a hearing has been limited does not support his motion; it undermines it. *Cf. United States v. Guerrero*, 693 F.3d 990, 1001 (9th Cir. 2012) ("we are persuaded by [the defendant's] failure to identify any court's restriction of access to competency hearings"). Nor did the Court's research reveal any published or unpublished decision denying open access to an evidentiary pretrial hearing to address a request for an additional sanity examination. *Cf. In re Times-World Corp.*, 488 S.E.2d 677, 681 (Va. Ct. App. 1997) (concluding that the experience requirement was established in part because the Court "found no appellate decision," and none was cited, "denying the press a qualified right of access to criminal competency hearings"). At least one such hearing was open to the public, and it took place in Colorado. *See People v. Rochester*, No. 10-CR-968 (Boulder Cnty. Dist. Ct. 2010).

Moreover, when "pretrial proceedings have no historical counterpart," some courts have nevertheless determined that "the traditional right of access should still apply" based on "the importance of the pretrial proceeding to the criminal trial." *Press-Enterprise II*, 478 U.S. at 10 n.3, 106 S.Ct. 2735 (citations omitted). Given

the defendant's plea of not guilty by reason of insanity, the defendant's sanity at the time of the crimes is the core issue in the case. Thus, there is no question that the hearing will be of great significance to the criminal trial. If the Court grants Motion P-68, there will be another evaluation of the defendant, possibly by the prosecution's own experts, which may be admitted at trial. On the other hand, if the Court denies the prosecution's motion, the only Court-ordered sanity examination that may be introduced at trial will be the one conducted by CMHIP.

Under the circumstances present, the Court concludes that the experience throughout the United States does not militate against a finding of a qualified First Amendment right of access to the hearing. To the contrary, the Court rules that the experience element of the *Press-Enterprise II* test is satisfied.

2. Logic

The defendant contends that public access to the hearing would not play "a significant positive role in the functioning of the particular process in question." Motion at p. 2. According to the defendant, "[t]here is little to be gained by public access to this hearing other than more harmful pretrial publicity." *Id.* The Court could not disagree more.

This nation's history "in part reflects the widespread acknowledgement, long before there were behavioral scientists, that public trials had significant community therapeutic value." *Richmond Newspapers*, 448 U.S. at 570, 100 S.Ct. 2814.

"[P]eople sensed from experience and observation . . . [that] the means used to achieve justice must have the support derived from public acceptance of both the process and its results." *Id.* at 571, 100 S.Ct. 2814.

Although the Court in *Richmond Newspapers* addressed an order closing the trial to the public, its comments are nevertheless apropos here:

> When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter ***the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.*** Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operate to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent urge to punish.
>
> Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution. ***The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner or in any covert manner. It is not enough to say that results alone will satiate the natural community desire for "satisfaction."*** A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. ***To work effectively, it is important that society's criminal process satisfy the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it.***

Id. at 571-72, 100 S.Ct. 2814 (emphasis added) (internal quotations and citations omitted).

The Court in *Richmond Newspapers* added that "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id.* at 572, 100 S.Ct. 2814. "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Press-Enterprise I*, 464 U.S. at 508, 104 S.Ct. 819 (emphasis in original). Hence, openness "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* (citation omitted).

Consistent with these observations, in *Star Journal Publishing Corporation v. County Court*, 591 P.2d 1028, 1029-30 (Colo. 1979), the Colorado Supreme Court acknowledged that, by subjecting trials to "public scrutiny," the United States Constitution ensures "efficiency, competency, and integrity in the operation of the judicial system." Two years later, the Court echoed the United States Supreme Court's concern that "[p]ublic confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's

decision sealed from public view." *In re P. R. v. District Court*, 637 P.2d 346, 353 (Colo. 1981) (quoting *United States v. Cianfrani*, 573 F.2d 835, 850-51 (3d Cir. 1978)).

Contrary to the defendant's assertion, the press plays a vital role in this country's criminal justice system. As Justice Brennan eloquently explained in his concurring opinion in *Nebraska Press Association v. Stuart*:

> ***[I]t has been correctly perceived that a responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.*** Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. ***Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.***

427 U.S. 539, 586-87, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) (Brennan, J., concurring) (emphasis added) (internal quotations and citations omitted); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) ("in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies

necessarily upon the press to bring to him in convenient form the facts of those operations;" as it relates to judicial proceedings, "the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice") (citation omitted); *Star Journal Publ'g Corp.*, 591 P.2d at 1030 ("The news media play a crucial role in maintaining [the] public scrutiny" to which trials are held under the United States Constitution).

In the Court's view, the hearing is sufficiently like a suppression hearing—which "often [is] as important as the trial itself," *Waller*, 467 U.S. at 46, 104 S.Ct. 2210—to justify the conclusion that public access to it is essential to the proper functioning of the criminal justice system. At the hearing, witnesses will be "sworn and testify, and of course counsel [will] argue their positions." *Id.* at 47, 104 S.Ct. 2210. Furthermore, the outcome of Motion P-68 will depend in part on the resolution of at least one factual matter: whether the CMHIP examiner was in any way unfairly biased.

It is true that the hearing will be different than most suppression hearings because the conduct of police and prosecutors is not being questioned. But the adequacy and fairness of CMHIP's work is under challenge, and in this case, that will be of more import at trial. It is also true that the Court's ruling on Motion P-68 is unlikely to result in the exclusion of evidence from the trial. However, it will

determine whether evidence of another examination, potentially by the prosecution's own experts, will be generated and available at trial.

Additionally, the aims and interests underlying the qualified right of public access to trials and pretrial proceedings "are no less pressing" here. *See id.* at 46, 104 S.Ct. 2210. This is a significant factor for the Court.

Under all the circumstances present, the Court finds that the logic prong of the analysis has been met. Public access to the hearing plays a significant positive role in the proper functioning of the proceeding and the criminal justice process.

In sum, the Court concludes that the media and the public have a qualified right to attend the hearing. Thus, unless the defendant can present an overriding and compelling interest that justifies closure, the media and the public must be allowed access to the hearing.

B. The Defendant's Constitutional Right to a Fair Trial Overrides the Qualified First Amendment Right to Public Access

The defendant contends that, even if this Court were to find that the media and the public have a qualified First Amendment right of access to the hearing, his constitutional right to a fair trial justifies closure. Motion at pp. 2-3. The Court agrees.

The United States Supreme Court has made clear that any right the media and public may have to attend a particular criminal proceeding is qualified, not absolute, and "may give way in certain cases to other rights or interests, such as the

defendant's right to a fair trial." *Waller*, 467 U.S. at 45, 104 S.Ct. 2210. Circumstances warranting closure "will be rare, however, and the balance of interests must be struck with special care." *Id.* The Court in *Waller* set forth the standard for trial courts to apply before excluding the media and the public from any stage of a criminal trial:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Id. at 48, 104 S.Ct. 2210.

Similarly, although the Colorado Supreme Court has "continually recognized the fundamental nature of First Amendment rights," it has ruled that these rights may be curtailed. *Star Journal Publ'g Corp.*, 591 P.2d at 1029 (citations omitted). However, "criminal trials and pretrial proceedings should not be closed . . . unless an overriding and compelling state interest in closing the proceedings is demonstrated." *Id.* at 1030.

"The interest of the accused, whose life and liberty are in jeopardy, to a fair trial by an impartial jury is paramount, and may require, depending on the circumstances of the case, limitations upon the exercise of the right of free speech and of the press." *Stapleton v. District Court*, 499 P.2d 310, 312 (Colo. 1972). Indeed, "[n]o right ranks higher than the right of the accused to a fair trial." *Press-*

Enterprise I, 464 U.S. at 508, 104 S.Ct. 819. The issue "is one of balancing interests." *Stapleton*, 499 P.2d at 312. The trial court judge "is in the best position to assure that a defendant's right to a fair trial, as well as the public's right to know the course of the trial proceedings, will be substantially protected." *Id.* The trial court is vested with considerable discretion to carry out this function. *Id.* at 312-13.

"[I]t is permissible and eminently proper to convene closed pretrial hearings when there is a [s]ubstantial likelihood of prejudicial interference with a defendant's right to a fair trial by an impartial jury." *Id.* at 313. If the interest asserted by the defendant is his right to a fair trial, the hearing may be closed "only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Press-Enterprise II*, 478 U.S. at 14, 106 S.Ct. 2735 (citations omitted).

1. There is a Substantial Probability that the Defendant's Right to a Fair Trial will be Prejudiced

Because one of the interests advanced by the defendant in support of Motion D-191 is his right to a fair trial, the Court analyzes whether there is a substantial probability that his right to a fair trial will be prejudiced by publicity of the hearing. The Court finds that such substantial probability exists.

At the outset, the Court acknowledges that the risk of prejudice as a result of publicity "does not automatically justify refusing public access to hearings." *Id.* at 15, 106 S.Ct. 2735. Nor can the right to public access under the First Amendment "be overcome by the conclusory assertion that publicity might deprive the defendant" of his right to a fair trial. *Id.* (quoting *Press-Enterprise I*, 464 U.S. at 510, 104 S.Ct. 819). Rather, there must be a substantial probability of prejudice. *Id.* at 14, 106 S.Ct. 2735. Any determination that a substantial probability of prejudice exists must take into account the voir dire process, an effective screening tool to ensure an impartial jury. *Id.* at 15, 106 S.Ct. 2735. "Through *voir dire*, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict." *Id.*

The Court is convinced that this is one of those rare situations in which closure of a pretrial hearing is not only justified, but required, as there is a substantial probability that publicity will prejudice the defendant's right to a fair trial. Contrary to the media petitioners' implied assertion, the hearing will not consist of "legal arguments." Media Petitioners' Response at p. 7. Rather, the hearing is of an evidentiary nature, and the Court anticipates that extensive expert testimony will be presented. Publicity of the contents of the hearing will inevitably infect a large portion of the jury pool with factual information directly relevant to

the main question at trial and one of the primary issues during any capital sentencing hearing: the defendant's mental health on the date of the offenses charged.

The affidavits submitted by the prosecution's experts demonstrate that their anticipated testimony, in addition to including their opinions regarding the alleged deficiencies of the CMHIP examination and Dr. Metzner's alleged bias, will cover myriad details from Dr. Metzner's evaluation, as well as many of the contents of the notebook the defendant mailed to Dr. Lynn Fenton, a psychiatrist, just hours before the shooting. Neither Dr. Metzner's report nor the notebook has been made public. In fact, the Court has been careful not to show the contents of the report or the notebook to *anyone*, including its law clerks. There is a substantial likelihood that this information, if publicized, will prevent the Court from selecting a fair and impartial jury and will deprive the defendant of his right to a fair trial.

For example, Dr. Mohandie intends to testify about:

- [redacted]
- [redacted]
- [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

- [redacted]
- [redacted]

Likewise, Dr. Resnick intends to testify about:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

[redacted]

- [redacted]
- [redacted]
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[redacted]

The defendant has informed the Court that he plans to call Dr. Metzner at the hearing. Thus, more details of his evaluation, including additional contents of the

notebook, are likely to be discussed.[10] Moreover, on cross-examination, the Court anticipates that the People will elicit information from their investigative report summarizing their interview with Dr. Metzner about his evaluation. That report contains details related to the evaluation, some of which were not included or fully developed in the CMHIP report:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[10] [redacted]

[redacted]

Finally, the defendant intends to call Dr. Robert Hanlon as an expert. Although a summary of his proposed opinions has not been submitted, the Court anticipates that, like the other witnesses, he will discuss the contents of Dr. Metzner's report and the notebook in detail.

There is a substantial likelihood that learning this information in advance of the trial will preclude a large number of prospective jurors from serving on the jury.[12] As effective as voir dire is, it has limitations. Considering the defendant's insanity defense, it would be naïve for the Court to expect prospective jurors

[redacted]

[12] Even without disseminating this information, finding twenty-four citizens to sit as jurors and alternate jurors will be a daunting task for multiple reasons: (1) the trial is expected to last at least four months; (2) this is a death penalty case; (3) the defendant has pled not guilty by reason of insanity; (4) this case has received a great deal of publicity; and (5) there are more than four thousand potential witnesses. The Court's concerns are reflected in its decision to summon 6,000 prospective jurors for this trial.

exposed to media reports about the hearing to be able to set aside that information and any resulting views or opinions.[13]

That the information disclosed at the hearing may eventually be presented to the jury does not mean that "there can be no prejudice to [the] defendant's fair trial rights." Media Petitioners' Response at p. 8. The concern is that, based on the information received in advance of the trial, many prospective jurors will form preconceived notions about the case that they will be unable to set aside in order to be fair and impartial.[14]

The media petitioners' reliance on cases dealing with competency hearings is misplaced. As the defendant aptly notes, "the issues of competency and sanity are entirely different." Reply to Media Petitioners' Response at p. 1. Whereas "[t]he primary purpose of the hearing to determine the competency of an accused to stand trial is to ascertain whether he has sufficient mental capacity to know the

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[13] For every empirical study cited by the media petitioners to show that prospective jurors can disregard widespread pretrial publicity, the defendant cites an empirical study that reaches the opposite conclusion. Furthermore, while empirical data is useful, any determination regarding the likely effect of publicity on the jury selection process must be made on a case-by-case basis under the totality of the circumstances present. This case involves extraordinary circumstances.

[14] The defendant asserts that an additional concern is that "much of the evidence that will be discussed at this evidentiary hearing may not ultimately be admitted at a trial, and thus there is a unique danger that prejudicial yet inadmissible information will be revealed to the public." Reply to Media Petitioners' Response at pp. 2-3. The Court is unpersuaded. At this point, the Court has not ruled any such evidence inadmissible. Nor is the Court willing to resolve Motion D-191 based on the defendant's speculation that he may withdraw his not guilty by reason of insanity plea in the future. *Id.* at pp. 3-4. Further, even if "unreliable or illegally obtained evidence" is made public at a pretrial proceeding, that fact alone "does not automatically justify refusing public access" to the proceeding. *Press-Enterprise II*, 478 U.S. at 14-15, 106 S.Ct. 2735.

nature of the charge and to cooperate with his counsel in his defense," a not guilty by reason of insanity plea requires the prosecution to prove that the defendant was sane at the time of the commission of the act. *Parks v. Denver Dist. Court*, 503 P.2d 1029, 1033 (Colo. 1972). Evidence introduced at a competency hearing is rarely relevant to the charges, but evidence related to a defendant's sanity examination is directly relevant to the charges and his plea of not guilty by reason of insanity.

The Court is keenly aware that this case has already received significant media attention. Thus, it is natural to inquire whether additional publicity about the hearing would make a marked difference in the jury selection process. The Court is convinced that it would. The information that will be discussed at the hearing goes to the heart of the case. The primary issue in dispute in this case is whether the defendant was sane at the time of the offenses charged. The related issue of whether any mental illness affects a mitigating factor in the death penalty statute will also be hotly contested at any capital sentencing hearing. Moreover, the information in question is much more [redacted] than any information previously publicized, and there is a much higher likelihood—indeed, a substantial likelihood—that, if disseminated, it will abridge the defendant's right to a fair trial.

Under the circumstances, the Court finds that the defendant's right to a fair trial overrides the qualified First Amendment right of the media and the public to attend the hearing. Accordingly, the Court concludes that the defendant has met the first part of the standard outlined in *Waller*. *See* 467 U.S. at 45, 104 S.Ct. 2210.

2. The Court's Closure is No Broader than Necessary, and There Are No Reasonable Alternatives to Complete Closure

Under *Waller*, the Court must ensure that any closure is no broader than necessary, and the Court must consider any reasonable alternatives to its closure order. *Id.* at 48, 104 S.Ct. 2210. Here, the Court rules that closure of the entire hearing to the press and all members of the public, including the victims, is necessary.

The media petitioners maintain that closure of "the *entirety* of the evidentiary hearing" is not warranted. Media Petitioners' Response at p. 10 (emphasis in original). The Court disagrees.

The Court contemplated closing only the portion of the hearing that will address the adequacy of the CMHIP examination, as it will include the most [redacted] information. However, a partial closure is unfeasible. As Motion P-68 and the defendant's response demonstrate, the issue related to the fairness of the CMHIP examination and Dr. Metzner's alleged bias cannot be divorced from at least one of the general conclusions reached by Dr.

Metzner. *See* Motion P-68 at p. 2, ¶ 4; Response to Motion P-68 at pp. 12-13, ¶¶ 57-58. Further, in order to properly address these issues, the defense will have to explore other parts of the CMHIP evaluation. *See* Response to Motion P-68 at pp. 12-13, ¶¶ 57-58. Notwithstanding the strong First Amendment interests of the media and the public, the Court is not comfortable publicizing any of the undisclosed contents of the CMHIP examination. There is a substantial likelihood that such disclosure will deprive the defendant of his right to a fair trial.

The Court also thought about allowing the media and the public to attend counsel's oral arguments. However, counsel's arguments will necessarily reference the evidence presented at the hearing, including the testimony on the issues of adequacy and fairness.

The Court next entertained the idea of requiring counsel to alert it before a question eliciting prejudicial testimony is asked so that the press and the public may be ordered to leave the courtroom or to stop watching the proceedings via closed circuit TV. However, the bulk of the testimony will include detailed facts relating to Dr. Metzner's report and the notebook. Therefore, it would be disruptive and unworkable to require counsel to comply with such a procedure and to have the media and the public exit and re-enter the courtroom repeatedly throughout the hearing.

The Court even considered granting the media and the public as much access as possible by releasing redacted versions of the suppressed briefs and attachments that have been submitted on Motion P-68. The Court actually spent hours redacting these filings. In the end, the Court realized that, save for the curricula vitae of the prosecution's experts, almost all of the contents of the parties' submissions would have to be redacted.[15] Hence, disclosing the redacted versions of those documents would have provided no new substantive information to the media and the public.

The prosecution suggests a different type of limitation on any closure order. The prosecution urges that, if the Court determines that closure is necessary, under article II, section 16a of the Colorado Constitution and section 24-4.1-301, *et. seq.*, C.R.S. (2013), the victims should "be exempted from that order." Prosecution's Response at p. 4. The Court disagrees.

On August 28, 2013, the Court issued a thorough Order granting in part and denying in part the defendant's motion for sequestration (Motion D-54), and granting in its entirety the prosecution's motion for the victims to be present at all critical stages of the criminal justice process and to be exempt from sequestration (Motion P-44). *See* Order D-54B and P-44 (hereinafter "August 28 Order"). Although recognizing that the parties' motions presented a difficult question

[15] The Court will post redacted versions of these curricula vitae on its website.

involving conflicting interests, the Court ultimately concluded that it should not exclude the victims from any critical stage of these judicial proceedings, including the trial and pretrial hearings on motions concerning evidentiary matters. In Order D-181-A, the Court denied the defendant's motion to reconsider the August 28 Order.[16]

However, the Court also recognized in the August 28 Order and in Order D-181-A that a crime victim's right to be present at judicial proceedings may never be enforced at the expense of the defendant's constitutional right to a fair trial. *See* § 24-4.1-303(6)(a), C.R.S. (2013), ("[a] victim . . . may be present at all critical stages of a criminal proceeding regarding any crime against such victim unless the court . . . determines that exclusion of the victim is necessary to protect the defendant's right to a fair trial"). The Court granted Motion P-44 only after determining that sequestration of the victims from the critical stages of the proceedings was not necessary to protect the defendant's right to a fair trial.

There is no question that the hearing is a critical stage of this case. But the Court concludes that there is a substantial probability that allowing the victims to be in attendance will interfere with the defendant's right to a fair trial.

There are hundreds of victims in this case. It is unrealistic to expect the [redacted] information discussed in this Order to be kept confidential if it is

[16] The Court incorporates by reference the August 28 Order and Order D-181-A.

shared with hundreds of people.[17] It is equally unrealistic to expect that the media will not be able to acquire such information from one or more victims.

This case has attracted a great deal of media attention locally, nationally, and internationally. Journalists from Colorado, other states, and even other countries have attended hearings and have reported on the case. Understandably, the media has been intensely curious about the contents of the notebook[18] and the results of the CMHIP evaluation. If the Court allows the victims, but not the media, to attend the hearing, representatives of the media are likely to contact the victims after the hearing to attempt to find someone willing to talk about the evidence and arguments presented at the hearing.[19] Given the savvy and skilled media representatives covering the case, the Court has no doubt that they will succeed. The Court does not blame the members of the press. They have a job to do. But the Court's concern remains: under the circumstances, if it allows the victims to attend the hearing, it accomplishes nothing by closing the proceeding to the media and the rest of the public.

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[17] Because of courtroom space limitations, some of the victims have attended prior hearings through closed circuit TV in overflow courtrooms.

[18] The defendant has previously alleged in these proceedings that on July 24, 2012, a reporter managed to obtain information about the contents of the notebook from two confidential law enforcement sources, even though a "gag order" prohibited them from discussing the case.

[19] The names of the victims were previously made public.

As the August 28 Order and Order D-181-A show, the Court understands the victims' rights under Colorado law and their strong desire to attend the critical stages of the proceedings. However, the Court is also charged with protecting the defendant's right to a fair trial and preserving the integrity of the proceedings. There is a substantial probability that the Court will be unable to fulfill these responsibilities if the victims are allowed to attend the hearing.

Although the Court closes the hearing, this Order provides the media and the public as much information as possible about the prosecution's request, the defendant's position, and the evidence anticipated at the hearing. The Court does so because it is mindful of the value of openness and the vital role the media plays in this nation's criminal justice system. Short of opening the entire hearing, there is no other procedure available to ensure that the media and the public (including the victims) are informed about the proceedings regarding Motion P-68.

The Court realizes that the defendant objects to the disclosure of some of the information contained in this Order. *See generally* Reply to Prosecution's Response. For example, the defendant opposes the disclosure of the names of the expert witnesses. *Id.* at pp. 1-2. However, if the expert witnesses endorsed were not expected to discuss Dr. Metzner's evaluation, the notebook, or other similar information, the Court would not close any portion of the hearing, and the media and the public would learn their identities. The defendant speculates that the

experts will be harassed once their identities are revealed. *Id.* Be that as it may, this is not a compelling and overriding interest that can overcome the qualified First Amendment right of public access. In any event, the names of the experts were disclosed on the record at the December 18 status hearing, and the Court is not disclosing the experts' contact information.

The Court finds that disclosure of the information included in this Order is necessary and appropriate under the qualified First Amendment right to public access. First, the media and the public have a right to know the relief requested in Motion P-68, the grounds on which the prosecution relies, the defendant's position, and the type of evidence anticipated at the hearing. It is of the utmost importance to the Court that the media and the public not be kept in the dark about Motion P-68. Second, there is not a substantial likelihood that disclosure of this information will interfere with the defendant's right to a fair trial.

In sum, the Court believes that this Order strikes an appropriate balance of all the interests involved. On the one hand, it affords the media and the public (including the victims) an opportunity to learn generally about what is happening in the case, what the prosecution is requesting and why, the grounds on which the defendant objects, and the testimony anticipated at the hearing. On the other, it protects the defendant's constitutional right to a fair trial.

CONCLUSION

For all the foregoing reasons, the Court concludes that the defendant's Motion D-191 has merit. Accordingly, it is granted.

Dated this 20th day of December of 2013.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2013, a true and correct **REDACTED** copy of the Court's **Order Regarding Defendant's Motion to Close Evidentiary Hearing on Motions P-67 and P-68 (D-191-A)** was served upon the following parties of record:

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